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Some common challenges in opening statements

By: F. Dennis Saylor IV and Daniel I. Small February 9, 2017

With this column, we wrap up our discussion of opening statements by addressing some of the more difficult challenges an opening may present.

1. Introducing key legal concepts

The traditional rule is that any discussion of the law or legal concepts is out of bounds. Many judges are terribly prickly about this subject and will growl at you (or worse) if they perceive that you are treading on their turf.

The problem, of course, is that most cases turn directly on one or more legal principles. Did the defendant "intend" to evade his taxes? Did he "possess" a firearm? Did he "conspire" with others to distribute drugs? Was he "negligent?" Did he "discriminate?"

Often it is strongly desirable to make the jurors understand the relevant concepts at the beginning of the trial, before they hear the evidence.

If the case turns on a legal principle, you need to say so. But be very careful. Do it in broad terms, with minimal legal language. Never use explicit definitions or technical language. Don't say, for example, *"To act intentionally means to …"* or *"Negligence is defined as … ."* And don't delve too deeply into any legal issue.

If the legal concept is simple and uncontroversial, you can usually just say it. For example:

Mr. Jones does not deny that he did not report that income on his tax return. But he did not act knowingly and willfully — in other words, he did not do it on purpose. He was sloppy, and neglectful, but he did not intentionally evade his tax obligations.

Or:

We will show that XYZ corporation was negligent — that it had a duty of care to its customers to keep its store safe, and that it breached that duty when it failed to fix the broken floor.

Whatever you do, be absolutely 100 percent certain that nothing you say is disputed, or even slightly controversial, in terms of its content. Nothing will anger the judge more quickly than stating a proposition of law that is wrong.

2. Anticipating your opponent's arguments

If you're a civil plaintiff, and therefore going first, you want to anticipate your opponent's points. It's obviously somewhat tricky to anticipate something that hasn't been said yet. If you're too specific, for example, you may get it wrong. And some judges may not let you go very far down this path. This is often a good spot for rhetorical questions:

I expect that you will hear testimony from the company that Mr. Jones wasn't performing his job properly. Of course he wasn't perfect; no one is. But ask yourself, as you listen to the evidence: Is that the real reason he was fired? Or was something else going on?

If you're a prosecutor, be exceedingly careful about anticipating defense arguments. With rare exceptions, it is almost impossible to do so directly without impermissibly suggesting that the defendant has to put on evidence, or otherwise shifting the burden of proof. So don't say, for example, *"I expect that the defendant will try to show that … ."*

3. Addressing weaknesses in your case

Should you try to address the weaknesses in your case? Yes, almost always. Try to take the sting out of any bad facts, to the extent you can. You don't want to ignore them, and thus allow the other side both to introduce and frame the issues.

Usually, the best way to handle this is something along the following lines:

It is true that we do not have a single witness who saw everything. The case has been pieced together from multiple witnesses and multiple sources of evidence. Some of those pieces do not fit together perfectly, and there are some minor gaps. But that evidence, circumstantial though it may be, compels only one conclusion.

Or:

You will hear that Mr. Jones was not a perfect employee. It is true; he was not. He was occasionally tardy, and he had some difficulties with a supervisor many years ago that led to a mediocre performance review one year. But you will hear nothing to suggest that he was not an honest and hard-working employee who deserved a shot at a promotion, regardless of his sexual orientation.

This can also be tricky in practice, especially if you're trying to keep a bad piece of evidence out and the judge hasn't ruled yet. Still, as a general principle, if the jury is going to hear something bad, let them hear it from you first.

4. Thanking the jury

Should you thank the jury in your opening? Conventional wisdom says yes. Most lawyers do it; the chances are good that your opponent will. Why not do it? Because it may sound a little bit phony. Jurors haven't done much yet that's truly worthy of thanks, and they know it. And you don't want to strike a false note, or seem like a flatterer, right from the outset.

If you decide to thank them, don't overdo it. Just say it, and move on. Alternatively, if you want to say more, make sure it's genuine. You could try saying something like this:

Thank you for your jury service here this week. I understand that all of you have busy lives and that we're imposing on your time. The best way I can thank you, and show my appreciation, is by trying not to waste your time. I can't promise that I'll be perfect, but I'll do my best.

However you phrase it, take care not to leave the impression that you are insincere in any way.

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.