

## **Lecture on Opening Statements**

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### **Trial practice and personal expression**

Trial practice is an art, not a science, and the preparation of an effective opening statement is most certainly an art. There is no scientific formula that will yield a perfect opening statement in every case. Rather, the lawyer must bring judgment, experience, skill and attention to the task of deciding how long the statement should be, what to include, and what not to include. There are a few rules that apply to all opening statements, and I'll tell you what I believe they are. But for the most part, every good trial lawyer will approach an opening statement differently, and every case will require a different approach.

The opening statement is one of only two chances the lawyer will have to address the jury directly. Although it's not an argument, the lawyer must draw on the skills of advocate, on a deep understanding of the facts, and on knowledge of human nature to boil the case down and explain it to the jury in a compelling way. There's a human dimension to every case. The challenge for the advocate is to communicate the values at stake in the case—values like fairness, the sanctity of a promise, or the arbitrariness of government overreach. Cookie cutter approaches don't work. Pat formulas and clichés don't work either.

Like other aspects of trial practice, the opening statement is an act of self-expression. To be persuasive, you must be yourself. You must deliver the opening statement from the heart, and you must be authentic. So, the trick is to find your own voice, and don't try to be anyone else.

### **Importance of preparation**

Your opening statement will be the first the jury will hear about your case. Many lawyers give little advance thought or preparation to the opening statement. They simply wing it with no preparation, or else they repeat the same series of opening statement clichés they use in every case.

Other lawyers, and I'm one of them, believe that the opening statement is crucial and that it deserves careful preparation. It's the lawyer's first chance to look the members of the jury in the eye, to establish a relationship, and to introduce your case's themes. Jurors will often forget evidentiary details as they emerge throughout the trial, but they're likely to remember the essence of a good opening statement. Since your opening statement comes at the very beginning of the trial, before the jury has formed any opinion, you have the chance to command attention, establish trust, generate sympathy for your client's position, and frame the issues in a memorable and useful way.

Some cases are won or lost in the opening statements of counsel. So, don't squander this opportunity. Give the opening statement plenty of thought. And don't be boring.

### **Objectives**

You should think carefully about your specific objectives for the opening statement. Although some of your objectives will naturally depend on the nature of the case and whether you

represent the plaintiff or a defendant, there are a few things you'll probably want to accomplish in your opening statement in every case.

Your main objective will be to capsule your client's version of the facts in simple, concrete language. In explaining the facts, you'll want to frame the issues the jury will be called upon to decide and present your trial themes, identifying which facts are going to be important and why.

You may also want to explain—very briefly—something about the trial process: how the case will unfold and how you, as the advocate for one of the parties, are going to fit into the process. Jurors like to know generally what to expect, in a sequence they can understand. You may also want to introduce the people who will be working with you—the lawyers and paralegals in the trial team—so that each of them can stand and say hello to the jury.

You'll probably want to identify a few key witnesses, telling the jury who they are, what they're expected to say, and (most importantly) what the significance of their testimony is likely to be in relation to the issues.

You may want to “inoculate” the jury by telling them about the most obvious problems with your case so that they're not caught off guard later in the trial.

At the end of your opening statement, you'll want to explain what you'll be asking the jury to do at the close of trial. You'll want to tell them that you'll be speaking with them about the evidence and the issues in the closing argument.

You may well have other objectives. For example, if you're a prosecutor, you'll want to explain the charges against the defendant and perhaps something about the grand jury process that led to the charges. If the case involves technology or a field of commerce with which the jury will be unfamiliar, you may want to provide the jury with some background. If the case is likely to involve obscure terms of art, you may want to explain them. If the case involves a crime scene, an accident scene, or a specific industrial setting, you'll probably want to show them a diagram or map or photograph. The opening statement is a great opportunity to provide basic orientation.

Beyond all of this, your overriding objective should be to gain the jury's trust, making it clear that you're going to be an honest broker of the facts and a resource they can rely on. By the end of the opening statement, you'll want the jury to understand that you have their interests in mind, that you'll tell them the truth, and you'll operate efficiently. You might want to commit to being prepared and not wasting their time.

### **Do's and don'ts**

Before discussing some of the specific elements you're likely to include in your opening statement, let me give you a few do's and don'ts:

--Strive for immediacy. Avoid clichés. Avoid long prologues or speeches that waste time.

--Strive for brevity. There are few cases that require an opening statement of more than 30 minutes. The longer your opening statement, the greater the risk of your losing the jury's attention.

--Strive for factual accuracy. If you tell the jury something that they learn is untrue, they won't forget it. If you tell the jury you're going to prove a set of facts, you must be sure of your ability to deliver.

