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Some common mistakes in opening statements

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There's no such thing as a perfect trial, or anything close to it. Some mistakes, though, are easier to avoid than others. Here are some common ones lawyers make in opening statements.

1. **Not starting at the beginning**

Jurors tend to feel overwhelmed at the beginning of a trial, particularly in complex cases. Information is coming at them from all angles, and they often feel disoriented and confused.

Even if you use a brief thematic or other introduction, the first order of business is to orient them. Tell them who the parties are, what kind of a case it is, what the dispute is about, and so on. Plunging right into the evidence, without any set-up at all, is risky at best.

2. **Using a witness-by-witness recitation of the evidence**

There are several basic ways to organize your opening statement. The most basic, and normally the most sensible, is a chronological description. But one common method lawyers use is to organize it by witness:

You will hear from Mary Jones, the executive vice president for human resources. She will tell you [_____] … . You will then hear from Joe Smith, the deputy superintendent for shipping and receiving. He will tell you [_____] … .

And so on. This is never a good idea. An inherent flaw in the trial process is that the evidence comes in witness-by-witness, in a disjointed fashion. You only have two opportunities to pull that evidence together into a single coherent narrative: your opening and your closing.

Why would you organize your opening in the same disjointed way that the trial will proceed? And when the jury likely won't remember any of the names, especially without faces to match them to? Would you ever tell a story that way outside the courtroom?

3. **Reciting unnecessary detail**

The opening statement is normally the first time that the jury learns anything at all about the case, other than the most basic facts (such as, "This is a murder case."). Again, jurors often feel overwhelmed at the beginning of a trial. It is therefore the worst possible time to load up on unnecessary detail. Yet lawyers do it all the time.

Eliminate every single detail from your opening statement that is not necessary to tell the story or make a point. Such details are not merely superfluous; they are like lead ingots weighing your opening down.

Certain types of detail are particularly problematic: dates, times, addresses, witness names and occupational titles are common examples. Suppose, for example, you want to say, "The meeting took place on May 16, 2007." It might matter that the meeting took place on May 16, but chances are it doesn't. How about "May 2007"? Or "later that year"? Does it even matter that there was a meeting?

Compare these two approaches:

This: *At the bi-monthly human resources staff meeting on August 16, 2014, the executive vice president for human resources, Mary E. Jones, spoke with the Midwest regional personnel director, Roberta Maria Hernandez, about a potential transfer of the plaintiff to the South Central regional sales and marketing office in Wichita, Kansas.*

Or this: *In the summer of 2014, her supervisors discussed transferring her to Kansas.*

Of course, some details help to paint a picture or propel the story forward. An opening with no detail would be flat and uninteresting. But if it doesn't matter, or doesn't help, take it out.

4. **Not using visual aids**

Visual aids should be an integral part of any opening statement. They will help almost any presentation.

Let's take a simple automobile accident. An obvious visual aid would be a diagram of the intersection where the accident occurred. An ordinary juror would surely find that very helpful, as opposed to having things just described orally ("the vehicle proceeded in a southwesterly direction"). And it can be created or even downloaded easily on a home computer.

It's hard to see how the negatives could ever outweigh the positives, but too many lawyers do not use them, or don't use them enough.

5. **Stating, "What I say is not evidence"**

It's true, but why say it? Many jurors won't even understand what it means. And it suggests that maybe the jury shouldn't give too much credence to what you have to say. Certainly it adds nothing to the force of your presentation. Let the judge say it, not you.

6. **Making risky promises**

Be careful about making promises — explicit or implicit — that you may not be able to keep. If you promise that something will come in, and it doesn't materialize, you'll hear about it later — and you won't enjoy it when that happens.

If there's any doubt about whether you will be able to prove something, leave it out.

7. **Reading a script**

Openings are peculiarly susceptible to being read aloud in a stilted or wooden manner. This is probably because lawyers tend to prepare their openings more carefully than their examinations or closings, and because they're more likely to be nervous at that point in the trial. Script your opening — carefully — but deliver it, don't read it.

You'll make plenty of mistakes at trial. All lawyers do. But that's not an excuse for being boring or confusing in your opening. Almost without exception, you should have enough time to prepare and get it right.

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.