

Effective opening statements in American trial practice:

Part 2 – Organisation

It usually takes more than three weeks to prepare a good impromptu speech.

- Mark Twain



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Use the evidence – don't just display it

The goal is to organise your opening statement so that it has maximum persuasive impact. There is a world of difference between *using* the evidence, and merely *displaying* it.

Unprepared and disorganised trial lawyers are attracted by the allure of some seemingly 'natural' methods of organising their opening statement, such as chronology or witness summaries. They allow the accident of witness observation or the serendipitous occurrence of events to replace dynamic organisation and attention to the theory of the case. This approach often amounts to nothing more than *displaying* the evidence.

Effective trial lawyers, on the other hand, use the evidence in opening statement. Using the evidence involves the purposeful ordering of the facts in a manner most sup-

portive of the theory of the case.

Avoid witness summaries. It remains a mystery why many trial lawyers think that they can help the fact-finder understand the case by naming the witnesses and outlining the expected testimony of each (the so-called 'witness-by-witness' approach).

The very purpose of the opening statement is to overcome the disjointed fashion in which the witnesses will produce evidence at trial. Witness-by-witness rendition of the facts is not likely to produce a coherent story.

The Court will hear a number of witnesses testify in this case.

The plaintiff will testify that . . .

Then John Dunn, a firefighter will tell you that . . .

You will also hear from Amy Lipton. She will testify that . . .

Interesting? No. Persuasive? Absolutely not. The opening statement quickly becomes boring and difficult to follow.

An even greater problem with the witness-by-witness approach is that it obstructs the trial lawyer's ability to develop a theory

of the case. Your theory will seldom depend upon which witness provides a particular piece of information. Rather, the theory will always depend upon how the various facts fit together.

Be wary of chronology. Chronology is an obvious way to organise an opening statement. After all, events in the real world occur in chronological order.

However, simply because events occurred in a certain order is not a sufficient reason to present them that way to a fact-finder. By lashing you to the mast of events as they happened, chronology may very well prevent you from organising the facts in their most persuasive order.

For example, the following are the first three paragraphs from the lead article of the *New York Daily Tribune* of April 15, 1865:

President Lincoln and his wife, together with other friends, this evening visited Ford's Theatre, for the purpose of witnessing the performance of the 'American Cousin.'

It was announced in the papers that General Grant would also be present, but

he took the late train for New Jersey.

The theater was densely crowded, and everybody seemed delighted with the scene. During the third act, and while there was a temporary pause for one of the actors to enter, a sharp report of a pistol was heard, which merely attracted attention, but suggested nothing serious, until a man rushed to the front of the President's box, waving a long dagger in his hand, and exclaiming 'Sic semper tyrannis!' and immediately leaped from the box, which was on the second tier, to the stage beneath, and ran across to the opposite side, making his escape amid the bewilderment of the audience, from the rear of the theater, and mounting a horse, fled. The screams of Mrs. Lincoln first disclosed the fact to the audience that the President had been shot.

You did not have to be a seasoned journalist to have realised at the time that the assassination of President Lincoln would be a pivotal moment in American history. Surely, there could be no more captivating fact with which to lead the story:

As Mrs. Lincoln's screams rang out, everyone realised that the President had been shot! Moments before, a man rushed to the front of the President's Box in Ford's Theatre . . .

As you can see from this example, a strict chronological organisation may clutter your story with useless and confusing detail. Do not make the fact-finder wade through inconsequential details before you get to the point.

Using details persuasively. Using - as opposed to merely displaying - the evidence in your opening statement depends upon the persuasive arrangement of major propositions and supporting detail.

1 Big ideas, then details. It is usually most effective to organise your opening statement as a series of big ideas, each of which is immediately supported by persuasive supporting details.

The fact-finder will resolve the case on the basis of certain pivotal issues. Marshall details to make your version of these pivotal issues more persuasive.

Assume, for the sake of illustration, that a major issue in an automobile collision case is whether a fire engine sounded its siren immediately before the accident. If the fact-finder determines there was a siren, a verdict for the plaintiff is more likely; if there was no siren, the defendant has a better chance. Thus, the siren is a pivotal issue in the trial.

