

# **OPENING STATEMENT**

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An effective opening statement is an essential component of every trial. What makes an opening statement effective? I would not be so presumptuous to suggest that I know THE answer to that question. This paper contains some suggestions, techniques and ideas for your consideration in preparing an effective opening.

Over the course of my 30 years of practicing law, the trial techniques that are considered to be “effective” have evolved in response to changes in society’s beliefs and attitudes. These adjustments apply to opening statements as well as other parts of the trial. One thing that has not changed is that the focus of the opening should be on the defendant’s conduct. The opening statement is your first opportunity to tell the story of your client’s case. You should tell that story in a manner that focuses on the defendant’s wrongdoing rather than the actions of the injured party. By doing so, you emphasize that the defendant’s conduct caused the consequences suffered by the plaintiff. Emphasizing the defendant’s conduct also allows you to more clearly explain that a change in the defendant’s conduct would have prevented the harm that will be the focus of the trial.

Years ago, I began my opening statements with a direct, in-your-face, blunt attack on the defendant. It worked. If I used that approach today, I believe I would have virtually no receptive jurors at the conclusion of my opening. Our society, i.e., jurors, has become much more conservative. They are turned off by lawyers, lawsuits, requests for money damages, and the perceived excessive litigiousness of our society as a whole. They believe that plaintiffs and their lawyers are greedy, manipulative and seeking “jackpot justice” or money for nothing.

In addition, there is a strongly held public opinion that people must accept responsibility for their own actions, and that plaintiffs seeking money in court have refused to accept personal

responsibility. It is imperative that you don't reinforce these widely held beliefs during your first presentation of your client's story to the jury. One of the most common models for opening in today's environment is to present your case by demonstrating that your client was harmed because the defendant failed to follow the rules and failed to adhere to widely accepted standards of conduct in the defendant's industry. This approach embraces the conservative beliefs that there are rules of proper behavior, those rules must be followed, and anyone breaking those rules is responsible for the consequences.

There is an excellent book titled Rules of the Road - A Plaintiff's Lawyers Guide to Proving Liability.<sup>1</sup> Its authors point out that complexity, confusion and ambiguity are weapons for the defense that can defeat plaintiffs even in deserving cases. It should be noted that these are not just tools used by the defendant. Plaintiff's lawyers hurt their own interests by failing to present their cases with simplicity and clarity.

Jurors generally do not know what their job is or what is expected of them. It is only natural that jurors in that position will look for someone to guide them safely through the bewildering trial process. Think about the role of a tour guide and how one looks to that person for help in a foreign environment. The guide is someone who knows the subject matter, who provides important information, who leads the journey from start to finish, who has the answers to your questions, who is responsible for getting you from beginning to end, and ultimately gives you a favorable impression about the process and the outcome of your trip. The opening statement is the plaintiff's attorney's opportunity to become the jurors' guide at trial from start to finish.

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<sup>1</sup> Friedman, Rick & Malone, Patrick, Rules of the Road – A Plaintiff Lawyer's Guide to Proving Liability (Trial Guides, 2006).

An opening that is not well planned will most likely result in the plaintiff's attorney digging a deeper hole than he or she is already in prior to the start of trial. Studies have indicated that 80% of jurors return a verdict consistent with their opinion regarding how the case should come out immediately after opening statements. Others believe that the jurors' minds are not made up in opening. Rather, they decide what the case is about, and that determination influences the light in which they view all evidence and the inferences that follow.<sup>2</sup>

I made a list of words that came to mind when considering the goals of an opening statement. My list included the following: inform, explain, instruct, lead, guide, persuade, promise, concise, simple, rules, damages, credibility, trust and rebut. Many more words could be added to this list. The length of the list shows how easy it would be for an opening statement aimed at fulfilling all of these goals to play directly into the hands of complexity, confusion and ambiguity -- the death knell of the plaintiff's case. The challenge for the plaintiff's attorney in delivering an effective opening statement is to concisely, simply, clearly **and without advocacy**, convey to the jury the following:

1. The story of your client's case;
2. What the defendant did wrong;
3. The consequences of the defendant's wrongful conduct;
4. What would have been proper conduct by the defendant;
5. How proper conduct by the defendant would have easily prevented the plaintiff's harm;
6. Why your client's case is important;
7. In what way your plaintiff has been harmed;
8. The day to day impact of the plaintiff's harms;

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<sup>2</sup> Ball, David, David Ball on Damages: A Plaintiff's Attorney's Guide for Personal Injury and Wrongful Death Cases (NITA, 2001).

9. The job and responsibility of the jurors individually and collectively; and
10. Assurance that you will show them how to do their job.

You may ask why I believe that the opening should not contain advocacy. Jury research has shown that as the plaintiff's attorney takes on the role of an advocate, there is an immediate drop in the receptiveness of jurors to the attorney's message. Advocating too early in the trial reinforces existing juror attitudes that the plaintiff's attorney is there to manipulate and trick the juror into giving money to an undeserving plaintiff. Remember the plaintiff's attorney's role is to guide and inform, not advocate, during opening statement. You develop credibility and trust by delivering on what you tell the jury in opening. It is only after you have earned that trust and credibility that you are free to become an advocate for your client's position.

David Ball's book on damages states that jurors believe the case is about what you emphasize in opening. Most of us put much more emphasis on winning liability than proving damages. David Ball's lesson is that opening is the attorney's opportunity to explain that the jury's primary job will be to determine how much money it will take to compensate an injured plaintiff rather than to decide who was right or wrong, i.e., liability. If the jury believes its primary job is to decide who is right and wrong, its attention throughout the trial will be focused on the evidence that will help them answer that question. On the other hand, if the jury understands that its main responsibility is to determine the amount of money required to fully compensate an injured plaintiff, the jury will focus on the damages evidence.

Remember we are talking about effective opening statements. One definition of effective is "able to cause some desired result." From the plaintiff's perspective, obtaining a verdict that fully compensates your injured client requires planning, preparation and more planning and

preparation. Simplicity, conciseness and clarity are the keys to obtaining the desired result from your opening statement.