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Opening statement: Creating a competitive advantage

The well-crafted opening statement can create unstoppable momentum

Opening statement is the lawyer's first opportunity to obtain a substantive edge on the opponent. In the battle of strategy, evidence, and demonstration, the opening statement can create momentum out of the gate that sets the tone for the entire case. Much like the 2014 Super Bowl when the Seahawks scored a safety after a bad snap twelve seconds into the game, creating momentum for subsequent domination and leading to a 22-0 score at halftime; the final score of 43-8 was the third largest point differential (35) in Super Bowl history. The two points scored in the safety was nothing for quarterback legend Peyton Manning to overcome; it was the momentum that created a competitive advantage for the Seahawks, turning what should have been a close game into a total bloodbath.

Creating serious momentum early in trial can demoralize your opponent and establish more opportunities throughout the trial to expose your foes' weaknesses. This article highlights strategies used in opening statement to create a competitive advantage – try them in your next trial.

The art of storytelling

Since the beginning of human communication, we have developed a strong emotional engagement to the storytelling process. Anthropologists have analyzed the great works of public speech, literature, and theatre confirming some commonalities in the art of successful storytelling. Using Aristotle's "dramatic structure" of beginning, middle, end, an opening statement can artfully convey your client's story in compelling fashion.

The reality is that, after hearing opening statements, jurors will develop a first impression or "tentative opinion." Some studies show that 80 percent of jurors' ultimate conclusions with respect to the verdict correspond with their

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tentative opinion after opening statements. For this reason, extraordinary emphasis must be placed on the opening statement to increase your chances of gaining an early lead on your opposition.

The opening statement should be a story, one with emotional triggers and themes to appropriately vilify the wrongdoer and create compassion for your injured client. Almost universally, it is best to start out with focusing on the defendant and the bad conduct. At the outset, you have little to no credibility and the jurors are looking at everything with a critical viewpoint. Focusing first on the defendant and his conduct is intended to establish a "gut feeling" critical impression of the bad guy from the outset. This approach may begin with a first slide showing the severe crush damage to your client's vehicle with the words "when a trucking company needlessly endangers the public, the company is responsible for the harm."

After an introduction focusing on the defendant and his or her conduct, you must then shift gears and introduce your client. Using pre-injury photographs, you can highlight your client before the incident, their work and family history, and something from their history that plays into your theme or "plaintiff's story." Every person has a "story" or something interesting which makes them unique but that will allow jurors to identify with them. It is up to the trial lawyer to spend time with your client and the family to understand what this story is and how best to get that story across to the jury.

Tell the liability story again from the defendant's perspective. Make your story one that appeals beyond just the circumstances of your client and this defendant. Focus on the reptilian factors of safety and danger to the public to the extent possible.

In the damages' portion of your story, provide a clear breakdown of the economic damages (past medical expenses, future medical expenses, past loss of earnings, future loss of earnings, etc.). When it comes to non-economic damages there is a split of authority with respect to whether you should tell the jury up front how much you believe is reasonable for past and future non-economic damages. Some lawyers get this out of the way in voir dire and repeat the number in opening statement. The risk in that scenario is potentially losing some jurors who may be offended by the high number without having had the benefit of hearing the evidence. Sometimes the case gets better, or worse, throughout the trial and giving a suggested number for non-economic in the opening can create an issue. My personal approach is to discuss generally the category of non-economic damages and touch on the testimony the jury will hear from the family and friends to support a substantial award.

The following seven topics focus on strategic methods you can employ to obtain a competitive advantage in your opening statement establishing momentum to carry you to a successful verdict.

Evidentiary Stipulations – Get the evidence in before you begin

With judicial resources being ever more limited, trial courts are encouraging pre-trial evidentiary stipulations. This includes pre-admitting evidence that the parties can agree upon. Obviously, the pre-admission of evidence depends on a certain amount of cooperation from opposing counsel. However, an organized approach to pre-admission of evidence can lead the trial court to make rulings on certain evidentiary issues before opening statement. The following is a discussion of how my colleague Tom Schultz used this approach in a trial we did together which truly created unstoppable momentum resulting in a successful verdict.

In a recent bus-versus-pedestrian case, this strategy began when Tom appeared at the final status conference with a streamlined notebook of all of plaintiff's trial exhibits. Defense counsel was given this notebook and asked to tab anything to which he objected. The court was informed that we had already started the process of agreeing to certain exhibits for pre-admission. The judge offered to assist in giving his preliminary views on any disputed items.

