

Openings: telling the story

By: F. Dennis Saylor IV and Daniel I. Small ◉ December 30, 2016



Here's another installment in our point-counterpoint series on opening statements. We'll begin with Dan.

Dan Small —

As lawyers, we play many different roles: advocates, counselors, drafters, reviewers and much more. One of the most important roles, though, is storyteller, and nowhere is that more important than in opening statements.

A good opening statement weaves the facts into a story that grabs the listeners, draws them in, and makes them listen to the evidence at trial through the perspective of your story.

A few years ago, movie director Andrew Stanton ("Toy Story 2," "Finding Nemo," "John Carter") gave a talk titled "The Clues to a Great Story." In it, he gave his idea of "the greatest story commandment, which is 'Make Me Care!'"

Jurors today live in a world of short attention spans and practically infinite choices. When they are confined to the jury box at the outset of a trial, you have their attention. But it won't last unless you tell a compelling story that makes them care.

How do you accomplish that? Stanton gives several "clues" that help provide a good start.

1. Know your punchline. One of the many lines attributed to Yogi Berra is: "If you don't know where you're going, you might wind up someplace else." So it is with opening statements. Everything — language, themes, substance, structure — should lead to the punchline, the ultimate message. If it doesn't lead to that goal, consider taking it out.

2. Make a promise. Promise your audience — the jurors — that this story will lead somewhere that's worth their time. It's not just a contest between bickering lawyers. They see enough of that on TV. It's something real, something important, something lasting.

3. Make them work for it. From our earliest years, we love to figure things out ourselves. Whether it's a child's jigsaw puzzle, or the complex puzzle of a case in court, we most enjoy, and best remember, the puzzles — the challenges — we solve ourselves.

Therefore, you can try to convince a jury of your conclusion by mercilessly pounding on it, or by organizing and presenting the case in a way that inexorably leads jurors to it.

Thus, if an opening is done right, we can then watch in amazement as one juror after another reaches our conclusion *with* us, not *from* us. Don't deprive them of that joy and yourself of that power.

4. Keep them engaged. Don't falter in your mission by getting lost either in detail or in harangue. Keep your audience engaged by keeping your story real, human and moving forward. "Real" in the sense of real-world events, not abstract concepts or hypotheticals. "Human" in the sense of human interest: Who are the players and what are their strengths, weaknesses and motives?

Keep in mind that good stories are about people — their actions, relationships and motivations. No matter how much your case may involve documents, numbers, science or whatever, always keep the human element in mind.

We all love a good story — and a good storyteller. It has been part of our lives since we were very young. Sadly, too many lawyers get to trial and make the mistake of thinking that this is a lecture — or worse yet, a diatribe — not a story.

Bring the jury with you, and it will appreciate the journey, and you, far more.

Judge Saylor —

I agree with Dan's basic points, but as usual some cautions apply.

It is certainly true that the central focus of your opening statement almost always ought to be the story (I would call it the narrative). And it is certainly true that you should tell the story, if at all possible, in a compelling way.

Lawyers sometimes forget that and wander all over the place without ever getting around to a coherent description of the facts. More often, they tell the story, but do other things that rob it of its force — such as encrusting it with legalese and unnecessary detail.

But don't take the notion of storytelling too far. The movie director can do all kinds of things to make his story engaging. He can cut corners, disregard anything that doesn't fit, or just plain make stuff up. You can't do that. Plus, the director doesn't have an opponent, waiting to pounce on his mistakes.

So, while it's very important to tell an engaging story, make sure you aren't sacrificing accuracy or ignoring harmful facts.

The idea of making a "promise" also gives me some pause. Be careful about doing this literally; it's a whole lot easier to promise something than to deliver it. If you do make a promise or a prediction (for example, "There will be no evidence of x"), you should be absolutely sure that it can't go wrong.

And I wonder about making the jury "work for it." It's certainly true that people don't like being hit over the head with arguments, or having other people tell them what to think. But jurors are often called on to make difficult decisions arising out of complex facts. It's the attorney's job to guide them to the correct decision. I wouldn't assume that they'll get it right with a few subtle hints here and there.

Finally, if you're representing a criminal defendant, you may not really have a story to tell, or if you do it may be quite circumscribed. You may be limited to trying to accomplish other things, such as humanizing the defendant and reminding jurors of their obligations.

You need to be as engaging and compelling as possible, but don't try to tell a story that doesn't fit the facts. You're likely to lose your credibility without accomplishing anything.

Previous installments of Tried & True can be found at masslawyersweekly.com. 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.