Opening Statements

By George A. Googasian

Overview

The trial is a story, and in the opening statement you are the narrator. This presents a unique opportunity to address the jurors before they have heard a single witness or seen a piece of evidence. Like an artist with a blank canvas, you can paint the perfect picture of why your client should prevail. To win the day for your client, you need to make the most of this opportunity.

A good opening statement captures the jury's attention, focusing on the facts important to a party's cause while explaining those facts in the context of the controlling law. As you narrate the story and later present the evidence, jurors are making judgments not only about your case but also about you. The opening also serves as a benchmark for your credibility when compared to the evidence jurors hear during the trial. Your credibility is precious—guard it—because once compromised before a jury, it may never be regained.

Opening statements are governed by the Michigan Court Rules and the common law. Pursuant to MCR 2.507(A), an opening statement must include *a statement of the party's case and the facts on which the case is based.* Under the Michigan Court Rules, opening statements are statements, not arguments.

Preparation

Preparing the opening begins long before trial. While it is inevitable that facts and theories change as information is obtained in discovery, a theme and theory should be developed at the outset of litigation and honed as the case progresses.

It is important to know not merely the facts of the case, but also which facts will be permitted before the jury. Knowing that key evidence will be admitted or excluded allows you to retain credibility with the jury.

File motions in limine on important evidentiary issues that cannot be resolved by agreement well in advance of opening statements so you know whether key evidence will be admissible at trial and therefore whether you should include it in your opening. You do not want to mention evidence that will not be produced and then have your opponent point that out to the jury during closing.

The opening statement is not the time to argue the law, but lawyers are permitted to discuss the law that applies to their client's cause.[1] Try to get jury instructions approved before trial so you can use the same language and terms in your opening.

Trial judges have broad discretion to control opening statements.[2] If you do not already know the judge, ask around and find out what the judge will and will not permit during an opening. Court personnel and other practitioners are sources of information.

Theory and Theme

A serviceable opening statement will comply with the dictates of MCR 2.507(A) and 2.513(C) and include an outline of the party's case and the facts the lawyer intends to prove. Covering these legal bases will help avoid the potential for a dismissal or directed verdict following the opening. But an opening statement that merely serves these purposes may squander opportunity.

An effective opening statement is built around the theme and theory developed for the case. A theme is an explanation of the case that reveals why your client should prevail. A theory explains what happened and why. Finding a theme that resonates with a jury can be a daunting task, but it is essential to the success of a case. Entire tomes have been written on developing themes that will fit the facts and, more importantly, jurors' perceptions of those facts and events.

Find out how people react to your case. Use focus groups to test your themes and theories. If your case and budget do not permit a formal focus group (or even if they do), talk to family and friends and run your theme and theory by them to gauge their reactions. In doing so, you may gain valuable insight into what will ring true with potential jurors and what may not.

Practice your opening to make sure you can deliver it smoothly and that it makes sense.

The full and fair statement of the case does not require recitation of each and every minute detail. Instead, the purpose of the opening statement is:

> to paint with a broad brush and with quick, simple strokes a word outline of [an attorney's] case…the rule's first requirement simply means that an attorney's opening statement should describe, for the jury's benefit primarily, the very general nature of his client's case. To be accomplished effectively before a jury, it must be done in simple language a jury likely will understand….[3]

Make your opening memorable. As one famous and fictional grizzled old lawyer put it, "It's a basic principle: If the judge and jury don't remember the important parts of your case, they aren't going to want your side to win."[4]

"Trial Practice" is designed to provide advice and guidance on how to effectively prepare for and conduct trials.

Teaching and Technology

Think of the jury as a classroom in which you're the teacher. From the simplest PowerPoint presentation to the use of video depositions to computer demonstrations, an advocate can use teaching tools and technology to communicate information to jurors in a way they are accustomed to receiving it. The use of technology has its own risks; preparation is key.

You may think you know the courtroom, but if you are preparing for a jury trial and have never sat in the jury box, you do not know the courtroom as well as you should. Find out when the courtroom will be empty and sit in the jury box. What can you see? What can you hear? Will jurors be able to see the exhibits you have painstakingly prepared? Will your chart be visible from every juror's seat or should you ask the court for permission to provide the jury with copies of what you are presenting? Are the highlighted portions of deposition transcripts you will use on cross and in your closing legible from the jury box with the lights on and the window shades open? Will jurors be able to hear the questions and answers in a video deposition without bringing in additional speakers? All these questions should be answered before trial begins if you want to leave the jury with the impression that they are seeing a prepared lawyer and a polished presentation.

An opening statement is no time to fumble with technology. Any computer-aided visual presentation should be as seamless as possible. An effective advocate will know what the jury will see when the PowerPoint presentation comes up. Will they see an embarrassing screen saver? Privileged information? A blank screen? Know how to use the technology, make certain it works, and have a backup plan in case it doesn't. If you do not know how to run a slide show or start a deposition video, or if doing so will interrupt your presentation or draw too much of your and the jury's attention, get help.

Miscellaneous

Some things simply have no place in an opening statement. Knowing what to avoid can mean the difference between a jury verdict sustained on appeal and having to try the case all over again.

An attorney's remarks in an opening statement may be considered admissions that are binding on a client and can result in dismissal of a claim or defense.[5]

Whether a lawyer represents a mom-and-pop outfit, a multinational corporation, or an individual, at least part of the lawyer's opening should be devoted to introducing the client.

Sometimes, despite the best efforts of a lawyer or client, the client or the client's representative may be absent during the trial. If your client will not be at trial each day, be sure to explain why.

Conclusion

Both sides in a trial have good stories to tell, and juries are incredibly good at discerning whose story better approaches the truth. Prepare your story with great care, tell your story with conviction, and stay true to the facts and evidence.

Use this unique opportunity to educate and persuade the jury to your client's cause and to establish your credibility as someone they can rely on throughout the trial. ■

George A. Googasian received the State Bar of Michigan's Roberts P. Hudson Award and the American Judicature Society–Herbert Harley Award. He is a Fellow of the International Society of Barristers, American College of Trial Lawyers, International Academy of Trial Lawyers, and American Board of Trial Advocates. He has authored numerous legal articles and coauthored West Group Practice Guide. *He was named "Detroit Area Best Lawyers Personal Injury Lawyer of the Year" for 2012.*

ENDNOTES

1. *Guider v Smith,* 157 Mich App 92, 102; 403 NW2d 505 (1987).
2. See *People v Swift,* 172 Mich 473, 482–484; 138 NW 662 (1912); *Taylor v Klahm,* 40 Mich App 255, 260–262; 198 NW2d 715 (1972).
3. *Ambrose v Detroit Edison Co,* 380 Mich 445, 454–455; 157 NW2d 232 (1968).
4. McElhaney, *Making memories,* 84 ABA J 74 (May 1998).
5. See *Ortega v Lenderink,* 382 Mich 218, 222–223; 169 NW2d 470 (1969) ("a statement made by a party or his counsel in the course of trial, is considered a binding judicial admission if it is a distinct, formal, solemn admission made for the purpose of, inter alia, dispensing with the formal proof of some fact at trial").