

OPENING STATEMENTS
“THE BEGINNING, MIDDLE AND END”

By:

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OPENING STATEMENTS

“THE BEGINNING, MIDDLE AND END”

“In my beginning is my end.” While T.S. Elliott was not speaking on the Art of Trial Advocacy, his words do reflect the importance the opening statement has with every aspect of the trial. What is said in opening will carryover through the middle of the trial as the evidence is presented and in the end provide means which the jury will identify with and accept in reaching their verdict.

The beginning of the trial in opening statements is when you can and must establish the rapport, the trust, and the confidence of the jury, all of which will be carried throughout the trial and end with securing a verdict for the client.

Importance

The opening statement presents the first opportunity to speak directly to the jury and tell them what the case is all about. As the jury is sworn in and seated in the jury box, their interest is at the highest point of the entire trial. In an unfamiliar setting they are curious, fresh and receptive. You have to take advantage of the heightened interest of the jury and proceed with an opening that will convey your message in a way that they will embrace and insure a verdict in your client’s favor.

Through opening statements each side lets the jury know what evidence they will present, and what their evidence will prove. It is the primary opportunity for attorneys to present their position to the jury prior to any witness taking the stand and any evidence being presented. How this becomes critical is that in the opening the framework is constructed as to how the jury will view the case. It is widely recognized that jurors process

information in light of the theme that is introduced and they adopt. Any information that is consistent with the adopted theme is easily remembered and information not consistent with the theme is forgotten or disregarded. A major battle is won when the jury views the evidence in the case from their perspective through the framework that you have constructed.

While generalizing human behavior can be difficult, it is safe to say that most people, everyday people, make up their minds early and stick with their decision. Unlike lawyers or scientists who are taught to gather all the facts and then come to a conclusion, everyday people have to process large amounts of information quickly, doing so by relying upon their widely-held beliefs and preconceived notions based on past experiences. Indecision causes stress, anxiety and nervousness. People also do not like to change their minds, so a decision made early is hard to reverse. This is reflected in a study from the University of Chicago in viewing human behavior in trial advocacy which concluded that 80% of jurors form opinions following opening statements and do not change those opinions after hearing the evidence. What this study indicates is that final decisions tend to be the same as the initial ones. Jurors form their first and often strongest impression of a case after opening. That is why the information from the University of Chicago study is so important. Jurors, like every day people, process information much the same way, using their widely-held beliefs, values and preconceived notions to organize the information and form a conclusion. While jurors are instructed to not make a decision until all the evidence is in, that is somewhat against human nature. Would you like to be precluded from forming an opinion of a TV show until it is over? Or not have an opinion

about a movie until the final credits appear? Or know what you think of a book until the final chapter? The remote control was invented for a reason. People decide early.

Have you heard the saying, “You never get a second chance to make a good first impression”? This holds true in opening statements. What is said early holds more importance than what is said later. Social scientists tell us that most people in a social setting develop a first impression within four minutes of speaking or listening to someone. How important is the first scene of a movie, or the first minutes of a television show, or the first chapter of a book? How the opening begins is so important that it must be structured to grab the attention of the jury when it is at its highest point and then begin to direct the jury through the evidence that you will be presenting. You don’t want to be in the position that the jury is holding the remote control and they began to change the channel before you finish the opening.

To accomplish this, consider beginning the opening with a short statement that gives the jury a capsule of the case in two to three dynamic statements.

This is a case about a promise broken, a dream ended, a life shattered.

This is a case about safety.

This is a case about a company that put profits over people.

What you will hear is a story of a human tragedy.

You will hear a story of a life changed forever because the defendant was too busy.

This case is not just about alcohol and driving; it is about indifference.

This is a case in which the defendant’s choice cost Mary her life.

You want to capture the jury's attention in the first few minutes in a way that will convey your case in a theme with simple language, and then proceed to tell the story so they can follow and understand. Avoid clichés and boilerplate statements like "What I say is not evidence." "This is a road map." "It is like a jigsaw puzzle." "At the close of the case, the court will instruct you." "It is your decision to determine the facts." "It is now my opportunity to give an opening statement to tell you what I think the evidence will be." If you do that, by the time you are finished with your introductory remarks, they are thinking about something else other than you. It wastes time and gets into the four-minute window – that period that the jury is most receptive and you have to get your point across or the window will be shut.

