

STARTING STRONG – HOW TO BUILD A WINNING OPENING STATEMENT

CONTINUING LEGAL EDUCATION COURSE

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I. The Role of the Opening Statement

The first detailed impression a jury will have of your case is often what they hear during the opening statement (or perhaps during a mini-opening given during *voir dire*). The same could apply to the trier in an administrative hearing and, depending on the circumstances, perhaps even the judge hearing your case if they are assigned late. In short, the opening statement is often your first, and perhaps best, opportunity to shape the trier's sympathy in favor of your client's needs. And, if the opening is sufficiently powerful, it may establish a predilection or bias through which all the following evidence and argument will be evaluated.

Imagine, for example, a juror who, upon hearing the opening for a 12-year-old boy who sustained serious injuries in a fall into an abandoned well shaft on state land, perceives the child as a disciplined and careful adolescent. That juror is primed to accept as credible the plaintiff's allegations that he saw no warning signs in the area, and to accept the plaintiff's argument that the warning signs posted by the State were too small and obscured to be of any value in warning of the well danger. On the other hand, if the opening statement successfully plants in the juror the notion that plaintiff was an irresponsible joy-riding teenager whose parents were equally undisciplined, that juror may remain very skeptical of any claims that the boy did not see the State's warning signs and may perceive arguments about the adequacy of the State's warning signs to be a post-hoc lawyer gimmick.

So, the opening is a chance for the lawyer to set a framework for the trier of fact – a roadmap for how they should process each piece of evidence they hear and see. The effective opening will not only introduce the general theme the attorney wants the trier to identify with, but also sets the stage for where each piece of evidence fits within that theme. Through the opening, the trier becomes familiar with a party's story, familiar enough that testimony and evidence should be quickly recognized for the part they play in the story.

An example of the foregoing might be introducing the jury to the theme of “the Domino effect” in a case arising from a wreck between a passenger vehicle and a commercial truck. In this hypothetical counsel has selected the theme to help explain the cascading series of ever more

debilitating injuries suffered by the plaintiff as a result of an accident that initially appeared to have inflicted only minor, soft tissue injuries. The opening would introduce the trier to both the familiar visual of toppling dominoes and the lengthy series of complications and related medical procedures suffered by the plaintiff. When, during presentation of the evidence, the plaintiff puts on testimony from a witness who begins with his expertise in ophthalmology the trier will immediately associate him with the detached retina claims introduced in the opening and will pay special attention for testimony connecting the detached retina to a whiplash claim introduced earlier through an accident reconstructionist.

II. Characteristics of the Effective Opening.

A. Is Built Upon a Solid Theme.

Critical to any opening, in fact critical to the organization of any trial presentation, is the identification and development of a solid case “theme.” The theme is the short, plain statement that summarizes the essential point or organizing principal of the party’s case. It creates both a factual and emotional structure that counsel intends the trier to use in organizing the evidence they hear and see. Considering that the lawyer’s most important role in trial is that of storyteller, the theme is, simply put, the “moral of the story”.

Themes may be a short descriptive statement about the case, such as: “Acme Inc. puts corporate profits ahead of customer safety.” Or it may employ well-worn clichés, like: “In this case, Mayor Johnson did everything he could to prove to Ms. Jones that you can’t fight City Hall.” And, it may use a common analogy: “To Acme Corp., its marketing plan was like your mother’s secret cake recipe.” The well-crafted theme assists the trier to answer the question “what is this case all about?” without ever hearing any testimony or seeing a single exhibit. It thereby enables the trier to predict both the content and the importance of particular witnesses or exhibits.

For example, assume the defendant’s theme is “like the ancient Roman emperor Nero, Mr. Jones fiddled while Rome burned” in a breach of employment contract case brought by a discharged corporate president. The trier is able from this theme to picture the plaintiff, Mr. Jones, as a thoughtless, heedless executive who carelessly allowed the company to be destroyed while indulging himself. The trier will use that image to predict the relevance of particular evidence. For example, a spreadsheet showing Mr. Jones’ salary might be expected to show the power and wealth lavished on Mr. Jones, and the testimony of his personal assistant will be anticipated for the insights it will reveal about Mr. Jones’ insensitivity to corporate perils.

