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Telling Your Client's Story in a Persuasive Way through Opening: A Primer

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INTRODUCTION

This purpose of this paper is to act as a primer for the inexperienced attorney who wants some particular suggestions regarding how to think of, structure and give an opening statement/argument in the trial of a criminal or civil lawsuit. With any luck, it will also serve as a reminder to the more experienced trial lawyer of some of the more salient principles to be thought about and followed when getting up on his hind legs to delivering an opening.

It would be impossible to prepare a readable paper which covered every aspect of opening statements/arguments, and which was still short enough to be of practical use by the attorney both in this seminar and in her day-to-day business in the courts of her particular jurisdiction. There is just too much information to cover the topic fully.

Legal scholars have been writing about the proper way to open a case for many years. The advice given today runs the gamut from "never waive an opening" to "never give one if you don't have to do so." Additionally, *what* one can say in an opening, and *how* one may say it, indeed, even *what name* to give an opening (an "argument" or a "statement") are still the subject of much debate.

I think I have clearly taken sides in some of the debates and have, on occasion, added my own thoughts to those of much more prolific and scholarly authors. I hope that

I have been able to catalogue some of the more important principles to think about and follow when planning and giving the opening in any particular case.

I am indebted to Herb Stern, a superb teacher of trial advocacy, who taught me nearly 20 years ago and to whom I return for advice even today . Many of the following ideas are his; though any misstatement of his material is only my fault.

VERDICT FOR YOU. NO WAITING

If it has been true for several hundred years that "Time waits for no man," then it is now equally true that "no man waits for Time." If the 1960's were The Age of Aquarius, it is now just after the Dawn in the Millennium of Mercury. It is the season of instantaneous information on the Internet and coeval commerce. The photos of *Life* Magazine have been replaced by the split-second glimpses of modern culture on MTV. Full length newspaper stories in the *New York Times* and the *Wall Street Journal* have been replaced by a few paragraphs and a headline, with graphics in cinematic color, no less, in the *USA Today*. Six minutes of interview on the network news shows; maybe fifteen on *Montel* or *Oprah*. People are moved to hold opinions, informed or otherwise, on every topic under the sun at the speed of sound bytes.

In short, we have just kicked off the 21st Century and no one waits for anything anymore. As a byproduct, no one is impartial on any topic for any longer than she has to be Even now, you are making up your mind whether to believe these assertions, or to continue to read this paper, or not.

Time is in greater abundance because we have learned to lessen the amount we routinely need to live our, not necessarily fuller, lives. And, even though, as Will Rogers

said in his autobiography, “half our life is spent trying to find something to do with the time we have rushed through our life trying to save,” we still rush through our lives and have begun to see as an anathema anything which interferes with our efforts to spend the time we have been able to save in recreational ways which lead to our personal comfort.

Despite the rhetoric about how jury service is the right and obligation of every citizen, service as a indentured serf in the jury pool of the local judicial system is one such anathema. Those who cannot get out of such service want it over as quickly as possible so that they can move on with the “more important” things they have to do.

It is within the framework of this new reality that this paper takes a brief look at that moment in a jury trial known as “the opening statement of counsel.” With the view toward convincing the reader that opening statement is a moment of singular opportunity for counsel, I will show that the opening statement is the legal equivalent of Merlin’s *Spell of Making* or Rumpelstiltskin’s Spinning wheel; that magical process by which lead or, in the latter case, straw, may be turned into gold, through the pure sorcery that is the essence of the client’s story, persuasively constructed, and vividly told.

PRELIMINARILY SPEAKING

At the outset, it must be noted that opening statements are not really “statements” at all. They are carefully constructed arguments which, while incorporating the advocate’s theory of the case and using the emotional themes chosen by the advocate to move the listener to action, are delivered in a hybrid method of grouping facts and evidence in a way to make points, arranging the points in a persuasive order and presentation of those points by using the ancient method of storytelling.

