

**Opening Statements**  
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**I. Initial Thoughts**

Opening statements must inform the jury. If the opening statement informs well, then it will also be persuasive. The challenge for a trial lawyer is to inform in a way to focus the jury's attention on the issues most important to your client's interest. These issues are the Defendant's conduct and the Plaintiff's damages.

Do not make unsupported allegations in an opening statement. Instead, show the jury what the facts are. Describe the scene. Describe the choices made by the Defendant. Do not tell them that the Defendant was negligent or that "clearly" the Defendant is liable. You must show them the facts that allow the jurors to determine in their own minds that the Defendant is responsible for what happened to the Plaintiff.

You are not endowed with credibility by a jury. You may be the most honest person in the world, but when you appear before a jury as a lawyer, you are not initially credible. Accept this situation. The public perception is very skeptical of litigation in general and of lawyers in particular. There is nothing you can do to dispel that perception in the first minutes of opening. The only good news is that your opponent also suffers from the same jury bias.

You must build your credibility. Think of building your credibility as if you are building a house. If the voir dire is your foundation, then the opening is the framing of the entire house. The structural strength of the house depends on placing the proper beams in the right place to support the roof and walls of the house. You install these beams one at a time. Fasten each beam securely. In building your credibility, show the jury one fact at a time. Build your credibility slowly and steadily.

If you have appeared reasonable during voir dire, then you begin to build on whatever rapport was created during the voir dire. Begin with a short factual statement. Do not begin with dramatic statements. The jury expects lawyers to attempt to manipulate them with dramatic statements. The jury will resist manipulation. If you start with a dramatic statement then you have just reinforced the jury's unfortunate assumption that you are not credible.

Refer to third persons as the ones who will state the facts and opinions that you describe to the jury. For instance, "Dr. Jones treats Plaintiff and believes that Plaintiff will have a permanent disability in his neck as a result of the wreck". With this statement, the jury does not have to rely on your credibility in assessing the fact. You are only a messenger. You are only reporting what others saw or believe.

You can also assume that the jury will be distracted at various points of time. We all become distracted during presentations. The minds of many of you are wandering now. Everyone's mind will wander at some point during the presentation. That is just human nature. Accept this fact. Your jury will behave in the same way. Recognize that their minds will wander and account for this expected behavior. Do not expect too much from the jury, they are only human.

All you can do is minimize the mind wandering. The best way to do this is to make your presentation interesting. Show charts, pictures or enlarged documents at some various points of

your presentation. Move around some, but don't pace. Use rhetorical devices such as an occasional silence to maintain attention. Use rhythm. Use repetition. Use the rule of three. See "Persuasion" at [www.howardnations.com](http://www.howardnations.com) for a discussion of rhetoric.

Also, be aware that the jury is forming opinions and beliefs from the first time they come into the courtroom. A thought vacuum does not last long. The jury is constantly taking whatever information it can get to try to make sense of what is going on. This thought process is full of assumptions and infirm conclusions but it is ongoing. The sooner you can get the facts to them, the sooner that they can begin forming firm conclusions about what the case is all about.

Know your audience. The most important single planning activity is to find out what the most important fact is to lay people. This may be different than the most important fact to you. In fact, it likely is because people do not think legally, as you do. They have a far more simplistic approach to the issues. Their thought process looks for short cuts to assist them through the anxiety of making a decision. They are thinking on a moral basis, as opposed to a legal basis, in allocating responsibility. This should be expected because they are not legally trained.

One way to determine the most important facts to lay people, is to conduct a focus group. Give the focus group the facts. Notice what facts they discard and what they cling to. Learn how they interpret the facts. Use this information in determining your factual focus.

Make the opening about assisting the jury. How can you best assist them in their job. They have a problem to solve; they have a duty to fulfill. They are in a strange environment. They are anxious about the situation because they have not been in a situation like this very often. They do not want to be embarrassed. Some may not be happy about being there. They are being told when to sit, when they can leave and when they have to return.

You must be the jury's assistant and teacher. You must give them the information they want and that they believe they need to make their decision based on what they believe is important. If you do this, then you will have fulfilled their needs and you will have earned credibility.

