Opening Statements: Getting It Right

Finding the Leitmotif

GARY L. BOSTWICK

Three tips on opening statements—one is about you as a person, one is about the final argument, and the third is about leitmotif. Most advocates call this the "theme," but I figure you'll be more likely to remember this tip if I call it something unusual and catchy. Get it?

You as a Person

Make sure that when you have finished your opening, the jury likes you and trusts you. Whenever twelve to sixteen people are gathered on any occasion, I find it impossible to convince all of them that I am honest and likable, so don't worry about perfection. Worry about the jury members whom you recognize as leaders, even quiet leaders. If you, the messenger, cannot be trusted, then why believe the message? If the jury doesn't like you, why will they like your client?

One way to accomplish this objective is to convince the jury that you like and trust them. They need to know you understand how serious this matter is to them and what problems they may face in arriving each day and dealing with the thorny issues. It's called empathy. No article can explain how to communicate that with any specific jury panel so I won't try here. But I can say that I practice a Zen meditation routine focused on loving each member of the panel before voir dire. You should find your own way. You may not practice in California.

The Finale

The most important moment to visualize in planning your opening statement is when you stand up and give your final argument. Why? Because that's where you're going. You have to keep in mind the elements of proof that will be in the ultimate jury instructions and how you are going to argue them when the evidence is in. So tell the jury in your opening all of the evidence they need to know so that they will vote for you on each of those elements of proof.

But tell it smoothly, like a good joke or a story you tell to your young child. It has to start at the beginning, move smoothly from element to element, and end up with a moral or a punch line. Always with that final argument in mind.

In *Masson v. New Yorker*, we all knew we were heading toward actual malice. Much of my opening told the story of a hard-working journalist who tried very hard to get it right and why she believed what she wrote. A big issue was that the defendant author had welded together quotes from interviews with the plaintiff over widely disparate times and locations. In opening, I set a series of children's alphabet blocks on the ledge of the jury box one-by-one, setting down each as I told the jury about where each interview had taken place and when. When the five blocks were placed down on the ledge, they were random nonsense. Then I told the jury how the author, applying her considerable art and skill, had to truthfully rearrange the components of the separate interviews (moving the blocks as I said this) to bring some order and common sense to the matter for all of us, the readers. The blocks I had quickly rearranged now said *story*—in other words, an honest interpretation of chaotic information in an attempt to bring meaning with no actual malice.

The Punch Line

Now let's talk about the punch line, the moral, the premise, the leitmotif. This is an art. You should practice finding leitmotifs in your spare time. (Exercise one: What is the leitmotif of each of these: *Letters from Iwo Jima*, *Great Expectations*, *The Wire*, the O.J. Simpson case, the Scopes Monkey Trial, or *The Dark Knight*?) Somehow, you have to try to reduce the crux of the case into just a few words. ("Can you hear me now?" "Where's the beef?") They must be understandable to your twelve-year-old daughter or your eighty-five-year-old father. They must not be forced. They *must* be authentic and fit the evidence. Hopefully, they will be clever, but don't worry too much if this doesn't quite work. (Better not to be clever than to try and fail.) And remember . . . in your presentation of the evidence you will demonstrate repeatedly how true your expression of the theme was. You will return to that fact and remind the jury of it in your final argument. (Clarence Darrow said this in the Scopes trial: "We have the purpose of preventing bigots and ignoramuses from controlling the education of the United States." He didn't do it in the opening statement, but it is one helluva leitmotif.)

In *MacDonald v. McGinnis*, I started off from the very beginning saying "This is a case of a false friend." The plaintiff was a convicted murderer, the defendant a celebrated author. But our case was about fraud and breach of contract and the story that would unfold was of a person claiming to be a friend and telling the plaintiff that he would be vindicated, even long after the author had decided quite the opposite. The payoff for the author was the plaintiff's continued cooperation. This leitmotif is archetypical and reaches so far back in human experience that it was a powerful unifying theme. Of course, the evidence had to fit the theme.

So, three things to remember: make them trust and like you, keep your eye on the jury instructions during your opening, and find a leitmotif that makes jurors say, "That hits the nail right on the head."

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The Judge, Your Client, and the Victim

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Know Your Judge's Ground Rules

Trial judges have great discretion when handling disputes that arise during opening statements. Lawyers who are unaware of the judge's usual approach to such disputes are likely to suffer the consequences. For example:

- ***Use of Graphics.*** Many judges expect the parties to exchange demonstratives, such as timelines, that might be used in an opening

statement. If you have organized your opening around a timeline or set of story boards, and opposing counsel objects when you try to display them to the jury, you will be in trouble if the judge bars their use.

- ***Use of Trial Exhibits.*** Don't wait until the first day of trial to find out if the trial judge permits the display of trial exhibits (as opposed to a verbal description) during an opening statement. If the judge permits the display of exhibits, less is more. Avoid the temptation to display every useful exhibit in your case. Less is more.