--Avoid legalese and jargon at all costs. There is always a clearer and more immediate way to explain what you mean to a lay person of ordinary intelligence.

--Don't patronize the jury. Treat them like adults. Jurors are usually pretty smart, and they're usually interested in doing their job well. You can assume that they are people of normal intelligence. If you do your part as an effective advocate, the jury will understand everything they need to know to decide the case.

--Don't argue the evidence or the law in the opening statement. If you do, the other side will object and the court will stop you. Rather, explain what you expect the evidence will be and what it will show. As an example, the following is permissible: *"The evidence will show that Mr. Smith was at home sleeping in his bed when the alleged crime was committed."* But the following is not permissible: *"There's no way Mr. Smith could possibly have committed the crime."* The line between argument and explanation is sometimes unclear, and some judges are more sensitive to this issue than others.

--Never personally attack any party or attorney. Treat counsel, the parties, the court, and the court's staff with respect.

### **The power of a good five-minute summary of your case**

Good lawyers often decide to begin their opening statements with a short, compelling account of the most important facts. My own preference is to begin with a five-minute summary crafted to persuade the jury (1) that the case is simple and understandable, and (2) that my client should prevail. This is something I work hard on during trial preparation, and I commit it to memory so that I can deliver it without notes, making eye contact with the members of the jury. I hone the language of the summary to deliver the maximum impact. My factual summary should embody my most important trial themes, and it must connect with the jury on an emotional level. I normally deliver the summary immediately after I introduce myself—and before I say anything else.

For example, in a fraud case in which my client is a defendant, I might begin my opening statement as follows:

*"Ladies and gentlemen, I'm Alan Sullivan, and I represent the defendant Mr. Robert Smith, who is sitting beside me. The issue in this case is very simple. It's whether Mr. Smith lied to Ms. Jones about the condition or suitability of the property he sold to her in March 2019. The evidence will show that in February 2019, just a month before the sale, Mr. Smith encouraged Ms. Smith to inspect the property carefully, and she did so with her realtor, not once, but on three different occasions. Then, on the basis of those inspections, Ms. Jones and her realtor prepared a detailed written statement on the condition of the property, which they gave to Mr. Smith to read. He agreed with it and told her that he agreed with it. Apart from this, he never communicated with her about the property or, indeed, anything else. Mr. Smith will tell you that he never told Ms. Jones, as she now claims, that the property would be suitable for her business. In fact, at the time*

*of these events, he did not know what her business was, or why she wanted to buy the property.”*  
And so on.

I try to keep the summary brief and simple so that the jury will understand and remember it. This is not the time to get into the weeds of the case. I try to present the summary at the very beginning of the opening statement so that the jury will appreciate the overall thrust of my case from the get-go. Once the jury understands the thrust of my case, they'll be on the lookout for evidence to support it. There's an old saying that the first lawyer who is actually understood by the jury wins the case.

### **Identification of key witnesses**

I think it's always a good idea to tell the jury about the most important fact witnesses from whom they'll hear, explaining a bit about each of them, what you expect them to say, and how their testimony will relate to the issues in the case. For example, I might say the following about a witness: *“We'll call Mr. James Burton, Mr. Smith's long-time neighbor. He'll testify that he observed Ms. Jones and her realtor on one of their visits to the property. He'll tell you how long they were present on the property and what they did. He'll tell you about a brief conversation he had with Ms. Jones at that time. You'll want to listen carefully to his testimony because it will help you evaluate the important question whether Ms. Jones had a meaningful chance to inspect the property during the period leading up to the purchase.”*

In a complicated case with many witnesses, you'll probably want to focus the jury's attention on only three or four of them, and then indicate generally that there will be other witnesses whose testimony will address this issue or that issue.

You may also want to mention your expert witnesses. You might say, for example *“We expect to call as a witness Mr. Dan Simmons, an expert real estate appraiser with over 40 years' experience in this community. Mr. Simmons will testify as an independent expert, meaning that he has no interest in this case, and he doesn't have any relationship with either of the parties. We have asked him to testify because his expertise will help you in deciding the issues. He'll provide you with his opinion on whether the price Ms. Jones paid was fair.”*

Identifying some of your witnesses to the jury in the opening statement serves several purposes. It allows you to develop your major themes by explaining the evidence you expect to present on the questions the jury must answer at the end of the case. It tells the jury what to expect and why they should listen carefully. And it sends the jury the message that you are prepared, that you have a sensible trial plan, that you've been deliberate in the selection of your witnesses, and that you're not wasting their time with random witnesses. You want the jury to understand that with you in charge of the case, they're in good hands.