Perhaps the most powerful impact of a strong theme is its effect on how the opponent’s evidence is received. The trier is likely to view even testimony favorable to the opponent skeptically, and to look for those elements of it that fit the theme. For instance, in the hypothetical from the foregoing paragraph, assume the jury hears from Mr. Jones’ longtime head of accounting who testifies that Mr. Jones spent long hours at the office preparing the company’s annual report. Rather than simply seeing this as evidence of personal diligence and dedication to corporate welfare, the jury may instead perceive this as yet another example of where Mr. Jones acted out of self-interest to make himself look good, and may even suspect Mr. Jones’ motives

were impure, personally involving himself so that he might ensure his mismanagement was covered up.

Recognizing just how powerful an organizing theme is, counsel developing an opening statement should start by selecting an appropriate theme around which their opening story can be organized. The following are tips on crafting a helpful theme:

- Keep it concise – the theme is a concept, not an argument;
- Make sure it actually fits the evidence you have – don't stretch;
- Make sure it is relatable. Themes that depend on “insider” or specialized knowledge or vernacular will have little impact;
- Anticipate how the weaknesses in each theme option might be exploited by your opponent.

Keep in mind also that a theme need not be announced expressly to the trier. For example, assume in a case alleging that academic failure of various students is the fault of inadequate educational funding by the State you, as defense counsel, have selected “the State offered ample opportunities for success,” as your theme. You may elect to actually present this theme as a statement during your opening. On that other hand, you may more effectively simply make the point by walking, chronologically, through the many opportunities the State educational system offered each of the students. The trier will adopt your theme as their own conclusion – which is a far more effective and lasting form of persuasion than you would ever achieve by handing the theme expressly to the jury.

B. Tells a Compelling Story.

As noted above, persuasion in the trial context is all about effective storytelling. Cold facts, unattached to an understandable story, rarely lead a trier to reach conclusions that become matters of deep personal conviction. Yet, that is precisely the type of impact you are looking to make as trial counsel. You want the trier of fact to reach, independently, the conclusion or conclusions that evoke sincere sympathy or empathy for your client and make the trier convinced that they are in need of, and deserving of, the trier's help. A compelling story achieves this goal.

As with all good stories, your trial story should have clearly identifiable characters with whom the trier can easily relate or identify, and similarly identifiable characters that the trier can readily find fault in. It should present a central tension or dilemma, the resolution of which is something the trier can supply. And, it should present the facts of the story in a way that creates a sense of urgency to the resolution. If your story supplies all these elements the trier will easily divide their loyalties in favor of the characters they identify with and against the others, will clearly understand why the characters they identify with need help and what help, exactly, they need, and will conclude that they can supply the help such characters need and should do so right away.

Imagine as a model for such a story the type of compelling personal interest stories we often hear from national news outlets after a weather tragedy. The victims are often presented in

ways we can all relate to. They look and sound like us, and the routine of their personal lives is normally one to which we can well relate. It is clear that they are innocent victims, that the storm that has devastated their home or taken the lives of their loved ones is a malicious and unpredictable event, and that as innocent victims they are justifiably in immediate need of shelter, food, clothing or medical care, all of which our monetary donations might quickly help supply. We are moved to act, not necessarily by any express call to donation, but by our basic human emotional reaction to the plight of those suffering an injustice. Such stories put powerful emotions into play – emotions that move us not just to think but to act. That is what persuasion is about, at its heart.

The key to good storytelling is delivery. It is not enough to have facts that make up a compelling story and to present them, one by one, to the trier of fact. That can still result in a boring, disjointed presentation that evokes boredom or confusion more than an emotional pull. Instead, the facts should be presented as a story, using all the techniques of effective storytelling while still presenting only those facts you reasonably believe will be developed through admissible testimony and exhibits.

