COLLECTIVE WISDOM

DESIGNING AN EFFECTIVE OPENING STATEMENT

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Designing an Effective Opening Statement

It is paradoxical to write about a component of trial—the opening statement—that there is no absolute right to present. Although taken for granted as a trial advocacy essential, the United States Supreme Court has implicitly stated there is no Constitutional violation if opening statements are curtailed or precluded entirely.

When holding that there was such a right for closing statements, the Court explained that "[n]othing said in this opinion is to be understood as implying the existence of a constitutional right to oral argument at any other stage of the trial or appellate process."[1] Lower courts have run with that proposition, reiterating as an affirmative statement that there is no constitutional right to make an opening statement and rejecting claims of ineffective counsel when a lawyer chooses to forego it.

That is remarkable, because no one questions the importance or potential efficacy of an opening statement. That efficacy has taken on the status of an eternal truth, with too many claiming that 80% of verdicts are decided at the end of openings, a point even regurgitated in decisional law. But that is a myth, as Hans Zeisler, the author of the research to which it is attributed, has made clear.[2] No researcher posed that question—but the assertion lives on.

The 80%-mind-made-up fallacy does not diminish the power of and opportunities found in the opening statement. Whether it is the primacy affect, the framing effect, the distilling of a complex set of facts into a logical story that makes comprehension and retention possible, the creating of a theme that resonated and conveys the righteousness of the cause, or the first (or early) step in creating trust between jurors and counsel, the opening paves the way for a successful trial.

Before going further, it is important to note that the opening statement as a component of a trial has not always been a staple of American jurisprudence. "[T]here was no settled body of English law concerning opening statements to which the framers of our Constitution could look when the Sixth Amendment was drafted in 1789."[3] But it has its origins in Anglo-American legal history, albeit with a function different from that of persuading the factfinder:

> **In an 1835 English murder trial, Rex v. Orrell, 1 Mood. & R. 467, 7 Car. & P. 774, 173 Eng.Rep. 337, 338, counsel for the prosecution, after stating the facts,**

1 *Herring v. New York,* 422 U.S. 853, 863 n.13 (U.S. 1975).
2 https://plaintiffmagazine.com/recent-issues/item/a-mind-is-a-terrible-thing-to-change (last visited Nov. 12, 2023).
3 *United States v. Salovitz,* 701 F.2d 17, 19 (2nd Cir. 1983).

> **indicated that there was evidence of previous expressions and declarations of the prisoner which he (the prosecutor) would not detail, whereat the presiding judge, upon consultation with an associate, ruled as follows: "We think the fair course toward the prisoner is to state all that is intended to be proved."**[4]

And even where permitted, it was not always the custom to make use of an opening. The waiving of opening statements "was a frequently agreed-upon maneuver at the turn of the [twentieth] century, simply designed to move cases along more quickly."[5]

But opening statements are commonplace now, expected by juries, embraced by advocates, and often written into Rules of Procedure. Among the many aspects of the opening statement, some to consider are:

Getting up close. The opening is actually the second (if not third) opportunity for counsel to become known and, perhaps trusted, by the jurors. The first—when courts permit attorney involvement—is jury selection, a time where themes may be presented and common connections developed. Next is in the pre-opening interaction with the judge and opposing counsel, where behavior is scrutinized. But it is in the opening when the relationship is that of 12 (or eight) to one—the lawyer speaks directly to jurors. Not "in their space" or "in their faces," but directly and with the chance to have their complete attention. It is also the time for credibility to be gained or shredded.

It is a "statement." Courts regularly affirm that the pre-evidence speeches by counsel are a "statement" of the case and may not be "argument," although in hundreds if not thousands of reported decisions the term "opening argument" is used by appellate courts. One example will suffice: "the prosecutor appealed to the war on drugs several times during opening argument. . . ."[6]

Yet the line between persuasive explanation of what the case will show and outright argument is ill defined at best in at least two regards: definition and application.

In his comprehensive review of this, L. Timothy Perrin writes that:

> **The rules preclude discussion of inadmissible evidence or evidence of doubtful admissibility during the opening statement. The advocate may only discuss evidence that he has a good faith belief will be introduced during the trial. Moreover, the lawyer may not discuss the law beyond a brief or cursory mention, and may not express personal opinions about the evidence or the case. These limits share universal acceptance among lawyers**

4 *Calhoun v. Commonwealth,* 378 S.W.2d 222, 223 (Ky. 1964).
5 Curriden and Phillips Jr., CONTEMPT OF COURT 83 (New York 1999).
6 *State v. Loughbom,* 196 Wn.2d 64, 71 (Wash. 2020).

> **and judges. Some courts also prohibit any discussion of the opposing side's evidence in the case.**[7]

Notwithstanding this summary, he adds that:

> **[t]he term "argument" carries a precise meaning in the context of the opening statement, connoting a limitation that is narrower than the dictionary definition. The rule against argument does not attempt to preclude lawyers from presenting their side of the dispute. Instead, it forbids advocates from interpreting the evidence for the jury by drawing conclusions or inferences from facts. Unfortunately, determining the precise parameters of "argument" is extraordinarily difficult, often leaving lawyers, commentators, and even judges confused or uncertain. . . .**[8]

As to where that line is, jurists indeed stake out their own positions. Here are some illustrations:

- The defense describing a prosecution witness as someone who bullies smaller people, uses drugs, and is reluctant to testify was impermissible, with the first two comments being improper forms of character attack and the final comment about reluctance being speculation. *Taylor v. State,* 2021 Tex. App. LEXIS 6990 (Tex. 5th Court of Appeals 2021).
- The prosecution describing its own witness as "reluctant" was proper as part of an opening statement "because it described Everesha's testimony that was later admitted." *Allen v. Koenig,* 2022 U.S. Dist. LEXIS 240395, *29 (Cen. Cal. 2022).
- "The prosecutor may refer in opening argument to evidence that the State intends to introduce, including evidence that is arguably admissible but is later excluded." *State v. Debler,* 856 S.W.2d 641, 656 (Mo. 1993).
- Misstating the significance of an item of proof is error. *Commonwealth v. Kapaia,* 490 Mass. 787, 800 (Mass. 2022).

There does come a point where the play on emotion becomes too great, and error occurs. *Kapaia,* above, is one such example:

> **[T]he opening statement here went beyond humanizing the proceedings and setting the stage . . . [T]he inflammatory rhetoric regarding the nature of the scene and the family's memories of the victim was a predominant theme of the prosecutor's opening, particularly during the early part. Ultimately, the repetitive use of emotionally provocative language, focusing the jury's attention on the victim's family's last memories of the victim, constituted an erroneous appeal to the jurors' sympathy. . . .**[9]

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7 Perrin, L. Timothy, *From O.J. TO McVeigh: The Use of Argument in the Opening Statement,* 48 Emory L.J. 107, 111 (Winter 1999) (footnotes omitted).

8 *Id.* at 112 (footnotes omitted).

9 Commonwealth v. Kapaia, 490 Mass. at 796.

> **It would have been fine to narrate the facts, especially that family members witnesses the murder—including details of the crime itself—but relating the emotional impact of bearing witness crossed the line.**

It is [Maybe] Not "Evidence." The traditional caveat provided to jurors is that the opening statement is not evidence. As one court elaborated when applying that principle,

> **the plain language of Maryland Rule 5-404(a)(2)(C) makes clear that a prosecutor is not permitted to offer evidence of an alleged victim's trait of peacefulness to rebut statements that defense counsel makes during an opening statement. Rather, under the plain language of Maryland Rule 5-404(a)(2)(C), there must first be evidence presented by the defense that the victim was the aggressor before a prosecutor may offer rebuttal evidence of the alleged victim's trait of peacefulness . . . Nothing whatsoever in Maryland Rule 5-404(a) indicates that "evidence" includes opening statements.**[10]

Yet some courts have ruled to the contrary.[11]

More caution must be applied here. Some words stated in an opening may be deemed a binding judicial admission. "[A]ttorneys can bind their clients by unequivocal statements in pleadings or opening statements, before evidence is introduced; when such a statement is made before evidence is presented, it can speed the trial process by eliminating the need for proof on admitted items.[12]

It is a moment of opportunity. Opening statements should be the second chance for the jury to get to know—and trust—you and your case. Often forgotten are the opportunities to "pre-open" during jury selection, but even when counsel is cognizant of that option it may be foreclosed by the judge precluding counsel from active participation. But voir dire or not, the opening is the first guaranteed time when there is no barrier (other than possibly a lectern) between counsel and the jurors. It is the time to address these individuals, people you now know something about—their occupation, family, values and concerns. It is "up close" but not "in their space" time.

It permits clarity. Knowing the importance of the "story" as key to an effective opening statement, we often forget that each juror may hear that story in their own way, distorting or reinventing the images and narrative you hope to convey. To that end, it is the time for pictures, for making the courtroom the scene of the occurrence, for using descriptive words ("the car was flipped onto the driver's side, crushed so badly that the steering wheel was pushed into the back seat") rather than

10 *Ford v. State,* 462 Md. 3, 34 (Md. App. 2018).