CLOSE FOR SHOW. CROSS FOR DOUGH
DIRECTS ARE TOO HARD AND OPENINGS TOO SLOW

The four major phases of any trial are the opening, the direct, the cross, and the closing.[1] In each phase, the goal is **either** to tell your story, to argue your case, and to advance your theory; **or**, to tear apart the story, the argument and the theory of one's opponent. Historically, legal scholars and members of the profession have raised cross-examination and closings to a sort of *filet mignon* status within the trial. Everything else that needs to be done is the trial work equivalent of *White Castles*. If you want proof, look at the offerings on the library shelves and listen to your friends in the profession when they recount their famous victories

Posner and Dodd's book on cross-examination is a best seller. Anthologies of the best closing arguments delivered throughout the long and storied careers of giants, locally and nationally known, are published regularly. Almost always when you are entertained with a story of some great triumph, by friend, foe or fabricator, that story has, at its heart, some supposed verbatim rendering of a brilliantly destructive cross-examination or some eloquent closing argument which moved a jury to tears and to a verdict in record time.

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[1] With due apologies to *voir dire*, which is all but gone in federal courts and is fast disappearing in the state courts. If one is lucky enough to be able to conduct meaningful *voir dire*, then that phase is the first opportunity for counsel to establish his personal *ethos* with the triers of fact. However, even where significant *voir dire* is allowed, the opening is the still first opportunity for counsel to argue her client's story of innocence, or reduced culpability with a view toward persuading the jury to believe that counsel is the truth giver in the courtroom.

But, look for a book on openings or direct examinations, listen for the tale of the direct that won the case or the opening which stole the hearts of the jury and you may as well be looking and listening for a symphony orchestra in the middle of the Sahara.

Comparatively speaking, throughout the colorful, yet rather static, history of the last 200 years of trial work, openings and direct examinations are the work of the Little Red Hen while closings and cross examinations are the banquet upon which all want to feast.

OPENINGS: PERSUASION PERSONIFIED

What is wrong with this view is that it is undeniable that openings are harder to craft – because they come before evidence is actually received – and harder to deliver – because of the rules against "argument." More importantly, however, what is also, only slightly less, undeniable is that openings are the tool favored by "persuaders." In the relative vacuum that is the case, at the point at which the opening is given, persuasion can actually take place because the jurors are wanting to know the truth and are wanting to be able to make up their minds. In my view, closings only act to "attest" to that which is already known, or believed, by the jurors because of all which gone before. But, openings actually "persuade" because they are given at a time when (almost) nothing has gone before. The minds of the jurors are as *tabula rasa* as they are ever going to be during the trial of the case.

Openings allow the advocate to take full advantage of the rules of primacy. And, while there is debate among the writers about which is more important, *primacy* or *recency*, (both of which will be discussed more later) there is no debate that the opening

is the advocate's first and best opportunity to move the jurors; emotionally to accept the truth of the story, rationally to accept the logic of the argument, and intuitively to accept that justice can only be done by delivering the verdict for which counsel has asked.

Further, once a juror has made up his mind, once he has actually taken a position, he – like all of us in every other matter in our lives – will do everything possible to avoid having to change his mind or alter his position. The juror does not want to admit he has made a mistake and the longer he holds his opinion, the less likely he is to change it and the more likely he is to rationalize, or deny outright, evidence adduced which is to the contrary.

Therefore, it is incumbent upon the advocate, the persuader, to take all possible steps to persuade the jurors at the earliest possible moment in the trial and, again with due respect to the voir dire, of course, that earliest moment is the opening. The advocate must be prepared to open, (and must open) fully, powerfully and persuasively. She must leave nothing out of the opening which she believes is outcome determinative in the minds of the jurors. She must not leave anything which is, actually, outcome determinative for later. Don't leave anything for "later." This is Normandy. If you can take the beach now, you can take Berlin in time.