Theme

Jurors do not come into court empty, void of any knowledge or feelings. Their minds are not a blank slate ready for you and the other lawyer to fill with only the evidence of the case. They absorb information based upon their values, their experience, and their concept of what is right and what is wrong. It has been said that every case turns or is decided on a few fundamental concepts that are universal. Identifying those concepts and making it into your theme is the key to success. Therefore, a theme is essential for any trial. If you don't have a theme, you will be like a warrior going into battle without a sword.

What is a theme? It is a short, simple concept that states a capsule of your case. It "provides essential meaning to the jury and helps them to organize and remember the case facts" and is the means to reach the ultimate action in the case. Identifying the theme of your case is something that should be done when you first take the case – not the night before, or during lunch right before opening statements are to begin, or never at all.

What is it that you feel the case is all about? Why is it important? If you had to explain the case in 30 words or less, what would it be? If you had to explain it to your child when they ask you what the case is about, how would you explain it in a short, concise statement? If a neighbor asks what kind of case are you working on, how would you tell them what the case is about?

A theme should be easy to remember, favorable to your client, and consistent with universal concepts of fairness and what is right. When identifying a theme, it should be based on life's experiences, human values, and general principles that are inherent within our society. It is recognized that jurors deliberate in themes as it seems to provide mental organization that enables them to look for evidence that fits the theme. That is why you must develop a theme that taps into the collective unconsciousness of the jury. If you fail to connect the plaintiff's situation to the values of the jury and the values they hold, they will not find in your favor. You then arrange the facts in support of the theme to persuade the jury. The right theme helps jurors rationalize any and all of the case conflicts and gives them the means to justify the desired result. If you fail to give the jury a theme, they will come up with one on their own, or worse, use the other side's theme.

When you think of a theme that will resonate with the jury and explain your case and why your client should win, think of things that involve life's values. It is these themes that resonate with ordinary human beings, i.e., fairness, hard work, personal responsibility, good over evil, weak over strong, and justice. It is important because human memory is set up to remember a central theme rather than individual details.

Some examples of themes:

Life, liberty and property.

Good vs. evil.

Right vs. wrong.

Quality of life.

Improved safety.

Joy of life.

With every job there is responsibility.

Failed to follow the rules.

Dropped the fly ball.

He dropped the ball.

If the lion gets away, Kerr MGee will pay.

The buck stops here.

When in doubt, you must rule out.

If the glove does not fit, you must acquit.

Race to judgment.

Profits over safety.

Break the watch without harming the crystal.

This is a case about a woman entitled to keep her job, her dignity, and her life.

This is a case not just about alcohol, driving; it is about indifference.

The buyer needs a thousand eyes – the seller only one.

You must be stupid, stupid, stupid.

Safety first, not last.

A person should outlive their car.

Follow the rules.

The key on a theme is simple, easy to remember, such that it can be used by the jury throughout the case and it is consistent with the jury's belief that allows them to right the wrong. The theme must be told so that each juror can index their own favorable beliefs and principles to that theme and use it in processing the evidence to reach a conclusion or result in your favor. Jurors use conceptions based on past experiences to organize information and come to a quick conclusion. Verdicts almost always connect the juror's mind to points made in the opening.

Delivery

In order to deliver an effective opening statement, it should be presented as you would present and tell a story. Telling a story is one of the most persuasive means of communication. Explaining and arguing, while great at showing our rhetorical skills, is not as persuasive as storytelling. A cold listing of facts that each witness will testify to fails to persuade. Facts stacked on facts producing a rack of facts, while it will give the jury an outline of the case, it generally will not be effective in persuading them. Information does not tell us what we always want to know or need to know. It is recognized that when people receive random data or unconnected facts, it seldom leads to understanding or knowledge. Data does not equal understanding, and understanding is the key to persuasion. Henry David Thoreau said "It takes two people to speak the truth, one to speak it and one to hear it."

