

II. OPENING STATEMENT – SETTING THE STAGE FOR A SUCCESSFUL VERDICT

A. You Never get a Second Chance to Make a Good First Impression – Ways to Ensure a Great Start

After months of preparation and expense, after burning the midnight oil for days or even weeks before the big opening statement, why do so many lawyers devote so little attention to the first impression they will make on a jury? Perhaps we get so wrapped up in the facts and the law we forget we are on stage.

Although a very serious form of entertainment, trials are entertainment. How long can you watch prime time television without watching a courtroom drama (or even a courtroom comedy-remember *Night Court*? Isn't *Judge Judy* comedy too?) There is even a very entertaining multi-media continuing legal education seminar about courtroom movies called *Reel Justice* (Note 1). People love the courtroom! If you are not a natural entertainer, start practicing. Most of your jurors will be serving for the first time. They are excited. Do not let them down! You are on stage and must be cognizant of the way you look and act. Most of all, you must be yourself or you will come across as insincere – a phony – and that is fatal.

What to wear? Obviously, the best place to start is your “Sunday best.” If you haven't bought a new ensemble lately, go shopping. Personally, I don't believe men or women should wear anything except a suit, sportcoat or blazer to trial. If women don't want to wear a tie, there are many good substitutes. Consult your haberdasher. There is much written and said about the sincere nature of navy blue, the frivolous nature of busy blazers or loud colors, about colors to go with your personality, etc. A grain of salt is in order.

Go for comfort and use your common sense. Noted author, communication specialist, playwright, director, and lecturer David A. Ball, Ph.D. (Note 2) convinced me that the best attire for men in which to conduct voir dire is a sportcoat and slacks. His reasoning is comfort, both yours and the jury's. Although it is tempting to wear something terribly formal, I think this temptation should be resisted. You want to look like the jurors to some degree. Leave your silk stockings in the drawer at home.

I think you want to look "appropriate" and Rule 2.03(e) of the Rules of Practice – District Courts mandates it, but you don't want to look too different from the jurors themselves. I always get a kick out of the difference between what jurors wear the day they are picked for the jury and the first day of their service. Most of them come in looking very casual for voir dire and then show up for opening statements looking like they are out on a first date. Don't be afraid to dress a bit nicer than they do on day one, but be mindful of their naiveté and don't dress to the nines until at least day two – and then use your common sense.

Things about behavior and first impressions which should go without saying but must be said:

- Do an actual dress rehearsal for people and get their feedback
- Keep your hair out of your face and freshly trimmed
- No gum, mints, or lozenges
- Polish your shoes
- Empty your pockets
- Don't carry pens
- Avoid jewelry
- Check yourself carefully in the mirror, both front and back

Your client will also be conspicuous during opening statements. Introduce your client(s) to the jury. Address your client's behavior with him or her ahead of time, before opening statements. The jury's six or more pairs of eyes will be upon everyone in the courtroom – and won't miss a thing.

All of the above simple rules work for clients as well as lawyers. Hair back, polished shoes, mouths and pockets emptied. For example, don't let your client get on the stand dangling thousands of dollars of jewelry. Dress your clients conservatively, but somewhere between business casual and funeral attire. If your client is not going to feel comfortable in what he or she wears, they will not look comfortable, and the jury will see it. If your client behaves poorly when not on the stand, the jury will notice and render a predictable verdict. Do not wait to address the issues for yourself and your client during trial to ensure a great start. Start early and make that first impression a good one!

B. Compelling Openings That Make the Jury Want You to Win

While opening statements are extremely important to the conduct of a successful trial, I do not believe cases are usually won or lost after the opening statements. I view the opening statement as a promise to the jury about the proof you will submit to it during the course of the trial. If you have kept your promise during the evidentiary phase of the trial, you can capitalize on it during your closing argument. If you are honest with the jury in your opening, and it is reinforced through the trial, the jury will want you to win. If not, I suggest you try to settle your case as soon as you realize you can't deliver on your promise.

