

## One Chance to Make a First Impression:

### The Primacy of the Opening Statement

By: Michael Cole

Have you ever sat watching a football game (or any other competition) without any particular reason whatever to root for one side as opposed to the other? That didn't last long, did it? Didn't you find yourself quickly taking sides, probably for reasons you couldn't quite pinpoint?

And no wonder: a state of indecision is alien and uncomfortable to the human psyche. Therefore, we look for reasons, irrational though they may be, to escape that state. The same applies to juries – after all, they're just collections of individuals. And those individuals, consciously or not, are looking for reasons to take one side or the other as quickly as possible. As a trial lawyer, the opening statement is your first best opportunity to give jurors as many reasons to side with you as you possibly can. Therefore, do not stint in your effort to make the most of that opportunity.

Indeed, I maintain that the opening statement is without question *the* most important part of almost every trial. Most of us are familiar with the hoary “rules of primacy and recency”: people remember best what they hear first and last. But because the psyche looks to escape a state of indecision as soon as possible, primacy is by far the most important – what the jury hears first. Statistics bear this out. Most jury studies show conclusively that the majority of jurors have, after the opening statements, either made up their minds or are *strongly* leaning in one direction or the other.

And then there comes into play another factor of the human psyche – reinforcement. Once a person has made up his mind, he doesn't like to be proved wrong. Therefore, he actively looks for facts (evidence) that support his initial impression, and discounts those that don't. Thus, studies also show that once jurors have made up their minds, a very small percentage are willing to change thereafter despite lofty exhortations from both the court and counsel to “keep an open mind,” and “reserve judgment until all the evidence is in.” (By the way, you'll never hear me say that to a jury; I want their minds to close like steel traps – in my favor – as soon as possible.)

But even if you still disagree with my fundamental premise about the primacy of the opening, some of the rules and tips laid out below – my recipe for an effective opening statement – are ones you may still find helpful. If not, I hope to see you in court some day.

First, argue your case! You should do this at every opportunity, even in *voir dire*, but again, your first best opportunity is the opening statement. And yeah, yeah, I know: an opening statement is not argument – that comes at the end. Where that rule is found in any code or case law I don't know, but it has infected, I guess by osmosis, almost every court in the land, and Virginia certainly is no exception.

Early in my career, I'd stand for my opening statement and before I was three sentences into it I'd hear, “Your Honor, counsel is arguing his case in opening.” That

almost invariably was followed by the judge intoning, “Mr. Cole, don’t argue your case in opening; simply outline your case to the jury.”

Huh? I thought. What’s the difference? I mean, I’d heard that argument is drawing inferences from the facts. Okay, but almost all inferences are opinions about facts. How can I talk about facts without laying the groundwork for them? I was totally flummoxed, and for a while I resorted to the dry, boring, ultra-ineffective drone of drivel and dry detail that characterizes so many opening statements.

But then, at a seminar, my eyes were opened, and a whole new way of arguing in opening was revealed to me in these simple words: “We intend to prove ...,” and “The evidence will show ....” I quickly found that as long as I prefaced my remarks with one or the other disclaimer, I could suggest to the jury that pigs could fly! “Yes, ladies and gentlemen, we intend to prove, we intend to bring evidence before you to show conclusively, that pigs can fly!”

At last, I was liberated, and I argued and I argued in opening statement, and better yet ... I began to win cases. For example, I told a jury in opening that I intended to prove – that “the evidence would show” - that the plaintiff was a “pathetic liar, a cheat and a fraud, and his whole case is based on lies and deceit.”

After all, whether the plaintiff is, in fact, a liar, a cheat and a fraud is a factual issue, is it not? He is or he isn’t – as a matter of *fact* –and that fact was supremely relevant to my case in that particular instance. I only use this by way of extreme example. If you don’t have “the goods” to prove that the plaintiff is, indeed, a liar, then don’t make the promise that you will. But if you do have the goods, you’re not doing your job if you don’t tell the jury so – early and often.

Second, be passionate. Show your emotions. Let the jury know you *believe* in your case. After all, if you don’t appear to, how do you expect the jury to get riled up over the fact that “a pathetic liar” has dragged your unfortunate client into court to waste everyone’s time – yours, theirs, the court’s - with a frivolous – indeed fraudulent – claim? One old chestnut I love to hear from opposing counsel for the plaintiff in opening is that bit about how the burden of proof is like the scales of justice. You know: “If the evidence tilts the scales the slightest bit in his/her favor, you have to find for my client.” (Inspiring stuff, that is!)