How this is done is through a story to tell the information, the evidence you have, so that the jury will understand it, and its relationship to the theme. How we persuade is how we deliver and tell our story to the jury. Cicero, a great attorney from ancient Rome,

set forth “Six Maxims of Persuasion” that can be used and incorporated into any opening to effectively communicate and persuade the jury.

1. Understand that what reaches the mind moves the heart. Passion, as well as reason, must be used.
2. Understand motives to understand human behavior. The defendant’s conduct is an essential part of persuasion and should come first.
3. Move from the particulars of the case to universal truths. Social importance of taking action is an important element in the story.
4. Draw the audience into the story. Tell the story in the present tense as if the jury was watching the events unfold in front of them, rather than hearing a narrative of something that happened in the past.
5. Expose the flaws in the opponent’s position.
6. Communicate your passion and logic in words the jury will understand

Storytelling is the most basic means of communication. Stories are everywhere – the Bible, life’s parables, the Greeks, the Old West, TV shows, movies, books, and comics. It is how we communicate with each other daily. It is how we were raised, how we grew up, and how we talk about our days and our life. Much of what we learned in life, we learned through stories. Stories told to us by our parents, stories that were read to us as children, and stories that we have told our children. How we tell someone about an event is through a story, with action, suspense, and drama. It has a beginning, a middle and an end.

We have communicated our heritage by telling stories. Although we may not sit cross-legged around campfires signing *Koom ba ya*, we communicate our daily events

through stories. Storytelling helps simplify and focus the facts. It is common that when people receive unconnected facts or information, they become anxious and soon stop listening. Random facts presented to people cause them to not listen and certainly not understand. A story can make the complex simple, the boring interesting, and the dull exciting.

You want to make your opening statement like a good story. It can make the most complex simple, the boring interesting, and the dull exciting. It should have a beginning, middle and end. In the beginning, you grab their attention with an impact theme. The principle of primacy also dictates the need for a strong beginning. People tend to retain those things they hear first. They are slow to change their view from what they hear first. If you can express the essence of your case in the first four minutes, you will take full advantage of primacy.

Sequencing of the facts is also important in how you tell your story. Who are you going to focus on? Whose conduct do you want the attention to be on? When you begin to tell the story, consider starting with the defendant's conduct. Studies have shown that you achieve the most impact if you start with the defendant's conduct. Consider if you start with the plaintiff's conduct, the listeners may question why the plaintiff did something or failed to do something.

The middle is where you provide the facts and evidence with the theme wove throughout, using devices to help persuade. The middle of the story should employ techniques such as rhetorical questions, analogies, visual aids, and the rule of threes, keeping in mind the principles of persuasion. Use passion, draw the audience into the story, use your theme to relate to general principles and universal truths.

The end or conclusion should be dramatic and powerful and connect to your opening. It should give them a call to action, involving them in the process to make the right and just decision.

The content of the presentation and the manner in which it is made is important. Social scientists have studied the impact of messages related to the three primary channels of delivery: verbal (words), vocal (how the message is delivered), and nonverbal (facial expressions, eye movement, body positions). What is said – the words – account for only 10% of the impact. Our voice message, inflection and resonance, account for 40%, but by far the most important aspect of the message is nonverbal, which delivers 50% of the impact. You have to use all three means of delivery if you are going to persuade in your opening. Consider the following techniques to enhance the power of persuasion in your opening.

Primacy. That which is heard first will be remembered best. If the jury accepts the belief in the beginning, their belief is more intense. They believe more intensely that which they hear first. This is shown by the first impression approach and the four-minute rule. You can also use this with positioning of facts. In a listing of events or facts used repeatedly, the jury will more likely remember the first fact presented. So, one can introduce strong facts first and weak facts last to get the most effect.

Visual aids. Be careful not to use too many, but several visual aids may be effective in conveying a point. Charts and diagrams can be helpful in understanding. Jurors remember what they see and hear better than what they just hear.

Avoid overstatement. Never overstate what your case is or state something that you will not be able to prove. Credibility is an important factor in a jury trial, and the loss of credibility will result when you overstate what your evidence may be.