TO OPEN OR NOT TO OPEN

Now, there is plenty of contrary advice out there. In his 1991 book, *Trying Cases to Win*, (Pages 132-136), Herb Stern identifies the substance of the contrary advice

"Waive opening"

"Consider waiving the opening"

"If you open, be short and concise and don't give your strategy away"

"If you open, be sure to remain fluid and do not commit to a position"

"If you open, do so in a chronological fashion"

"If you open, avoid telling specific facts and don't argue"

"Opening is not the time to confuse the jury with facts that are in dispute"

before destroying such "wisdom" with the words of Edward Bennet Williams:

> I think the first impression you make on the jury is crucial– you start with voir dire, if you have it. Then you make an opening statement. I don't ever remember passing up that opportunity. [...] Your aim is to present the best first impression of your case and your client as possible. [...].

In short, *never waive an opening*.

THE SEVEN LAWS OF OPENING

Having advocated my insistence that an opening be given in every case, this seems the opportune moment to touch briefly upon the Seven Laws of the Opening.

Law 1: **Rely on personal advocacy (ethos)** during the opening. Jurors believe that the lawyers know what actually happened and they look to the attorneys for the truth. Be the truth giver in the courtroom and understand that your own personal credibility is the key to the acceptance of your theory of the case by the jury. Do everything to protect your own personal credibility and, with every opportunity, try to destroy the personal credibility of your opponent. Never be seen as a trickster or a games player. Craft different ways to convey to the jury your own personal belief in the rightness of your

cause without violating the ethical cannons which prohibit your giving a personal opinion regarding the facts.

Law 2: **Once you have constructed the theory of the case and chosen your emotional themes, stick to that one central theory. (*Logos*)** Repeat the themes. Never waiver from the "principle of the whole;" that one explanation which best reconciles the greatest number of discrepancies. Do not offer the jurors a "smorgasbord" of theories form which to choose. Certainly do not offer theories that actually contradict each other. But, also, do not offer theories which "appear" to contradict each other. Do not cumulate theories – weak ones on top of a stronger one – because you will, in fact, only weaken your chances to have the jury accept your strongest theory. Doing so also hurts your personal credibility.

As a corollary, your central theory must account for every fact, not just the facts in "your case." First, there is no such thing as "your case" and "their case." To the jury, there is only "the case" and both counsel are held responsible for all the facts. You must account for every indisputable fact (facts beyond change) in "the case" when you form your theory. This is especially true when considering the indisputable "bad facts" of the case. If your theory fails to account for even one indisputable "bad fact," the theory will fail and the jury will find against you. Every "bad fact" must be accounted for in your theory and to "account for" such facts means to make every such fact work for you in support of your theory. Remember the four levels of advocacy regarding indisputable "bad facts":

Level 1: Is to deny the existence of the fact. Actually, this is not advocacy at all. It is the height of lunacy.

Level 2: Is to admit the fact's existence but to never mention it. It is to hide from the fact.

Level 3: Is to admit the existence of the fact to the jury and to draw the sting of the fact away from your opponent.

Level 4: Is to show that the fact actually supports your theory. It is the highest level of advocacy. It is to use the fact, in an affirmative way, to support your theory.

Be cognizant that errors must be preserved but, do not try the case for the appeal. Try the case to win at trial and to have the verdict stand up on appeal. Give away anything which you cannot keep and every point that you cannot win which is not central to your overarching theory. Try the case on the one or two points upon which everything else turns.

Law 3: **Make the case bigger than the facts.** Find the emotional appeal, the dominant emotion, of the case **(pathos)**. Move the jury by showing them that the case stands for a principle larger than the facts or by resting on an emotional appeal that will sway them. This is the difference between being legally right and being righteous. This is where learning about the attitudes and views of jurors on voir dire can be used with great aplomb.