Telling a story will require you to deliver the facts as a story, a question of technique discussed further below. To achieve that technique, however, requires counsel to first plan effectively how their story will be told and how it will unfold during the opening statement. Effective storytelling does not require that you follow a chronological presentation of the facts, but that is perhaps the simplest way to organize the story. After all, it fits a common structure of stories – following a straight line from the beginning to the end. This may be a particularly effective approach if you are trying to show causal relationships. The fact that one event caused a second event is often easiest to grasp when the events are presented in their causal order rather than as detached.

On the other hand, you may want to pique attention by focusing first on the dilemma or the climactic portion of the story. For example: “Corey Smith sits before you because he cannot stand. On April 6th two years ago he fell from a ride at the State Fair and crushed his spinal cord. He fell because a State Fair worker had failed to fix a cracked strut on the Ferris Wheel that inspectors had warned over a week before had to be replaced.”

Alternatively, you may wish to structure your story around character development, which may in turn lead to jumping forward and backward in time for each new character. For instance, in presenting the altruistic nature of your client, you may want to follow their selfless acts from beginning to end first, then run the trier back in time to highlight the key events that have led to the claim in the present case. Here is an example:

Johnny Jones built dollhouses for needy children. He starting building them in 1985 when his own children were just 7 and 9, and he built them right up until a table saw built by Smith Inc. took his right hand. And then, after four years of rehab and countless hours of practice at becoming left handed, Johnny Jones built his first dollhouse against this year, though it was smaller than usual and took him three times as long to finish. But Saw, Incorporated really does not care, because in 1992 they decided that instead of using butterfly nuts to hold

their saw blades in place they would substitute cheap hex nuts that worked their way off easily when the table shook with each saw pass. And when they found their warranty claims up and injury claims skyrocketing, they just kept selling the saws without any new warnings.

In sum, then, storytelling allows considerable flexibility in organization and presentation styles. But, at the end of it all, it requires that you find a way to have the trier understand who your client is and what problem they face that requires help, and then relate to them and want to help them solve their dilemma.

C. Places the Trier in the Story.

The trier who feels personally involved in the lives of the parties will have the greatest emotional reaction to the case story. Counsel should craft the opening, then, to draw the trier into the story. You can achieve this by giving them facts they can relate to. For example: “As a child Suzy loved her mother. They often played games together. They sang songs while Suzy’s mother fixed her hair, and on rainy days they made cookies to cheer themselves up. Their interactions today are different. Suzy’s mother adjusts her feeding tube, and turns her every four hours to avoid infections that might kill Suzy, but she does not sing more.” These are facts that anyone who has cared for a child, or been cared for as a child, which hopefully is most people, can relate to on a personal level. We have lived some of the positive experiences described in Suzy’s relationship with her mother, and can feel the tragedy and despair now that they are gone.

D. Is Well Organized for Maximum Emotional Impact.

Because counsel should aim to draw the trier into the story and make them relate at a very independent, emotional level that motivates action, they must pay careful attention to how the opening is organized. Stories that have a truly obvious emotional pull may benefit from putting the heartrending facts right up front. For instance: “Donna was only seven when Mr. Briggs set fire to the brush near her playhouse, a fire that would leave her in the hospital, unconscious for eight months and eventually take both her legs.”

Or, if the trier’s reaction is likely to be more immediate and powerful only after they understand the context in which the parties acted, then counsel must consider laying those details out first. For example:

For seventeen years Clock Industries, Inc. built timepieces that mariners relied on. Their clock engineers spent a combined 40,000 hours designing the special warp-proof, watertight seal used to keep their timepieces running flawlessly even under the harshest ocean storms. And, this special design enabled them to climb from the 500th largest clock maker in the world to the 3rd in just 7 years. It pushed their sales from 47 clocks back in 1998 to over 12,000 by 2010. And, then, in 2010, John Smith took the plans for the warp-proof, watertight seal, the plans that had taken 40,000 to come up with, and he secretly sold them to Timers, LLC, who then flooded the market with cheaper products that claimed to be as reliable as the

Clock Industries clocks. Their plan worked, and Clock Industries saw sales fall to only 2,500 clocks last year.

