

**WINNING FROM WORD ONE:  
CONSTRUCTING A STRONG OPENING STATEMENT**

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Everything that man just said is bullshit. Thank you.

– Opening Statement of the Defense in *People v. William Gambini and Stanley Rothenstein* by Joe Pesci as Vincent Gambini a/k/a Jerry Gallo a/k/a Jerry Callo (My Cousin Vinnie, 1992)

**Introduction**

Studies have shown that people remember what they hear first and last. Studies on juries have also shown that jurors reach their first impressions during opening statements and though they will be open minded throughout the trial, they tend to return to their original impressions in a very high percentage of cases.

Because plaintiffs have the burden of proof, they always face an uphill battle. In employment cases, it is that much more difficult. But having survived the dreaded summary judgment motions, plaintiffs get their first real break: they get all the procedural advantages at trial.

The plaintiff has the first opportunity to address the jury at every turn from *voir dire* (if the Court permits it) to opening statements, to presentation of witnesses and evidence, to closing arguments. In addition, plaintiffs also have the advantage of the last word both in being permitted a rebuttal case and in being permitted a rebuttal at closing. The successful trial attorney will take advantage of these tools.

This presentation is devoted to the opening statement which is the most important tool plaintiffs have at trial. The opening statement is the first real impression a jury gets of the case and the one that will stick with the jurors throughout the trial.<sup>1</sup>

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<sup>1</sup>This presentation was originally prepared as an oral one only. Therefore, its strength resides in the power point slides included in the Appendix. As a result, this paper is intended as little more than a medium to get the basic points across. For anyone reviewing this material without having attended the live presentation, I recommend getting a tape of it.

## **Structure of the Opening Statement**

In order to hold the jury, any opening statement must meet particular structural requirements. It must have the following four sections: 1) an attention grabber; 2) an introduction; 3) a body; and 4) a conclusion. Without these four sections, the statement will lack cohesion, will miss opportunities, and can easily lose the jury.

Many people begin an opening with the introduction, skipping the attention grabber altogether. This is a serious mistake. The opening is your first chance at the jury. The good opening will grab the jurors and bring them into the case.

Attention grabbers can use different means to accomplish their ends. One way is to shock the jury. This tactic is useful where there are offensive facts. Those facts should be thrown in the juror's faces. Another tactic is to throw damages at the jury – displaying the plaintiff's raw pain. Yet another is to emphasize the power differential between plaintiff and defendant – create the David and Goliath story. The tactic of choice will be determined by the facts of the case. The attention grabber should be powerful and interesting. It should serve as a preview of the case and if possible it should assess blame.

Following the attention grabber is the introduction. Now that the jury sees this case as an important one, a good opening lowers the tension level and introduces the attorneys and parties. It also has the dual purpose of taking what might otherwise be surreal and making it real with real people. The introduction also provides the attorney the opportunity to connect directly with the jurors. The introduction should introduce the attorneys, the parties, the claims, and at least some of the themes of the case.

The body of the opening comes next. This is where the majority of the case is described and the majority of the contents need to be included. A good opening provides the highlights of the case and manages the themes.

And the opening should always have a conclusion to it creating not only a climax, but a resolution so that the jury knows what to do and cares. Always use the conclusion to bring the jury into the case and to thank the jurors for participating.

## **Contents of the Opening Statement**

While the structure of the opening is like the steel structure of a building, the contents is what goes into it. Several different pieces need to be included in the opening: 1) a story; 2) the themes; 3) the characters; 4) the negatives; and 5) the injuries. An opening statement that provides a story is interesting and keeps the jury involved. That story should use several themes.

Themes will be drawn through the case both by testimony and in closings. But since the testimony is not always a certain thing and since its impact may vary, having multiple themes is important. Whichever themes played strongest through the testimony can be worked into the closing.

The opening statement should always address the negatives of the plaintiff's case. Rarely is the plaintiff the very best performer in the department. An opening which admits this up front not only provides credibility to the attorney, but makes the plaintiff a real person. And by addressing those negatives, the plaintiff's attorney can take the wind out of the defense's case.

Finally, no opening is complete without an emphasis on the injuries. Note that there is a significant difference between "injuries" and "damages". The opening should explain how the plaintiff was injured, it should not ask for recompense. Measuring the injury to request damages can be done in closing once liability is established.

### **Style of the Opening Statement**

If at all possible, an opening statement should be done in the present tense. This is particularly true for sexual harassment cases, but also applicable to discrimination cases. By doing the opening in present tense, the jurors are permitted to "experience" the case. This gives the case credibility. The two situations where the opening should not be in present tense are: a) a bench trial where trying to play the pathos card with a judge will not be appreciated; and b) a case based on logic and mathematics where emotion will not play well (e.g. an overtime case).

It is also helpful to use visuals in the opening statement. Photographs, even if they are just of places and not events, help to place the jury at the scene. Photographs can be blown up and mounted on foam board. Where performance is the issue, blow-ups of charts or other exhibits can be referenced and the jury will recognize those exhibits when used during the course of the trial and know that they are important. (To the extent that a juror has lost interest and is no longer paying attention during testimony, when the exhibit is used, that juror will likely take notice again.) Finally, the plaintiff(s) and defendant(s) are visuals. Pointing may not be nice, but it can be effective.

### **Conclusion**

While certainly a case is more easily won with a quality presentation in all phases, the opening statement is probably the most important phase. Even if the testimony suffers from a certain paucity, if jurors were persuaded by the opening statement and that statement was not contradicted by testimony, they are likely to return to that first impression. And while a case can be lost at other stages, the lead created by a strong opening statement may be enough to carry the day. But in order to be effective, the opening statement must be heard by the jurors and have an impact on them – and it must cover all the bases.

## **Appendix Power Point Slides**

This appendix contains the power point slides used in the oral presentation. The oral presentation includes a sample opening statement with a complete breakdown of its elements. That opening is not itself included because it is not intended to be introduced to the listener in written form. However, copies can be obtained by making an email request to:

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