  And if, as is common, the parties are required to exchange, prior to the opening, the exhibits they intend to display, be sure to have the ability to display the exhibits chosen by the plaintiff. If plaintiff's counsel ignores critical passages from a document, you will want the opportunity to blow that passage up in your own opening. Finally, if there are dangerous exhibits whose use you want to minimize, bring a motion *in limine* to exclude them from evidence. While many judges will defer final rulings on admissibility until trial is underway, the motion improves your chances of obtaining an order that bars the use of the challenged exhibits during the opening.
- ***Use of Depo Clips.*** Media trials often involve individual plaintiffs suing media corporations, which means that the plaintiff's counsel may have had more deposition targets and a correspondingly broader menu of damaging depo clips to choose from. Depo clips, when carefully cut, arranged, or both in a montage format, can have a great impact in opening, especially if there are Generation X and Y jurors on your panel. Defense counsel should consider a motion *in limine* to exclude the use of depo clips in opening, on the grounds that: (1) showing a clip three separate times (in opening, during trial, and in closing) gives the testimony undue emphasis; and (2) the federal rules and many state rules make deposition excerpts subject to a "Rule of Completeness" when used at trial. Parties should not be allowed to evade that rule by using incomplete or misleading excerpts in opening.
- ***Use of Argument.*** All lawyers argue their cases in opening statement; indeed, most dictionaries define *argue* to mean nothing more than "persuade by giving reasons." The trick is to argue without drawing an objection (or at least, without drawing an objection that is sustained). You should, if possible, attend opening statements in other cases pending before your trial judge and get a sense of his or her ground rules on the use of argument.

Don't Read Your Opening

You will be going second. Your opponent may have scored some direct hits, your client's anxiety level may be high, and the jury may appear to be hostile as you approach the podium. Your understandable fear of missing important points may lead you to cling to your script as though it was a life preserver. It isn't. You should reduce your script to a bullet point outline, and you should practice your opening *in context*. Prepare an opening statement for the plaintiff and have one of your more persuasive colleagues deliver it in your practice sessions, preferably before an audience.

Humanize Your Client

The jurors may well start out with a bias against large (or even small) media organizations. You should, in your opening statement, begin to chip away at that bias by referring to your client not as Fox News or CNN or Knight Ridder, but as Joe Brown and his producer, Nancy Smith. Walk through all the careful steps that Joe and Nancy took to avoid any harm to the victims of the scam they were investigating. Talk about their reasons why this investigation was important to them and why they cared about it. A jury is more likely to forgive a mistake if they understand from the get-go that it was an error by a particular individual (who is, hopefully, present in the courtroom), and not a by-product of corporate decision making.

Be Respectful of Innocent Victims

Libel and related claims that survive summary judgment often involve innocent (or arguably innocent) victims who claim to have been mischaracterized by the media or victimized by the news-gathering process. In a case involving the use of hidden cameras, for example, the plaintiff is often an unwitting staff member of the target of the investigation or a victim of the scam under investigation. Because the jurors will readily place themselves in such a plaintiff's shoes at the opening stage of the case, opening statements may not be the time to attack the plaintiff or to appear indifferent to his or her predicament. While you can show a healthy skepticism during the opening about the plaintiff's damage claims, the jurors may view any attack on the plaintiff's credibility as confirmation of their belief that large media corporations care only about ratings and revenues, and not about truth, justice, or First Amendment freedoms. Hold your fire until the plaintiff testifies.

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Eight Steps to a Powerful Opening

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During opening statements, you get to address directly the trier of fact in your own words. It is your chance to describe what the evidence at trial will show. While witnesses will elaborate on the points that are made in the opening, each witness typically just covers a slice of the overall story. And with witnesses, there may be presentation issues—some witnesses may be better than others. But during the opening, you can describe the facts in an efficient, organized, and clear fashion. Moreover, the timing of the opening—before the hurly-burly of the trial starts—will give you time to prepare carefully. The opening will also help establish your style and credibility, and you may be able to build a connection with the trier of fact.

You want to make the most of the opportunity. Below are some tips to keep in mind in preparing an opening.

Find Out the Judge's Preferences

Before you can prepare your opening, you first need to find out the ground rules. It is imperative to find out ahead of time the judge's preferences as to

openings for your case. Will there be time limits? Will there be a podium? Must you stay behind the podium or will you be able to walk around? Will you be allowed to use exhibits and, if so, must they be pre-admitted? Will you be allowed to use demonstrative exhibits and, if so, will you need to exchange them ahead of time with the opposing party? Is so, when? If the case is high profile, how will the judge handle publicity and the press? Most important, if the case is a bench trial, will the judge even permit openings?

Each of those questions will affect how you prepare and deliver your opening. This information can be gained, for example, by researching the judge's standing orders, sending a joint letter to the judge inquiring as to these issues, or finding out during a scheduling conference.

