

# OPENING STATEMENT AS STORYTELLING

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## I. INTRODUCTION: OPENING STATEMENT IN PERSPECTIVE

- A. **An** effective opening statement is vital to success in trial and should rank high in the priorities of the trial lawyer.
- B. Opening statement is the most neglected phase of the trial and often improperly consists of legalistic phrases like "the evidence will show" followed by a fact and then a repetition followed by another fact.
- C. Studies show that the final result in a trial is the same as the tentative conclusion held at the end of the *opening statement* 75 percent of the time.
- D. Psychologists suggest two reasons for the importance of opening statement:
  - 1. Opening statement comes at the beginning of the case taking advantage of the psychological principle of primacy.
  - 2. A tentative conclusion is reached by the juror after the opening statement and evidence presented thereafter is judged in light of its proving or disproving the tentative conclusion. The opening statement predisposes the juror to one side or the other.
- E. Opening statement cannot be effectively done impromptu. It requires detailed and careful preparation.
- F. Opening statement must be carefully constructed to set the stage for the rest of the trial and must be carefully coordinated with the closing argument.
- G. *Opening statement* is a speech and must follow the fundamental principles of speech and drama.

H. The difference between effective speech, including opening statement, and ineffective speech is subtle but the difference in result is great.

L The principles of storytelling are most useful in making effective opening statements.

## II. THE LAW OF OPENING STATEMENT

A. The scope and manner of opening statement is, in general, within the discretion of the court and reversing of the decisions of the trial judge are rare.

B. The function of opening statement is to give the jury or judge a preview that will allow evidence to be put into perspective as it is admitted. The statement should be of the facts and reasonable inferences from the facts that are expected to be admitted.

C. Evidence the admissibility of which is questionable should not be mentioned in opening statement or should be cleared with the court prior to opening statement.

D. It is also permissible in opening statement to set forth the issues of the case.

E. Opening statement is not to be argumentative.

1. This is the most often sustained objection to opening statements.

2. Argument in opening statement is also bad persuasion.

- a. The jury is not ready for argument

- b. The attorney should let the facts argue for him/her because at this point in the trial persuading by telling a story is more effective than by argument.

## III. CONTENT OF THE OPENING-STATEMENT

A. Creative thinking or brainstorming from the beginning of the case produces the ideas for the opening statement.

B. The substance of the opening statement must forward the theory of the case.

C. Details must be produced that will allow the building of the story and word pictures discussed in Section V.

D. The theme and theme statement are vital components of opening statement.

#### IV. EFFECTIVE OPENING STATEMENT IS STORYTELLING

A. The purpose of opening statement is to give the factfinder a preview of the advocate's position so the place and significance of the evidence as it comes in may be understood.

B. The story is the device for organizing, understanding and retaining the facts and position set forth in the opening statement.

1. "Without the aid of an analytical device such as the story, the disjointed presentations of information in trials would be difficult, if not impossible, to assimilate." Bennett and Feldman, Reconstructing Reality in the Courtroom, Rutgers University Press 1981

C. Studies show that the process for factual determination is the taking of the story of one side in the lawsuit and testing it by putting that story next to the factfinders' beliefs as to how the world works. The result is determination of the plausibility of the story. The story is not believed unless it is consistent with the belief system of the factfinders. The same process is applied to the story of the other side. A comparison of the plausibility of the two stories determines the factfinders' findings.

D. Factfinders apply their belief systems, perceptual sets, life experiences, etc. to determine the plausibility of any version of the litigated event or transaction.

E. The story must contain sufficient detail to give background and place the matter in a context that supports the position adding plausibility.

F. An obstacle to using the story as a persuasive device is the feeling that to do so is unlawyerlike. There exists plenty of opportunity to use legal concepts and organize by elements so it should be acceptable to use the story as a highly persuasive device.

#### V. PUTTING TOGETHER THE STORY

- A. The principles, methods and devices of rhetoric, composition, and drama are all useful in putting together the story.
- B. The story persuades indirectly by setting forth details of background, context, and support.
- C. Description in detail setting forth the dominant interest is a very useful device.
- D. Narration giving emphasis to the prominent action by selecting the relevant detail is an important device.
- E. Painting word pictures by 'visualizing the scene and then describing or narrating the scene so that it is visualized by the factfinder is an unusually effective device.
- F. It is often best to start with a theme statement
  - 1. Start with "this is a case about . . ." and add a capsule description of the overall theme or issue.
  - 2. An example of a theme statement in a breach of contract case is "this is a case of a broken promise and all the trouble that breaking that promise caused."
- G. The middle part of the opening statement should consist of blocks which make separate points with the order carefully determined.
- H. Devices from drama and the movies such as flashbacks, flashforwards, close-ups with great detail, etc. are useful.
- I. Consider setting the scene in detail or building a character--either good or bad--the way it is done in drama.
- J. The humanizing of the client results in the identification of the factfinder with the client.
- K. The opening statement should end with a final appeal that tells the factfinder what is wanted as a result of the wrong detailed in the story or asks for vindication of the defendant's actions.

## VI. SPEECH METHODS WHICH DO NOT WORK IN TRIAL

- A. Effective speech must "live," have flexibility and spontaneity, have natural communication with the focus on the audience, and be "in the moment."