The plaintiff's position could be made

more persuasive through the addition of supporting details:

- The fire engine was responding to a call;
- There is a departmental policy to use the siren whenever responding to a call;
- The driver of the fire engine was an experienced firefighter, well aware of the policy;
- Other motorists stopped their cars.

The details have little meaning when offered on their own. They become important only in light of the pivotal issue on which they are offered.

2 Weave in the witnesses. While the witness-by-witness approach will not result in a persuasive opening statement, this does not mean that you should not mention individual witnesses in the course of your opening. Actually, it is important to let the fact-finder know the source of a specific fact. The key is to weave the information about the witness into the narrative so that the witness references arise in the context of your theory of the case.

Take, for example, our fire engine example. The plaintiff says there was a siren; the defendant says there was not. The plaintiff can bolster her position by weaving in witness information when her opening statement narrative reaches the siren issue:

Just as she approached the intersection, Janet [*the plaintiff*] saw and heard an approaching fire engine. It was sounding its siren and flashing its lights. We know that the siren was operating because Lieutenant Jim Dunn, the driver of the fire engine, will testify that he always sounds the siren when he is answering a call. That is fire department policy and Lieutenant Dunn is a decorated firefighter who has been with the department for over ten years. Lieutenant Dunn will testify that he is certain that he was doing his official duty – using all audio and visual alarms on the day of the crash.

The information about Lieutenant Dunn neither stands alone as an isolated description of the witness, nor does it interfere with the flow of the narrative. Rather, it adds support to the plaintiff's theory at the precise moment when the fact-finder will most readily appreciate such support.

The operative facts

The most important part of any opening statement is its treatment of the operative facts. Facts win lawsuits. Everything else - organisation, presentation, theme development - is only an aid in communicating the facts of the case.

The parties and witnesses. Introduce the essential people, both the parties and key witnesses. Describe your witnesses in such a way that will make their story understandable and their testimony credible.

You should remind the fact-finder that the case involves people, and not merely abstract legal problems. The more your client and critical witnesses are humanised, the more likely it will be that the fact-finder will perceive them as believable. For example:

This is John Smith. John is an accountant. He had worked as an accountant at Acme Corporation for 15 years, supporting his wife and three children. John had risen through the ranks at Acme to become Chief Accountant. He has lived in our community all his life.

Before April 25th of last year, John Smith was a completely healthy man. He was physically active. He did all the work around the house – he even built an addition a few years ago when his little girl was born. He enjoyed playing tennis, hiking and camping with his family and friends. He never had any problems with his back or legs.

Action and key events. It is critical to use the opening statement to begin to paint a picture of the events in a way that helps the fact-finder to visualise the case from your client's perspective.

To do this effectively, you must first have created your own mental image consistent with the testimony to be given later by your own witnesses. The importance of preparation cannot be overemphasised. You must know precisely how, and in what terms, your witnesses will relate each incident.

In describing events, nouns and verbs are much more helpful than adjectives and adverbs. This may seem counter-intuitive, since we commonly think of modifiers as adding descriptive depth. Consider, however, which of the following accounts is more evocative of the crime:

Example 1 – Maximum use of adverbs and adjectives:

It was a heinous, horrible crime. The defendant's actions were awful and inhuman. He brutally grabbed at the victim's gold chain, fiercely pulling it away. He left an ugly bruise on the victim's neck. Unsatisfied with the proceeds of the armed robbery, the defendant then coldly and wantonly stabbed the victim twice, leaving his jacket lying in a bloody heap. It was indeed a cowardly act, taken against a defenseless victim.

Example 2 – Virtually no modifiers:

The defendant placed the knife against the victim's body. Without waiting, he grabbed the gold chain from the victim's neck and twisted it until it snapped, leaving bruises on the victim's neck that did not heal for over a week. Although he had already taken what he wanted, he pushed the knife into the victim's shoulder, turning as he pushed, and watched the blood well to the surface. Then he stabbed the victim again, until the blood soaked the jacket all the way through.

Example 2 is more vivid, because it describes the action as it happened. By contrast, *Example 1* actually obscures the action by substituting value-laden modifiers for an account of the events themselves.

Modifiers frequently stand for judgments rather than for descriptions. Words like 'heinous,' 'brutal,' and 'awful,' or 'lovely,' 'wonderful,' and 'grand' may convey the trial lawyer's opinion about something, but they do not depict a vision of the events themselves.

