

Litigation

WWW.NYLJ.COM

MONDAY, NOVEMBER 14, 2011

Opening to Win

Seven tips for delivering an effective opening statement.

BY DAVID R. MARRIOTT
AND RICHARD SULLIVAN

WHILE THE opening statement occupies a small portion of most trials, it is difficult to overstate its importance in a jury trial. Done well, a lawyer's opening statement can shape the way jurors receive the evidence and create a lasting positive impression. Done poorly, an opening statement can put counsel at an early disadvantage from which it may be difficult to recover. Although there is no single formula for every case, this article outlines seven tips for delivering a winning opening statement.

Recognize Its Importance

Crafting a convincing opening statement begins with appreciating its importance. Because the opening statement occupies a small portion of most trials and what counsel says is not evidence, the opening statement can be given short shrift. Some lawyers relegate preparing their opening statement to the nights immediately before trial, in between prepping witnesses and finalizing cross-examination outlines, as exemplified by Vincent Gambini's opening in the movie *My Cousin Vinny*: "Uh...everything that guy just said is bullsh*t. Thank you."

But at least in a close case, a trial can be won or lost in the opening. Jurors are never as attentive as during opening statements. And research and experience show that jurors dislike remaining neutral.¹ They want to find the "good guy" and



NYLJ/ARTVILLE

the "bad guy" rapidly, in the same way they decide almost immediately which movie character or sports team to root for. Once jurors reach a preliminary conclusion about which side they support, it can be difficult for them to change their preference, even in the face of contradictory evidence. A good opening statement can serve as the lens through which jurors see the evidence as it comes in over the course of the trial. As such, it is critical to communicate to the jury your story of the case and the most persuasive evidence that supports it as quickly as possible.

Argue Without Being Argumentative

In most courts, openings are not allowed to be "argumentative." Some lawyers interpret this limitation to mean that openings should take on a fundamentally different flavor from closing arguments. A strong opening, however, parallels a closing argument. The opening statement is a persuasive presentation about what the evidence will show, whereas the closing argument is an argument about what the evidence has shown.

By carefully choosing and ordering the facts and combining them with a compelling theme, you can maximize the chances that the jury will lean your way at the end of the opening. "Evidence itself is eloquence, and the facts, if properly arranged, will make the argument which you are not allowed to make as such. The facts, if put together right, will shout louder than you could."²

Take, for example, this recitation of facts during the prosecution's celebrated opening statement in the trial of Timothy McVeigh, the Oklahoma City bomber:

[McVeigh was arrested in his car about 75 miles outside of Oklahoma City.] In his pocket at that time were a set of earplugs, the type that would be worn to protect your ears from a loud noise. And on his clothing, an FBI chemist later found residue of explosives, undetonated explosives, ... the kind of explosives you would have on your clothing if you had made the bomb... And the T-shirt he was wearing virtually broadcast his intention. On its front was the image of Abraham Lincoln; and beneath the image was a phrase about tyrants, which is a phrase that John Wilkes Booth shouted in Ford's Theater to the audience when he murdered President Lincoln. And on the back of T-shirt that McVeigh was wearing on that morning, the morning of the bombing, the morning that he was arrested, was this phrase: It said, "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants." And above those words was the image of a tree...that instead of fruit...bears a depiction of droplets of scarlet-red blood.

There is little “argument” in this vignette: It does not assert a witness is incredible, it does not explicitly ask the jury to draw inferences, and it does not argue the law. But it is effective advocacy. Given the tendency of jurors to make up their minds quickly, an effective opening must communicate to the jury not only the verdict sought, but also *why* it is the right verdict. While an opening statement should not be argumentative, an opening statement that does not argue the case by the artful assembly of facts is usually ineffective.

Tell Your Story

No one can resist a good story. For centuries, people have used storytelling to communicate complex information about history, culture and morals. The call of jury duty does not diminish the appeal of a good story. In fact, the key to an effective opening is to tell a thoughtful factual story that squares with the jurors’ common sense and experience. Such a story provides jurors with a framework that they can use to filter and organize the evidence they see and hear during the trial, and it also keeps them engaged during the opening long enough to understand the case.

The government’s opening statement in the sentencing trial of admitted terrorist Zacarias Moussaoui provides a good example here. The opening lines alone contain several elements of good storytelling, including vivid character development and foreshadowing.