Fredric G. Levin, among others, disagrees with me about the dispositive nature of opening statements. He claims (with scant authority):

Jury studies have shown that after the opening statements by plaintiff and defense, most jurors have made up their mind about the outcome and do not change it throughout the balance of the trial.

Over two decades ago [about 1960], in one of the initial studies, Professors Harry Kalven and Hans Zeisel of the University of Chicago

Law School found that 85% of the time, the verdict the juror would have returned immediately after the opening statement was the same verdict which was returned at the end of the case [date added](Note 3)

Perhaps the reasoning of the initial studies, which I have heard spouted as conventional wisdom for the last 25 years, can be explained by the jurors' thinking process. Of course they knew who was going to win right after the opening statements. It was obvious! Although true in hindsight, and although this thinking confirms the brilliance of the juror, I don't buy it. Thinking that 85% of jury trials are decided after the opening statements, in my opinion, is downright dangerous. On the other hand, there is no doubt in my mind that jurors will remember the opening statements and remember the lawyer who did or did not tell them the truth.

Jury memory is why it is so important to be accurate with your story and make sure it conforms to the proof you plan to present in the evidentiary stage of the trial. When you catch opposing counsel failing to prove what he or she said would be proved during the opening statement, call it to the attention of the jury in your closing argument. You will be setting the stage for a successful verdict.

Make sure you tell the full story to the jury without being interrupted. Two objections to keep in mind are arguing and stating facts the other side might try to prove. Stick to your own facts and don't argue. How do you present a compelling opening statement without arguing? There is a fine line between fact telling and arguing, and you can find a lot of examples of opening statements in the literature which contain argument. Nothing can disrupt an opening statement more than a sustained objection based upon lawyers using argument.

To be convincing without arguing, your facts must be laid out in a logical sequence in the form of a story. Although you can repeat certain facts during your opening statement, pushing it too far may result in an argument objection. Just remember Sgt. Friday, "Nothing but the facts, Ma'm." If you think about closing argument themes, let them pass. Your time to argue will come after the conclusion of the taking of evidence. Be content with telling a story that incorporates all of the major factual components you intend to prove through your witnesses, documents, and other evidence.

Please don't list each witness's testimony and the key documents – that's not story telling. Remember ... Once Upon a Time ... Good sequencing and strong descriptive word selection will make your case compelling. Weave it all together.

In summary, if you shoot square with the jury, if you are a teacher and a storyteller and not another sleazebag lawyer, the jury will want you to win.

C. The Art of Telling the Full Story in Your Opening

The art of story telling is an ancient one, probably one of the first art forms after the invention of language. We all love to hear a story. It keeps our interest and keeps us listening. It is also a wonderful mnemonic device, which I hope to demonstrate to you in my oral presentation. Tell the full story – whole warty full story. Better first out of your mouth...

Although I do not believe it is possible to win your case during your opening statement, I definitely believe it is possible to lose it. If you try to over-sell your case, it is you who will pay. There is no way to present a good opening statement unless you know your facts cold. Any overstatement or misstatement of facts risks a loss of credibility and a loss of your clients' causes of action with it. This means you must have at your fingertips a detailed timeline which you have committed to memory. Although this may sound daunting at first, if you put everything in story form, you will be amazed how easy it is to smoothly deliver your opening statement - without notes! Something bad happened to your client and it has someone else's fault. Although we beat themes to death, this is the basic story of every lawsuit. Tell it like a story. Think of books or movies, or even jokes. They are all stories. Chronological stories always work, but flashbacks or dual tracks can also be used. Anything goes, as long as each part makes the jury anxious to hear the next part.

The earlier you prepare the story of your opening statement, the sooner you will be able to make a realistic assessment of your case's value – look at the full story. Although discovery is required to flush out the details of the story and obtain information your client didn't know when his or her cause of action arose, you will know the basics

after your first consultation with your client. Don't procrastinate! Try to imagine a jury trial from the outset. This not only helps you start delegating duties to your legal assistant, paralegal, or client, it forces you to take a realistic look at the most important determination of all: whether or not you are willing to take the case. To make a compelling opening statement, you must practice it – early and often.