An effective description of the actions and key events includes statements that are objectively accurate, complete, and believable. A description that is too abstract, too subjectively biased, or incomplete will not be persuasive.

The physical scene. The physical details of a particular setting may affect things such as probability, credibility, and visibility. It is important to use your opening statement to set the scene for major events.

Describe the scene so that the fact-finder can visualise it. The objective is to develop *verbal pictures* so that when you close your eyes and listen to the description, you should actually be able to form a mental picture of the scene described.

Clarity is critical. If the fact-finder cannot visualise what you are describing, the rest of your opening statement will not be as persuasive. Give one fact at a time, allowing the fact-finder to absorb it and to add it to the developing mental picture in her mind. For example:

The collision occurred at the intersection of Main Street and Clark Street. Picture a car traveling south on Main Street towards Clark Street. Main Street is a two-lane street. There are parking lanes on both sides that are filled. On both sides of Main Street near the intersection with Clark Street there are commercial buildings approximately three stories high. Clark Street intersects at right angles with Main Street. It is a four-lane street. Clark

Street has no parking lanes. It too is lined with commercial buildings. Consequently, as you drive down Main Street you cannot see the traffic coming down Clark Street until you are literally in the intersection itself.

Setting the scene involves describing a potentially unlimited number of details. The key is to dwell only on those details that are significant to your case while avoiding those that are merely clutter.

It is often difficult to visualise references to compass directions, degrees, or angles in the abstract. Therefore, in setting the scene, a diagram, enlarged photograph or other exhibit can be enormously helpful to aid the fact-finder.

In cases where the date and precise time of an event are important, or the weather and lighting conditions are significant, describe them in detail:

The robbery happened at 11:30 at night on August 31st. Although it was nighttime, the intersection was well lit. There is a street-light directly over the spot where Mr. Jones was beaten, kicked in the head, and then robbed. There are other streetlights further down the street in each direction, on both sides of the street. The storefronts that line the streets provide even more lighting.

Transactions and agreements. Most commercial cases involve written and oral communications far more than they do physical occurrences. These 'non-physical' events can be more difficult to describe during opening statement, since there is little or no activity to depict.

Nonetheless, if the case turns on the interpretation of a contract or the meaning of a series of telephone calls, you must search for a way to bring the transaction to life.

The surest way *not* to bring a business transaction to life is to parse it out in minute chronological detail.

It is generally much better to start at the end. Explain the gist of the agreement, and then go back to fill in only those details that are necessary to support your interpretation.

The effective trial lawyer knows, however, that it is not enough to simply recite the terms of the agreement, and then to point out that it was either kept or broken. While such an approach may, in the driest sense, convey your theory, it will not add anything to the moral weight of your case.

Recall that your trial theme is intended to provide the fact-finder with a reason for wanting to rule in your client's favor. This

cannot be done if you merely explain why your client is right; this can only be done if you explain the *rightness* of your interpretation of the contract. Why were the particular terms so important? Why was your client's reliance on the other party's word justified?

Motives and motivations. As we have seen, stories are more persuasive when they are told about people who have reasons for the way they act. An opening statement should always attempt to stress the motivations for the parties' actions.

The activity that you describe will be that much more believable if, at the same time, you are also able to explain *why* the people involved acted as they did.

However, the opening statement is not the time to speculate about a person's secret motives. The opening statement must develop motive in the same way that it treats everything else - through the preview of evidentiary facts.

End with a bang!

The ending - the last minute of your opening statement - must accomplish several things quickly:

- Repeat the themes one last time.
- Summarise the basis for liability or non-liability, guilt or innocence, by tying the key facts to the key themes.
- Tell the fact-finder what you want her to do through the verdict.
- Motivate the fact-finder to see that an injustice is righted and fairness is served.

For example:

We are asking this Court to tell the defendant that two years of denial is enough; that two years of failing to take responsibility for what their negligence did to Karen Adams is enough. At the end of this trial, we will ask this Court to find that the defendant's negligence caused Karen's injuries and damages. We will ask this Court to find that plaintiff has proven damages in the amount of R[_____]. We will ask this Court to do what only it has the power to do: return to Karen some semblance of all that the defendant took away.

In the last article in this series, we will look at some strategic considerations and discuss effective delivery of the opening statement. 