September 11th, 2001 dawned clear, crisp and blue in the northeast United States. In lower Manhattan in the Twin Towers of the World Trade Center, workers sat down at their desks tending to e-mail and phone messages from the previous days. In the Pentagon in Arlington, Virginia, military and civilian personnel sat in briefings, were focused on their paperwork. In those clear blue skies over New York, over Virginia, and over Pennsylvania, in two American Airlines jets and in two United Airlines jets, weary travelers sipped their coffee and read their morning papers as flight attendants made their first rounds. And in fire and police stations all over New York City, the bravest among us reported for work. It started as an utterly normal day, but a day that started so normally and with such promise, soon became a day of abject horror. By morning’s end, 2,972 people were slaughtered in cold blood.

By beginning the narrative with a focus on common, every-day activities, counsel for the government created an immediate connection between the victims of the terrorist attacks and the members of the jury. As this example makes clear, a good story is a powerful tool for grabbing the jury’s attention and communicating your message at multiple levels.

Jurors are never as attentive as during opening statements. And research and experience show that jurors **dislike remaining neutral**. They want to find the “good guy” and the “bad guy” rapidly, in the same way they decide almost immediately which movie character or sports team to root for.

Focus on Your Key Facts

Most trials, especially in complex cases, require counsel to communicate a lot of information (often from fields unfamiliar to jurors) in a condensed period. But inundating jurors with too much information during the opening can not only dilute your key points but also lose the jury altogether. Every great opening is selective in the facts it highlights.

Take, for example, the opening statement of the prosecution in the fictional trial at the center of the movie “A Few Good Men.” There, the key issue was whether two marines killed a third marine deliberately or accidentally. In its opening, the prosecution effectively told its story by focusing on a discrete (but powerful) set of facts:

The facts of the case are this: At midnight on August 6th, the defendants went into the barracks room of their platoon-mate, PFC William Santiago. They woke him up, tied his arms and legs with rope, and forced a rag into his throat. A few minutes later, a chemical reaction in Santiago’s body called lactic acidosis caused his lungs to begin bleeding. He drowned in his own blood and was pronounced dead at 32 minutes past midnight. These are the facts of the case—and they are undisputed.

By similarly reducing the facts in a case to their core, counsel can concentrate their persuasive force.

Account for the Bad Facts

In almost every case there are bad facts on both sides. Delivering an effective opening statement requires counsel to deal with those facts. To be sure, sometimes the best way to deal with bad facts is to say nothing about them in an opening. But that does not mean they should be ignored. At a minimum, an effective opening must set out a theory of the case that accommodates the bad facts, even if it does not expressly mention them. Sometimes the best way to deal with bad facts is to acknowledge them early and openly so as to minimize their force and take out the sting that would result if opposing counsel were to introduce them first. Moreover, embracing bad facts can go a long way to preserving, if not even building, counsel’s credibility with the jury.

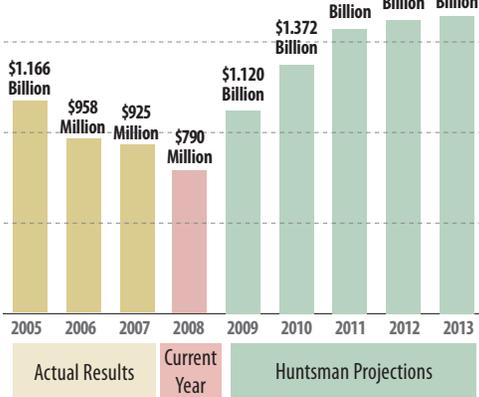
In defending Imelda Marcos in her 1990 trial on racketeering and fraud charges, Gerry Spence conceded what the jury was sure to learn at trial: “She spent money. No question about that. She is a world-class spender. She is a world-class shopper.”³ But he also used that concession to highlight the theme of his defense, namely, that she was a “small, fragile woman” with little grasp of “the intricacies of finance” who was manipulated by others.⁴

At the same time, an effective opening statement highlights the weakness of the other side’s story. Just as it is advisable to focus on the key facts that best tell your story, an effective opening draws the jury’s attention to the two or three facts that best undercut opposing counsel’s competing story. Take, for example, the successful civil case against O.J. Simpson for the murder of Nicole Brown. There the plaintiff anticipated that Mr. Simpson’s defense, like in his criminal trial, would hammer on allegedly shoddy and biased police work by the Los Angeles Police Department. To block these arguments from making inroads with the jury, the plaintiff focused on the mass of forensic blood evidence that implicated Mr. Simpson, not all of which could be blamed on poor police work or analysis. The jury was told that it would hear about:

