EFFECTIVE OPENING STATEMENTS FROM THE PLAINTIFF=S PERSPECTIVE
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By now, most attorneys have heard about the studies conducted at the University of Chicago Law School, which revealed that in approximately 80 percent of cases which were tried to a jury, there was a correlation between the ultimate verdict, and the verdict jurors would have rendered following the opening statement.[1] Thus, the attorney who Awings@ the opening statement is missing out on a significant opportunity to win his or her case from the outset. The opening statement presents one of the only opportunities, besides voir dire (where it is even allowed to be conducted by the attorneys) and the closing argument, where an attorney can directly address the jury. Thus, although attorneys are prohibited from being argumentative in openings, this stage of the trial, in reality, is the time where attorneys must be their most persuasive.

A plaintiff=s attorney is in a particularly strong persuasive position due to the rule of primacy. This rule stands for the proposition that jurors will tend to believe or accept that which they hear first.[2] This rule suggests that jurors make up their mind based on the opening statement, and then selectively accept or deny pieces of evidence which confirm what they already decided.[3]

I. Tell Your Client=s Story

In recent years, television shows about the legal system have abounded. And, while the majority of these shows are geared toward criminal trials, they have nonetheless created certain expectations among jurors regarding what they will experience when they sit for a civil jury trial.[4] The primary expectation is that they will hear a story, complete with a dramatic plot and a developed set of characters, including the good guy and the bad guy. Thus, an attorney=s goal during opening statement should be to present his client=s story in a way that captivates the jury, introduces all the characters, and ultimately reveals his client as the good guy, deserving of a verdict in his favor.

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[1] Bobb, P.C., *Winning Your Trial in Opening Statement*, ATLA Winter Convention Reference Materials (Feb. 2001).

[2] Weaver, D.J., *Opening Statements*, ATLA Annual Convention Reference Materials (July 2000)

[3] Galligan, T.C., *Technology and Opening Statements: A Bridge to the Virtual Trial of the Twenty-First Century?*, 67 Tenn. L. Rev. 523, 525 (Spring 2000).

[4] McEvoy, P.J., E.A. Foley, and S.L. Jaros, *Telling the Right Story in Opening Statements*, 17-Jan CBA Rec. 25 (Jan. 2003).

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Indeed, some studies have shown that rather than weighing the evidence presented throughout trial, jurors will spend their time in the deliberation room fitting the facts presented into an agreed upon story. Thus, jurors will create their own story, if not provided with one from the attorney.[5] And the story created by the jury will likely not be the story most favorable to your client. Therefore, a big step to winning a case is having the jury accept the story you present during the opening statement.

A. Can You Tell the Story in 20 Words or Less?

The most important part of your story is the theme, which can be carried from the opening statement throughout the trial, and into the closing argument. The theme should be able to be summed up in one sentence, which can provide an extremely effective introduction to your opening statement, as well as your closing.[6] Then, once you have presented your theme, the story evolves by presenting the pertinent facts which support the overall theme.

Further, the introductory comments introducing the parties, the attorneys, the judge, and a brief summation of what the case is about are now taken care of through voir dire. Therefore, starting an opening statement with this information is a waste of a valuable opportunity.[7] Rather, capture the jury=s attention from the first sentence by stating your theme from the outset.[8] Doing so ensures that the jury will remained focused on you and your client=s story throughout the opening statement.

B. Plaintiff=s Perspective or Defendant=s Perspective

When crafting the story for the opening statement, the attorney must determine from whose perspective the story will be told. For a plaintiff=s attorney, the natural inclination might be to tell the story of his client, and the impact that losing his job, or being discriminated against has had on his or her life and family. By telling the story in the first person, or active voice, from the plaintiff=s perspective, the attorney has the opportunity to infuse his story with emotion.[9] How did your client actually feel when he lost his job after 20 years of dedicated

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[5] *Id.*

[6] Smith, A.R., *Crafting the Story: Opening Statement*, ATLA Winter Convention Reference Materials, (Winter, 2002).