## **II. The Structure- The roadmap to your destination**

By structure, I am referring to how to organize the topics generally. Each of us will believe that different structures are best for each of us. Different situations may require different structures. There are numerous ways to structure an opening of any presentation. The structures listed below have been suggested from various sources.

Cicero's Six Rules of Discourse from his essay on "The Theory of Public Speaking" were written thousands of years ago and still provide a basic structural framework to begin with for a persuasive presentation. The six rules are the following:

- (1) Introduction - To gain attention
- (2) The facts- Describe with brevity, clarity and plausibility.
- (3) Division - Explanation of what is agreed upon and what is not
- (4) Proof - Describe the facts that support your position.
- (5) Refutation - Describe the fallacies of your opponents position
- (6) Conclusion - Describe action to be taken.

R. Hoff, I Can See You Naked 178 (1992) available on Amazon.com

When these rules are considered in the context of an opening statement, they could be classified as follows:

- (1) Introduce the theme
- (2) Describe the decisions that the jury must make (i.e. They must decide on a verdict)
- (3) Describe the facts succinctly (i.e. Facts they need to decide on a verdict)
- (4) Describe how the facts will assist the jury in deciding on a verdict
- (5) Describe how the facts are not consistent with the expected defenses
- (6) Urge them to enter the appropriate verdict for your client based on the facts

Cicero's six rules do not neatly fit into an opening statement. However, it is important to understand his rules because he was a successful orator. Your structure may be a reorganization of this order of subjects. For instance, you may order your opening as follows:

- (1) Most important facts which include responsibility theme
- (2) Story of the events that emphasize the most important facts again
- (3) What the jury must decide with a description of their power and of the order of events.
- (4) Damages of Plaintiff
- (5) Introduction of expected defenses and explanation of why they are not reasonable
- (6) Request favorable verdict- The reasonable resolution based on the facts

Jury consultant David Ball advises that at least one third of the opening should be on damages. The focus of the opening should be on what the defendant did wrong and the resulting damages. Ball suggests the following structure:

- (1) What are the rules (standards, etc.)
- (2) What did the defendant do
- (3) What were the immediate harms
- (4) Who and why are you suing
- (5) What is wrong with the expected defenses
- (6) What are the consequences of the immediate harms
- (7) What can the jury do about it all.

D. Ball, David Ball on Damages (2001) available through  
[www.nita.org](http://www.nita.org)

Notice that all of the proposed structures include an attack on the opposition. Again, this attack should be a presentation of the facts which allows the jury to decide that the defense is wrong. Your protestations and conclusions about the defense will be dismissed as argument and will only hurt your credibility. Stick to the facts. You can make your point with the facts. The point will be well guarded by the jury member who makes up his own mind based on the facts

that you present to him. That is the advantage of primacy.

### **III. The Message - What to say**

You must have a plan in your head. You may use notes to navigate your way. My favorite method for staying on track is to use a flip chart on an easel with handwritten key words on ten or so pages. Personally, I believe the flip chart helps maintain and focus the jury's attention, visually communicates when you are moving to a different topic and assists the jury's memory.

The first minute is always the hardest. There are a thousand ways to start an opening. Just remember that the first two minutes will set the stage for the rest of the case. You will have everyone's attention at that point. What is the most important item you want them to grasp. Your theme? A particular fact? The defusion of a strong defense?

What you say should be based on the empirical studies performed by ATLA. See ATLA, Juror Bias Seminars (1999, 2000, 2001). ATLA has studied the numerous biases that juries reliably bring with them to the jury room. These biases are fully discussed at ATLA's annual seminar on the topic. There is not time to fully discuss these biases in this short paper. I will mention a few of the primary biases that you must be aware of when addressing the jury. You must know your audience and knowing the biases of your audience allows you to know them.

"It is easier to ride a pony in the direction in which it is going", instructs Howard Nations at the ATLA Juror Bias seminar. See [www.howardnations.com](http://www.howardnations.com). The pony (i.e. jury) is going in the direction of its biases. This gives you two choices. You can waste a lot of time trying to break the pony and muscling the pony in the direction which you want it to go. Or you can use the energy of the pony's travel and conform your presentation to the pony's route. This second choice will provide the best results.

