

Opening Statement: The Plaintiff's Perspective

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**Austin Bar Association Litigation Council
Austin's Ultimate Trial Notebook Seminar
May 19, 2006
Austin, Texas**

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By Mark L. Kincaid & Trevor A. Taylor

I. Introduction

There is an old expression that well begun is half done. Trial lawyers know that opening statement presents a special opportunity: it is one of the three chances a lawyer gets to speak directly to the jury. It is critical that this opportunity not be squandered.

This article is intended to provide guidance for your good beginning. In the first section, it provides a brief description of the law of opening statement. It then provides some practical guidance on delivering effective opening statements. The article ends with a sample outline of an opening statement.

II. The Law of Opening Statement

The law of opening statement is relatively sparse. The Texas Rules of Civil Procedure state that prior to the presentation of evidence, each party may “state to the jury briefly the nature of his claim or defense and what said party expects to prove and the relief sought.” Tex. R. Civ. P. 265(a).

The party adverse to the party who opened may make a statement about the case either before any evidence is introduced or before introducing its own evidence.

Each party to a case is entitled to have his attorney make an opening statement on his behalf. *See Russell v. Dunn Equip. Inc.*, 712 S.W.2d 542, 546 (Tex. App.–Houston [14th Dist.] 1986, writ ref’d n.r.e.).

The trial judge’s decisions regarding the length and subject matter of opening statement will be reviewed for abuse of discretion. *See Ranger Ins. Co. v. Rogers*, 530 S.W.2d 162, 170 (Tex. Civ. App.–Austin 1975, writ ref’d n.r.e.); *Guerrero v. Smith*, 864

S.W.2d 797, 800 (Tex. App.–Houston [14th Dist.] 1993, no writ). *Tacon Mech. Contractors v. Grant Sheet Metal*, 889 S.W.2d 666, 675 (Tex. App.–Houston [14th Dist.] 1994, writ denied).

Assertions made during opening argument are not evidence and are not judicial admissions. *Weslaco Fed’n of Teachers v. Texas Educ. Agency*, 27 S.W.3d 258, 263 (Tex. App.–Austin 2000, no pet.) (not judicial admissions); *Carrasco v. Texas Transp. Inst.*, 908 S.W.2d 575, 580 (Tex. App.–Waco 1995, no writ) (not evidence).

The party with the burden of proof on the whole case has the right to make the first opening statement to the jury (and introduce evidence first). Tex. R. Civ. P. 265 (a)-(b). Most often, that means the plaintiff has the right to make the first opening statement (and introduce its evidence first).

A defendant has the right to make the first opening statement (and introduce evidence first) if it has the burden of proof for the entire case under the pleadings. Tex. R. Civ. P. 265 (a)-(b).

III. Tactical and Practical Considerations in Opening Statement

1. Know your trial judge.

Given that the trial judge has wide latitude in limiting the content and scope of opening statement, find out what his or her preferences are. Find out how much time you will be given for opening statement. In a simple case, ten minutes of opening statement per side may be ample. In more complex cases, opening statements may take more than an hour per side. If you plan on using demonstrative aids, alert the judge and anticipate any objection to their use.

2. Restate your themes.

The theme should embrace central facts in your case and motivate jurors to find in your favor. They should also be easily communicated. A common theme for a breach of contract case is “a deal’s a deal.” In the insurance cases I try for insureds, a theme of violation of trust is powerful. For example, “Ms. Morales purchased an insurance policy from Great Benefit Deprived Insurance Company trusting that if she paid her premiums, they would pay her claims. For five years, she dutifully paid her premiums. But when she needed them, when it came time to honor their commitment, they walked away. We’re asking that at the end of the day, you make Great Benefit honor their commitment.” If you’ve done an extensive voir dire, restating your theme should be fairly succinct. You’ve already given the jurors a glimpse, now give them an overview.

3. Don’t promise things you can’t deliver.

This shouldn’t need much explanation. As advocates, we obviously present the strongest and most forceful case for our client. This obligation sometimes leads us to gild the lily. Doing so in opening statement can be fatal. There are fewer closing arguments stronger than exposing promises broken from opening statement. Also, the jury will embrace a conclusion more strongly if they reach it on their own. Don’t try to hammer them to a conclusion early on, before they’ve heard any evidence and before you’ve earned their trust.