Mr. Simpson’s blood leaving the scene of the murder at Nicole’s condominium; his blood dripping to the ground from the fingers of his

Huntsman's Projections

Adjusted EBITDA (\$ Billions)



Opening Statement of Credit Suisse and Deutsche Bank Huntsman Corp. v. Credit Suisse Securities (USA) LLC, and Deutsche Bank Securities, Inc.

opening. This presents a significant opportunity, as you can then (with the judge's permission) incorporate helpful deposition clips, documents and tangible evidence into your opening and thus add force to your story and make it more memorable. For example, in 2008, Huntsman Corp. and two banks disagreed about whether the banks were required to fund a takeover of Huntsman. One disputed issue in the case was the reasonableness of Huntsman's financial forecasts. The banks argued that Huntsman's forecasts were litigation-driven and overly optimistic. In support of that argument, the banks included the following slide in their opening statement, vividly contrasting Huntsman's declining actual projections (during good economic times) against its projections of rapidly increasing earnings growth (during and after the Great Recession).

Communicate With Conviction

Albert Mehrabian, a Professor Emeritus of Psychology at UCLA, has published research with important implications for trial lawyers. According to Mr. Mehrabian, there are basically three elements in any face-to-face communication: (1) words; (2) tone of voice; and (3) nonverbal behavior, such as facial expressions and eye contact. Of these three, the non-verbal elements are particularly important for communicating feelings and attitude, especially when they are incongruent. If words disagree with the tone of voice and nonverbal behavior, people strongly tend to believe the tonality and nonverbal cues.⁶

The implication for trial lawyers is that the most persuasive presentation of words in an opening will be severely undercut if the jury does not believe that the lawyer delivering it is convinced his client is in the right. The jury understands that trial lawyers are paid advocates and may be naturally skeptical. It will closely watch posture, tone of voice and eye contact to discern clues about counsel's conviction. Gerry Spence once observed that "a lawyer who has a choice [shouldn't] take cases he can't get his guts into. You gotta

love your client. A jury can tell if you care. They won't if you don't."⁷ Thus, in preparing to open, it is important to focus not only on the words used in opening, but also on nonverbal forms of communication that may give rise to an "inference" of conviction as to the merits of the case. Practice making eye contact rather than reading from a script; practice the transition between visuals until fumbles and glitches are minimized; and practice posture, hand placement and voice inflections. The resulting ease and confidence in your nonverbal presentation can magnify (or at least not reduce) the persuasive power of your words.

Practicing these principles makes for a more powerful opening statement, the importance of which is difficult to overstate. To quote Plato, "The beginning is half of the whole."



1. Vinson, Donald A., "Jury Persuasion," Aspen Law & Business, 1993.
2. Stryker, Lloyd P., "The Art of Advocacy," 53 (1954).
3. Time, July 2, 1990.
4. Id.
5. U.S. Dept. of Labor, "Presenting Effective Presentations with Visual Aids," available at <http://www.osha.gov/doc/outreachtraining/htmlfiles/traintec.html>.
6. Mehrabian, Albert, "Silent Messages: Implicit Communication of Emotions and Attitudes," Probus 1991 (2d ed.).
7. LA Times, April 17, 1990.

left hand; Mr. Simpson's blood on the glove he wore when he killed Ron and Nicole; Mr. Simpson's blood in his car that he used to drive from Bundy to his home at Rockingham, five minutes away; Mr. Simpson's blood on the driveway of his home; Mr. Simpson's blood inside his home; Ron's blood in Mr. Simpson's car; Nicole's blood in Mr. Simpson's car; Ron's blood on Mr. Simpson's glove; Nicole's blood on Mr. Simpson's glove.

Driving home such "roadblock" facts with the jury during opening statements will maximize the chance that the jury will examine your adversary's case with a critical eye.

Use Demonstratives and Visual Aids

Jurors learn better when the spoken word is complimented with demonstratives and visual aids. One study concluded that retention is six times greater when information is presented by visual and oral means than when the same information is presented by the spoken word alone.⁵ This is powerful math, and it compels the conclusion that much of what you say during your opening should be connected with a visual. But, of course, is it not enough to simply show jurors a visual. Effective trial lawyers often devote considerable time and energy to making sure that their visual aids are just right and that they are sequenced in the most persuasive manner.

In complex cases, the judge may require the parties to reach stipulations on the admissibility of much of the proposed evidence in advance of the

Reprinted with permission from the November 14, 2011 edition of the NEW YORK LAW JOURNAL © 2011 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-11-11-25