D. The Delivery

My personal favorite jury consultant, author and lecturer Eric Oliver (Note 4) tells us, “The good news is, there is such a thing as body language. The bad news is every body has its own language.” I have tried to study body language extensively but by no means consider myself an expert on it. When you work with people like Eric, the things he can do with body language border on the scary. I highly recommend you consult with him in an appropriate case (i.e. lots of money involved). Anyone who tries to sell you a universal-type body language should be ashamed of themselves.

A few basics on delivery should provide you with some practice pointers:

- Stand still. Although this sounds simple, if you do not already do it, try it. A theatrical instructor (Note 5) taught me this in law school and I still find it very difficult to perform today, despite 25 years of practice. Plant your feet in one spot, and spread them out approximately the length of your shoulders. It will probably feel very unnatural. By the same token, it is very effective. Although pacing, anchoring, and moving to emphasize exhibits or graphics are all terrific tactics, standing still should be employed during the vast majority of your opening statement. The jury won't be distracted and will be focusing on your words, facial expressions and arm/hand gestures. You will appear rock solid and believable.
- Ditch your notes. This also may be hard for you to fathom, but it is essential. First, you want to appear that you know the facts in your case without the need to resort to notes. Second, lawyers tend to bury

themselves in their notes and forget about their audience. Third, notes distract the jury.

- Practice your facial expressions and arm/hand gestures. Communicating without facial expressions and arm/hand gestures is an unnatural way to communicate. For a trial lawyer, it may be a reason for commitment to a mental institution. On the other hand, don't let your arms and hands imitate Don Quixote tilting at windmills. Be more subtle with your facial expressions than a mime. Something in between these extremes is needed. Of course, it must be natural for you as well. The only way to get comfortable with facial expressions and arm/hand gestures is to practice in front of a mirror or videotape yourself. Hand gestures are natural. Most people simply have to become aware of what they do naturally before they can begin to use their bodies to help communicate the words they are using. After graduation from solo practice, you can practice before a live audience. Get feedback and incorporate it into your continuing solo practice.
- Keep an open stance. A cardinal rule is never to turn your back on the jury. Keep your body position open to the jury at all times. This is particularly important when you are the focal point during your opening statement. If you have ditched your notes, keeping an open stance will be easier for you. When you need to walk around, keep an open posture to the jury. Use your open hands at a waist high level with palms up for a basic open position. If you can help it, don't button your clothing more than necessary to avoid a wardrobe malfunction a la Janet Jackson.
- Don't forget to breathe. Don't laugh! Most of us are so "on" at the beginning of our opening statements, we literally forget to breathe. This results in the brain suffering from an oxygen deficiency and will

make you lose your train of thought and eventually feel like passing out. Slow down! Smile at the jury. Remember to breathe!

- Smile, it's not a funeral. All laughter aside, this is a serious matter. Do doctors joke in the operating rooms? Of course. If you watch *Six Feet Under*, you know even the grim reapers must maintain a sense of humor. Don't forget yours at the office when you try a case.

CONCLUSION

The opening statement features you, the trial lawyer. It is your first moment to shine in front of the jury with no visible support. Look your best without looking like it's your wedding day. Thorough and accurate preparation is a must. Practice, practice, practice! Make sure you and your client are ready to make that first good impression. If your opening statement doesn't sound like a campfire or bedtime story, you are not ready. If you are honest about what you intend to prove during the course of the trial in your opening, chances are the jury will like your story when the evidence bears it out and the jury will want you to win. Good luck!

NOTES

1. *Reel Justice, Power Passion & Persuasion*, Dominic J. Gianna, The Professional Education Group, Inc., 2001.
2. David A. Ball, Ph.D., *Theater Tips and Strategies for Jury Trials*, Theatre de la JeuneLune, 1997.
3. Fredric G. Levin, Esq., *Effective Opening Statements: The Attorney's Master Key To Courtroom Vistory*, Prentice Hall, 1983.
4. Eric Oliver, MetaSystems, 42015 Ford Road #224, Canton, Michigan 48187.
5. Patricia Feld, actress and wife of University of Minnesota Law School Professor Barry Feld.