4. Don’t weaken your credibility.

Related to over promising, it is not uncommon for lawyers in opening statement to devote time to emphasizing that what they say is not evidence. I find this discussion suggests that somehow they should not be believed. You want the jury in opening

statement to develop confidence and trust in you. You want them to pick you as their guide through the trial. You don't do that by telling them to ignore you.

5. Use “the evidence will show” sparingly.

We are all taught not to argue in opening statement. To avoid argument, we are told to throw in these magic words. Using them once or twice should be enough.

6. Use notes sparingly.

Opening statement is one of three times during trial when we get to talk to jurors directly. It is important that we connect with them. That's tough to do if you're reading your statement. It is tough to do if you aren't making eye contact. Plan the statement in advance, rehearse it once or twice, and use notes sparingly.

7. Be understood.

Tell the story of your case in understandable language. Avoid legalese. You should use present tense, and the active voice. Give some thought to point of view. Do you want to tell the story from the plaintiff's or defendant's perspective? If you represent the plaintiff, telling the story from his perspective may not always be the best choice. Given the tendency of some jurors to play devil's advocate, consider telling the plaintiff's story from the defendant's perspective.

8. Don't bury your weaknesses.

No case is perfect. You don't help your cause by failing to recognize its weaknesses. Hopefully, you've had a chance to explore juror reactions to your case weaknesses in voir dire. Opening statement is the time to deal directly with the weaknesses. Put them in context. Minimize their significance. But don't ignore them.

9. Humanize your client.

Some plaintiffs' lawyers believe that your case is only as good as your plaintiff. While I can think of some exceptions, the point is a good one. Communicate to the jury that you represent a real person with real values. Show that the defendant's conduct has caused him real harm. Communicate to the jury that your client is worthy of the attention and ultimately their help. If you represent a greedy, cold and heartless corporation, your challenge is greater. Your goal remains similar; you need to show that the company is not made up of a group of Ken Lays and Jeffrey Skillings, but of people with values and principles.

10. End strong.

End your opening with a statement of how we got to this point and the jurors' role in the upcoming trial. In a personal injury case, you may end your opening by saying "faced with mounting medical bills, John Smith was given no choice but to file this suit and ask for your help in righting the wrong that changed his life forever."

IV. An Outline for Opening Statement

1. **Reintroduce your case theme.** Use three or four sentences to describe what your case is about.
2. **Reintroduce yourself and your team.**
3. **Explain the burden of proof.** If you are the plaintiff: "We brought this case. We have the burden of proving to you what we say. We embrace that burden."
4. **Outline the legal principles.** Describe the cause of action and the elements of the case. Make sure the jury knows what they will be asked to decide, so they have a framework for the evidence they will see and hear. Include both liability and damages. If you represent the plaintiff in a

personal injury suit and are asking for a million dollars, it is important to say so, confidently and clearly, in opening statement.

5. **Tell the story of your case.** Introduce the witnesses, fact and expert, as you tell the story. Don't feel compelled to introduce all the witnesses; be selective and use the ones that tell your story best.
6. **Tell the jury what this case is not.** In personal injury cases, it is not uncommon for defense lawyers to suggest that the plaintiff is looking for sympathy. If you represent the plaintiff, it is important to make clear that the plaintiff has had her fill of sympathy from friends and family. She is in court looking for justice.
7. **Preview your opponent's case.** Attempt to take the wind out of your opponent's sails in your opening statement.
8. **End with an appeal to justice.** Show them how a verdict in your favor is right and just.

V. Conclusion

Made-for-TV dramas suggest that most cases are won by last minute, stem-winding performances by lawyers. Experience suggests otherwise. Lawyers that wait for the closing argument to begin the persuasion process are often disappointed with the result. Hopefully this article will help you craft your own strong beginnings.

Bibliography

The following are excellent resources if you are looking for additional insights into opening statements:

1. Thomas A. Mauet, *Fundamentals of Trial Techniques* (3d. ed. 1992).
2. Jack E. McGehee, *The Plaintiff's Case: From Voir Dire to Verdict* (Texas Trial Lawyers Ass'n, 1997).
3. Jim Purdue, *Opening Statement – Plaintiff*, *The Ultimate Trial Notebook: Personal Injury Law* (1998).
4. Russ M. Herman, *Courtroom Persuasion: Winning with Art, Drama and Science* (West 1997).

5. Michael O'Connor & Byron P. Davis, *O'Connor's Texas Rules: Civil Trials* 553-55 (2006).