Laws 4 and 5: **Primacy and Recency.** What is said first (*primacy*) and what is said last (*recency*) is remembered best. There is disagreement about whether Primacy or Recency is most important. I come down on the side of Primacy. But, there is very little

disagreement, if any, that you must be powerful both when you start and when you finish. What is to be minimized must be left to the middle. Be powerful when you first get up on your hind legs. Don't wind-up. Use a hook, or an emotional theme, to gather the jurors to you from the outset. Make your strongest point out of the box. When you wrap-up, be powerful. Be memorable. Forget about legalisms; talk like a human being, not a lawyer. Forget presumptions – whether of innocence or otherwise – and the burden of proof. Leave law school behind and go back to being the person you were before law school twisted your mind and affected your carefree personality. After all, none of the jurors (most likely) went to law school and are quite happy that they didn't.

Law 6: **Frequency.** Repeat the themes. Repeat the strong evidence; more than once and in more than one way. Paint mental pictures by presenting the evidence in small, memorable, bites.

Law 7: **Vividness.** Paint your case with word pictures. Use demonstrative evidence. Bring the case to life in a three-dimensional way. Use the blackboard, a flip chart, overheads, diagrams, power point presentations, computer-generated presentations, physical evidence, photographs, blow-ups of photos or prior testimony, and experiments (only after trying them out before hand, of course). Remember, while evidence must be accurate and authenticated before it is received by the jury, demonstrative aids do not bear those burdens.

CONSTRUCTING THE OPENING

One of the key things to remember as you begin the construction of the opening is

that organization persuades as much as content. Put another way, it can be said like this: ***The order in which you say what must be said, is as important as what you ultimately say.*** That having been said, it will be easy to describe the two main ways in which openings are given and to show why these methods are unpersuasive.

1. **Chronological (story of the event).** The chronological narrative is the most common way that lawyers open. It is nothing more than a listing of the facts and events which the lawyer intends to prove and which, by implication, the lawyer believes are important to the jury's understanding of the case. These facts and circumstances are presented in the order in which they occurred

2. **Witness-by-Witness (story of the trial).** This method of opening is just what the title says: it is a recitation by the attorney of each person he intends to call, in the order he intends to call them, with an exposition being made after each name concerning what the person to be called will testify to.

Both of these approaches are seriously flawed. If the purpose of the opening is to persuade, then neither of these approaches does that. Additionally, to the extent that an opening argues the party's case in order to be persuasive, neither of the above approaches is, in any sense of the word, an argument. To note the facts in a blindly chronological order or in the haphazard fashion in which they would come into evidence through the witnesses called at trial is everything short of compelling and no where near persuasive.

3. **Grouping facts and positions.** The proper approach is for the advocate to

group the facts and the evidence in support of particular points to be proven. Then, to take those groupings of facts and evidence and organize them into an order based upon their persuasive force. This is not to say that this method ignores chronology and witnesses. It doesn't. But it uses partial chronologies and the witnesses as footnotes to the credibility of the advocate's argument. The opening attacks and defends points in depth and references the time-frames of the case and those witnesses who play a part in the full explication of each point.

4. **Telling a story.** Another method of opening is the telling of a story. In this storytelling method of opening, a premium is placed upon describing the emotion of the case and how the actions taken by the people involved were motivated by the emotions they felt at the time they acted. However, admittedly, very few of us are Hans Christian Anderson or one of the Grimm boys and constructing an interesting and compelling story from start to finish is an exercise that is difficult to do. However, within points, all of us can bring together the facts, law and emotion to create the scenario for persuasive argument. Within a point, all of us can show a jury why people did what they did. Using archetypes and universal themes, we are able to construct an argument that maintains a "story line" throughout the course of the opening.

I am a believer in the storytelling method when it is used in connection with the grouping of facts and evidence to make points, as above. I believe that the use of this "hybrid" kind of opening allows for the advocate to bring out the best of herself by forcing the advocate to think about the case from both the head and the heart.

DELIVERING THE OPENING

It does little good to describe all that has gone before if the actual giving of the opening is ignored. And, so, a series of important points must be made regarding the delivery of the opening.