11 *See, e.g.*. United States v. Campo Flores, 945 F.3d 687, 706 (2nd Cir. 2019) (allowing in a prior consistent statement before the declarant/witness is cross-examined due to the attack leveled during the opening statement).

12 *Weida v. Kegarise,* 826 N.E.2d 691, 697 (Ind. App. 2005). See also Mosqueda v. Delgado, 2021 Cal. App. Unpub. LEXIS 3726 (Cal. App. 5th Dist. 2021).

adjectives (“it was a devastating, horrific crash, one that totaled the car”).

It demands clarity. Lawyers are prone to ignoring the “curse of knowledge,” forgetting that because they know all the facts the listener does also. The “curse” leads us to tell a tale with missing links—for example, all of a sudden the words “and then Ms. Jones drove away in the Volkswagen” appears. We know who Ms. Jones is, and we know where the Volkswagen was parked or why it was there, but the jurors don’t. This dilemma requires coherence and testing—the opening must be road-tested before trial on people unfamiliar with the case. If they can tell you the gist of the case, your opening has coherence; if they ask “Wait a minute, who is Jones?” you have a gap.

It provides “repeatables.” Themes count. So do individual words. And the opening, by highlighting each, paves the way for repetition and reinforcement during trial. Those repeatables become the link to the closing.

It permits the building of credibility. Credibility may come best from simply letting the facts—pure facts—tell the case best, letting jurors assess them as logical and reasonable and from there drawing their own conclusions. Credibility across the trial may come from promises that are made in opening and then kept. And credibility certainly comes from acknowledging damaging if not damning facts, the “we’ll be the first to tell you that . . .” exposure that leads to inoculation.

It is where your opponent's credibility may be damaged. When you open first, the responsive opening must be studied word for word, phrase for phrase. What is being conceded, what promises are made that ultimately are not kept, what doors may have been opened for proof previously deemed inadmissible. When you open second, seizing upon what your opponent did not acknowledge—the "opposing counsel failed to tell you that . . ." moment—is critical in generating doubt about your opponent's case. Related to this is the "flip," a phrase or concept deployed by your opponent that can be turned on its head and used to your advantage.

It may be the time to begin explaining the law. Notwithstanding the tedium of discussions of law and the ways in which they broke the flow of storytelling and judges disfavoring such discussions, an opening statement may be the time to discuss legal concepts briefly, in user-friendly language, to the extent they are needed to frame the case. Tread lightly: cover this briefly, but do so wisely.

It needs to be cognizant of listener attention span. Would that there was a single, provable, test of attention span. Writers claim anywhere from eight seconds to the ten- to 15-minute range, and of course whatever the number is it is variable across individuals and the tasks they are performing (e.g. listening versus listening, taking notes and asking questions). But whatever the number is, it is not limitless. A useful rule of thumb is 30 seconds, the time urged for those who create commercial advertisements. Depending on local custom, a greeting may be essential before beginning the statement—but then it is time to dive in to the case, doing so with techniques such as peripeteia that will capture attention.

It requires a story. An opening that tells a story—brief, memorable, consistent with stories the community has experienced or can embrace—is the best communication mode. If you don't provide a story, jurors will take your facts and reframe them into their own stories, a loss of control of the narrative that can only damage your cause.

This overview only begins the discussion of how to design and offer an effective opening. What follows are essays by leading advocacy instructors nationwide on specific aspects of the opening statement.

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PRACTICAL TIPS TO HOOK A JURY IN OPENING STATEMENT

If you talk to any litigator, they will tell you how important closing argument is and to always be thinking about what you will argue at the end to win your case. However, studies have shown that at least some jurors, if not a majority, will make up their minds about how they will vote in a case after they hear opening statements. Thus, it is imperative that trial attorneys present clear and captivating opening statements to prevail. Having been a litigator myself—trying more than 30 jury trials as a prosecutor—and now a law professor teaching a variety of courses on trial skills, I have seen quite the gamut of techniques used in opening statements.

Structure matters. If a jury is unable to follow the story you are presenting, this puts you at a major disadvantage for the rest of the trial. To keep it simple, I follow this type of structure for openings: theme, theory, set out the time/date/location, and then tell the story chronologically. I avoid departing fromthe story with fillers like, "you will hear . . ." or "this person will testify about . . . ." I find it much more effective at keeping the listener engaged by staying in story mode. If there are multiple important issues in my story, I organize the sections in an easy-to-follow structure and explain who each person is in detail so the jury can remember them. So often, we see opening statements with characters mentioned so briefly that when they are mentioned again during an important issue section, we have no clue how this person relates to the case. If possible, I use photos or other exhibits that have been approved by the judge in my opening and I always conclude with a clear and succinct ask from the jurors about what I want them to do at the end.

The theme of an opening statement tends to mystify some. It can be one word, a catchy bumper sticker, a proverb, a quote, a sound, etc. For those who struggle to pick a theme right off the bat, I suggest workshopping your theory first. After you have those few sentences that describe your case as neatly and as understandably as possible, the theme is much easier to pin down. For example, say my case theory is about my client who was wrongfully accused because "the police failed to interview available witnesses, did not collect video evidence, and did not follow up on suggestions that would have proven he did not commit x crime." I can now come up with several themes without the jury needing to know the rest of the facts. For example, I might use "lazy police work," or "shoddy investigation," or "rush to judgment." Once you have

a clear theme, you can now move on to more advanced techniques, like weaving your theme through each witness who hits the stand for use in closing argument later.

Keep jurors in the story and consider word choice. Don't take the listener out of the story with phrases like "ladies and gentlemen," "you will hear," "they will tell you," etc. Keep jurors engaged as if they are watching a movie trailer rather than a rehearsed list of facts. We are taught about how short attention spans are and primacy/recency, so why not start with an attention grabber? It's important to take the jurors to the scene with you by using vivid imagery in your wording. A non-descriptive example: "He was driving a car through the intersection when another car collided into him." A more descriptive example: "John was driving a red 1992 Honda Civic at 45 miles per hour in a 50-mile-per-hour zone when a 7,000-pound silver Ford F-150 pickup truck plowed into the driver's side of his car at 80 miles per hour. The truck hit John's Honda so hard that it took off both doors and the airbags went off."

Many new attorneys get timid about how far they can go with their persuasiveness in opening statements. They tend to pull back and avoid approaching the line between persuasion and argument. I often tell my students, when they are confused about whether they are in argument territory, to ask themselves if they could add the phrase, "The evidence at trial will show . . ." before the sentence they think is argumentative. Typically, this will weed out

the overstepping inferences, opinions, or outside information used as argument and affirm the convincing description of the facts. Using this technique has often worked in trials where I faced an opponent who loved to interrupt my flow with objections during opening. I would tell the court that I could rephrase, and I would use the safety line, "The evidence at trial will show . . ." before I repeated the exact sentence that was initially objected to.

A common mistake made by both prosecutors and defense attorneys is giving the other side's version of the story too much credit. While it can be a good strategy to get ahead of the other side's defenses or harp on the prosecution's weak case, novice attorneys can be seen spending most of their time in opening focusing on the defense's alibi or repeating the facts of the prosecutor's favorite evidence, instead of building up their own case. My practice is to present my best facts first, then comment on the issues with the other side briefly to minimize or neutralize them, if possible, then wrap it up by repeating my theme and presenting my ask.

Stay composed. Your reputation with the jury is important and opening statement is where you can get them on your side early. I have occasionally spoken with jurors after a verdict has been rendered and there were times when all the jurors talked about was how the attorneys carried themselves throughout the trial. Just like a Yelp review, they always want to talk about the negative.

Presenting an engaging opening statement at the start of trial is critical to the outcome. To do this effectively, you will need to offer a clear structure, tell a solid theme and theory, stay in story mode, use descriptive language, test your persuasiveness, focus on your strengths, and keep your cool. Following these techniques has proven to be successful for me in court, and I hope they will prove to be advantageous for others.

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SETTING EXPECTATIONS USING THE RHETORICAL TRIANGLE

The opening statement is a critical part of any trial. It is the advocate's first meaningful opportunity to utilize Aristotle's rhetorical triangle to set expectations for the fact-finder. According to Aristotle, an effective advocate appeals to the audience in three specific ways: logos (logic), ethos (credibility), and pathos (emotion). These three types of appeals form Aristotle's rhetorical triangle. An effective opening statement uses the rhetorical triangle to set reasonable expectations that the advocate can meet throughout the trial. Using these appeals, the advocate primes the audience to expect and be satisfied with the trial presentation to follow.

Setting Expectations

Setting expectations is critical. In the case of a jury trial, the advocate faces an audience largely mystified by the entire trial process. Although the jury knows something about the nature of the case from voir dire, that information was presented in a fragmented way. Being told by a judge "this is a car accident case expected to last three days" suggests more questions in a juror's mind than this statement answers: Is this a minor fender bender or a fatal crash? Was one driver under the influence of alcohol or drugs? Will the trial involve nuanced questions about the cause of the accident, or are the mechanics straightforward? The more an advocate anticipates a juror's questions and answers them by setting realistic expectations in the opening statement, the more the jury can focus its attention on the substance of the evidence.

