

This Week's Feature

The Importance of an Effective Opening Statement

By Chris Cotter



The morning of the first day of a jury trial presents an interesting dichotomy. The lawyers, and the persons and companies that they represent, have spent the last several months or years in the shadow of this day, gathering

facts, conducting discovery, deposing witnesses, working with and cross-examining experts, pouring over evidence, and otherwise attempting to understand every facet of the case in defense of the lawsuit. In sharp contrast, there are perhaps eight or twelve people in the courtroom who had no plans to appear that day until they received a notice in the mail requiring their presence, and they know nothing about the facts, the evidence, or the testimony developed in the lawsuit.

The opening statement is the moment when the jury first hears the facts of the case, to understand who the witnesses will be and to learn why the jury should decide in favor of the defense. The defense lawyer can choose to give a run-of-the-mill recitation of facts read from note cards, or the defense lawyer can choose to give a persuasive and powerful presentation that makes an impression and creates a framework for the jury to work from throughout the case. The latter requires preparation, thought, and a little creativity. And the results are well worth it.

In the days and weeks leading up to the trial, the defense lawyer should talk with nonlawyers (i.e., family and friends) about the facts of the case. Their thoughts and feedback are extremely valuable and will be helpful in developing the theory and theme of the case. The theory of the case must be logical and plausible. It must be factually strong, supported by the evidence that will be presented in the case. It must be simple. And it must lead to the correct legal result. The theme of the case gives the jury the *moral* reason to decide in favor of the defense. In a case involving a slip and fall at a grocery store, the theory of the case for the grocery store could be as follows: The liquid that the plaintiff slipped on was observable to anyone who would have looked at the floor before walking through it. The theme could be personal responsibility.

Also, before that first day, the defense lawyer should organize the opening statement by selecting the most persuasive facts and evidence and deciding on the order in which to present them. Organization and a coherent

presentation are so important because of the knowledge gap that exists the morning of the first day of a trial. The jury knows nothing about the case. The defense lawyer must place herself or himself in the position of the jurors, and he or she must construct the opening statement in a way that allows the jurors to take it all in. The attention that the jury gives to the attorneys during opening statements is perhaps the most that it will give to the attorneys during the entire trial. The defense should award the jury for that attention, by presenting the defendant's case in an organized and helpful manner.

Visuals are the key to helping the jury understand and remember the case. While the adage "people remember 20 percent of what they hear, but 80 percent of what they see" may not be statistically accurate, the point is clear. Visuals such as a PowerPoint presentation can be a powerful tool. Every case involves a key photo, a central video, or a crucial document. The jury should see these in the opening statement. The defense lawyer should not fall into the PowerPoint habit of creating slides with bullet points and strings of text. The PowerPoint should be primarily a visual aid, not something for the jury to read.

One final step in preparation is the presentation itself. The defense lawyer should practice, practice, practice—in front of others and in front of the mirror. There is no substitute for repeated rehearsals. And the small, and occasionally significant, revisions to the opening statement that come from practice will be well worth it.

When giving the opening statement, the defense lawyer should talk with the jurors, not at them, and should make eye contact with each person. The opening statement should be delivered without notes. The defense lawyer should not argue or recite facts but tell stories, pausing after key points and repeating key sentences. Volume, cadence, and pace should be varied. Plain English should be used, with a preference toward small words, rather than big, everyday words, rather than legalese. By the end of the opening statement, the jury should be well acquainted with the defense's theory of the case and should have compelling reasons to consider the defendant's evidence and viewpoint throughout the rest of the trial.

Primacy is paramount. The opening statement is the first moment for the jury to hear and understand the case. The defense lawyer should seize that moment and make the most of it for his or her clients.

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