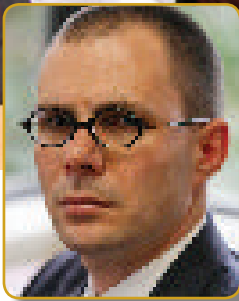


# Effective opening statements in American trial practice:

## Part 1 – The essential elements

*Put it before them briefly so they will be interested in it, clearly so they will appreciate it, picturesquely so they will remember it, and above all, accurately so they will be guided by its light*

- Joseph Pulitzer



Willem H Gravett,  
New York State Bar

**F**or the effective trial lawyer, the opening statement is much more than merely a summary of the evidence to come. It forms the framework from which the fact-finder will evaluate the evidence, the parties, and the lawyers for the rest of the trial.

The opening statement is a unique opportunity to present your theory of the case in a persuasive, compelling manner, and to secure a victory for your client before the battle has even properly begun.

### Seize the moment!

*A man's mind, stretched by a new idea, can never go back to its original dimension.*

- Oliver Wendell Holmes

The opening statement is the trial lawyer's first opportunity to speak to the fact-finder about the merits of the case. It marks the

beginning of the competition for the fact-finder's imagination. This moment is crucial.

In trial, as in life, first impressions become lasting impressions. The notion that fact-finders suspend their own judgments and impressions until they have heard all of the evidence is a fiction. The exact opposite is true. After the opening statement, the fact-finder's mind may still be open, but it will no longer be empty.<sup>1</sup>

Done well, the opening statement will directly influence the way in which the fact-finder interprets the evidence presented during the rest of the trial. The trial lawyer who is successful in seizing the opening moment will have an advantage throughout the trial, because the fact-finder will filter all of the evidence through the lens created by the effective trial lawyer.

You only get one opportunity to make a first impression. Seize the moment and make it count!

### Impact beginning – the first minute

How do you make an immediate impact? You

must decide how best, and in what order, to do three things in the first minute:

- Grab attention
- State your theme
- Give a short overview of the case that draws the fact-finder into the story.

What you say in the opening moments must convey one clear message to the fact-finder: 'It is going to be worth your while to listen to me.'

### For example:

- May it please the Court, come back with me to the evening of June 1<sup>st</sup> at around 9 o'clock. We are at the Chicken Shack, a fast-food restaurant on the corner of Main Street and Broadway. Inside are two employees and one customer. Suddenly, the front door bursts open. A man pointing a shotgun and wearing a mask storms in and yells, 'If you move, you die!' [An effective theme] That man, the man who pointed the shotgun, the man who uttered that threat, is the defendant, the man standing right there [Prosecutor pointing at the dock].

## Communicate your theory

Your single most important objective during opening statement is to present a coherent **theory** of the case.

A trial theory is the adaptation of a factual story to the legal issues in the case. Your theory must contain a simple, logical, and provable account of facts which, when viewed in light of the controlling law, will lead to the conclusion that your client should win. Use the opening statement to explain to the fact-finder *why* the verdict should be in your client's favor.

## Themes and labels

Your **trial theme** – as distinct from your theory – should be expressed in a single phrase or sentence that captures the moral force of your case.

Introducing a theme during opening is particularly effective as a matter of persuasion, since it will focus the fact-finder's attention on a cognitive image that you will return to throughout the trial.

The principle of *primacy* posits that fact-finders remember best what they hear first. The first few minutes of the opening statement constitute the 'beginning of the beginning,' and therefore have the potential to be among the most memorable moments of the trial. Put them to good use. Do not waste your opening statement on trivia or platitudes. Get right to the point.

During the first minute, you should communicate the strongest theme of your case. Strong themes catch the ear, make a vivid and visceral connection, and send a clear message:

- 'This is a case about taking chances.'
- 'Mary Jones had a dream and a plan.'
- 'This is a case about a man who is motivated by one thing, and one thing only: greed.'
- 'This is a case about a driver who was too busy to be careful.'
- 'We should feel safe in our own homes.'
- 'This is a case about broken promises.'
- 'The law is supposed to protect everyone.'

One of the most persuasive opening themes I have come across is that of defense counsel in *Chiron v Genentech*, a patent infringement case tried to verdict in Texas in 2002. In that case, Chiron, a pharmaceutical company, alleged that its rival, Genentech, manufactured two medicines that infringed its patent on 'humanised mouse antibody that binds to HER-2, a protein that protrudes from the surface of many breast cancer cells.'<sup>2</sup>

Imagine having to formulate trial themes in this complex commercial case, where you have to contend not only with a sophisticated, technical area of the law, but also with

complicated scientific facts. That is exactly what Leora Ben-Ami, lead defense counsel for Genentech had to do.

Ms Ben-Ami stood up, she held up two medicine bottles, and after a pause to create a moment of suspense ensuring that that fact-finder's attention was focused on her, she said:

'This case is about two medical miracles.'

