

# Opening statements not just job of outside counsel

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If you're an in-house counsel whose case is heading for trial, make it a priority to help shape the opening statement. If you think of the opening as more of an outside-counsel task, think again: In-house counsel can add enormous value in guiding the opening statement, and in doing so, play a key role in building the larger trial strategy.

In many ways, the opening statement encapsulates your entire case for trial.

Constructing the opening requires your trial team to make crucial strategic decisions, including which themes to present, how to respond to challenging facts, and which witnesses to introduce.

The opening will introduce your case to the jurors, at least some of whom will make a preliminary decision about who should win the case based on the openings.

How do you take an active role in shaping the opening? Work with your outside counsel to ensure that you follow these strategies for a great opening statement.

## • Fair. Reasonable. Repeat.

No matter what claims you face at trial, the opening statement should stress that your client acted fairly and reasonably. As they listen to the openings, jurors size up the two sides — not by reference to legal arguments, but by common sense. Which side behaved reasonably? With which party can they identify?

Therefore, your opening statement should stress the evidence that shows that your client acted fairly and reasonably. Don't let members of your trial team get so bogged down in the legal theories that they lose sight of the basic theme of fairness. If you feel that the trial team is overly enamored with an argument that may not resonate with real jurors, say so.

For example, in employment litigation, no matter what the specific claim is, some jurors initially may be inclined to identify with the plaintiff. The jurors will want to know whether the company or supervisor dealt with the plaintiff fairly. If you can show that the supervisor gave the plaintiff many chances to improve performance, or that the plaintiff's chronic absences were causing big problems for co-workers or customers, you can show that the discipline was fair and that the company, not the employee, acted reasonably.

## • Tell a good story, complete with compelling characters.

Even if the case involves esoteric legal theories, the opening must be a compelling nar-

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ative. Any good story starts with good characters, so the opening should introduce your client and your witnesses not just by identifying them, but making them real.

Let the jury know what your company does, in real terms. For example, if your company is a retail chain, tell the jury what the stores are like, what the stores sell, and where the jurors might have seen the company's advertisements. If the case involves a complex corporate structure, use a simple visual to illustrate how it worked.

Avoid corporate-speak; terms like "dotted-line relationship" or "360-degree evaluation" will not resonate with a teacher or car mechanic in the juror pool.

Humanize the witnesses who will testify. Draw out relevant facts that show that your witnesses are real, likeable people.

Let the jury know if the witness is a single father or someone who is not much good with computers, if those facts are relevant.

Explain what the witness's job is, in everyday terms. Explain what he does every day when he goes to work. Point to the witness in the courtroom: "Ms. Brown is the lady in the front row, in the red sweater. She was in charge of ordering all of the products that the grocery store sold and making sure they always had products on the shelves."

Show the jury with words and body language that you genuinely like and trust your witnesses.

## • Only promise what you (definitely) can deliver.

We once heard a plaintiff's lawyer tell the jury that an opening statement is like a check, and at the end of the trial, the jury has to decide whether they can cash the check each attorney has given to them. Did the attorney deliver on the evidence she promised? It is an apt analogy.

The jury will be listening closely to the opening and will notice if a piece of evidence that you promised does not materialize. If you say jurors will hear from a particular

witness, you had better be sure that you call that witness. If you promise that Ms. Brown will testify that the crucial meeting was on May 25, you better be sure that Ms. Brown is going to so testify.

Before the opening statement, the trial team should determine which witnesses it will definitely call and weave those witnesses into the opening. Review the opening with each of your witnesses to be sure you have 100-percent factual accuracy and that every witness is fully comfortable with the narrative. Facts or witnesses that are not certain to materialize have no place in the opening statement and should be left for later in the trial.

As in-house counsel, you're the lawyer who knows your company best, and you can be very helpful when outside counsel reads the opening to you; if a fact in the draft opening does not sound exactly right or you're concerned that your witnesses may balk on a particular point, let the trial team know and help clarify the point.

## • Inoculate against known dangers.

By the time of trial, you are well aware of opposing counsel's themes and arguments. If there is a theme that you feel sure opposing counsel will hit — and you fear it could have sway with the jury — inoculate against it in the opening statement. The same is true for a bad fact.

By directly confronting an opposing theme or bad fact, you may be able to influence the way the jury feels about the issue. You will also telegraph that you are not afraid of the argument, and that there are two sides to the story.

Tell the jury members what they will hear from opposing counsel. Ask them to listen very carefully to the evidence on that point. And tell them what evidence they will hear that refutes the theory. By the time they hear the plaintiff's evidence, it will have lost some of its luster, and the jury may remember to be skeptical.

## • No gimmicks

Some trial lawyers are tempted to resort to gimmicks to make a splash in the opening. But that's almost always a mistake. Remember that most of the jurors were hoping to be dismissed, not empaneled, and at the time of the opening, the jurors are mainly concerned about how long they'll be stuck in the trial.

A joke that falls flat will almost certainly irritate the jurors. Anything off topic will make the jury resent counsel for wasting its time. Excessive theatrics can damage your credibility as trial counsel at a crucial moment, when you really need to be persuading the jury that your side has the more reasonable position.

Avoid any language in the opening that could even conceivably draw a rebuke from the judge, such as excessive argument or veering into a topic excluded by a motion in limine.

Keep it simple. An opening presentation that is authentic, straightforward and concise will put you in the best starting position as the trial gets underway.

## • Sell it like you mean it.

The trial lawyer who delivers the opening statement must actively sell a case to the jury. A dry reading of a written script will not cut it.

Instead, counsel should practice the opening and be completely comfortable with it by the time of trial, whether reading it or reciting it from memory. That kind of ease with the material will allow counsel to deliver the opening with animation and conviction. Watch your trial counsel practice the opening and give feedback. The opening should leave the jury with no doubt that your trial counsel passionately believes in your case.

It's worth investing the time to get the opening statement right. A great opening will serve as a roadmap for the jury and for the trial team, and provide the jury the best possible introduction to the narrative of your case.

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