The most prevalent of the jury biases is that of "personal responsibility". Politicians know this. Several years ago, you heard both Bill Clinton and Newt Gingrich both espousing the benefits of personal responsibility. The focus groups of both political parties told them that personal responsibility was a deeply held belief. In "riding the pony in the direction in which it is going", they both used this deeply held belief to persuade others to support their agendas. This illustrates that a belief can be neutral. The decisions that a jury makes may depend on which advocate utilizes this bias and how this theme is presented to the jury.

For instance, Plaintiff's counsel can argue that the tortfeasor must be held responsible for choices he made that have caused injury to Plaintiff. Furthermore, that the injured Plaintiff could not have avoided what happened and had no choice to make in what occurred to him. Since we are all responsible for our personal actions, the tortfeasor must pay full compensation. No one should be allowed to avoid their personal responsibilities, that is one of the problems in today's society.

In contrast, Defense counsel may argue that Defendant is sorry for what happened, but it could not be helped. The Defendant did not intend to hurt anyone. Besides, if only the Plaintiff had been more careful. The Plaintiff could have slowed down, or sped up, or looked both ways twice, or three times. The Plaintiff must be responsible for his actions. Plaintiff, like a lot of people these days, are always trying to blame someone else for their problems. In today's society, no one wants to take personal responsibility for his actions.

You now know that “personal responsibility” is going to be an issue. It is always an issue whether or not either side argues it. You must capture this theme in opening statement. Take the high ground and defend it mightily. Emphasize Defendant’s choices. Emphasize the many decisions Defendant made leading up to the injury. De-emphasize any of Plaintiff’s choices and show why they would not have made a difference.

The Defendant does have a strong ally in the biases. This is the bias of “defensive attribution”. Most jurors sincerely believe that they would have acted differently and would have avoided the injury that Plaintiff suffered. This is because people do not want to feel vulnerable. You have to deal with this bias. This bias will appear in the jury room whether or not anyone argues for or against it. Show the jury why the Plaintiff could not have avoided the incident.

Remember to focus on the Defendant’s actions. The trial is about the Defendant’s actions and the Plaintiff’s damages. The trial is not about the Plaintiff’s actions. The Plaintiff’s actions are peripheral to what happened because the Plaintiff’s actions are not on trial. By way of illustration, consider the following stories which concern the same incident but are told from different view points

### Story 1

A professional man, John Adams, decides to leave his office early one day. He decides that he is going to mow the grass so that he can play golf later in the week. He looks forward to mowing the grass, grilling some steaks and drinking some beer. On the way out of his office, he stops and chats with the attractive receptionist. He talks for longer than he had anticipated.

John then finds his car in the garage and decides to go to a car wash. He washes his car, fills up the gas tank and then decides to take a new way home. He is driving through an area of town that is unfamiliar to him. He takes a wrong turn. He comes to an intersection with a stoplight that he had never been to before. The light is green.

He drives into the intersection slower than usual because he is trying to orient himself and find a familiar landmark. Before he makes it through the intersection, another car runs the red-light, crashes into the right side of John’s car and snaps his neck.

Now complete the following sentence: If only \_\_\_\_\_, John would not have been hurt.

There numerous alternative solutions to the sentence and all of them are correct. The answers include the following: (1) if John had not left early, (2) if John had not talked to the receptionist, (3) if John had not washed his car, (4) if John had not gassed up his car, (5) if John had taken his usual way home, (6) if John had been more careful and not gotten lost, (7) if John had driven through the intersection at a normal speed, (8) if John had stopped at the intersection and pulled to the side of the road and looked around to orient himself. The problem with all of these solutions to the sentence is that they all focus on John. John did not cause the wreck. The other car did. However, the we know virtually nothing about the other car.

### Story 2

Andy Smith is having a hard day although it has just begun. The one million dollars in stock options for which he had worked so hard are now worthless. He has lost his accounting job

with Enron. He is clearing out his office. He throws his books and photographs into a box and walks out the door. He stops and talks to the receptionist who is also clearing out her office. He asks her to have a drink with him at the bar down the street. She agrees.

Andy stays at the bar and grill until early afternoon. He skips lunch. He drinks lunch instead. Around mid-afternoon Andy decides to go home. He decides to go home, cut the grass, and grill steaks.

When he leaves the bar and grill, he is a little disoriented. He finds his car. He starts home but gets lost. He does not like the part of town he is in. He speeds up to try to get to a street that he recognizes. He does not see the red light. By the time he sees another car in the intersection, he can not stop. He crashes into the right side of the other car, knocks it across the intersection, and snaps the driver's neck.

