



Opening statements

WHAT WORKS AND WHAT DOESN'T

Before we get to the opening statement techniques, it is important to talk about the elephant in the room – the jurors' remarkably short attention span. You see, the opening statement is an awfully long monologue. In this day and age of instant gratification (exacerbated by social media, streaming videos and podcasts), the folks in the jury box are deeply conditioned to short, colorful and engaging content.

The traditional opening statement is not exactly an interactive activity and can be an excruciating experience for the jury. Flashback to my law school, when 90% of my classmates played solitaire during law school lectures and, mind you, we were paying tens of thousands of dollars to be there. The prospect of sitting through a 45-minute opening statement in court and pretending like they are paying attention, to most jurors, would seem worse than suffering through a bad date. Actually, at least they have the option to walk out on a terrible date – a luxury they do not have at trial, without risking a bench warrant.

It is an uphill battle, folks. You are fighting against a formidable enemy – the jurors' attention span and their lack of control over the content that is being placed in front of them. You are not going for a standing ovation during your opening, you are trying to keep them awake and interested. What does all of this tell you?

Make it simple, short and engaging.

But how do you do that? Here are a few tips that could make our opening statement engaging and effective. Likewise, there are some pitfalls you should definitely avoid.

Use active voice: Defendant acted vs. bad things happened

Let's start with the boring yet super-important fundamentals. You may think active voice is a minor detail, but it actually forms a critical, structural basis for your opening statement. Most lawyers default to passive voice: "...and on June

17, 2019, plaintiff was fired...." "and plaintiff was hit by the semi-tractor trailer," and "plaintiff was incorrectly diagnosed by Doctor Smith." Sure, you are getting your story across, but in faint, unremarkable colors, with a blurred line between right and wrong. Simply changing your voice to active, the picture you will be painting will be noticeably brighter and your message will be a lot more convincing: "...and on June 17, 2019, Defendant X fired Mr. Smith," "the semi-tractor trailer hit plaintiff," and "Doctor Smith incorrectly diagnosed plaintiff with . . ." Practical tip: Get into the habit of telling your friends and family your daily events in active voice!

Present tense is king: "LIVE, from the courthouse!"

Another basic fundamental of opening statements – keep it in present tense. Past tense, unfortunately, is a common pitfall of opening statements, because it is too easy to overlook someone who is focused solely on content.

The typical past-tense opening: "By December, plaintiff was suffering from migraines and stomach pains. She called the doctor and he prescribed her a new medication. On January 23, she drove to work and collapsed in the parking lot."

Here is a much stronger version: "By December, plaintiff *suffers* from migraines and stomach pains. She *calls* the doctor and he *prescribes* her a new medication. On January 23, she *drives* to work and *collapses* in the parking lot."

Let's look at another example from an employment case: "Plaintiff complained to his supervisor about racial harassment and called the company president. The next day, he was fired."

Compare that to: "Plaintiff complains to his supervisor about racial harassment and *calls* the company president. The next day, the company *fires* him."

Any veteran storyteller would agree that present tense automatically draws the listener into the middle of action. For attention-drained jurors, this is a game

changer, because it is similar to live stories on Instagram or watching an action-packed movie trailer. Let's change the biography genre to an action flick.

Show, don't tell: Storytelling

Believe it or not, the two fundamental techniques above (active voice and present tense) would make you a pretty good storyteller already, even if your content is "meh." As counterintuitive as it is, you are not focusing so much on convincing your audience in your opening. Far from it, you are focusing on telling an interesting story with a relatable narrative. Your job is to get jurors to identify with the main characters in the story and follow the narrative the way you present it to them. By offering the case facts in a story-like fashion, you are indirectly appealing to jurors' emotions, rather than logic and reason (logic and reason will join your narrative later). You need to build trust from the audience. Don't worry, you will have plenty of time during the trial to make your point in cross-examination and then go for the kill.

This reminds me of a story about French poet Jacques Prevert. One day he met a blind man who had a sign: "Blind man without a pension." Prevert asked the blind man how things were going. "Not great," he replied, "Most people keep walking." To help him out, Prevert changed the beggar's sign. When he stopped by a couple of days later, the beggar told him that he was getting a lot more money. What did Prevert write on the blind man's sign? He simply changed it to: "Spring is coming, but I won't see it."