### **Discussion of your adversary's case**

If you know that the other side is going to challenge your version of the facts in a particular way, it may be a good idea to deal with that challenge up front, in the opening statement, so that the jury doesn't feel blind-sided later on. This part of your opening statement is damage control. You are inoculating the jury from testimony or documents they'll get from the other side.

For example, if the opposition is going to contend that your client actively prevented Ms. Jones from inspecting the property or from learning of its environmental problems, you may want to say the following in your opening statement:

*“Ms. Jones and her lawyer will tell you that she never had a meaningful chance to inspect the property, that Mr. Smith prevented her from performing a complete inspection and then withheld from her a negative environmental report. But I ask you to listen carefully to the evidence on each of these points. The evidence will show that Mr. Smith repeatedly invited Ms. Smith to inspect the property, with no time limits or preconditions. We’ll show you that she visited the property on three occasions with her realtor for the specific purpose of determining if it was suitable for her business. And we’ll show you that the allegedly negative environmental report was issued by the government long before Mr. Smith bought the property. Mr. Smith himself was unaware of it until this lawsuit began.”*

Or, for example, if the plaintiff contends that your client was motivated by a desire to destroy the plaintiff’s business, you might say, *“Counsel told you in his opening statement that Mr. Smith intended to destroy Ms. Jones’s business. But we will show you that this could not have been the case. At the time of these events, Mr. Smith had never met Ms. Jones and had no knowledge of her business interests. On this score, you’ll want to listen carefully to the testimony of Mr. Smith himself as well as the testimony of his realtor.”*

As you prepare this portion of your opening statement, be sensitive to the difference between an explanation of the evidence to be presented (which is permissible) and argument based on the evidence (which is not permissible in the opening statement).

### **Explanation of what you will ask the jury to do**

By the end of your opening statement, you should make sure that the jury has a clear idea of what its job is going to be in the case. The more specific you can be about this, the better the jury will be prepared to listen to the evidence in a useful way.

In a criminal case, the defense lawyer will want to tell the jury that at the end of the case, they will have the duty to decide innocence or guilt beyond a reasonable doubt on each of the charges in the indictment. The lawyer will tell the jury that in closing argument he or she will review the evidence with them and then ask them to return a verdict of not guilty on all counts.

Plaintiff’s counsel in a civil case might say, *“Ladies and gentlemen, at the end of the case you’ll be given what’s known as a special verdict form, a sort of questionnaire in which you’ll be asked, in effect, whether Mr. Smith should be held liable to Ms. Jones and, if so, how much he should be required to pay her. I’ll have the opportunity to speak with you after all the evidence is presented. At that time, I’ll go over with you each of the questions in the special verdict form so you’ll know exactly where we stand. I’ll review with you the evidence relating to each question. I will ask you to render a verdict in Mr. Jones’s favor on all questions and to award damages in an amount that fully compensates Ms. Jones for her losses.”*

### **Use of visuals**

PowerPoint presentations, photos, maps, diagrams, and documents may all be useful in

opening statements. They can be helpful in orienting the jury to the facts that will be presented. They can focus the jury's attention on the most critical information with which they'll be presented. And they can make the opening statement much more interesting. But I have three words of caution.

First, before the trial starts, you'll want to discuss the visuals you intend to present in the opening statement with opposing counsel. I normally send my visuals to opposing counsel a week before trial and ask if there will be any objection to my use of them. If there are objections, I may decide to approach the court for a ruling that I can use the visuals. If there are no objections from counsel, I will provide the court with a copy of the visuals and ask for permission to use them in the opening statement. One potential problem may be that a visual embodies evidence that has yet to be admitted and about which there will be an objection. (This, of course, will not be an issue if exhibits are pre-admitted on the parties' stipulation.) Another potential problem is that a visual is argumentative and therefore impermissible at the opening statement phase.

Second, don't let visuals overwhelm your presentation. Remember that you want the jury to be watching you and listening carefully to your presentation, not staring continuously at a screen. So be selective about what you present on the screen.

Third, if you're going to use technology to present your visuals, don't bungle it. A seamless visual presentation speaks volumes about your competence and preparation. On the other hand, nothing reflects more poorly on your competence than the failure to operate a laptop presentation effectively. So, before trial starts, practice.

### **The importance of tone**

At the beginning of trial, the jurors are interested in obtaining useful information from you; they are not interested in hearing overblown oratory. They are interested in hearing about the facts of the case and the trial process, without argument or theatrics. So, be calm and genuine. Avoid attempts at humor because they may be perceived as a self-indulgent waste of the jury's time.

The opening statement is as much about you as it is about the case. Your objectives should be to convince and enlighten, but also to engender the trust and confidence of the jury.