Counsel should also consider the concepts of “primacy” and “recency” in organizing the opening. Research confirms that often the facts addressed first or last will have the most lasting impression on the trier of fact. Facts that come out in the middle of a presentation often have less lasting impact. Counsel should consider, then, placing those facts they really want the trier to pay attention to either last or first in their order of presentation.

E. Draws the Sting from Unfavorable Themes or Arguments.

Most cases will not get to trial without both sides having a case to make. That means the opponent will try and counter or minimize every helpful fact and will offer themes of their own for the trier to adopt. If possible, a strong opening should take such countermoves into account and address them.

The manner of addressing such issues may be very subtle. It may, for example, consist of just mentioning facts that will undermine the opponents’ anticipated themes. For instance, imagine a case in which the opponent’s theme is “this is just like the story of David and Goliath.” You may have facts that show the opponent does not exactly fit the bill of an underdog. Maybe it’s their corporate accounting records showing a hefty financial bottom line, or perhaps it’s the fact that they employ fifteen in-house attorneys who frequently sue to enforce corporate claims.

On the other hand, some cases may justify calling out the opponent’s themes directly. For instance: “Plaintiff claims my client never even gave him a chance to buy his valued family property back. This ignores the twelve times my client sent him letters offering to sell.” Or: “Plaintiff claims the homestead has incalculable emotional value, but he does not offer up the fact that he listed the property for sale nineteen times between 2010 and 2012.”

You may also want to “draw the sting” or “inoculate the trier” on particular unfavorable facts. Counsel does so by introducing the fact and then explaining its minimal role, its lack of relevance, of the countervailing facts. By “inoculating” the trier with acknowledgement of the unhelpful evidence, you reduce (perhaps even significantly) the evidence’s emotional impact. For instance, assume that in a sexual harassment case the defendant can introduce evidence of flirtatious text messages sent by your client to her manager on several occasions. You may elect to offer those facts up in your opening as plaintiff, and to deal with them through countervailing facts. For instance:

At first, Jane really like working for Mr. Smith, and she even enjoyed interacting with him on a personal level. She thought he had a great sense of humor, and that he was physically attractive, and she did at one point try to get his attention with some flirtatious text messages. Three to be exact. But those stopped after Mr. Smith responded by locking Jane in a supply closet and demanding she kiss him to get out. And they certainly never invited Mr. Smith to photoshop pictures of her face onto disturbing images and then leave those all over her desk.

One can imagine the trier's reaction after hearing this when the defendant tries to force their attention back to the flirtatious e-mails. In fact, in this case, acknowledging such facts up front and dealing with them may even encourage the trier to become indignant or feel insulted when opposing counsel attempts to put heavy emphasis on the negative evidence.

F. May Undermine the Opponent's Evidence.

Drawing the sting from potentially unfavorable evidence the opponent may offer in their own opening statement is not the only consideration that should be given to the opponent's positions in crafting the opening statement. An opening may provide exceptional opportunities to undermine the credibility of the opponent's evidence.

Consider, for instance, a case in which the opponent places heavy emphasis on the testimony of one particular eye-witness. That witness, you know from their deposition, will testify forcefully and without wavering that they saw your client initiate a fight. However, assume there are four other eye witnesses that saw the fight initiated by the other participant. And assume that the witness your opponent relies on is biased because the person your client fought with is their nephew. And, finally, you have evidence the witness had consumed five drinks at a nearby bar just before the fight occurred. Assuming the opponent will rely heavily on the single eye-witness, weaving in these several credibility-diminishing facts to your story may pay off well.

You may also point out through the opening the factors that make your evidence more compelling, despite the fact that it may be contradictory of evidence the opponent may introduce. For example, the fact that your eyewitness's account is corroborated by a surveillance video might be helpful to mention, as would the fact that they have no relationship to either party. Counsel should consider discussing as part of their opening story the admissible evidence that will either undermine the credibility of the opponent's evidence, or that will alternatively strengthen the believability of their own conflicting evidence.

G. Helps the Trier Understand their Role.

If the trier is a jury, they will often understand little of exactly what their role in the case is. Though they may receive pre-trial instruction, the context of trial is often a very foreign environment. Your opening statement, then, provides an opportunity to further educate the jury on just what it is they are expected to do, what they have power to do, and how and when they can exercise that power. This may be very welcome instruction that eases the trier's mind and thereby eliminates considerable mental "noise" that might otherwise get in the way of your story.