Although the fact-finder in a bench trial is an experienced jurist, that fact-finder nonetheless benefits from clear expectations set at the outset of trial. An opening statement that concentrates on the key disputed issues helps the judge focus on the evidence that most matters to the ultimate determination. The judge likely has a substantial docket; the opening statement is a pithy way to remind the judge which case this is and why it deserves attention.

In addition, each time the advocate speaks to the judge in a bench trial, the advocate also addresses a less overt audience: the judicial law clerk. Whether sitting in the courtroom or listening to a recording in chambers, the clerk plays a critical role in helping shape the ultimate opinion issued in the case. Unlike the judge, who can interrupt the trial and question witnesses to ensure comprehension of the testimony, the

clerk plays a more passive role. The clerk likely has considerably less litigation experience and substantive knowledge than the judge. Setting expectations in a bench trial not only aids the presiding judge but also that judge's clerk. A prudent advocate considers what the clerk might need or want to hear.

For these reasons, an opening statement is critical whether the advocate addresses a jury or a judge. No matter which audience is addressed, the advocate shifts the audience to side with the advocate's client. By setting clear expectations that appeal to logos, pathos, and ethos, the rhetorical triangle helps the advocate gauge what trial strategy to predict in that opening. Although it is possible to persuade using just one of these appeals, it can be more effective to craft a trial strategy that considers all three types. A balance is useful. If one appeal fails, another type may succeed.

Setting Expectations Using Logos

Appeals to logos focus on rationality. These types of appeals typically rely upon facts, figures, and data. Although appeals to logic may not viscerally grab a fact-finder the way appeals to emotion may, fact-finders nonetheless rely heavily on logic in reaching their decisions. If a litigant's presentation of evidence does not "ring true" to the fact-finder, that fact-finder will struggle to return a verdict for that litigant no matter how emotionally invested the fact-finder is.

Stated another way, the opening should tell the fact-finder a story that is both authentic to lived experiences and consistent with the evidence.

In advance of trial, a prudent advocate will muster a comprehensive list of all the immutable facts that will be admitted at trial. Immutable facts are those that cannot be changed. From an evidentiary perspective, these are the facts that the parties either agree upon or that the opposing party cannot dispute. That advocate will then craft a narrative story that is likely to be true given those facts. In that way, without saying expressly "logic is on my side," that advocate will set expectations for the trial that are inherently logical.

Consider for example a slip-and-fall trial where the plaintiff pedestrian claims that one January afternoon she fell on ice allowed to linger on the defendant property owner's sidewalk. Plaintiff's counsel might be tempted to use the opening to tell the story of that day from the plaintiff's point of view, describing her testimony that she saw ice on the sidewalk. The plaintiff's perception is not an immutable fact. Any witness's perception can be attacked or impeached. If a source whose accuracy cannot reasonably be questioned, like a weather report, states the temperature and precipitation that day, those facts are far more immutable than the plaintiff's testimony that she saw ice.

Prudent counsel considers promising the fact-finder that it snowed for hours before the accident and never warmed above freezing rather than promising that the plaintiff will testify she saw ice. The former strategy allows plaintiff's counsel to harness the power of logic. Defense counsel will have to convince the fact-finder of a conclusion that runs contrary to logic—that there was no ice.

Appeals to logos focus on the evidence. An effective opening statement should set expectations for that evidence that can be

fulfilled and that appear consistently with the world as experienced by the fact-finder.

Setting Expectations Using Ethos

Appeals to ethos focus on credibility and authority. These types of appeals ask the fact-finder to put trust in the advocate. Advocates often make subtle appeals to ethos without even realizing it. As any experienced advocate knows, fact-finders pay close attention to how advocates behave in the courtroom. Jurors track which advocates most often object to evidence, and whether those objections are sustained. Judges notice who is well prepared with organized exhibit binders and visual aids ready to present on screen at the snap of a finger. Advocates who consider this already recognize the power of ethos.

The opening statement is a key opportunity to reinforce for the fact-finder that the advocate is one who can be trusted. In the case of a jury trial, the opening comes on the heels of the voir dire process. The information jurors learned during voir dire is fresh in their minds. What's more, this information was largely provided to them by the most important and credible person in the room: the judge. An advocate who takes the information provided by the judge and reinforces it in the opening does a few subtle but effective things. First, this advocate incorporates into the opening information that the jury already knows and has accepted as true. It aligns the advocate with the truth. Second, it also aligns the advocate with the judge, suggesting to the jury that if the judge is credible—so too must the advocate be on the side of truth.

Early in the opening, the advocate should harken back to information from voir dire. Compare two approaches plaintiff's counsel might take early in the opening statement of the slip and fall case. Plaintiff's counsel could say, "This case is about what happened to Jane Doe on January 3." That would orient the jury to the important date in the case. But that is all this statement would do.

Instead, plaintiff's counsel might refer back to the voir dire process, subtly fulfilling a promise made by the judge to the jurors. Plaintiff's counsel might instead say, "During the questioning and answering process, the judge asked if any of you knew the plaintiff Jane Doe. You heard her name, and the judge told you you'd learn more about her. Now you're going to learn what happened to her on January 3." The substance conveyed is the same but the second approach bolsters the advocate's credibility. A promise was made during the voir dire. It is fulfilled in the opening. This suggests that the entire story told by the advocate in the opening is also likely to be true.

Even in the case of a bench trial, an opening that sets reasonable expectations and anchors those expectations to immutable facts builds ethos. By promising the fact-finder that certain facts will be adduced at trial that the advocate is certain will be adduced, the fact-finder makes a promise that can always be fulfilled. That advocate becomes viewed as reliable, because that advocate's representations from the opening statement are fulfilled through the presentation of evidence. As each piece of evidence is admitted that was predicted in the opening, the admission reinforces that the advocate is a truthteller who can be trusted.

Appeals to ethos focus on the advocate. An effective opening statement shows the fact-finder that the advocate should be trusted. When the advocate meets the promises made in the opening, the fact-finder has a reason to believe that advocate in other situations—like when credibility must be evaluated or evidence must be weighed.

Setting Expectations Using Pathos

Appeals to pathos play on the fact-finder's emotion. These appeals ask the fact-finder to evaluate the case using beliefs and values. They invite the fact-finder to use creativity and imagination.

It is largely ineffective to simply tell a fact-finder how that fact-finder will feel about the evidence. Statements like "you will feel sorry for my client" or "you will want to award my client damages" are unlikely to persuade. Emotions are personal. Emotions are experienced. They are self-validating. Rather than tell the fact-finder how to feel, an effective opening sets an expectation of what emotions the fact-finder will feel during the trial by providing a glimpse of that feeling of emotion during the opening. Then, when the fact-finder indeed feels that emotion during the trial, that experience is automatically validated.

One effective way to evoke an emotion during the opening is to tell the client's story from the point of view of the litigant as the litigant experienced the underlying events. This requires telling the story from the litigant's point of view, in present tense. It often requires a non-linear narrative, because individuals are not omnipotent and learn information out of sequence.

In the slip-and-fall case, plaintiff's counsel can invite an emotional reaction from the fact-finder by telling the story of the accident from the plaintiff's point of view as the plaintiff lived that experience. Rather than narrating the day in past tense starting with the snowfall that morning, plaintiff's counsel could tell the story of that day in present tense starting with the plaintiff feeling her feet slide out from under her as she fell face-first onto the pavement.

By focusing the opening on the plaintiff's experience as the plaintiff lived it, plaintiff's counsel invites the fact-finder to experience the shock and distress along with the plaintiff. This sets an expectation in the opening that the fact-finder will find the defendant's actions shocking and distressing. When evidence adduced at trial causes feelings of shock and distress, the fact-finder will feel validated in having that reaction to the evidence.

Appeals to pathos focus on the litigant. An effective opening statement gives the fact-finder a reason to reinforced when identifying with that litigant. The more the fact-finder identifies with the litigant the more the fact-finder will find ways to side with that litigant at the conclusion of trial.

Whether in a jury trial or bench trial, the opening statement is a critical opportunity. It offers an advocate a chance to set expectations by appealing to logos, ethos, and pathos. By doing so, the advocate can effectively persuade the fact-finder from the very outset of trial and increase the chances of a favorable judgment or verdict at the conclusion of trial.

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KISS (KEEP IT SIMPLE, STUPID) 2.0: TOTS (TELL ONLY THE STORY)

As of this writing, the band KISS has just played the final concert on their End of the Road farewell tour, ostensibly the last live performance before retirement. Coincidentally, the time is ripe to bid farewell to another KISS: the longstanding acronym capturing the strategy for opening statements in favor of one aligned with what neuroscience reveals the jurors' brains will be doing as they listen to the opening.

What Does the Law Assume is the Effect of the Opening Statement on Jurors?

The law's view of the opening statement rests on the behavioral presumption that has animated the American trial process from its founding to the present. Our dispute resolution system assumes that during the trial each juror will warehouse the evidence as it offered, withholding judgment until they have received the judge's final instructions on the law and discussed the evidence with their fellow jurors (who likewise have simply been repositories of evidence during the trial). The law permits opening statements only to facilitate the jurors' ability to understand the legitimate bases of their eventual verdict—the testimony of witnesses and content of exhibits—when they are later offered. As the opening statement is not itself evidence, jurors most certainly should not be reaching any conclusion about the case based on the opening.