Starting off in an organized fashion in this way enabled both sides to gain credibility with the court at the outset. Over the course of the next week before trial began, there were several meet and confers about the exhibits. The reality is that most evidence that gets admitted in trial is something that is either stipulated, or should be. In our case, the defense counsel agreed to many exhibits but refused on others. By way of motion in limine, we were able to have the court rule on pre-admission of a limited number of important exhibits we wanted to use in opening statement. When it came time for the Opening statement, all of the key evidence in the case was pre-admitted including medical records, accident reconstruction diagrams and animations, and defendant driver employment application and training records.

This kind of opening statement felt more like a closing because we were able to refer to so much that was in evidence already. It was impossible for the defense to recover.

Electronic presentations in opening

In Los Angeles, it is important to remember that prior court approval or stipulation of counsel is required to use anything other than the chalkboard or butcher paper. The Superior Court of Los Angeles County, Local Rules, rule 3.97 states: In opening statements to the jury by counsel, no display to the jury or reference should be made to any chart, graph, map, picture, model, video, or any other graphic device or presentation except (1) when marked as an exhibit and received in evidence, (2) by stipulation of counsel, or (3) with leave of court. With prior approval of the court, counsel may use the chalkboard or paper for illustrative purposes during opening statements.

It is recommended to file a motion in limine to allow for electronic presentations in opening as to not run afoul of Local Rule 3.97. It is well-established that the "use of photographs and tape recordings, intended later to be admitted in evidence, as visual or auditory aids" have been deemed "appropriate." (*People v. Fauber* (1992) 2 Cal.4th 792, 827.) In

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People v. Wash, (1993) 6 Cal.4th 215, a California Supreme Court case, the trial court allowed the prosecutor to use a taped confession, photographs, and slides in opening statement; this use was upheld as proper by the Supreme Court. *(Please contact the author for a sample motion in limine outlining the pertinent law on this topic.)*

Video deposition testimony of defense experts

The importance of playing clips of the defense experts in opening cannot be over-emphasized. This technique allows you to gain credibility with the jury by playing video of the other side's hired guns. For example, in a serious-injury case the defense medical examiner may admit that your client will have pain for the rest of his or her life. Such testimony carries huge weight coming from the opposition. Other times, the defense experts may take a hard-line position and call your client a malingerer or liar. In a recent bus accident case we tried in Oakland, the main defense doctor called our client "a liar." This worked nicely into the theme of our case since the defendant bus driver was caught on video calling our client a liar and refusing to summon emergency help. This type of testimony helps polarize the case at an early stage and makes it difficult for the defense to recover from.

Code of Civil Procedure section 2025.620(d) provides:

> Any party may use a video recording of the deposition testimony of a treating or consulting physician or of any expert witness even though the deponent is available to testify if the deposition notice under Section 2025.220 reserved the right to use the deposition at trial, and if that party has complied with subdivision (m) of Section 2025.340.
>
> (e) Subject to the requirements of this chapter, a party may offer in evidence all or any part of a deposition….

Code of Civil Procedure section 2025.340(m) requires that you give notice to the court and the other side of the parts of the deposition to be played. Notice must be made with sufficient time for the other side to make an objection and propose a counter-designation.

What this boils down to is for key treating doctors and defense experts, you will want to prepare designations of deposition testimony. With programs such as Transcript Pad and others, this process is now easily streamlined. These programs allow you to read the transcript on your tablet and highlight the testimony you wish to designate. A report can be generated which lists out the page/lines and testimony. While inevitably expert depositions are happening right up until the start of trial, it is essential to get the designations in as soon as possible. The last thing you want is for the defense to object that they have not had a reasonable amount of time to review and submit objections.

This code section is equally useful for treating doctors, plaintiff experts, and defense experts. For this purpose, we will often locate one or two helpful treating doctors and notice their deposition with video. The video of these treating doctors can be used at trial without the "unavailability" requirement.

In most trials you will require some court intervention regarding the scope of the allowed depo clips in opening. One helpful tip is to streamline the process and get rulings regarding the clips to be used in opening as opposed to the entirety of the depo designations allowed at trial. This approach saves an enormous amount of time and allows the trial to get started without taking undue time in a hearing regarding the designations.