By holding the two bottles in her hand, Ms Ben-Ami established physical control over the medicines – a powerful visual image for the fact-finder who had to decide their ownership. By calling them 'medical miracles,' she communicated the importance of the case. Genentech was pursuing a cure for breast cancer and non-Hodgkin's lymphoma. Ms Ben-Ami staked out that ground for her client right at the opening bell and won the case.

I once heard a particularly able local prosecutor start his opening statement in a drunk driving case in this memorable way:

'W, R, R, X, Y, Z, Q, R. This is how that defendant [pointing] recited the alphabet as part of a field sobriety test at 2 o'clock in the morning of November 3<sup>rd</sup> . . .'

On another occasion, he opened an assault and battery prosecution with:

'25 stitches . . . 3 weeks in hospital . . . 2 permanent scars . . . This is the handiwork of the defendant, . . .'

In addition to advancing your themes, in opening statement you should use the **labels** – the trial vocabulary – that you have selected to refer to the parties, events, transactions, vehicles, weapons, and other things important to the case.

Labels are important because they convey attitudes and messages. There is a distinct difference between calling your client '*the plaintiff*' or '*Jane Smith*,' between calling a vehicle a '*car*' or a '*big, black Jaguar sports car*,' and between calling a crash an '*accident*' or a '*collision*.' There is a difference between referring to the eyewitness as a '*child*' or a '*teenager*,' between calling the defendant '*drunk*,' or '*impaired*,' by referring to a window as '*broken*' or '*smashed*,' and between calling the scene of the murder a '*house*' or a '*home*.'

Choose the labels that personalise your client and depersonalise the opposing party and that project the images you want to convey. Then use these labels consistently during opening statement and the rest of the trial.

## Tell a persuasive story

Effective opening statements, like so much of trial work, is based on persuasive storytelling.

- Persuasive storytellers at trial:

- Portray the central characters as real people.
- Make the events vivid and visceral by using sensory language and creating lasting images.
- Tell the story in real time, using the present tense.
- Organise the story in a sensible way that always moves it forward.
- Begin and end the story on strong points.
- Provide enough detail to allow the listener to follow the story with ease, without getting bogged down in unnecessary detail.
- Answer the questions, 'What happened?' 'Who did it?' 'Why did she do it?' and 'What will make it right?'
- Create memories, reaching both the fact-finder's heart and mind.
- Show that a favorable verdict will give the fact-finder the opportunity to right an injustice.

**Focus on the people, not the problem.** All people (including fact-finders) view the world through emotional eyes. They are interested in people and what motivates them to do the things they do. You must therefore focus on, and personalise, your client and key witnesses.

**Humanise your client.** It is particularly important to personalise – to humanise – your client. If your client is likeable and sympathetic, the fact-finder will identify with her. It is simply human nature.

Needless to say, not everyone is naturally likeable and charming. And the more obnoxious and disagreeable the client, the deeper you have to dig to find something commendable about that person to present to the fact-finder.

What do you do when you represent a **corporation**? How do you 'humanise' a bloodless entity?

First, by putting the right human face on it. You should carefully and deliberately select the people that are going to represent your client at trial. These personal representatives should not merely be able to explain your client's position – they should exemplify your theory of the case. Their demeanor should reflect confidence in your case.

For example, in a financial fraud case, you might choose the articulate senior accountant with a distinguished and spotless reputation. In an employment discrimination suit, you might select the compassionate personnel manager to represent the client.

Secondly, focus on the people, not the entity. Speak in terms of individuals, not job titles, locations, or divisions. Show how the company cares about people. Focus on the company's concern to 'ensure that its product



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is safe,' not its 'potential financial exposure' in case of death or injury.

**Re-create the events.** The most effective opening statements speak to the mind's eye of the fact-finder. It puts the fact-finder 'into the picture' and lets the fact-finder relive the events from your client's perspective.

As you re-create the events, be vivid and dramatic, since your aim is to draw the fact-finder into your story.

One of the most effective ways to re-create the events is to take the fact-finder back to the scene by using **narrative style in the present tense**. This method creates a sense of suspense, and of urgency and excitement. For example (hit-and-run prosecution):

It is April 25<sup>th</sup> at around 4 o'clock in the afternoon. Eight-year-old Johnny Smith is walking along Main Street, just around the corner from his home. School vacation has just started, and he is excited about the family's upcoming vacation at the Coast. Little does he know that these are the last steps that he will ever take. Suddenly, a car approaches from behind. It speeds through the stop sign, and it does not slow down or swerve. The car smashes into little Johnny. The impact breaks his back in two places, crushes his ribs, and tears his spleen. So great is the force with which the speeding car slams into little Johnny that it throws him into a ditch some twenty meters away, where the driver of the car leaves him for dead . . .

**Build tension.** A good way to grab the fact-finder's attention is through strong, detailed imagery that builds tension. Human conflict, the essence of a good story, always triggers interest.