What Will the Brains of the Jurors Actually Do While Listening to the Opening Statement?

The past 30 years have witnessed a technological revolution that has allowed neuroscientists literally to see the human brain process information.[1] The resulting findings are entirely at odds with the prescriptive effect of the opening statement and require that—while remaining safely within the guardrails of the rules—lawyers treat the opening as a seminal persuasive moment of the trial.

Contrary to the law's conceit, it is impossible to prevent a juror's brain from reaching a decision while hearing a properly crafted opening

1 In the interest of not burdening the reader with the law professor's stock in trade of excessive footnotes, I have omitted citations to the literature on which this article is based. I will gladly share those authorities with any reader who wants to take a deeper dive into the underlying neuro and social science. With apologies for the shameless plug, for a fuller exposition of neuroscience and the factual story of the case, see Molly Townes O'Brien & Gary S. Gildin, TRIAL ADVOCACY BASICS (3d ed., 2022), Chapters Three and Four.

statement. For at every moment our brain is automatically, unconsciously, and unstoppably making a prediction based upon everything we are perceiving through our senses. Otherwise, we likely would not have survived to serve as lawyers and jurors. As we wandered the savannah, we had to respond to sights and sounds that could represent either friend or life-threatening foe. Our brains evolved to instantaneously make and act upon a prediction—a prediction reached by comparing what we are presently sensing to what we had experienced in the past. Once it finds a sufficiently similar match to a prior occurrence, the brain predicts that current reality mirrors that earlier experience and signals the body to react accordingly.

As our lives ceased to hang in the balance, the human brain evolved to include a frontal cortex that harbors the capacity to organize knowledge and make considered strategic decisions after carefully weighing alternatives. Nevertheless, our brains continue to command immediate action based upon autonomous, subconscious, and constant predictions—with the database being our lived experience. Where what we sense is analogous to what previously has occurred in our

life, the brain predicts that the past experience explains the present state of affairs and immediately signals the pertinent action. Our brain will not waste precious and finite energy that would be necessary to engage its executive functions. Instead, our brain will ignore, or even suppress data that contradicts the prediction.

Despite the judge's instruction, then, as each juror listens to your opening, their brain is automatically associating what you are saying with their past experience. That personal history includes not only events; the brain of the juror has neurally linked each past occasion with the character traits and motivations of the persons involved in the episode. If the character, motive, and plot portrayed in your opening sufficiently resembles an analogous incident in the juror's life history, their brain instantly will predict that is what occurred. For the balance of the trial, the juror unknowingly will watch only for testimony that confirms that prediction, and will ignore or even push away evidence that would force the expensive expenditure of glucose to reconsider.

How Will the Jurors' Minds Organize What They Hear in the Opening?

Given what we now know about the operation of the brain, our opening statement must be calculated to cause the jurors automatically to predict that our factual version of the disputed event giving rise to the trial is what actually occurred. What should we include in our opening, then, to trigger the prediction?

Even before the neuroscientific community's game-changing discoveries about the brain, social scientists concluded that jurors make sense of evidence as it is offered by fitting the testimony into a story that bears resemblance to the juror's life. The principal criterion for the juror to find a story plausible is its coherence—consistency between (1) the character traits of the person whose story we are telling, (2) their motivations, and (3) their actions.

The newer revelations in neuroscience confirm and explain the earlier findings of social scientists. Our brains are not pre-wired; rather, from the time we were babies our brains form distinctive neural pathways linking (a), what we experience through (b), interactions with other persons having certain traits, and who (c), had reasons for how they acted. Our opening statement will cause the jurors' brain to subconsciously predict, accept and then defend our factual version as true only if (1) we tell one person's story; (2) the story relates a single version of what occurred (as opposed to offering alternate plots); (3) the person whose story we are telling had a motive to act as we portrayed; and (4) their motive arose and can be explained by earlier events in their life, the backstory we will call character (not the evidentiarily prohibited prior similar acts offered to show a propensity to repeat these actions). Put another way, our opening must tell a story whose character → motive → plot continuum simulates universal human experience.

What Should We Not Do in our Opening Statement?

If we tell a congruent story in our opening that adequately parallels the jurors' lived history, their brain automatically and subconsciously will predict, accept as true, and decline to reconsider that version of the facts. Our equally important task in opening is to avoid sabotaging that prediction. As lawyers, we marry the unique capacity to explain why every piece of evidence may be relevant with the competitive instincts that render us loathe to consign any fact to the cutting room floor of our opening. Further complicating matters, we know that at the conclusion of the trial the jurors will be called upon to apply the facts to the law. Consequently, we feel remiss if we fail to point out the burden of proof and legal elements in our opening. Yet every word out of our mouth that does not relate the character → motive → plot continuum will serve only to hinder the prediction we aim to trigger. The longstanding acronym for openings—KISS (Keep it Simple, Stupid)—while remaining true, should be retired in favor of one that more pointedly accounts for the lessons of neuroscience: TOTS, or Tell Only The Story.

Does Telling Only the Story Violate the Rules Governing Opening Statements?

The unstoppably persuasive effect of telling a congruent story admittedly cannot be reconciled with the law's yearning that the opening statement is not evidence that should convince the jurors. On the other hand, as long as our opening recounts facts that will come from the mouths of witnesses and the content of exhibits, Telling Only The Story fills the law's prescription that we preview what our evidence will show. As we are not discussing the credibility of either party's witnesses or attacking our adversary's factual theory of the case, Telling Only The Story does not constitute impermissible argument, Conversely, were we to ignore the lessons of neuroscience and choose not to Tell Only the Story, we would fail to utilize the "skill, thoroughness and preparation" that Model Rule of Professional Conduct 1.1 requires for the competent representation of our clients.

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AVOIDING COMMON PITFALLS FOR PROSECUTORS IN OPENING STATEMENTS

Prosecutors have great advantages in criminal trials: a presumption of credibility because they represent "The People," investigative tools that far exceed those of most defendants, and the structural advantage of being the first (primacy) and the last (recency) to talk to the jury. But these advantages aren't without pitfalls. As criminal defense attorneys (and former prosecutors), we have seen prosecutors repeatedly fall into them. Opening statement can be particularly perilous because the prosecution has to give an overview of the entire case, educate the jurors on the law they will be applying, and do it all without knowing what the defense will say. In an effort to do all these things, prosecutors sometimes try to do too much. This can come off boring, disorganized, and confusing to jurors, who haven't been living with the case for a year. It can also lead to a prosecutor overselling their case in a way that catches them off guard later. This article focuses on how to avoid these mistakes with three pieces of advice: keep it simple, make it digestible for jurors, and stay focused on what you know you can prove.

Keep it Simple, Keep it Interesting

There are many trial lawyers who believe you can win a case with a great opening statement. While that may be subject to debate, there is no debate that you can completely lose the jury with a boring opening statement.

Boring opening statements often fall into one of three categories: (1) too long, (2) too confusing, or (3) too complicated. And each of those problems can be solved by picking a simple theme and sticking to it.

Why is the theme so important? It helps you, and the jury, focus on what the case is really about. A simple theme also gives the jury something to focus on and follow. It can make even the most complicated set of facts interesting and easy to understand. When the jury hears certain facts or views certain evidence, they will be able to

think about how it fits into your theme. This is particularly so, if you weave your chosen theme into your trial presentation and closing argument—an article for another day.

So, what makes a good theme? Simplicity. For example, while a prosecutor almost never has to prove motive, asking yourself why a defendant may have committed the crime is often the easiest way to develop your theme. Is this a case about Revenge? Greed? Anger? You can use the answer to create your theme.

Once you have a theme, you need to implement it. You need to grab the jury at the start. You should tell jurors your theme within the first or second sentence of your opening. Then, develop a story that tracks the theme. Don't just use the theme once at the beginning; you need to weave it through your story. Tie the evidence you are going to present back to the theme and at the end of the opening, remind them of your theme before you tell them what you are going to ask of them (i.e., telling them that at the end of the case, you will return and ask them to find defendant guilty of all charges).

Picking a theme and sticking with it will help you develop a simple opening that will tell jurors what they should be looking for as you marshal the evidence in your case.

Pack a Punch by Making it Digestible for Jurors

Because the government has the burden of proof, some prosecutors fall into the trap of providing too much detail about what evidence will be presented. This approach typically does not frame the issues for jurors and often overwhelms them with too much information right out of the gate. Moreover, this approach can bury the government's really compelling evidence. Jurors' attention level during opening statements is at one of the highest points compared with the rest of trial. As such, giving a concise, well-organized opening statement, using your theme and key facts, is more effective than a longer one with more detail. It will highlight the government's best evidence and leave the jury eager to hear the whole story.

This starts with ruthless editing of which facts you tell the jury about in your opening statement. The jury will not remember all of the details you provide them so stick to the most important and compelling ones (and as discussed below, the ones you are certain you will prove) to demonstrate your theme and story. By cutting out excess facts, you will make your opening shorter and easier to follow.

