

FRIDAY

MONDAY

TUESDAY

WEDNESDAY

TODAY[Previous](#)[Next](#)[Bookmark](#) [Reprints](#)

Professional Tools For Litigators: Opening Statements

James P. Gray is a retired judge of the Orange County Superior Court, and presently serves as a mediator and arbitrator for ADR Services Inc. He is the author of "Wearing the Robe: the Art and Responsibilities of Judging in Today's Courts" (Square One Publishers, 2009), and can be contacted at

JimPGray@sbcglobal.net or
through
www.JudgeJimGray.com



Many attorneys, judges and legal commentators believe that, second only to issue of the credibility of witnesses, the opening statement is the most important aspect of the trial when it comes to convincing a jury. I share that belief. Skilled and artful attorneys will use an opening statement to tell the jury about what they anticipate the evidence at the trial will be, which means they will tell a story that allows the jurors to see the case through their client's eyes.

Another approach is to see the opening statement as a trailer or preview of a movie, with the presentation of evidence being the movie itself, and the closing argument being a critique of the movie after it is finished.

Opening statements are not to be used to "ingratiate" counsel or their clients to the potential jurors, pre-condition the jurors to vote in their favor, instruct the jurors about the law, or in any other way argue their case. Those comments are objectionable, and opposing counsel and trial court judges will be listening.

But mostly everyone at trial knows that to some degree, this is often exactly what is intended - and frequently it cannot be stopped because the lines can be difficult to draw. Nevertheless, do not stray too far from the guidelines, if only because it hurts the continuity of your story to be interrupted by an objection - particularly if it is done by the judge - and it certainly does not make a favorable impression upon jurors to have an objection sustained.

The best approach is to preface your substantive comments with the phrase: "The evidence will show that..." and be true to that statement. And, since the evidence will not show what the actual law is, or that you too are a member of the Rotary Club or Methodist Church (just like one of the jurors), or how the jurors would feel if this

tragedy were to be visited personally upon them, etc., your opening statement should similarly not include such comments.

If an opening statement is done well, it can be a beautiful thing to hear and to watch. Frequently, for example, it will take the jurors through a normal day in the life of the plaintiff before the incident in question, and through a normal day after the incident. As long as the evidence will show what those normal days had been, this approach is perfectly appropriate.

The opening statement is the most important aspect of the trial when it comes to convincing a jury.

Another effective approach is the careful selection of terms by counsel, both in their opening statements and during the trial. For example, in many auto vs. auto cases, if it is plaintiff's theory that damages were caused to plaintiff because defendant was speeding or went through a red traffic light, plaintiff's counsel should not use the term "accident" to describe the incident. Not only that, counsel should object if the opposing side uses that word. Why? The word "accident" assumes a fact not in evidence, because it is not an accident if defendant was breaking the law! Instead, consider using the words: crash, impact, collision, slamming, or smashup, depending on the circumstances. From the defense's perspective, consider touching, fender-bender, bump, or coming together. Words are a trial attorney's tools, and a well chosen word plants the seeds of your theory in the minds of the finders of fact. And it all begins with the opening statement.

What might the theory of your case be? Obviously it will depend upon the individual case. Here's an example: "Everything was under control and going well until defendant 'lowered the boom.' How did this happen? Mr. Smithson's company, my client, was meeting all of its deadlines, and paying all its employees and bills on time, until defendant Jones Corp. failed to pay its outstanding invoice (You cannot say "breached its contract," because that would be argument.) for goods that had been sent to it by Mr. Smithson's company on a timely basis and without any complaints."

After your opening statement, the finders of fact should view your client as good and responsible human beings (who may have made some human mistakes), who have been wronged and damaged. Thus they are reasonably and logically looking to their fellow citizens to rectify those wrongs by awarding them (note the difference between the word "awarding" as opposed to "giving") with a verdict of lots of money.

Technically, counsel cannot anticipate defenses during their opening statement. But if counsel have a good faith belief that the evidence will be as they state it, discussing that evidence in opening statement should be permissible. But there is a trap for the unwary: If counsel says in opening statement that a particular witness will testify, or particular evidence will be presented, and it does not happen, experienced counsel on

the other side will be sure to note that absence during closing arguments. That can be noteworthy to a jury, even if it is on a minor point, and you will probably not have a chance to explain the absence. So be careful!

Otherwise, keep your opening statement brief. If attorneys come across as ponderous, unprepared or uninteresting, that will hurt their client's chances at success. Many legal professionals join me in believing that most jurors have strong inclinations about what they feel the eventual verdict should be by the end of opening statements. And clumsy attorneys will probably be seen as representing clumsy clients, which is not a good thing.

So that being the case, should defense attorneys reserve their opening statements until the conclusion of plaintiff's case? Although it certainly depends upon the circumstances, most of the time, the answer is no because you want to plant the seeds of your theory as early in the proceedings as you can. But if there is more than one defendant in the case, and the defendants' interests are parallel, it can be beneficial to present an opening statement before the taking of any evidence, and the other to reserve until plaintiff's case is concluded. That literally gives the defense two bites at the apple. In the situation where one attorney represents two parties, two opening statements will probably not be allowed. This is, however, up to trial judge, and it doesn't hurt to ask.

Finally, good opening statements, like good cross-examinations, do not come about without rigorous thought and preparation. What to discuss, and what not to discuss, are issues that must be considered conscientiously over time. Evidence on small points that cannot be effectively challenged can be quite representative of the big picture, so they should be included. Big issues that could come out in various ways during the presentation of the evidence must not be ignored, but should be treated more generally.

And overall, the old "Reach's Rules" recommendation that speech should always improve upon silence should also be honored. So practice your opening statement on your law partner, secretary, spouse, adult children and friends; tell your client's story that will be "shown by the evidence"; make the story human and interesting; and then do everybody a favor - keep it short. You, the jury and your client will be glad you did.

Previous **Next**