You don't want to tip off your opponent to the best clips you will focus on so send them a pared-down designation which includes your opening clips. The court will likely be more inclined to make pre-opening rulings on designations if there are twenty clips at issue as opposed to one hundred. As a practical matter, it is helpful to raise this issue as soon as possible with the court to make it known that you are meeting and conferring and may need the court to make some rulings pre-opening. Some courts do not see this practice used very often and it may require some discussion regarding the specifics of section 2025.620(d). The sooner you get the ball rolling with the defense and the court about designations, the better off you will be.

Defendant deposition testimony

We place great emphasis on the value of video recording a defendant's deposition. The same is true for the defense Person Most Qualified, and the other defense employee witnesses. The Code allows you to use these video depositions "for any purpose." Code of Civil Procedure section 2025.620(b) states: "An adverse party may use for any purpose, a deposition of a party to the action, or….an officer, director, managing agent, employee, agent or designee under Section 2025.230" (Person Most Qualified).

If you are intending on playing designation clips from the defendant deposition, then you have every right to play portions in your opening. Make sure to timely file and serve deposition designations as mentioned above.

Defense contentions

It is important to take the necessary time to fully discuss each of the defense contentions in your opening statement. An effective way to do this is through the use of short video clips of the defendant and defense experts. Summarize the key defense points and have a rebuttal to each point explaining what the plaintiff's evidence will be.

This framework flows nicely with the strategy mentioned earlier of focusing on the defendant, his or her conduct, and now the attention being on the unsubstantiated legal arguments used by the defendant to avoid responsibility.

Be on your toes for the Hail Mary. Watch out for improper conduct by the defense!

After watching you effectively lay out the evidence, and dismantle their case in your opening statement, the defense will be reeling by the time they stand up to give their opening remarks. It is under these circumstances that desperate measures are employed. Much like when

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Peyton Manning was down 15-0 in the second quarter facing a 3rd and 13, he tossed a wobbling duck squarely into the hands of Seahawks linebacker Malcolm Smith. When the defense lawyer tries to break the rules you need to do what Malcolm Smith did. Intercept and run with it. Pick six.

While it is good practice to allow courtesy to your counterpart and avoid objections for trivial matters, it is critical to object when the line has been crossed to improper conduct. In order to preserve any claim of error on appeal an objection is generally required.

The following is a list of things to watch out for in the defense's opening statement:

• **Misstatements of the facts or law**. Where the misstatements were made in bad faith or intentionally, such conduct may violate the Rules of Professional Conduct and expose the attorney to disciplinary proceedings. (See *People v. Bolton* (1979) 23 C3d 208, 214. See RPC 5-200: "In presenting a matter to a tribunal, a member (A) shall employ…such means only as are consistent with truth; (B) Shall not seek to mislead the judge…. or jury by an artiface or false statement of fact or law…")

• **Matters known to be unsupported by the evidence**: "counsel in opening statements should not ... include testimony which they know will not be received, and state the testimony for the purpose of prejudicing the jury ..." (*Upham Co. v. United States Fid. & Guar*. (1922) 59 CA 606, 610.)

• **No good faith belief such mentioned evidence will be tendered and admitted**. "It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence." (*Hawk v. Sup.Ct*. (People) (1974) 42 Cal.App.3d 108, 121.)

• **Statements of opinion or personal belief.** (*Hawk* at 119; See also ABA Model Rule 3.4(e) "A lawyer shall not ... in trial ... assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.")

When faced with what is perceived to be an egregious violation, the appropriate procedure would be to object and ask for a side bar. Explain the basis of your objection to the Court on the record and ask for an immediate admonishment in front of the jury. Cite the above case law which should help your cause in the right circumstances.

Set-up for final argument

When giving an opening statement, it is critical that you clearly explain the evidence in an accurate fashion with no embellishments which will not come to fruition in the trial. The first thing many trial lawyers do in final argument is go back to what their opponent said they would prove in opening statement. Simply put, if you can't prove it, don't say it. Ask the jury to hold you to everything you tell them in opening, and to hold the defense lawyer to the same standard.

On the flipside, when your opponent is giving his or her opening statement, listen closely for inaccuracies, misstatements, and points you know will not come to light through the evidence. Use these points with witnesses throughout the trial to prove that the defense lawyer was overreaching or flat-out lying in opening statement. These points become powerful ammunition for your final argument to expose the untruths told by your opponent throughout the trial.

Conclusion

Trials are battles of impression and delivery. Winning the tentative opinion of the jury at the beginning of the case is critical. When done correctly, an opening statement can demoralize your opponent, creating further opportunities to expose their weaknesses. By using these strategies, the opening statement can give you a competitive advantage creating unstoppable momentum.

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