Be thoroughly prepared and apparently extemporaneous. Because of the large number of trial advocacy courses which have taken a root-hold in the law schools around the country, it should not be necessary at this point to say this: **Don't read your opening**. But, because of the continued insistence by counsel to violate this rule, it bears repeating: **Don't read your opening**. In fact, it is a bad idea to use scripts of any sort at every stage of the trial. If a topical outline is necessary in order to keep the organizational structure of the opening straight, that is all that should accompany the speaker to the podium.

I also do not espouse the memorization of the opening. It is a much better idea to be thoroughly familiar with the facts of your case and to allow the words to come to you at the moment they are needed. Never form the words that you will use before actually saying them.

When the advocate has his head buried in the words on the page, he loses the opportunity to watch the listener and to pick up those subtle clues which indicate whether the speaker is making progress in his goal of persuasion. Additionally, when one reads or delivers a memorized speech, she does nothing to enhance her personal *ethos* and credibility with the jury.

Part of this is due to the rigid or stilted way the words come out of the speaker's mouth in those situations. Part is due to the speaker's loss of the opportunity to use emotion effectively; and to use any part of his body to convey the story, at all. The ability to use exhibits and/or demonstrative aids is all but nullified when the advocate has his head immersed in the written word or his mind engulfed by the task of remembering what comes next.

It bears repeating that the thoroughly prepared advocate will have the ability to form the words that are needed in the moment that they are needed. It is nothing magical that allows for this. It is the speaker's intellect combined with a consummate knowledge and command of the facts that allows for what can be described as a sort of prepared eloquence.

No wind-ups. Don't start off your opening by talking about how the trial will proceed, or what all the different procedural variables are that the jury might witness. Most likely, the judge has already done that, to some extent. Even if she hasn't, the jury could care less. The juries of today are savvy and informed enough to know what will happen; even if only in a general way. What they want to know is who they are supposed to vote for and why nobody has told them that as yet. Besides, you don't have enough time to explain everything. There are always some variables which don't come up enough to warrant their being mentioned or which you forget about.

Remember the words that followed the initial strikes in Iraq this year: ***Shock and Awe.*** When you first stand up to deliver your opening, use the *ethos/pathos/logos* of the

case to bomb your opponent. Do not waste even a single minute warming up the crowd or warming up to them.

Do not delay the warm-up to a later point in your opening. A new trend that I have seen from judging law school mock trial competitions is to drop a bomb at the very beginning of the opening and then, after a one minute barrage, do a six to ten minute warm-up; explaining everything from who the advocate is and where she comes from to a detailed exposition of every phase of the trial. Forget the warm-up entirely. Do not bore the jurors. Once you have landed at the beach of Normandy, proceed to take the beach and begin moving toward Berlin.

Length of the opening. After you have shocked and awed the jury and have moved into the very heart of your story or argument, how long should you go on? On this point, I cannot say anything in any better way than Stern. You deliver the opening for exactly as long as you have to in order to make all your points and then you stop. You do not open for a moment longer, nor a moment shorter than it takes you to get the job done.

Use of the podium. This I leave to the discretion of the advocate. There is literature on both sides of this issue. I believe that power can be achieved from behind the podium as well as from other areas of the courtroom. On the other hand, I also believe that the attorney will begin to lose power as he or she approaches the rail of the jury box. The conscientious advocate must give thought to the issues surrounding the use of space in the well of the courtroom as well as the invasion of the personal space of the

jurors.

However, whether one uses a podium or not, one must manage "movement" during the opening. Too much movement can be distracting. Standing like a statue behind a box can lead to a kind of group hypnosis. Some movement must take place but all movement should be with a purpose. Move from point A to point B to help in the telling of the story (to indicate another venue, a different date, or a different speaker/point of view) or to obtain and use an exhibit or demonstrative aid, or to accomplish some other purpose which is essential to persuading the jury that this version of the story is the true one.