Reveal your weaknesses. To defuse or mitigate the known problems or weaknesses in your case, identify those matters early on and this will cause a jury to emotionally identify with the Plaintiff. Explain before you have to contradict.

Present tense. Consider when you tell the story, telling it in the present tense makes it more real in that the jury is actually with you, participating in the process. For example, “John was stopped at the light when he was struck from the rear.” Or “John is sitting in a car at the stoplight thinking of his children, when suddenly his car is smashed from behind throwing him against the dash and through the windshield.” Or “He walked up the stairs, or he walks up the stairs to the room that is now empty.” “He was a good father or he is a good father.”

Repetition. Repeat words and your theme. Repeat the theme throughout the opening. Repeating words or phrases can give them more significance and importance.

Rule of three. Social scientists again tell us that information is best understood when it is presented in groups of threes.

It’s as simple as one, two, three – faith, hope, and liberty.

The good, the bad, and the ugly.

Blood, sweat, and tears.

Of the people, by the people, and for the people shall not perish from the earth.

Free at last, free at last, thank God Almighty, we are free at last!

I came, I saw, I conquered.

Life, liberty, and the pursuit of happiness.

ABC.

The three Marx brothers.

The three D's - discrepancy, deception, distortion.

Three blind mice.

Friends, Romans, Countrymen.

Individuals are more capable of understanding concepts if the data is inputted in the form of three pieces of information. The rule of threes is important in persuasion.

Voice inflection. The change in the tone of your voice or the speed in your voice. The delivery of your opening. Be careful in opening statements to not go too fast. You don't want to tell your story so fast that it is similar to getting on an airplane and flying off without the passengers. Be sure that you have connected with the jury and that they are in the plane before you allow the plane to take off. Opening is not a race.

Anchoring. Anchoring is a rhetorical device of which you refer to a certain event, theme, or piece of evidence at a particular place in the courtroom. Every time you come back to it, the jurors are anchored by that position.

Rhetorical questions. Is that fair? What is it like to not be able to tie your own shoes, to take a fork and eat a piece of chocolate cake? Is that right? Why would a company fail to do that? Why would they not tell the customers about that?

Avoid legalese and use everyday language. Car rather than vehicle, before rather than precedent, after rather subsequent, heart attack rather than myocardial infarction, brain damage rather than hypoxia ischemia encephalopathy. The words should be simple

and direct in everyday English. Richard Leder in The Miracle of Language said that 11 words account for 25% of all spoken English, and 50% of the most common spoken words are one syllable.

Recency. That which is said last is remembered best. Recency relates to the ability to remember. Primacy relates to the intensity of the belief.

Sequencing. The order in which the facts are presented can be important because it can cause the jury to focus on that conduct.

Persuasion is the key, by storytelling, using common rhetorical aids you can tell an effective story in a manner that will cause the jury to embrace your theme and make it their own.

Conclusion

The opening is the most critical point of the case. It is there that you have the undivided attention of the jury. They are fresh, eager and anxious to hear why they are seated in the jury box. With a powerful theme stated forcefully at the beginning of the opening, then developed into a story that you present, with a beginning, middle and end, hopefully you will take the jury where you want them to go – accepting your theme and making it their own by reaching a verdict in favor of your client.

In the beginning is my end. How your opening is presented will decide how your case will end. So, make a powerful opening that will make the case end the way you want it to.

THINGS TO DO

Have a theme.

Be yourself.

Be sincere.

Be prepared.

Keep it simple and short.

Disclose weaknesses.

Dress the part.

Weave the theme into the opening and throughout the trial.

Draw the audience into the story.

Reach their heart.

Use common language.

Morality is on your side.

Motive is important.

Be credible.

Start strong.

End strong.

THINGS NOT TO DO

Don't give the jury a rack of facts.

Don't say what the evidence will be, or at least don't be repetitious.

Don't say it is a roadmap.

Don't say a jigsaw puzzle.

Don't say bird's eye view.

Don't waste time on re-introductions.

Don't talk like a lawyer.

Don't patronize.

Don't say a simple case.

Don't say I want you to listen.

Don't read your opening.

Don't say what I say doesn't matter.