

The basics of openings

By: F. Dennis Saylor IV and Daniel I. Small ◉ December 1, 2016



Our next few columns will cover the topic of opening statements. Although we agree on the basics, we have different views on some issues, as is common among practicing lawyers and judges.

We're going to change the format of some of these columns in order to explore some of the differences. We'll start off by giving Dan the floor to introduce the topic, and then Judge Saylor will add some thoughts of his own.

Dan Small —

The old saying is true: You only get one chance to make a first impression.

The point of an opening statement is the same as the point of the whole trial: to win. The point of an opening is not to show how smart you are, or how thoroughly you can recite the facts.

Rather, it is to put facts and themes together into a clear and compelling story — a story that provides an introduction and background to the case, and a basis for members of the jury to understand how and why they should listen to and support your case, as the evidence comes in.

An effective opening statement requires an intimate knowledge and understanding of the entire trial environment.

Know your court. The limits on opening statements are often more a product of local practice and custom rather than clear written rules. Understand the requirements of your judge and jurisdiction, and work within those limits.

Know your case. Not in the sense of being able to recite endless detail, but in the sense of understanding what are the stories and themes behind it. What happened, who is to blame, and how do you make that clear? Juries want to do the right thing: What is it?

Know your jury. The jurors have gone through a selection process that is probably longer than they imagined. They have been told that they are there to use their common sense and do the right thing. Now they're seated together, waiting for you to show them what that is. Don't disappoint them. Draw them in with a compelling story, and make them want to right a wrong, in your client's favor.

Know your opponent. Know what your opponent will argue and how. If you go first, try to anticipate and deflate it. If you go second, be prepared to counter it. Don't legitimize the opponent's arguments by making them your centerpiece, but don't show that you're afraid of them by ignoring them.

Know yourself. In the opening statement, it is particularly important to "be the best *you* that you can be." What are you good at? What's your most comfortable style? Juries are pretty good at spotting a phony. Don't try to be someone you are not. Be yourself.

The goals of an opening statement are to dramatize, humanize and organize. Each one is a difficult challenge.

Judge Saylor —

Five additional thoughts:

First, the principal purpose of an opening statement is to outline the facts that you expect will be proved. Don't lose sight of that. The facts should almost always be presented as a narrative — that is, a story told in a sensible order. (In the case of a criminal defendant, that may not be a realistic option.)

Second, unless you have a very compelling reason, you should tell the story in

chronological order. Chronology is the basic framework for narrative; without it, it's much harder to follow the story. Don't organize the facts around your themes, and don't give a witness-by-witness account of the expected testimony.

Third, an opening statement also is an opportunity to orient the jury. Jurors tend to be a little overwhelmed and disoriented at the start of the trial. Lawyers as a rule don't do nearly enough to help them and often assume jurors know things that they really don't.

Fourth, an opening statement is also an opportunity to introduce key terms or factual concepts, and even to some extent key legal concepts. Don't forget to do that.

Finally, themes are important, but facts come first. There are lots of dangers in

over-emphasizing themes at the expense of facts, or twisting the facts to fit the themes. We'll discuss those issues in a later column.

Previous installments of Tried & True can be found here. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.

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