Consider Whether the Trier of Fact May Have Preconceptions

Another background consideration is what preconceptions the trier of fact might have about the media industry in general or your client in particular. Media companies are so well-known that preconceptions about them are likely, and some of them may be surprising. While you will be naturally attuned to consider this factor during a jury trial, do not ignore it in a bench trial. If the judge is the trier of fact, his or her past rulings and legal experience before joining the bench may help provide some guidance as to the judge's sympathies, although those are obviously imperfect guides.

For a jury trial, it is essential to try to figure out what preconceptions jurors might have before the trial. Figuring out possible juror preconceptions is not easy. While juror questionnaires work to some degree (if the court permits them), if it is financially and logistically possible, formal or informal jury research can be extremely helpful toward recognizing what preconceptions a jury might have.

To the extent a media company is perceived as wealthy or powerful, that could create a negative impression. On the other hand, if the jury recognizes the media company's role in providing creative entertainment and jobs, it may be possible to show a different side to the company. Moreover, you may also be able to put a face on a large company by highlighting individuals and their particular efforts, or may be able to give the trier of fact something tangible to care about such as encouraging creativity or prohibiting "free riders."

Define the Issues on Your Terms

A threshold goal for an opening is to define the issues of the case in your terms. You want to raise the questions that will resolve the case, but present them in a manner that leads to the answer that you want the trier of fact to reach. Quite simply, from your client's perspective, what is this case about? What do you want the trier of fact thinking about throughout the trial? Strongly and clearly inform the trier of fact of what needs to be decided and why.

Establish Case Themes

Another goal is to introduce your case themes, which will flow from the issues that you set-up. Whether before a judge or jury, summarize your case in memorable and understandable themes. Trying to simplify complex issues is an especially good idea.

For example, I recently tried a copyright infringement case against a publisher whose primary defense was fair use. To simplify the analysis of the four factors of the fair use defense, I noted repeatedly during the opening that the disputed book "took too much but did too little." That phrase first served to highlight what I believed to be the disputed book's wholesale copying of the author's copyrighted works. It also emphasized our view that the disputed book did not provide enough new analysis, commentary, or original thought to justify a fair use defense. It became a convenient phrase to use when examining witnesses, and I returned to it again at closing. Thus, that phrase helped to establish a simple, consistent theme throughout the trial.

Also remember that your case theme may be what is repeated by the press in high-profile cases. For the same reasons it should grab the trier of fact's attention, it will likely as well grab the press's attention as well.

Provide a Road Map of Your Evidence

The opening statement serves as your introduction to the trier of fact of not only the overall issues, but also what you believe the evidence is regarding those issues. In simple terms, the opening statement is supposed to plainly and coherently lay out what you believe the evidence will be. The trier of fact will be able to better understand the evidence with an overall road map that illustrates how the testimony and exhibits, which will be displayed in scattered pieces over the course of the trial, fit into the bigger picture of the case. Your road map should make clear what you believe is the key evidence, so that the trier of fact pays attention to that evidence when it is introduced, understands why it matters, and remembers it at the conclusion of the case.

If the judge permits you to use exhibits in your opening, the opening is a great time to start highlighting the important documents that tell your story. In addition, you may also wish to present evidence that calls in doubt the credibility of the other party's witnesses. This could create a negative impression of or suspicions about witnesses before they take the witness stand.

When you turn to the nitty-gritty of the particular evidence at issue, a jury might especially be disappointed that the case is not turning into a television show or movie version of a trial, and is instead more detailed and slow moving than they expected. It is here that you will have to work hard to keep their attention and focus while you are highlighting your evidence. For that reason, you should be careful in what evidence you select and how you use it, so that you keep hitting big, important points, and do not lose the trier of fact's interest.

Do Not Oversell

While you want to be persuasive, you need to be able to deliver on the promises that you make in your opening. If not, the other party will remind the trier of fact at closing that you promised to prove a fact, but failed to do so. Overselling can destroy your credibility and cause the trier of fact to forget about everything that you are able to prove. Conversely, if you were able to prove the evidence that you outlined in the opening, your closing is the perfect time to gently make clear that you delivered on your promises.

Address the Other Side's Case

The opening statement should address the other side's case—but with great care to avoid focusing too much on your opponent's story and not enough on your own. Otherwise, it may seem too

defensive. Nonetheless, you may need to defuse evidence that you know the other party will rely on by explaining your view of it. At other times, you may need to simply attack the other side's case. For example, you may need to discuss a disputed factual contention that the other side might otherwise present in a conclusory fashion because, if you do not do so, the trier of fact may assume that particular fact is undisputed.

Fit the Opening to Your Personal Style

These tips can be helpful to crafting an effective opening, but there is, of course, no one way to deliver an opening. The opening must fit your personal style. Whether that style is analytical or impassioned, or formal or more informal, what matters is that you present a clear and convincing story while demonstrating confidence in your case.

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