Now finish the same sentence. If only \_\_\_\_\_, John Adams would not have been hurt.

In the second story, all the information is about Andy Smith, the Defendant. All the decisions that are available for discussion are the decisions made by Defendant Andy Smith. There is nothing to discuss about John Adams. Since John Adams did not do anything to cause the wreck, it must have been caused by Defendant Andy Smith.

#### **IV. Damages**

Yes, you should discuss damages in opening statement. The jury needs to know what the case is about. The case is about the issues which you spend most of your time discussing and presenting evidence about. D. Ball, David Ball on Damages (2001). After you tell the story of what the Defendant did wrong, you expand your story line to describe how the Defendant's actions have affected the Plaintiff.

Tell the jury that the case is about money because sympathy will not pay the bills or compensate for loss of quality of life. You may have already addressed this issue in voir dire. The jury needs to know early that they will have to make a decision about an appropriate money verdict. Tell them that you need to explain to them what they will need to consider in making this decision on the appropriate money award. Now that you have told them why you are going to discuss the Plaintiff's injury, they are more likely to be attentive because they need the information. They now have a personal interest in knowing the information that you want them to know about.

Tell them about the immediate harm to the Plaintiff. If the case involves a muscular neck injury caused by acceleration and deceleration, explain what happened in detail. Do not just say that she hurt her neck. Explain the injury. Go into details about what happened in the neck muscles. Explain how they were injured. Refer to the opinions of the testifying medical providers. Use a medical illustration if you have one.

Later in opening, you can explain the consequences of the injuries. Let them know that you are not discussing this for purposes of obtaining sympathy, but to assist them in the decision that they will need to make at the end of the trial.

The consequences of the injuries would include the ambulance ride, emergency room treatment, convalescence, permanent residual, effects on ability to work and effects on activities of daily living. Spend adequate time on these facts in opening. This may be the most important

part of the opening. This is the part that the Defendant does not want you to talk about. This is the primary reason you are in Court.

Finally, tell the jury what they can do to fix the problem. The jury needs to be motivated to decide that a money verdict would be appropriate in the case. Explain what the money would be for. At a minimum, explain the special damages. But you will need to explain that you will be seeking more than the special damages. You are seeking compensation for the injury as well.

Avoid using the phrase "pain and suffering". The phrase has been attacked almost as much as punitive damages in the media. It is also a legal term. You can discuss "pain" by itself. You can also discuss "suffering" by itself. For both items, you will need to provide facts supportive of each. Deliver the messages of the witnesses who will testify. Do not exaggerate.

Describe the verdict form in generalities. Do not talk about an "award" of damages. The word "award" is legalese. Talk about money to fix, help and make up for the loss. Talk about fairness. Tell them that you will show them how to make a fair determination on the amount of the money award. Then sit down.

## **V. Concluding Thoughts**

If the jury does not "get it" during opening, it is not their fault. It is your fault. You are responsible for conveying the message to them in a manner which is useful to them. If they feel that you are trying to help them, then they will listen. If they feel you are trying to manipulate or exaggerate, then they will not listen.

Jury's do not make their decisions during opening statement. Although studies have been often quoted that draw this conclusion, it is not true. Juries make decisions about what facts are the most important and about what they must decide. They make decisions about what they need to hear during the trial to make their decision. They begin a story line in their thoughts about what happened, but they will not decide the case. You want them to adopt your story line.

The best you can do, is be the first person to give them valuable information to assist them in their journey. Show them the map and how they can use the map. Then they will find their own way to the destination.

The principal of primacy is important. But just because the jury hears something first does not mean that they will believe it. If they do not believe what they hear first, then they will initially form opinions that may be impossible for you to overcome. If they do believe the facts they first hear then they will begin to form opinions that will be difficult for the other side to overcome. That is the importance of primacy. It is an opportunity which should not be squandered.

At the end of opening statement, you want the jury to have formed a belief in your interpretation of the facts based on their independent consideration of what you have shown them. If the jury initially accepts your version of the facts based on the evidence that you have discussed, then you will have gone a long way in carrying your burden of proof. If you have done this, then your closing was successful.