How to Write an Effective Opening Statement

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An opening statement can make or break a case. By the end of openings, many jurors have developed strong beliefs as to what the trial is about. These beliefs affect how jurors view the rest of the trial. Openings that are well crafted, well structured, and well delivered can be powerful tools. This article is designed to lay out a structure for opening statements along with suggestions on how to make an opening statement more effective.

Before delving into the specifics, I want to lay out a general rule of persuasion: Imply your point twice for every time you explain it in specific terms. The more you leave out, the more jurors are able to fill in by using their own histories, thus attaching personal meaning to the story they are crafting about the evidence. People tend to hold fast to personal meaning much more so than they will to a recitation of facts. Therefore, whatever type of opening structure you decide to use, do not tell jurors what or how to think. Simply imply it.[1]

1. Rule and Consequences

When you begin your opening, jurors are skeptical of you. They know nothing about your personal character and they are weary of attorneys in general. If you begin your opening by playing to jurors' emotions, they may doubt the sincerity of the claim and question your motivations for bringing suit. Instead, start your opening with facts that do not require jurors to take sides.. Begin with a rule or principle that cannot be credibly disputed by the other side. The rule should be important enough in the case that proof of its violation will significantly increase the chances of jurors deciding in your favor. It should be easy for jurors to understand, should be a rule that was violated by the opposition, and should be a principle that the opposition cannot credibly dispute so that when and if they do dispute it, they look worse for doing so. An example might be "you must look both ways at a stop sign before proceeding." The rule is immutable, thus taking away any argument by the defense that the driver was distracted by someone else or other defenses. Rules can come from common sense, statutes, general rules of conduct, etc. Explain how the rule was broken and what the consequences were of breaking the rule.[2]

By starting your opening with rules, you give jurors time to begin trusting you while you simultaneously build the foundation of your case around undeniable rules. Whether jurors end up feeling emotional about your case or cast emotion aside, your case will have a stable base.

2. Story of What the Opponent Did

When jurors first enter a courtroom, they begin looking for fault. They will find fault in anything they hear first. Thus if you mention your client first in opening, even if in connection with innocent facts, jurors will mentally twist the story to blame your client. For example, in a personal injury case, if you start your opening explaining how your client woke up that morning, made some coffee, got in the car, drove down the road, and was hit by a semi truck, jurors will already begin wondering if your client was too busy drinking coffee to watch the road. Instead, start your story with what the opponent chose to do or not do. Begin talking about how the trucking corporation is set up, how they incentivize their drivers to make deadlines, what the driver was doing

that day. This keeps the focus, and thus the blame, on the opposition.

While explaining your story, be sure to include possible motivations for the opponent's actions without committing yourself to any disputed motivations. Most good stories are concerned with motivations and whether you supply them or not, jurors will look for them to make sense of the case. You should allow jurors to reject your suggestions of the defendant's motivation for his actions. Instead of guessing at the defendant's motives and forcing those guesses on the jury by stating "the defendant was likely motivated by A," leave jurors room to disbelieve your suggestions and come up with their own possible motivations. This can be done by stating, "the defendant may have been motivated by 'A, B, or C, or something else entirely. We don't know, only the defendant knows." Further, do not make the mistake of leaving out suggested motivations entirely or jurors will not be able to connect the story.[3]

If you are a defense attorney, be sure to respond to the plaintiff's opening arguments in some fashion. Merely telling your own story and stating your own facts will be insufficient because there is no explanation of why your version of the facts is superior to that of the plaintiff.

3. Blame: Who You Are Suing and Why (for Plaintiffs Only)

Next explain who you are suing and why. State the negligent act or omission and choose your words carefully. Rather than saying the defendant forgot or failed to do something, state that they "chose" to do or not do something. Jurors attribute more blame to people or companies that make conscious choices rather than mistakes. Explain what was wrong with the action, how it foreseeably causes harm, and what harm it did in this case. Suggest what the defendant should have done instead and what good that action would have done. The easier it seems to prevent the wrongdoing, the more jurors will get angry that the defendant chose to act differently.[4]

4. Undermine

The next step is to undermine any possible defenses or contentions made by the opposing counsel. Many attorneys are wary to bring up any weaknesses in their case so early on, but these weaknesses are going to be brought up either by the opposition or by the jurors themselves as they construct their own versions of what happened. It is much less harmful to your case to have jurors hear about the possible weaknesses from you as it gives you an opportunity to explain and to turn weaknesses into strengths. Further, and possibly most importantly, it gives jurors a reason to trust you because you are not hiding anything. Tell the jurors that before you came to trial, there were several things that had to be determined. Then state a defense contention, explain why this contention had to be examined, what you did to examine it, and what the result means. For example, in a collision case, where one issue is that your client had a pre-existing back injury, you might say, "*Before we came to trial, several things had to be determined. One of those things was whether Sally's earlier back injury was the cause of her pain now. If her pain is due to her earlier condition, then we could not be here to ask the defendant to take responsibility for Sally's care now. So we went to talk to a few doctors whom you'll hear from later. They determined that Sally's pain now, though still in her back, is created from a different source. It's a different problem. This means that we can hold the defendant responsible for his actions because he caused Sally's pain*."[5]

5. Damages

There is great debate over whether to mention any figures for damages in opening statements. Some consultants and attorneys feel that getting a larger figure out in front of the jurors early allows them time to digest it so that by the end of trial, the figure isn't as daunting. We recommend not mentioning any figures this early in the trial. Jurors are looking for you to ask for money and doing so plays into their stereotypes of attorneys. Instead, tell jurors that they will know by the end of the case what the legal value of the case is and that all you ask right now is for them to keep an open mind. You might mention that you'll be asking them later for a fairly large sum of money (without mentioning a figure) and that by the time you get through the case they will understand why such a large sum is due. This will alert them to be prepared to hear a large figure without having the shock of the actual number.

If you take the time to prepare your opening statement well, it can have a huge impact on the outcome of the trial. Set jurors up from the beginning to trust you, to think in terms of rules, to begin blaming the opposition, and to keep an open mind. And whatever else you do, remember to imply everything twice as much as you state it directly.

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Endnotes

[1] Eric Oliver, ACTS CAN'T SPEAK FOR THEMSELVES: REVEAL THE STORIES THAT GIVE FACTS THEIR MEANING (National Institute for Trial Advocacy 2005.)

[2] RICK FRIEDMAN & PATRICK MALONE, RULES OF THE ROAD: A PLAINTIFF LAWYER'S GUIDE TO PROVING LIABILITY (Trial Guides 2006).

[3] DAVID BALL, DAVID BALL ON DAMAGES: THE ESSENTIAL UPDATE (National Institute for Trial Advocacy 2005).

[4] *Id*.

[5] *Id*.