A call to arms: Defendant's choices

Right off the bat, we are all tempted to tell the jurors what our client has gone through, how they were wronged and the devastating injuries they suffered. Not a fatal error, but a tactical error, at least. The story is not about your client; it is about the defendant's conscious choices that

devastated your client's life. You can spend 40 minutes describing to the jurors how badly your client was injured by defendant, only to receive the juror's predictably skeptical "so what" attitude. Treat your audience as if they have been binge-watching *Forensic Files* for the last two weeks and have seen scores of horrific murders. Then examine your opening draft and re-focus the narrative on the defendant. Zoom-in on his or her ability (and opportunity) to make a different choice, and the consequences of their action.

Lost in translation: Use simple English

An opening that has too much legalese and professorial language is not a story – it's a law lecture. When this happens, the only person who pays attention in the courtroom is the court reporter. You lost your audience after "subsequently . . ." and good luck getting them back. Practice your opening with someone who has no legal background and take out any unnecessary legal jargon. Your audience only wants to know who, when, how and why in simple English. This is not your law school moot court exam; you do not score any points for linguistic complexity. Remember, you are not trying to impress anyone. You are simply trying to keep their attention by telling a story that is memorable and *reliable*.

The game of tones

A more difficult skill for many lawyers is striking a conversational *tone* and appropriately engaging their vocal inflection during their opening. The opening statement is a monologue, so it is not exactly easy to frame your narrative as a "conversation." If you need some inspiration, watch a few video clips of stand-up comedians or famous politicians addressing a crowd. (I admit to my addiction of watching President Obama's and President Reagan's keynote speeches for ideas.) Using your analytical mind, pay special attention to the pauses, the buildup, repeating sentences, themes, idioms, labeling, sign posting, vivid

metaphors, proverbs, body gestures, and timing of the punch lines.

You do not need to be eloquent; your opening statement is not an audition for the lead in *Boston Legal*. Tweak it here or there and you are good to go. But don't go overboard. This is not the right time or place to do your best impersonation of Amy Schumer.

The natural rising and falling of your voice might be challenging to master without significant practice. Many lawyers have a natural downward inflection. Whether you realize it or not, repetitive downward inflection makes anything you say sound like a eulogy. While it is quite effective at hypnotizing (and depressing) the jurors, you don't want your jury trial to resemble a funeral. Likewise, some lawyers have a rising inflection at the end of each sentence, which is also called "uptalk" or "upspeak." To the audience, your perpetual rising inflection might be irritating, since everything sounds like a question. Studies show that even if we personally believe uptalk is not a problem, it may be hurting our credibility with listeners. If you think you might need improvement in this area, there are many YouTube videos on voice inflection exercises you could study.

The screen's gambit: Use the visuals

Talk is cheap. Especially so at trial, when the devil is in the details and the jurors' attention is a rare treat. The visuals not only help the jury process information better, they also shift the focus to something other than you and allow the jury to follow the narrative without attention loss. I don't know about you, but continuously staring at one human being for 30 minutes straight without an opportunity to move (or say anything) is a daunting task for most people. Chances are, most of the jurors have repeatedly checked out during your opening anyway. In the age of social media, the use of visual aids at trial is becoming a must. The biggest challenges to your opening are numerous dates and the countless people involved in the lawsuit. To avoid confusion or juror amnesia by the time

you call your first witness, try to get stipulations from your opposing counsel before trial to at least use a timeline or an organizational chart during your opening. Otherwise, unless you are wearing a t-shirt with the key timeline on it, the only thing the jury might remember after your opening is your hair pattern.

What does not work

A few obvious tips here would be using passive voice, past tense, focusing on the plaintiff (instead of defendant) and speaking in complicated legalese. But, that's not all. There are a few other common mistakes lawyers make in their opening.

Nightmare on Hill Street

We all love John Grisham, but overdramatizing your opening and overstimulating your audience during your opening statement is risky at best. Throwing jurors right into a gory story is like taking someone you just met to a horror flick: They will remember the powerful special effects, but not the actual plot. The aftermath of your grotesque opening thriller? Jurors feeling extremely uncomfortable during your presentation and their verdict might reflect this infamous part of the trial. Leave your inner Alfred Hitchcock at the courthouse door.