To which I respond: “What we intend to prove is that the reason counsel was talking to you about that scale is that his evidence is so thin he’s got to rely on tiny movements of a scale to win. But we, ladies and gentleman, though we have no burden of proof, have no intention of hiding behind one either – we intend to undertake our own burden to show you that the plaintiff’s case is a house of cards that won’t stand up to the slightest scrutiny. Our evidence will bring that scale slamming down on our side.”

There’s ample case law out there to the effect that “rhetorical flourishes” and “fiery language” are not barred from the opening statement – indeed, these are legitimate and

time-honored techniques – as long as you talk about *what you intend to prove!*<sup>1</sup> After all, part of your job is, like it or not, to entertain the jury – and to come across as, if not necessarily eminently likeable and a nice guy (which is good if you can), the purveyor and protector of truth.

That impression will be transferred from you to your client, because to the jurors *you* are their most visible and consistent manifestation of your client. If they don't like you – if you bore them – odds are they won't like your client. Concede what you have to, admit that the other side has points in its favor. And never, *ever* try to mislead a jury. Your credibility is your only stock-in-trade before a jury. And once it's gone, the jury is not going to buy anything you have to sell.

And that's the reason I am amused by another old chestnut that often comes up during opening statement. The lawyer will say, "Nothing that either I or my distinguished colleague (opposing counsel) say to you is evidence; the only evidence will come from the witness stand." 'Oh, yeah,' the jurors are probably thinking, 'well then why should we listen to you at all?' After all, you're not supposed to be arguing, and according to you, nothing you say is fact, right? *The facts* are going to come from the witness stand!

I think this also betrays a certain insecurity on the part of counsel – a pre-emptive apology for anything counsel might misspeak, or just outright get wrong. (Far better to forego this mealy-mouthed approach; if you make a mistake, admit it, apologize for it, and move on.)

Third, *personalize* your case by putting it on your shoulders – you must fully become the embodiment of your client to the jury. You, as the lawyer, have two sometimes conflicting goals: 1) to present the evidence in as favorable and forceful a light as possible for your client; and 2) don't come off as a lawyer trying to "spin" the facts and play with words. One thing that will help right off the bat is to ban from your vocabulary, while within hearing of the jury, the term "my client".

When you use that expression, what are you subconsciously conveying? That's right – that you're a hired gun being *paid* to convince a jury of something on behalf of "your client." Before the jury, my client is always "Mr. X" or "Ms. Y",<sup>2</sup> while the plaintiff of course remains "the plaintiff", or better yet – "the complaining party."

Far better that you become your client. Your argument should include lots of "*we* intend to prove," "*our* evidence will be," and that the evidence will show that the plaintiff is trying to do this or that devious and dastardly thing "*to us*."

Fourth, always, always, *always* make the case bigger than its facts. You must develop a theme that gives the jury a *cause* to promote or defend! Remember the 'lying defrauder' described above, looking to hoodwink the jury and pick up some undeserved

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<sup>1</sup> See, e.g., \_\_\_\_\_.

<sup>2</sup> A client such as, say, "Acme International Dynamics Corporation, Inc." of course becomes "Acme," "we" or "us".

**cash on the cheap? Well, it's your job to make the jury understand that we (society, the community at large) need to make a stand against this sort of thing now, and this case is the place to start! Note: this is not a "send a message" argument, which is improper – rather it is a pitch to the jury to strike a blow for justice overall by putting a stop to such nefarious tactics *in this particular case*.**

**And finally, when Shakespeare said, "This above all; to thine own self be true, and it must follow, as the night the day, thou canst not be false to any man," he surely was talking to trial lawyers. Not everyone is loaded with personal magnetism, natural charm, flowing eloquence and an instantly incisive wit. So be it. Don't try to come off to the jury as something you're not. A jury will smell it every time, and it hurts your most valuable commodity – your credibility. Be yourself, be prepared with a thorough knowledge of the facts and the law, be passionate, and develop your case in a way that allows you honestly to project an air of supreme confidence in what you are "selling."**

**Then, the winning will take care of itself.**