- B Written speeches which are read or memorized and recited or otherwise scripted are unsatisfactory for trial.
1. A trial is a clash of ideas which requires flexibility so as to be able to battle on any issue at any time. Scripted speeches do not have this flexibility.
  2. Half-memorized speeches result in stumbling delivery and are not "in the moment." The energy put into the process of remembering prevents one from speaking with the audience.
  3. Memorized speeches are inflexible and cannot be effectively adjusted to the circumstances of a trial.
  4. Speeches which are read lack flexibility and are not "in the moment" and are difficult to make "live."
- C. Impromptu speeches lack preparation and organization and are seldom effective.
- D. The most often used method of operating from detailed notes is unsatisfactory as being dull and unpersuasive. It consists of the following:
1. The notes become the focus of the speech rather than the audience.
  2. The speaker feels prepared in direct proportion to the amount and detail of the notes.
  3. The speaker is merely a conduit for what is written on the notepad.
  4. The speaker is not relying on himself/herself as the source of the subject-matter but is relying on the notes.
  5. The preparation relies on the notes as containing the subjectmatter rather than the speaker becoming saturated so that he/she is the source.
    - a. This seems like a distinction too subtle to make a difference, but the difference in result is tremendous.
    - b. There is a different psychology involved in becoming saturated as opposed to that involved in

making voluminous notes with the expectation that the notes will be central to the giving of the speech.

## VII. THE EXTEMPORANEOUS METHOD OF SPEECH

A. The extemporaneous method is the only effective approach to trial.

B. The extemporaneous method requires deep preparation and organization but leaves the speech to be made at the moment of delivery.

G The extemporaneous method is **flexible and lives**. It comes from the heart and is natural and real. **It has a number of characteristics:**

1. The focus is the audience but the source of the message is the speaker and not the notepad.

2. The speaker is saturated with the case.

3. The Notepad is only an aid-- it is not central. The speaker is not a conduit for what is on the notepad.

4. The speaker's saturation with the subjectmatter of the trial allows a flexibility and spontaneity so the speaker can immediately deal with any situation which arises.

5. The speaker is responsive to the audience, and this makes the audience responsive to the speaker. The relationship between the speaker and the audience, therefore, lives.

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6. The extemporaneous method is natural and conversational and allows one to come across as a true believer.

7. The saturation of the speaker comes from much deep thought about the subject-matter. The depth of thinking produces depth in the speaker which is the saturation that is basic to the extemporaneous method.

D. The extemporaneous method requires an effective organizing and note system.

I. Related thoughts must be organized into points. Each point and its supporting material should be put into a block.

2. The block should be given a name which expresses the point or subject-matter and this name becomes the jog note for use during speaking.
3. The purpose of the jog note is to jog the mind of the speaker as to the point or subject to be covered. The **great** majority of the material supporting the point should then come from the speaker (as a result of the saturation) **without** reference to notes.
4. When there is a need to- be sure that certain things are mentioned, they may be listed and the list used as a checklist after the speaker's memory is exhausted on the subject in contrast to looking at the notes for each item. Quotations, etc., may be set forth verbatim in the notes and read to convey exactness to the audience.
5. Some say to use no notes, but this is ordinarily too much to ask. Using no notes is ideal but seldom feasible, so one should not hesitate to use notes as an aid to memory so long as they are only an aid and the speaker is the source of the information.

## VIII. THE LANGUAGE OF OPENING STATEMENT

- A. The language of opening statement is considerably different from the abstract and general language ordinarily used by lawyers. One must learn the language of *opening statement*.
- B. Use language precisely-say exactly what is meant.
- C. Use standard English-take legalese and the abstract and translate it into vivid, plain, simple language.
- D. Use power language.
  1. Take out qualifiers like "I think," "I believe," "I will attempt to show . . . ."
  2. Use the active voice.
  3. Rely heavily on nouns and verbs.
  4. Leave out unintentional hesitations and useless verbal pauses.

5. - Use language that has appropriate emotional content and appeal.

E. Use vivid language.

1. Use concrete, not abstract language.
2. Use specific, not general language.
3. Paint vivid word pictures.
  - a. The attorney should visualize the matter described and paint it for the jury.
  - b. There is great power in belief that comes from being able to see the event in detail.
  - c. The use of word pictures must be learned. Lawyers intuitively speak in abstract and general terms.

F. Have variety in sentence length, but tend strongly toward short sentences.

1. Recognize that written sentences are normally longer and more complex than sentences delivered orally.

G. Select and use key words.

H. Use "quo tables"--ways to say things which stick in the listener's memory.

## IX. EMPHASIS AND IMPACT DEVICES

- A. There must be emphasis to the extent that your points will dominate the conversation in the jury-deliberation room.
- B. Cases are lost because the jury does not know that something is important and, therefore, does not remember the point.
- C. Emphasis may be gained by telling the jury how important something is, by giving time to the point, by use of visual aids, by writing on a chart, etc.
- D. Speech devices are tremendously useful.
  1. Quotations.
  2. Analogies.

### Opening Statement as Storytelling ... Rensch

3. Similes and metaphors.
4. Illustrative stories.
- . 5.. Painting word pictures
6. Repetition.
7. Refrain.
8. Triples like "blood, sweat and tears."
- \_ 9. Parallel structure like "Ask not what your country can do for you; ask what you can do for your country."
10. Enumeration like "There are five facts showing negligence: (I).

### X CONCLUSION

The opening statement can frame, the issue, focus the case, and tell the story in a powerful way that will make the rest of the case highly persuasive.