[7] Grossman, S.P., *Opening Statements*, Trying The Case (1999)

[8] AMr. Hard Worker was fired after 14 years of dedicated service to MeanSpirited Corporation after he testified before the EEOC in support of 14 female co-workers in their claims of sex harassment and discrimination.@

[9] *Supra* note 4 at 26.

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service? Demoralized, useless, hopeless, and angry? These are emotions which most members of the jury will be able to readily relate to. Although the jury may receive an instruction that sympathy is not to play a role in their decision, telling the jury how your client actually felt is a powerful persuasion technique. Further, telling the story from the plaintiff=s perspective gives the attorney the opportunity to personalize his client.[10] In other words, it allows the jury to understand that the case they are being presented with involves someone just like themselves, or a member of their family, or a friend.

However, a word of caution is necessary at this point. Lawyers are often not held in the highest regard these days. Juries can be wary from the outset of what they perceive to be shady tactics from lawyers. Thus, while it is important to get your client=s story across to the jury, you should remain sincere at all times, and never inflammatory.[11] Do not overplay the emotions involved in the case, lest the jury lose trust in you, the attorney. If you lose the trust of the jury during the opening statement, it is likely that the jury will not trust any of the evidence or witnesses that come after.

If your case involves a breach of employment contract situation, or a situation where the story might not be as dramatic as a wrongful termination, it might be useful to tell the story from the defendant=s perspective, focusing on its culpability, rather than the plaintiff=s predicament.[12] When listening to a story, jurors will instinctively search for facts in the story to explain why the events in the story happened the way they did. Thus, if presented with several facts surrounding the defendant=s culpability, rather than facts about the plaintiff, the jurors will use those facts about the defendant to answer the Awhy@ question, and most likely place the blame on the defendant.[13]

C. Organization of the Story

While there are several ways to organize a story, the most common for the purpose of opening statements is chronologically.[14] Thus, the story begins at the beginning and finishes with the climax. Telling a story chronologically works well in most circumstances because it is easy for a jury to follow, and generally, people are most accustomed to hearing stories in this manner.

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[10] *Supra* note 6.

[11] *Id.*

[12] *Supra* note 4 at 27.

[13] *Id.*

[14] *Id.* at 26.

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However, as an alternative, you may want to begin with the climax of the story - in an employment case, this would likely be the termination of the plaintiff. This would be particularly persuasive if the circumstances under which the plaintiff was terminated were particularly egregious.[15] In this manner, the shocking beginning of the story immediately captures the attention of the jury, which in turn makes them want to keep listening to you for the explanation of events leading up to the termination.

If you opt to begin the story in the middle, and then backtrack, make it clear to the jury that you are doing so. One method for keeping the story organized is to use a time line. Of course, if you plan to present a poster or board to the jury which draws out the time line of events, clear it with the opposing counsel and the judge first during pretrial conferences so as not to draw an objection. Again, studies have show that if a jury is not presented with a time line of events, they will create their own during deliberations, and rarely do they re-create the correct sequence of events.[16] However, if you use a time line, make sure that each attorney working on the case goes over it scrupulously to ensure that it is correct. Mistakes in a time line will come back to haunt the plaintiff=s attorney in closing, where the defendant has the opportunity to point out mistakes in the time line, which can lead the jury to distrust the plaintiff=s entire case.

D. Present Just the Most Important Facts

A jury=s attention span is short. Thus, the opening statement should similarly be as short as possible to get the story across, and not lose the jury=s attention. Therefore, only the most important facts should be presented in the opening. As mentioned above, having a succinct, well-defined theme to start your opening statement can be a powerful tool to capture the jury=s attention. In addition to this, the theme can aid in narrowing down the facts which you present in your opening. Present only the facts of your client=s case which directly support the overall theme.

II. Do=s and Don=ts

A. Expose Your Case=s Weaknesses

Opening statement presents a plaintiff=s attorney with the opportunity to diffuse any weaknesses in his client=s case. By anticipating the facts the defendant plans to utilize to inject doubt as to your client=s credibility, the plaintiff=s attorney can present those facts first in a light most favorable to his client. By doing this, several objectives are met. First, it shows that

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[15] Powell, G.R., *Opening Statements: The Art of Storytelling*, 31 Stetson L. Rev. 89, 96 (Fall 2001).