In addition, effective storytelling must be structured. Your story must have a clear beginning, middle, and end focusing on the key evidence you will present in a way that also explains the charges the defendant is facing (more on that below) and tells the jury what you will ask of them once all of the evidence is presented. Disorganized opening statements do not help the jury focus on their task and often conceal or mute key government evidence.

Finally, one of the most effective tools to make sure you have an organized and digestible

opening statement is to practice your opening statement in front of people. Unlike closing and rebuttal arguments, there is almost always sufficient time to prepare and practice opening statements before delivering it to the jury. Mooting your opening statement in front of others who will provide honest and constructive feedback is critical to ensure you are hitting the mark with your opening statement. You may be tempted to only practice your opening statement in front of your fellow prosecutors; this, however, is a mistake. Your jury will likely not have any lawyers on it, and definitely will not have any prosecutors. As the first party to address the jury, you need to make sure your opening statement is understandable to and frames the issues and facts appropriately for lay people. As a result, mooting your opening statement to non-lawyers will provide you with some of the most valuable feedback to refine and sharpen your presentation to reach your exact audience.

Tell a Story, But Don't Forget to Tell them What the Charges Are

Imagine you and the defense have given your opening statements and one of the jurors sends a note to the judge with a question. The question is simple: Is anyone going to tell us what the defendant is charged with? (This really happened.) You may have told a great story but

if the jury does not know what they will be asked to find at the end of the case, it really does not matter. You need to have a theme and stick to it, but do not forget the basics.

For prosecutors, it can be hard to strike balance between storytelling and telling the jury what you have to prove. Yet, giving the jury a roadmap of the charges so that they can follow the evidence is critical. If they do not know what they are going to be asked to decide, they may struggle to identify the most important pieces of evidence.

For a simple case—for example, a drug distribution charge—it can be easy. Your theme may be the defendant sold drugs to fund his extravagant lifestyle. It is easy to talk about how and when he sold drugs (the charge) and then link it to his fancy car (the theme).

But add in a conspiracy count and suddenly you have to talk about overt acts and other people. Or think of a more complicated set of charges—a white-collar fraud case—that has terms like "interstate wires" and a "scheme to defraud" in the jury instructions. It may seem like you have to throw storytelling out the window to explain the charges. You don't. You just need to simplify things.

The elements can—and should—weave into your theme. Do not be scared off by the legal terms sprinkled through the jury instructions. The opening is a simple roadmap, not an appellate brief. Think about how you would explain the charges to a high schooler; you need a simple version of what you have to prove without a bunch of legal jargon.

So, back to the white-collar defendant. In the end, he may not be any different than the drug dealer. Instead of selling drugs, he told lies to fund his lifestyle. You may be hesitant to simplify it too much because you know at the end of the case the instructions for fraud may span a couple of pages. But you just need to give the jurors the basic outline of the charges, so they know what to listen for during trial. You can even front the fact that it might seem complicated. Tell the jury the defendant is charged with wire fraud, but then explain that wire fraud is simply a bunch of lies meant to get people to give away their money. And it involves using the wires which you will learn is just another way of saying emails (or whatever your wires are). Then, before they get too bored, make sure you highlight some great emails or other evidence and tell them how it fits into both your theme and the elements.

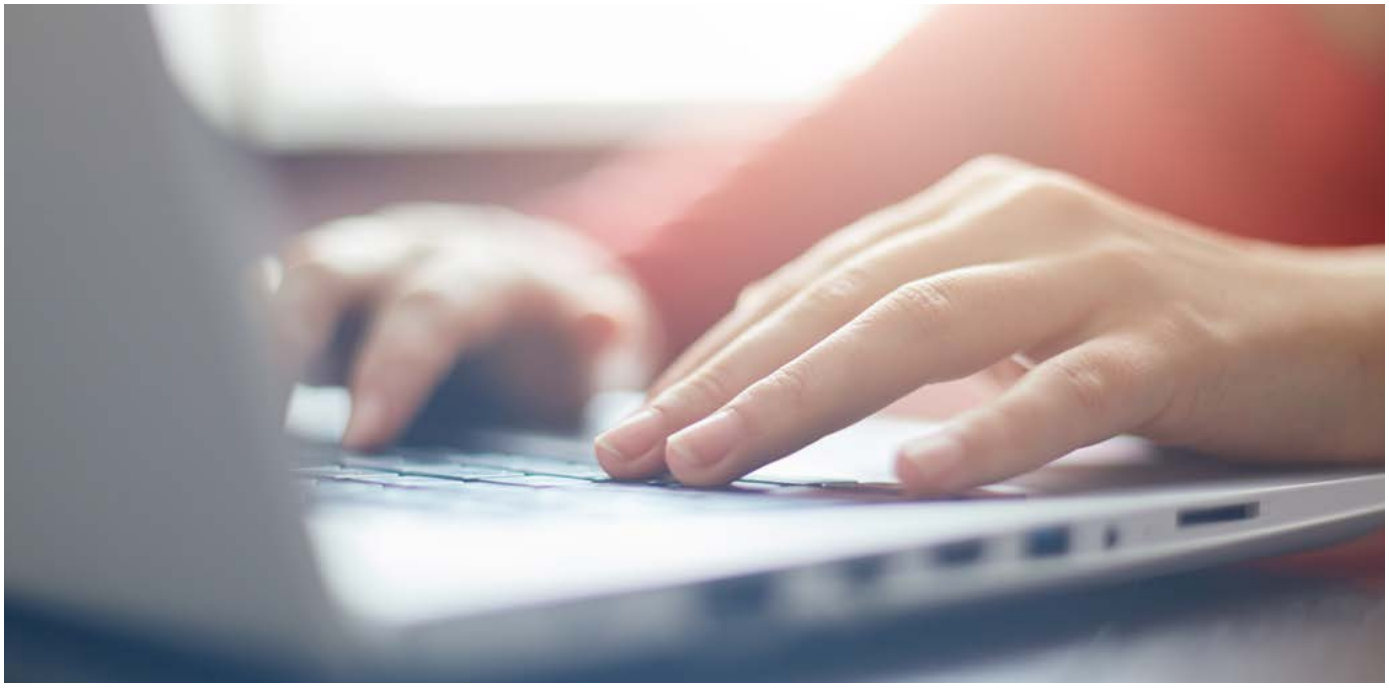
Stay Focused on What You Know You Can Prove

Defendants have one big advantage: surprise. While there are some reciprocal discovery obligations (and these vary by state), defendants can often shield their defense theory until they present their case. This makes opening statements a particularly risky area for prosecutors. The prosecutor must lay out their theory before they know what the defense will say. As the trial unfolds, the prosecutor can shift and respond, but only if they left enough room to do so in their opening statement.

A prosecutor may build up the testimony of their lead witnesses without knowing what impeachment the defense attorney has in their

pocket; a prosecutor may overly demonize the defendant because they don't know the defendant's story; or a prosecutor may simply put too much stock in what they think their cooperating witnesses will say. Any one of these mistakes will harm the credibility of the prosecutor and leave the jury feeling like the prosecutor did not live up to their promises. So, what can a prosecutor do to ensure they can still tell a compelling story?

First, prosecutors should be careful about overcommitting to what their witnesses will say and the importance of their testimony. Previews of important witness testimony should be buttressed by a preview of the corroborating evidence of that testimony. For example, a prosecutor may explain, "You'll hear from the defendant's business partner that they conspired to make false statements to the bank. He will take this stand and admit that they agreed to make false statements and that they both did make false statements to the bank." This is powerful, but risky. The jury is primed for the testimony and will be actively listening for it when the business partner is called to the stand. If the business partner doesn't say that or if they hedge on whether there was a conspiracy, it will be a glaring problem for the jury. Defense counsel will gleefully point it out in closing. (This did, in fact, happen to one of the authors when she was a prosecutor.) But if the preview of testimony in opening is buttressed by the other evidence that makes the same point, the risk dissipates. "But even without the testimony of the business partner, you'll see the books and emails don't match. That is fraud: a lie to obtain money." This pairing signals to the jury that the testimony, while important, is not a make or break moment for the case.



Second, prosecutors should be very careful when characterizing the defendant. The defendant is on trial for a specific crime, not for being a generally bad person. But the prosecutor can overreach: by hinging their theme and story on the defendant being a "bad guy," the prosecution is biting off more than they have to. The jury may like the defendant; the defendant's backstory may resonate with jurors; something that may seem inexplicable to the prosecutor may have a valid explanation, or at least an explanation that the jurors find credible. While passion and an appeal to emotion is important, with very few exceptions, that emotional pull should not hinge on an assumption that the jury will dislike the defendant. Because dislike of the defendant is not (and should not be) what the prosecution is about. As defense counsel, the hardest openings to rebut are ones where the prosecutor actually shows some level of compassion for the defendant but then refocuses the jury on the very specific crime and the facts that support the crime. When a prosecutor can do that well, the case becomes more difficult to defend. It tells the jury that much of what the defense will present is not relevant, no matter how strong the emotional pull.

