

# The Art of Opening Statement

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An opening statements is a (largely) uninterrupted opportunity to talk to the jury. A proper opening statement does two things: (1) introduces your theory of the case to the jury and (2) familiarizes the jury with the most critical evidence to come that supports your theory of the case. It is a persuasive narrative or roadmap for the case. A well-crafted opening statement leaves many jury members presuming the rightness of the lawyer's position. Even those jurors not fully committed to their vote at the outset will have a mental map of the road that the lawyer wants them to travel to the desired verdict.

The truth of the matter is that the opening statement is far more valuable a persuasive tool than the closing argument. The first impression in front of the jury is the most important opportunity to tell the theory of the case to the fact finder. Opening statements are designed to persuade, not to give an impartial overview of the evidence.

### **Theory/Themes**

A theory of the case provides a filter through which the jury should view the facts. Knowing the theory, as the jury hears the evidence progress at trial, they are able to say to themselves, "I see where you're going" and "I know why you should win."

Theory of the case is often referred to as "narrative." It is your version of what happened. A theory of the case must be legally sufficient and establish a prima facie case under the controlling substantive law. It must also be easy to follow, simple to understand, and should be consistent with the undisputed facts, as well as your version of the disputed facts.

In addition to having a theory of the case, a theme of the case is an effective tool to grab the attention of the jury. A theme is often a phrase that summarizes the theory of your case. A good theme is memorable and should be repeated throughout the opening statement, preferably after raising multiple pertinent facts that support the theory.

### **Detailed Facts, Not Conclusions**

An opening statement should rely on specific detailed facts organized around understandable topics. Lawyers are not permitted to "argue" their case in opening statement, but the facts the lawyer reveals, the order in which the lawyer discusses them, and the emphasis the lawyer gives them are all permissible devices that teach the theory of the case and "argue" for a certain result.

The lawyers must give the jury facts that support the conclusion she wishes them to embrace. The jury will form their own conclusions and opinions, and in turn, fact finder formed conclusions and opinions will not be easily challenged or changed - by anyone. Conclusions urged by lawyers, and unsupported by facts will carry little weight. For example, instead of telling a jury that a witness is biased, give the jury facts to allow them to reach that conclusion on their own.

Another reason for the use of facts as opposed to conclusions is that conclusions are often argumentative statements that are not proper in an opening statement. Sustained objections will interrupt the flow of your story and may affect your credibility to the jury.

The lawyer should elicit facts in opening statement to address each of the following:

- Why are we here? What are the issues?
- What will the evidence show and why is it important to your theory of the case?
- Who are the witnesses and how do they fit in?
- What are the key exhibits?
- What do you want the jury to do?

### **Organization/Sequencing**

Put the chapters into the order that makes the most sense for a fact finder who is unfamiliar with the case. In most cases, this will be chronological. It is not dictated by the order of witnesses.

The psychological principle of primacy—what the fact finder hears first, the fact finder is more likely to believe and remember the longest—strongly suggests that the advocate persuade from the beginning of the opening statement. Given this psychological principle, don't waste time getting to the theme. Many lawyers waste the first few minutes explaining the purpose of opening statement, thanking the jury, and/or going into a lengthy introduction of their client.

Similarly, there is a parallel psychological principle of recency -- the the fact finder will believe and remember best what was heard last. The conclusion of the opening must be important to the lawyer's theory of the case, well thought out, and strongly delivered.

It is not necessary or advisable to discuss every witness or every issue in opening. Just as the lawyer cross-examines only on selected material, the opening just points to the essence of the case. Organize your opening into chapters (or important topics) to make the presentation understandable to a jury.

### **Tips for an Effective Opening Statement**

- Keep it short and simple. Remember that you are talking to non-lawyers.
- Use story-telling techniques:
  - The story must account for the important facts that will come out during trial.
  - Use appropriate labels for the parties and other important people and evidence, and use them consistently.
  - Story Arc: Set the scene, Describe the events, Climax or turning point.
  - A story is not about the story-teller – do not inject yourself into the story with editorializing or conclusions.

- You do not have to preface each fact with “the evidence will show” or “we expect to prove.” Tell your story.
- Construct trilogies:
  - Find an important concept to the theory of the case
    - Express it in 3 different ways/divide into 3 separate parts
    - Express each of the 3 statements in 3 separate parallel statements
  - Establish the facts of importance to the theory of the case and establish them in such a way that they create, embody, or utilize selected theme phrases
  - Find examples throughout history.
- Humanize and personalize your client
  - Help the jury identify with your client and have positive feelings about your client
- Highlight admissions that from the other side’s witnesses and substantiate them with your own witnesses.
  - A fact finder is much more likely to believe admissions from the other side's witnesses; than the self-serving and predictable testimony of the trial lawyer's own witnesses.
- Make it visual – use demonstrative aids, courtroom technology

### **Proceed with Caution**

Remember that jurors look where you point. If you tell a jury that a witness will say something, and you are unable to elicit that testimony, your case lacks credibility. Similarly, if you tell a jury that a piece of evidence will come in, you should be confident that it is admissible, or jurors will be left questioning. Opening statements set expectations for how you will prove your case.

Statements of personal opinion are improper. For instance, “between M and S, S is more believable,” is objectionable.

The case is not about you or the other lawyer. It is about your client. Be professional and avoid any attacks, direct or indirect, on the credibility, demeanor, or actions of your colleague.

Beware of expressing too much emotion in opposing statement. Today’s jurors are weary of lawyers that they feel are overzealous and may cause them to doubt your credibility. Your content and organization. will install confidence with the jury. Emotion may also garner “argumentative” objections.