The use of exhibits and demonstrative aids. This is the earliest moment in which to instill in the jury a sense of confidence in you, and your version of the facts. The way to convey to the jury that their sense of your personal credibility (*ethos*) is not misplaced is to use the exhibits that will be entered into evidence during the trial. Show the gun, read the letters, hold up the prior record, pile up the drugs, show the photos, all of which will be introduced through the witnesses. Give the jury all the corroboration of what you say to them as you can. The exhibits serve as the footnotes to what you are saying. Don't rely solely on your personal credibility if you have the evidence to back-up what you are saying.

The use of illustrative or demonstrative aids in opening is somewhat easier to do because the rules governing the use of such aids is not as strictly regulated as the use of exhibits. Demonstrative aids do not prove things in and of themselves and will never be

admitted into evidence. In order to make the opening vivid and, by definition, memorable and, hence, persuasive, use such aids. Draw diagrams on the blackboard, write words on the board, or on an overhead transparency. Even computer generations that are not intended to be introduced may be fair game here and power point presentations can be modified to allow for the creation of illustrative aids.[2]

Here, the creativity of the advocate is challenged and should be explored in a brainstorming session prior to trial. Counsel should endeavor to use those tools and technologies that exist in order to enhance his or her presentation in order to make the presentation more powerful and persuasive.

Unpleasant facts. Generally, we are loathe to call people liars, cheats, thieves, murderers or to say other unpleasant things about our fellow travelers; at least, most of us were brought up that way. We choose to look for alternative ways to describe people and events which do not tend to shock the hearer or which are designed to make the hearer not dislike us for commenting on the person or event.

I do not take the position that all of our upbringing must be stowed away under counsel table when we are trying a case. Our first instinct should be to search for alternative ways of describing others. However, sometimes it is crucial that we call

[2] Power point can also be utilized to show exhibits in a rather more persuasive way than simply picking them up and waiving them around. Less frightening, as well, especially when showing a gun or other dangerous weapon.

people, events or things the way they are; however unpleasant that might be. When those situations arise, we must not be afraid of what the jury will think of us. If we expect the jury to say the same thing to us at the end of the trial, we must not be afraid to say it to them during the course of the trial; and, that includes the opening.

The key to knowing when to say something unpleasant or when not to do so is in the analysis of the case. Once you identify what you must have or prove in order to win, then you open on it as strongly as you can.....no matter how unpleasant or uncertain the claim. For example, if you cannot win unless a certain witness is disbelieved, then you must unhesitatingly promise to prove that witness is lying and you must find a way to convey that he is a liar to the jury in the opening.

Opening second. The attorney who opens second is always at a disadvantage. If the plaintiff or prosecutor has opened fully and powerfully, the responding party's counsel can never achieve Level Four-type advocacy because the jury will never hear the lawyer's explanation before they hear the accusation from the other side. Any response to damaging facts will, by necessity, sound like an excuse and not an explanation.

Nonetheless, the advocate who follows a forceful and full opening by her adversary must still open fully and powerfully. She must not "respond." She must give the opening she would have given had she gone first.

In going second, the advocate must ignore the opening of the adversary and develop the points and evidence in the order which is best suited toward persuading the jury of the rightness of this, alternative, position. He starts with an empty table and

begins to construct his model, the better model as far as he is concerned, and picks up the questions and challenges of his opponent as he goes along. He prosecutes his case and does not take defensive positions. He realizes that, because the order of what he has to say is as important as what he says, he must give his opening in the way that it was planned.

CONCLUSION

In closing this paper, there is really no need to reiterate the main points except to say that one must never underestimate the possibilities for persuasion inherent in the carefully prepared and powerfully delivered opening. The "winner" of the trial is likely to be, as Stern says, "the one that gets there firstest with the mostest." Keeping the principles set forth, above, in mind gives you the chance to do just that.