Finally, do not be afraid to address potential weaknesses in your case during opening statement (and make sure you learned those weaknesses in the investigation). For example, if a key prosecution witness has a significant criminal history or a strong motive to lie, tell the jury why they should believe the witness or how their testimony will be corroborated with other evidence. By addressing weaknesses in your case before the defense spends their 20 to 30 minutes of opening statement talking about those weaknesses, it will accomplish three things: (1) the jury will trust you because you told them evidence that might undermine your case; (2) it will take the sting out the weakness because they have already heard about it; and (3) it will cause the jury to hear the defense case through the prosecutor's lens.

Prosecutors have a great advantage in being the first to speak so long as they can keep it simple, keep it digestible, and not oversell their case.

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MASTERING OPENING STATEMENTS: ESSENTIAL SKILLS FOR LEGAL PRACTICE AND BEYOND

Learning to draft effective opening statements provides necessary transferable skills that will enhance your legal practice. In the dynamic landscape of legal practice, the ability to deliver compelling opening statements is an indispensable skill that transcends courtroom boundaries. This skill set is not just about winning cases; it fundamentally shapes a lawyer's approach to communication, analysis, and advocacy in all areas of legal practice. Proficiency in delivering opening statements is a foundational element for broader professional competence. Mastery is crucial to your success inside and outside the courtroom.

Opening Statement Goal

A good opening statement in court serves as a crucial element in the trial process, playing a pivotal role in shaping the fact-finder's understanding while providing their first perception of the case. A good opening statement is clear, organized, and credible, with a compelling narrative that connects emotionally and respectfully with the fact-finder. It sets the stage for the evidence to come and plays a vital role in framing an understanding of the case. The skills needed to master the art of effectively delivering an opening statement are crucial for your overall advocacy.

Keep It Simple and Organized

A good opening statement should clearly outline the essential elements of a case. It must be well organized, logically structured, and easy to follow. Just as jurors are not usually legal experts, neither are clients. It is crucial to avoid complex legal jargon and instead use plain language to not leave anyone behind. An opening statement should be accessible and understandable to individuals with no legal background. The minute someone has to contemplate the meaning of a word or legalese, you have lost them in communicating your story. When you are presenting the facts, the relevant law, and describing how the evidence will support the case, it should always be clear and easy to follow. The goal is to provide listeners with a detailed roadmap of what they can expect to hear and see throughout the case. To be successful, you must continue to work on your delivery until you can easily and clearly explain the important issues to a non-lawyer.

First Impressions are Powerful and Require Clarity and Brevity

A well-crafted introduction not only informs but also engages the fact-finder, framing the entire narrative. Imagine a complex corporate tax litigation case, where the crux of the matter lies in a web of contractual nuances. Here, the opening statement serves as a beacon, guiding the court through intricate legal and factual mazes and a necessary map to "follow the money." You want to be known for your ability to break down complex cases into straightforward narratives. This clarity is equally crucial in client interactions, where simplifying legal jargon and presenting actionable advice fosters trust and understanding. The essence of clarity and brevity can be honed through deliberate efforts: practice summarizing complex cases or legal principles into concise, understandable terms with colleagues and non-lawyers. Writing legal blog posts or participating in legal discussions outside the courtroom can provide valuable practice in distilling complex legal ideas into clear, concise statements.

Example: A lawyer representing a tech company in patent litigation must explain complex technology in layperson's terms. The ability to condense intricate details into a clear, concise opening statement is key. This skill is equally vital in client consultations, where explaining legal scenarios in understandable terms goes a long way to building trust and clarity with your client.

Tell a Relatable Story

One of the most effective ways to connect and relate to a listener is through storytelling. Using a compelling narrative that weaves the facts of a case into a coherent and engaging story can be powerful. This means presenting the facts in a way that is relatable and understandable for the listener. The easier it is for your listener to understand the story, the easier it will be for them to remember it. A good story can help a jury see the case from your client's perspective, making them more invested in the outcome. Remember to give enough details to make it interesting while allowing the fact-finder to "picture" what is happening when you tell your story. Bringing them along into the story makes it easier for them to remember it.

Enhance Your Power of Persuasion

Reviewing historical cases can illustrate the power of narrative. Polished attorneys who weave legal arguments into a compelling story about equality and justice can play a key role in persuading the court on important issues. Storytelling in opening statements creates a connection with the audience, transforming abstract legal concepts into relatable stories. To develop this skill, lawyers can study landmark cases and analyze how the attorneys presented their opening statements. Practicing storytelling in a non-legal context, like volunteer work or public speaking engagements, will enhance your ability to tell a story. Engaging in pro bono cases and explaining legal concepts to non-lawyers is an excellent way to refine this skill.

Example: In environmental law, lawyers often face the challenge of persuading public authorities or courts to see the broader impact of decisions. A persuasive opening statement can be a game-changer, influencing decision-makers' viewpoints and swaying public opinion.

Be Credible and Honest

Credibility is key in an opening statement. Lawyers must present the facts and the case honestly, without exaggeration or misrepresentation. Listeners often sense any insincerity; if you lose credibility, it can be detrimental to your case. To maintain credibility, you should acknowledge case weaknesses up front and address them directly. Mastering this skill allows you to effectively prepare your client to understand the realities of their case and helps you set boundaries and client expectations for realistic outcomes.

Make an Emotional Connection and Respect the Listener

While the opening statement should be factual and logical, connecting with your listener on an emotional level is also important. Instead of using theatrics, try highlighting the human aspects of the case. Empathy can be a powerful tool in helping listeners understand the impact of events and decisions made at the heart of each case. Showing respect for a fact-finder's role in the trial process is essential. Remember that culling through documents and witness testimony and simplifying the facts is your job, not theirs.

Remove all unimportant facts that fail to support your case theory. Respect includes not wasting time with unnecessary information and acknowledging appreciation for your listener's attention.

Analyze and Craft Logical Arguments

A lawyer's capacity to analyze a situation, predict potential outcomes, and construct logical arguments is the backbone of effective advocacy. Consider a complex multijurisdictional merger where the lawyer must analyze diverse legal frameworks and present a unified argument. Developing a coherent opening statement in such scenarios is like setting the chessboard before the game begins. To enhance these analytical skills, lawyers can engage in moot court competitions or in-house trainings tackling hypothetical cases. Regularly reading and discussing recent legal judgments and understanding how judges construct their arguments can also provide insights into building logical, persuasive arguments.

> **Example: Consider a merger and acquisition deal where a lawyer must analyze multiple facets and present a coherent strategy to stakeholders. Crafting opening statements enhances analytical thinking, allowing you to practice dissecting a complex case and presenting it logically.**

Build Public Speaking Confidence and Presence

Public speaking is a critical skill for lawyers, and the courtroom provides a unique platform to master it. Consider the transformation of a junior lawyer, initially hesitant, growing into a confident speaker capable of commanding the courtroom. This evolution is crucial not just for courtroom battles but for all aspects of legal practice, including negotiations and client presentations. Regular practice is key to developing this skill. Participating in public speaking clubs, volunteering to summarize new case law developments, and conducting workshops and seminars can offer valuable opportunities to build confidence and receive feedback. Additionally, observing seasoned attorneys in court and noting their speaking styles, body language, and audience engagement tactics will provide practical insights. Repeated practice in delivering opening statements will help you grow into a confident speaker. This transformation is crucial for leadership roles, where addressing boards, panels, and large audiences is necessary. Confident public speaking is a key leadership attribute.

Powerful Skills You Can Transfer to Your Practice

Mastering the skills used in executing a strong opening statement will enhance your overall effectiveness in various legal contexts.

1. **Improved communication.** Crafting and delivering an effective opening statement require clear and persuasive communication. This skill is crucial in negotiating settlements, mediating disputes, and presenting arguments to clients and fact-finders.

2. **Effective storytelling.** A good opening statement involves storytelling, helping to make a complex legal issue more

understandable and relatable. This skill is valuable in explaining legal concepts to clients and in persuading decision-makers.

3. **Critical analysis.** Preparing an opening statement involves analyzing many facts, evidence, and legal principles to construct a coherent narrative. These skills are essential in legal research, drafting legal documents, and developing legal case strategies.

4. **Organized preparation.** An effective opening statement requires thorough preparation and the ability to organize information logically. This skill is beneficial in all aspects of legal work, including case preparation, document management, and strategic planning.

5. **Public speaking confidence.** Delivering an opening statement builds your confidence and public speaking ability helping you speak authoritatively in various forums.

6. **Persuasive advocacy.** The primary aim of an opening statement is to persuade the listener. Mastery of persuasive advocacy is a core skill, useful in all areas of legal practice. To be persuasive, we need to be genuinely curious about people and understand how they make decisions.

7. **Adaptability.** The ability to adapt to the audience and things that occur at trial demonstrate flexibility and resilience. These qualities are very important in our dynamic and unpredictable legal field. Listening and pivoting when needed will make the difference between you being a good advocate and being a great one.

Remember These Tips to Help You Reach Your Goal

Effectively summarizing information and communicating in a direct, concise manner is critical for lawyers who advocate for their clients. The ability to be direct and concise is not

just a communication skill but a strategic tool in legal advocacy, enhancing clarity, efficiency, persuasiveness, and your overall effectiveness. Consider the following points as you prepare for your next client assignment.