**For example:**

The morning of September 5<sup>th</sup> started as a beautiful, clear day. To Shirley Johnson, the day was beautiful for other reasons too. She just moved to the city to start a new job. She was full of life, full of dreams, planning a bright, exciting future. She did not know that, at the same time, a man – that defendant [pointing] – was having his sixth martini at Franky's Tavern around the corner from Shirley's home.

**Use visual aids and exhibits.** Shakespeare said it best: *'To see sad sights moves more than to hear them told.'*<sup>3</sup>

Wherever possible, enliven the opening statement through the use of visual aids. Making information visual enhances its impact and retention, and, in turn, the persuasive impact of the entire presentation. This is particularly important at the beginning of the trial.

If the trial involves something visual, it is helpful to get as exact an image as possible

before the fact-finder of what is in controversy. Inferences made from a verbal description will always need revision during the trial when the fact-finder sees an actual photograph or diagram. But, if the fact-finder is given the opportunity to see the photograph or diagram during your opening statement, she will be able to form the intended impressions right from the start.

**Make it the story of an injustice.** Show the fact-finder that your case is the story of an injustice, and that your client was wronged. It is the sense of *injustice* that will move the fact-finder to want to right the wrong that your client has suffered by entering a verdict in your client's favor.

**Do not argue.** Our trial system is based on the production of testimony and exhibits. It has no place for argument that precedes the introduction of evidence.

It is trite that in opening statement the trial lawyer may not urge the fact-finder to draw inferences from facts, or to reach certain conclusions. You may not explain the importance of certain items of evidence or suggest how evidence should be weighed. It is improper to comment directly on the credibility of witnesses.

But, more than violating one of the most basic tenets of trial practice, argument during opening statement **does not persuade**. At this stage of the trial, solid facts, that create memorable mental pictures, have more impact than your argument ever could.

Opening statement is the time to tell a compelling, understandable, and believable story. It is the time for you to emerge as the trusted leader in the courtroom – the person that the fact-finder can rely upon to fairly and accurately guide her through the evidence.

If you characterize the evidence during opening statement, you become nothing more than a salesman, trying to sell the fact-finder on something she is not yet ready or willing to buy.

Rather than characterising someone as *'drunk,'* it is better to describe that person as *'crawling on all fours after having consumed four whiskeys in ten minutes.'*

Rather than characterising someone's driving as *'reckless,'* it is better to describe it as *'driving his two ton delivery truck at 100 km/h through the crowded crosswalk in front of the primary school where the posted speed limit is 20 km/h.'*

Facts, expressed through strong nouns and active verbs, are much more persuasive than characterisations and conclusions.

Consider the following two examples in light of the principles of persuasive storytelling. They represent two possible ways of presenting the plaintiff's opening statement. The case

involves a bicycle rider who was injured when the quick-release mechanism on the front wheel of the bicycle allegedly malfunctioned and caused the bicycle to collapse.

**Excerpt A**

I expect the evidence will show that my client rode her bicycle at a normal rate of speed in a normal manner across railroad tracks. The evidence will further show that the uneven surface resulted in the bicycle bumping up and down as it crossed the tracks, loosening the quick-release mechanism on the front wheel, so that the bicycle gave way under my client and she fell to the ground.

**Excerpt B**

Jodi is out for a bike ride on a bright summer day. She and her two friends have a few more days to relax and enjoy summer vacation. They decide to go to the movies, and head down Spring Street towards Main Avenue. They pedal at a normal speed, since they have a lot of time before the movie starts. Michael rides across the railroad tracks first, and then Mary Ann. Of course they bump up and down a bit, but they cross the tracks safely. Then, Jodi pedals across. Suddenly, he bicycle starts to shake and bounce. Just as she crosses the last track, the quick-release mechanism on the front tire pops open. The front tire comes completely loose from the frame of the bike. Jodi falls to the ground.

Excerpt A does little to create empathy or drama. The injured rider is abstractly referred to as the 'client,' the repeated use of the phrase 'the evidence will show' distances the fact-finder from the incident; the language is flat and legalistic.

Excerpt B, by contrast, refers to 'Jodi' by name, helping the fact-finder to see her as a person, not as a legal abstraction. The language is vivid and conversational, and the story unfolds much as it would outside of court. Without violating any rules, or playing upon false sympathy, Excerpt B is more likely to make the fact-finder want to rule in Jodi's favor.

Next time, we will look at how to effectively organize your opening statement – how to use the evidence, instead of merely *displaying* it.

**Endnotes**

<sup>1</sup> The study of the 'adaptive unconscious' is an emerging field of psychology that studies the ability of the unconscious mind to make 'very quick judgments based on very little information.' See Malcolm Gladwell *Blink: the power of thinking without thinking* (Little, Brown 2005).

<sup>2</sup> 'Chiron Loses Patent Lawsuit Against Genentech Cancer Drug,' *New York Times*, September 22, 2002, Section C, at p. 2.

<sup>3</sup> William Shakespeare, *The Rape of Lucrece*. 