[16] *Supra* note 4 at 26.

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the plaintiff is willing to disclose all aspects of the case, and is not attempting to hide anything. Second, it removes the element of surprise from the defendant. Third, it allows you to explain these facts or weaknesses. As mentioned, juries want to know why a particular thing happened. By exposing your client=s weaknesses first, you answer why your client acted a certain way from your client=s perspective rather than the defendant=s perspective.[17] However, be quick about presenting your case=s weaknesses - state them and move on.[18]

Conversely, if there are particular weaknesses in the defendant=s case, the opening provides the plaintiff=s attorney the opportunity to present those weaknesses first, thus taking advantage of the element of surprise and leaving the defendant in a position to explain away these weaknesses.[19]

B. Try Your Story Out on a Layperson

Sometimes, lawyers can forget how to speak like a regular person. Because of this, it is important to rehearse your opening statement in front of a non-lawyer, in addition to rehearsing in front of another attorney. Often, mock juries can be used for this purpose. However, in some cases, the cost of using a mock jury can be prohibitive. Therefore, rehearse your opening in front of family members and non-lawyer friends. By doing so, you can clear up any complicated Alegalese@ which juries may not understand.[20] Further, you can fill in any gaps and clear up confusing portions of your story before presenting it to the jury. Do not forget that you, as the attorney, have been intricately involved in the case for several years before trial. However, the jury is hearing the case for the first time. Thus, presenting your opening to a layperson, who is also hearing the story for the first time, can be an important method for ensuring that your opening is clear, simple, and well organized.[21]

C. Discussion of Damages

There are two approaches regarding damages which can be utilized in opening statements. Generally, attorneys may explain to the jury that their client indeed suffered damages, but will not discuss the dollar figures involved. However, where the damages sought are particularly large, there might be a tactical advantage to presenting the actual dollar figure to

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[17] *Supra* note 1.

[18] *Supra* note 7.

[19] *Id.*

[20] *Supra* note 15 at 101.

[21] *Supra* note 1.

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the jury in the opening. By doing this, the jury can become conditioned to the figure from the outset.[22] Thus, by the time deliberations come, the number will not seem shocking to the jury.

D. Don=t Promise More Than You Can Deliver

This piece of advice is related to the issue of presenting only the most important facts in the opening argument, as well as maintaining the trust of the jury in you, the attorney. Before preparing the opening statement, prepare the rest of the trial first, going through all of the deposition testimony, the expected witness testimony, and the exhibits to be presented. Only after doing this should the opening statement be prepared. By doing this, you can anticipate which evidence might not be allowed to come in, or which testimony might be struck, or which testimony a particular witness is shaky on. Then, when you prepare your opening, you can be sure that you only discuss the facts which you are certain will be allowed into evidence, and subsequently, are certain the jury will hear.[23] Failure to do so opens the door to the defendant to bring up your opening statement in its closing argument pointing out the promises you made then, which you were unable to keep throughout the trial.

In contrast, you should listen carefully to the defendant=s opening statement and take notes. Then in closing, remind the jury that in your opening you made certain promises to them to prove the crucial elements of your client=s case, and then show how you met those promises with the evidence you presented throughout the trial. Conversely, quote portions of the defendant=s opening statement, and show how the defendant failed to meet its promises and burdens.

III. The Conclusion of Your Opening

Your conclusion to the opening statement must leave the jury with a clear understanding of what you want them to decide. Again, without being provided with an ending, the jury tends to come up with their own, which may not be favorable to your client.[24] Thus, your final words should reiterate your theme, as well as state the most important reason for why the jury should find in your client=s favor.

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[22] *Id.*

[23] Levin, F.G. and M.H. Levin, *Opening Statement*, Florida Civil Trial Practice at ' 8.21 (2001).

[24] Fantel, J.I., *Opening Statement: Telling the Story*, ATLA Annual Convention Reference Materials (July 2000).

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