Information garbage: Too much too soon

Do you remember that less is more? Somehow, the message gets lost on so many trial lawyers, who unwisely jam every single detail of the case into their 45-minute opening. What should have been a short-yet-powerful story turns into a bad version of *War and Peace*. By the end of such overkill opening, you will be lucky if any of your jurors still have a pulse. If they do, most likely they do not know which fact out of the fifty you just chewed through was even important. By overwhelming them with facts, you dilute your client's story, making it completely flavorless. Cut the fat out of your opening and focus on the most important bare bones of your story. Next time you

draft your opening statement, channel O. Henry, not Tolstoy.

The “Talking Dead”: Mechanical recitation of case facts

Carpet bombing your jurors with countless facts is not the only problem. There is nothing worse than listing them in clinical fashion, while adding a monotone voice to the mix. The dry visual of “Bueller... Bueller?” comes to mind and the jury will mentally check out for good. This is not just boring; it is a painful experience for most.

Of course, you need to tell your jurors what happened in a chronological order, but it does not have to be in the robotic “timeline” style: “On July 17, 2018, at 3:15 p.m. Plaintiff was harassed by her supervisor. On July 22, 2018, she complained to the company president. On July 27, 2018, they fired her.” This is not a story – this is a dull police report or, to put it in more “scientific” terms – a total snoozer. Congratulations, you just successfully turned all your jurors into zombies. Good luck enlisting empathy from this crowd!

If your case is factually dense, you can peek at your opening outline from time to time during your opening, as long as you do not cling to it like a security blanket. Work on developing *evocative* storytelling. As I mentioned above, if you do not know how, watch other trial lawyers or keynote speeches from your favorite comedians, actors or politicians. You will catch the storytelling “vibe” and be able to breathe life into your own opening statement.

A “perfect plaintiff”: Failing to mention case weaknesses

This *could* be a fatal error, so read closely. Every case has weaknesses, and every hero has flaws, but the good news is most jurors accept that and do not expect your client to be flawless. (Besides, it is hard to relate to a flawless human being anyway.) Let’s say your client lied on her resume or did not go to the doctor right away – admit it, minimize it and move on. But do it in your opening statement, to defuse that bomb right up front, on your own initiative. If you do not mention anything about case weaknesses in your opening, you will go down in flames during the trial and there is little to do to save face later. By inoculating early, your goal is to get the jurors’ “So what?” reaction the next time opposing counsel brings up this topic at trial.

Great expectations and broken promises

You are skating on thin ice if you overpromise during your opening. Like American voters, jurors do not forget and they rarely forgive. Be careful with the evidence you are not sure about. Painting a utopian picture of your case can backfire during the trial and destroy your jurors’ trust. In some cases, you may need to strategically downplay the evidence, as it is much better to beat low expectations. No one is saying that you should play it too safe, but a calculated risk will do just fine. Remember the purpose of the opening: a compelling narrative jurors can relate to. Don’t argue your case even if the other side does not object. Some lawyers mention the amount of damages

in their opening, some do not. It depends on your case and the courtroom dynamic. Let your organized, evocative story sink in and percolate with the jurors for some time. If you told them a powerful story – you might not even need to ask for anything in the opening. They say that the craftiest con artists, after all, are able to get what they want without ever having to ask.

A few final thoughts

Your opening statement is not just a shorter version of your closing. It serves a different function at trial. Less experienced lawyers may benefit greatly from practicing the craft by watching online videos of other lawyers, attending trial colleges (e.g., CAALA’s Plaintiff Trial Academy) and doing as many mock opening statements as possible. Start writing your opening statement well in advance, as you need time to think about the structure (chronology, active voice, present tense), the content and practice effective delivery. At the end of the day, mastering a powerful opening statement is similar to any other skill, whether it is learning to cook, swim or speak a new language. Now go, get that verdict!

Tamara Freeze, a 2017 CAALA Trial Lawyer of the Year Finalist, is a founding partner of Workplace Justice Advocates, PLC – a plaintiff’s side all-female employment law firm in Beverly Hills and Orange County. Ms. Freeze is a graduate of University of California Berkeley School of Law and a former Big Law employment defense attorney.