1. **Send clear client communication.** Clear and concise communication is essential in explaining legal matters to clients, who may not be familiar with legal terminology or concepts. It also helps manage client expectations and assists them in making informed decisions. Being concise ensures the core message is clear and not lost in unnecessary details. This is crucial in legal settings where every word can influence the outcome.

2. **Be efficient.** Legal proceedings often operate under time constraints. Summarizing complex information succinctly respects time limits and can be more persuasive than lengthy arguments.

3. **Enhance your client's comprehension.** Your listener may not have specialized knowledge needed to understand complex legal jargon or convoluted arguments. Simple explanations make things more accessible and understandable.

4. **Focus on key issues.** Being direct and concise keeps the focus on important issues. Construct legal arguments emphasizing key points to influence the decision-making process.

5. **Build your credibility.** Articulate your points succinctly to be seen as more credible and trustworthy. This perception can positively influence how listeners view your arguments.

6. **Use persuasive nonverbal communication.** Your effectiveness is based on how things are said, not just what is said. Non-verbal cues like eye contact, proper tone of voice, and clear body language can significantly impact how your message is received. Engaging through confident, open body language can help establish a connection enhancing your persuasion.

7. **Take strategic advantage.** Your acute ability to quickly summarize a situation or argument can provide a strategic advantage in negotiations and court proceedings. Swift responses and adaptations to new information or arguments can help overcome arguments by the opposing side.

Skills encapsulated in delivering effective opening statements—clarity, storytelling, analytical reasoning, confidence, and clear communication—are fundamental to legal practice. They transcend the courtroom, influencing how lawyers communicate with clients, negotiate deals, and present cases. By consciously integrating skills-enhancement strategies into your daily practice, you will excel in court and elevate your overall professional capability. Today's practice demands the ability to adapt to the evolving demands of the legal profession. As a lawyer, investing in mastering this skill will elevate your courtroom performance and amplify your overall professional effectiveness.

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ANCHORS AWAY: CREATING MOMENTS THAT RESONATE

At our best, trial lawyers are storytellers. We talk about storytelling all the time in advocacy courses, CLEs, and sometimes even in our sleep. I've been thinking lately about the structure of a good story, the ways in which story structure are limited by the law, and our overwhelming need to speak for our clients as effectively as possible. I thought it might be useful to provide some context about how storytelling can enhance opening statements and some of the things I think about when creating an opening.

I've actually been struggling to put this into context for this article. Initially I thought I'd do a deep dive into the structure of opening statements, the legal justification for allowing them, and then outline methods for using them—but I'm not going to talk about that.

I then thought I might discuss with you how a grabber line can condense a case in a way that removes every extraneous piece of material, leaving you with a condensed core resonating with the truth of what you are saying—but I'm going to leave that for another time.

Next I considered opening with a call to our deep ancestral roots, pulling you through a predetermined story into the light of the fire of our shared humanity. I was going to share with you how storytelling has roots in ancient traditions, where it was used to pass down knowledge, culture, and values, unveiling how this historical context underscores its power in shaping perceptions and beliefs. We would dance by the proverbial fire together, passing down the wisdom of generations of trial lawyers—but that's a chapter in my next book, so you'll have to buy it to get that experience.

As I cast about for something to say that might really makes a difference for you in the small amount of time we have together, I thought about how we could share best practices for incorporating a story into an opening statement. But that would be a very long article, almost a book chapter, so I'm not going to talk about that either. But that storytelling piece resonates, so how might I give you one thing? How could I anchor it in your mind? My good friend Jules, as he politely prodded me to get this done, mentioned an anchoring demonstration I did years ago. When I read his email I thought that's it: anchoring. So what are we talking about?

If you have read Anthony Robbins, or have done work with Rafe Foreman,[1] you have some idea about anchoring. Anchoring is a way for us to create physical spaces in the courtroom that are tied to both the memory of events in the courtroom and the testimony of witnesses. This idea flows from neurolinguistic programming (NLP) and psychodrama. We create a physical map with our actions. It identifies what we want jurors to remember and ties their emotional reasoning and reactions to that map.[2] This allows us to bring the physical space into our oral storytelling tradition, multiplying the impact and anchoring the memory and emotional response of the jury to an event that happened during the trial.

There are many different techniques found with psychodrama and NLP, I want to talk about using one: anchoring. The idea behind anchoring is that you choose a physical location within the courtroom and you tie particular portions of your

1 Much of the work Rafe Foreman has done teaching with me and others is grounded in psychodrama. Psychodrama "accesses that part of us that, though invisible, provides the script from which we live—our psychological and emotional world, with all of its uniquely personal meaning, logic and significance. The world that drives and defines us." Dayton Ph.D., Tian. THE LIVING STAGE: A STEP-BY-STEP GUIDE TO PSYCHODRAMA, SOCIOMETRY AND GROUP PSYCHOTHERAPY (p. 4). Health Communications, Inc.. Kindle Edition.

2 Bandler, Richard; Roberti, Alessio; Fitzpatrick, Owen. THE ULTIMATE INTRODUCTION TO NLP: HOW TO BUILD A SUCCESSFUL LIFE (p. 11). HarperCollins Publishers. Kindle Edition.

case to it. For example, when I talk about a particular contested fact, I do so from an identified location in the courtroom. I stand there during voir dire, opening statement, examination of witnesses, and closings when referring or establishing that fact. Your physical location and movement during this process anchors the fact to that location within the courtroom and allows you to reproduce that emotional feeling for the jury when appropriate.

You anchor when it matters. The jury remembers your location and actions during important moments of the trial. By standing there, I am planting a memory in that place. It grows during the trial as you water it with additional references. At the end of trial, you harvest that fact during closings. Now, there is danger here. You can't plant too many facts, and you don't want to anchor things that don't matter, and a little bit goes a long way. It is a lot like looping—done properly, it pulls people into the story and validates it. Done improperly, it is just annoying. You must have properly analyzed your case to pick the moments that are sufficiently important that you wish to anchor them in the courtroom.

Anchoring is an effective tool to increase the emotional impact of the stories we tell during trial. Storytelling engages our emotional reasoning, assisting us in making decisions when the facts aren't clear and a way forward must be found.[3] We now know emotions play a crucial role in human decision making, and storytelling is an accepted means in the legal context of connecting emotion to facts, anchoring in moment that the jury will remember when they write the final story of your case during deliberations. Use an anchor to make sure the story the jury tells in the deliberation room is the one that wins your case!

3 Gottschall, Jonathan. THE STORYTELLING ANIMAL: HOW STORIES MAKE US HUMAN (p. 16). Houghton Mifflin Harcourt. Kindle Edition.

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SPEECH ACTS: A HOMERIC LESSON ON PERSUASIVE STORYTELLING

I find it useful to talk about opening statements and closing arguments in the same lecture. Why? Because I get to emphasize that both presentations by a trial lawyer to a jury (or judge) are opportunities for advocacy. And I will stress the word *advocacy*, making clear I am well aware of the cardinal rule that an opening statement must not contain any argument. But making an argument, I point out, is not the only way that we can advocate in a courtroom. Rather, we can also advocate by telling a persuasive story, which is the role of an opening statement.

Just as trial lawyers and trial advocacy professors have looked to Aristotle, the author of a treatise on Rhetoric, as a spiritual guru on how to make a persuasive argument, I have looked to another renowned figure from ancient Greece—Homer, the author of the epic poem The Iliad—as a spiritual guru on how to tell a persuasive story. In my mind, Homer and Aristotle essentially and figuratively bookend the trial; they personify the opening statement and closing argument, respectively.

What lessons on persuasive storytelling can trial lawyers draw from Homer? Let's focus, appropriately, on the beginning of The Iliad with Book 1. To help make my points, I will refer to two recently published works on Homer: a fresh plain-English translation of The Iliad by Professor Emily Wilson of the University of Pennsylvania,[1] and an illuminating analysis of The Iliad's enduring influence, Homer and His Iliad, by Emeritus Fellow Robin Lane Fox of Oxford University.[2] Specifically, I rely on and quote from Wilson's translation of "Book 1: The Quarrel" and on Chapter 2 of Lane Fox's book, entitled "Doing Things with Words."

We can view Book 1 of The Iliad as Homer's opening statement about a dispute between two parties, namely "the conflict between great Agamemnon, lord of men, and glorious Achilles."[3] What makes Homer's retelling of this conflict so vivid and captivating to listeners is his extensive use of brief speeches given by the two disputants, which are akin to statements made orally or in writing by litigants in our cases. As Lane Fox observes,[4] much of the content of what Agamemnon and Achilles say constitute what philosophers of language call "speech acts," i.e.,

1 W.W. Norton & Co., 2023.
2 Basic Books, 2023.
3 Wilson, 1:7–9.
4 Lane Fox at 25.

instances when "by saying something we do something."[5] In the context of the hearsay rule, we would call these verbal acts, i.e., statements that are performative as opposed to assertive or declarative, and hence not hearsay.