While counsel may provide some quasi-formal instruction to the jury about what they are being asked to do by your client, and what the court will expect of them in deciding the case, counsel may provide the same type of instructive information in a far less formal manner. Consider, for example, the following simple sentence: "Mary's injuries have cost her a career and a marriage. They have cost her a half million dollars in past medical bills, and will likely cost her five times that amount going forward. But you will be asked to shift that burden to the people who caused her injuries, and to protect Mary's home from foreclosure and her children from the impacts of a family bankruptcy, and to make up for all that Mary has suffered and will continue to suffer."

Of course, argument in opening statement is generally prohibited, so counsel must carefully plan their statements to avoid it. But, by simply indicating what the jury is being asked to do and what it can do, counsel can provide the jury much comfort and focus.

III. Effective Presentation Techniques.

The art of presenting the opening statement follows the form outlined above. It employs a well calculated and succinct theme, orders the discussion of facts to draw the trier in, makes them emotionally connected to your client, and helps them understand legally what role they can play in addressing the dilemma the case presents. The presentation may also benefit from following the recommendations below.

A. Use Simple, Direct Language.

Simple, concise wording holds great power. Consider, for example, the difference in fact between the following introductions of the same case:

Jake Johnson, without proper management exemption formally empowering him to deviate from the explicit provisions of his employment agreement regulating the maintenance of confidentiality for corporate trade secrets, breached the acknowledged terms of that agreement regulating his use, maintenance and divulgence of proprietary information.”

- versus -

For \$50,000, Jake Johnson e-mailed his employer’s secret product plans on to its competitor, ignoring the contract he signed, the red “do not disclose” stickers on the documents, and his promise to his boss just that day that “don’t worry, your secrets are safe with me.”

Being concise, in writing or speaking, is no easy task. It may take lengthy outlining and repeated practice to feel comfortable dumping the legaleze and speaking in a straightforward, “plain-English” fashion. But, such efforts will undoubtedly pay big persuasion dividends.

B. Do Not Oversell the Case.

Even the strongest position can be undermined, perhaps completely, if counsel makes the mistake of overstating the evidence. Jurors will remember a well-crafted opening, meaning they will expect to see during presentation of the evidence facts that support the facts counsel promised them in the opening statement. When the trier senses that counsel’s representations in opening were really hyperbole, *all* that such counsel said may now be disregarded.

The foregoing means that everything you plan to say in opening should be vetted against the actual evidence to confirm it is solid and will be well supported by the evidence introduced at trial.

C. Feel Free to Use Exhibits to Bring the Facts to Life.

As long as such items are already stipulated by opposing counsel as admissible, or you have no doubt they will be deemed admissible and admitted in the case, counsel should feel free to use physical evidence that brings the story to life. Waving the bloody knife before the jury has more impact than merely saying what happened. The same might even be said for staid exhibits like copies of a contract, or blueprints, or other physical documentary evidence. The visual stimulation such evidence creates helps invite the jury into the story, fosters better

understanding and attention to detail, and creates anchor points where, when the jury sees such exhibits at trial, they will immediately understand where in the overall story they are.

D. Be Personable.

Whether anyone respects you as highly educated member of the bar after the opening statement is largely immaterial. You are an extension of your client, and, just as you want your client to be likeable and believable, you must strive to create the same perceptions for yourself. This means, in part, not talking down to the trier of fact, not overselling things as if the trier were not smart enough to know the difference, and being responsive to questions you assume the trier might naturally have in the particular type of case.

E. Start and End on a High Note.

The key to effective storytelling may be to imbue the start of your presentation with enough detail to interest and draw the trier in, and to infuse the closing with facts likely to draw the strong, independent conclusions and emotional pull you are looking for. Think carefully, then, about where to place your “best”, most compelling facts either up front or at the end of your opening. And, do not be afraid to repeat such information in both places if the evidence is particularly strong.