Let's look at two examples from Book 1. In urging the prophet Calchas to step forward and speak freely about why the god Apollo is so angry at the Greeks, Achilles promises to protect him from any repercussions:

> **You do not need to worry now. Speak freely and tell us what you know about the gods. By Lord Apollo, the dear son of Zeus, to whom you pray when you reveal to us the gods' intentions, Calchas, this I swear—no one will lay a heavy hand on you beside the hollow ships, not while I live and see the light. Not one of all the Greeks will harm you, even if you speak about Lord Agamemnon, who now styles himself the best by far of all the Greeks.**[6]

Rather than merely telling the audience that "Achilles promised to protect Calchas from any harm for speaking the truth," Homer gives them the actual oath that Achilles utters in the presence of the assembled Greek warlords, including Agamemnon, a bully before whom Calchas quavers ("I am afraid I may enrage a man who has great power over all the Greeks,

whom everybody follows and obeys. A leader is more powerful and stronger when he is angry with a lesser man.").[7] Achilles' spoken words convey the gravity and solemnity of his pledge to Calchas far better than any narrative Homer could have mustered.

The Greeks subsequently learn from Calchas that Apollo will not be appeased until Agamemnon returns Chryseis, a young woman whom he has taken as a war trophy and slave, back to her father, a priest of the sun god, "without a ransom or reward."[8] Upon hearing this, Agamemnon flies into a rage ("You prophet of disaster! Your words have never done me any good."),[9] making clear that in giving up Chryseis to save the Greek army from Apollo's wrath, he is

5 J.L. Austin, How to Do Things with Words, Lecture IX, 108 (Oxford University Press, 1962). See also John R. Searle, Speech Acts: An Essay in the Philosophy of Language (Cambridge University Press, 1970).
6 Wilson at 1:115–25.
7 *Id.* at 1:105–09.
8 *Id.* at 1:133–38.
9 *Id.* at 1:143–44.

taking someone else's trophy:

> **. . . Now go, find me another trophy, so I am not the only Greek commander who lacks a trophy. That would be unfair. You can all see my trophy going elsewhere.[10] Are you commanding me to give her back? Fine—if the Greeks provide another trophy to satisfy my heart and make it fair.**
> **But if they do not give one, I shall come and seize a trophy for myself—your trophy! Or that of Ajax or Odysseus!**
>
> **The man I visit will be furious.[11]**

Agamemnon's spoken words amount to a speech act, too. This is not an idle debate over or an exploration of available options; everyone understands it as an inexorable command from the Greek overlord—something that is to be done purportedly out of his sense of "fairness," even though the other man "will be furious." And Agamemnon's announced directive packs far more punch than Homer blandly telling listeners that "Agamemnon agreed to give up Chryseis on the condition that he be presented with another woman to take as his trophy."

Homer's lesson for trial lawyers, then, is this. When we try cases that include speech acts, e.g., a breach of contract, a claim of sexual harassment, or a charge of disorderly conduct, rather than simply describing what the party did, refer to the words spoken or written by them in the opening statement. Those words will make a more colorful and indelible impression on the jury, which is exactly what we want to do coming out of the gate.

Let me illustrate with an example from a case file published by the National Institute for Trial Advocacy. *Kemper v. Nita City Cubs Holdings, Inc.*[12] is a lawsuit by Jessica Kemper against the Nita City Cubs, which own and operate the stadium where their baseball team plays its home games, for injuries she sustained from being hit in the back of her head by a souvenir bat that flew from the hand of a drunken and rowdy fan. One of her legal claims is that the Cubs negligently and recklessly trained, advised, and supervised their employees who sell beer to the fans. With that claim in mind, which of the following makes for a more effective opening statement?

Version 1: As you will see from internal emails between Lara Kotkin, the Cubs' Director of Security, and Ben Stone, the beer vendor responsible for Ms. Kemper's section of the stadium, the Cubs didn't want to jeopardize fans having fun in the stands when they trained their employees on how to deal with fights and other dangerous incidents. The Cubs wanted to give their fans a good time at the stadium, especially if the team wasn't playing well.

Version 2: In training their stadium employees, the Cubs prioritized fun in the stands and beer sales. In one email exchange between Lara

10 *Id.* at 1:157–60.
11 *Id.* at 1:182–88.
12 Theresa Moore, 1st ed. 2015.

Kotkin, the Cubs' Director of Security, and Ben Stone, the beer vendor responsible for Ms. Kemper's section of the stadium, regarding the protocol for dealing with fights and other dangerous incidents, Stone quips, "You're telling us we can't get these knuckle heads drunk when Castro can't find the plate with a map and compass!? C'mon Lara—you know what the people want! And it sure ain't the Nita City Cubs this season. New motto for the team: Wait 'til next beer! ☺"

Kotkin responds, "Always the comedian, aren't you Ben?;) You've been with us a long time, so you know the deal. Make sure the rookies are following your lead as our model vendor! Fan favorite who keeps them comin' back."

[*displaying Exhibit 12 to the jury*]

The words in the email exchange tell the story of an organization that irresponsibly puts beer sales and fun in the stands over fan safety more starkly and persuasively than the narrative version. Both Stone's and Kotkin's emails contain speech acts: Stone's "new motto for the team" is performative through and through, showcasing his intended conduct in the stadium, and Kotkin's directive to "make sure the rookies are following your lead as our model vendor" signals her approval, as Stone's supervisor, of his conduct. We put those words in front of the jury and let them evaluate their import. No argument included; no argument required.

Furthermore, as we can readily see from the above example, the words used by our witnesses reveal something about their character, which too is on display for the jury to evaluate. Stone blithely disregards any notion of safety protocols, and Kotkin betrays her position by exposing herself as someone who cares more about the organization's bottom line than stadium security.

Lane Fox makes the same observation about Book 1, noting that the "speeches implicitly reveal their speakers' character whether the haughty inconsiderateness of Agamemnon, causing the sending of a plague and then the quarrel, or Achilles' swift temper, becoming violently enraged, or Nestor, dwelling on his past with the habitual discursiveness of an old man."[13] In the above-quoted passages of *The Iliad*, for example, we can see Achilles' nobility radiate through his firm promise to protect Calchas from any harm, and Agamemnon's self-centeredness poke through his lack of concern with the feelings of his fellow Greek commanders.

I conclude by commending Wilson's translation and Lane Fox's exposition of *The Iliad* to trial lawyers who are looking for something fun to read while their jury deliberates. Like rhetoric, storytelling is an art passed down to us by the ancient Greeks (and other civilizations now long gone). There is much that we can learn from Homer's techniques to make our opening statements as effective as our closing arguments in advocating for our side of the case.

13 Lane Fox at 24.

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WHAT THEY DON'T KNOW, WHAT THEY MUST SEE

By the time of trial, hopefully no one knows the case—every detail, every nuance, every name, every event, every document, and every issue—as you do. And now a condensed, meaningful, and user-friendly summary of that universe must be presented to people who know nothing beyond the judge's description that "members of the jury, in this case it is claimed that . . ." and perhaps the date, time, and location.

We all know that less is more, the story is the best vehicle, and using descriptors ["the emergency room nurse"] rather than names [Mx. Calandra] will make the telling more comprehensible. But what is often forgotten by counsel is ensuring that sufficient knowledge is shared. It will show up in something like this:

> **Mr. Blakely closed the front door.**
> **The Volkswagen drove away.**

Sounds very visual, but there is one problem. Mr. Blakely's name was never mentioned until that moment; nowhere was the jury told about a Volkswagen, where it had been and how it connected to the case.

What is the cause of such incoherence? It is the "curse of knowledge," a condition that afflicts anyone with some advanced, specialized or 'insider' knowledge. We—those cursed with knowledge—hear the missing words (in our example, who Mr. Blakely is and what the Volkswagen has to with the case) and fail to say them out loud.

The phenomenon is real, and the remedy only moderately difficult. Check the draft opening with a critic's eye—will they get that reference, are all the missing links there—or test it on an audience of listeners who know nothing about the case. If the audience can retell the story and has no "who is this Blakely person" queries, you are now in a place of ensuring that your points have been made.

But even with narrative coherence the task is not done. Jurors "see" words in their own way. Consider this witness narrative (lifted from the movie True Believer):

> **Q: Ms. Gayle, tell the jury exactly what you remember seeing on that evening.**

A: I don't think I'll ever forget it. I was walking east on Pell Street, I had come from dinner with friends, and I noticed a man walk past me. I noticed him for two reasons. He was walking very fast and his hand was shoved inside his jacket.

Imagine that was your opening—Gayle, walking along in the evening, saw a man walk past with his hand in his pocket. Now pause—before you read on, read the words again and close your eyes to visualize it. Was the man coming from in front, the side, or behind? If from the front, how long was the face exposed? How crowded was the street? Evening? Did that word choice affect how light or dark it was?

This author has played this movie clip repeatedly, first without the video and then with—and the audience comes up with different answers to each of those questions. It turns out the witness saw almost nothing of the perpetrator's face.

The lesson is simple: if the words used are subject to varying interpretations, you have lost the day unless your closing shows the story. Walk through it in the courtroom, making the space into Pell Street; have video; or pause and add details so ambiguity is reduced if not eliminated. Without coherence and a shared vision, control is lost and communication is ineffective.

These are just a handful of options. I suspect there are a multitude more, be they case specific or discipline specific. But if one starts with them, they should bear great fruit.