

Five Essential Components of an Effective Opening Statement

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The beginning is the most important part of the work.
- Plato

Sometimes we talk because we think we are supposed to. Silence is an underused tactic these days. Our culture is one of self-help books and gurus and therapists telling us to unload our feelings, share information and unbundle our souls. But sometimes what we do not say can be as effective as what we do say. We must know this difference when we undertake an opening statement to a jury.

Our legal system has begun to move toward full disclosure. Especially in the civil arena, we see massive tools for the discovery of information prior to trial. The federal system has a system of mandatory disclosures. By the point of trial, if both parties are abiding by and utilizing the rules, then there should be no surprises. In the criminal arena, we have seen some moves toward more disclosure. Certainly, we receive more information under the statutory discovery laws than we have in the past. Some lawyers are very aggressive about seeking out information in DUI cases, utilizing Open Records Act

requests, discovery motions, notices to produce and subpoenas to get as much information as possible.

This process is very important, because knowledge is, as they say, power. If you don't know anything, then you cannot say much. More important, knowledge of the case is your key to the jury.

The jury in your case is looking to figure out whom they can trust. You want and need that person to be you. It is important to be on time, organized, prepared, and pleasant. It is just as important to make eye contact with the jury regularly. You cannot impress the jury with your belief in the rightness of your case if your eyes are locked on your notes.

I have had cases where the state did not know much about their case. In voir dire, the jury was asked if they knew a particular person by name. In that community, there were two persons by that name: one was a white middle-aged man who worked for a thread mill and the other was a black middle-aged man who managed a pawn shop. A couple of venire persons indicated to the prosecutor that they knew someone of that name but they weren't sure. The prosecutor could tell them nothing more about "his" witness. One of the first things I did when it was my turn was to say to the jury that there were two persons of that name in the community, and described that the prosecution's witness was the black, middle-aged pawn shop manager. From that point, the jury knew that I was the person in the courtroom to look to for reliable information.

You want the jury to count on you and not the judge, not the prosecutor, not a

bailliff, and certainly not any individual witness. You must, therefore, establish trust early and often. One of the earliest stages at which you can establish trust is in opening statements. To do so, you need to have done the work leading up to the opening statements including client interview, independent investigation, motion practice, organization, and trial preparation. You then need to know five things.

Remember that your opening may have more impact on the jury than anything that comes from the witness stand. Indeed, in most DUI cases, that is exactly the way that you want it. Let them look at the case from your perspective.

When to Talk

'Tis better to remain silent and be thought a fool,

than open one's mouth and remove all doubt.

- Samuel Johnson

Every lawyer knows when to give the defense opening statement—right after the prosecution's opening and before the prosecution's first witness. This is generally true and may prove to be the right answer in every case you try. However, there are times when another answer may be equally correct.

Under the uniform rules, defense counsel may make an opening statement immediately after the state's opening statement and prior to introduction of evidence, or following the conclusion of the state's presentation of evidence.² Where there are multiple defendants, the order of counsels' opening statements is within the discretion of the court.³

There are some situations where a defense lawyer may consider exercising the right to speak at the close of the state's evidence. There are a couple of factors that may motivate that decision. The first is that the lawyer is not clear as to what he is going to address in opening. The second is that there is some surprise information or a stratagem that should not be talked about prior to the close of the state's evidence.

There are several reasons that a lawyer might not be clear as to the focus of his opening. In some cases, the lawyer may not have an identified defense and may be

hoping for a misstep by the prosecutor. In other cases, the lawyer may be employing a shotgun approach and may not want to commit to any one theory of the case in opening.

Sometimes, there is a need to maintain the element of surprise. Identity of the driver is sometimes such a factor. The nature of a witness's testimony may be a surprise to the state even if the witness's identity is not. Disclosing too much in opening may cause you to lose your case. It may allow the prosecutor to fix problems in his case or locate rebuttal witnesses to conflict with your version of the case.

In all of these circumstances, the lawyer may feel a need to hold off on opening statement until the state's case has closed. This is particularly dangerous in the first circumstance where the focus of the defense is not clear. After all, what do you do when the state has no major missteps. You are likely caught flat footed.

Even where surprise is your ally, failure to exercise your right to make an opening statement as early as possible can be a major mistake. Just remember that for every rule there is an exception. Bench trials are an exception to that rule, depending upon the judge. I know of one retired judge who was living proof of the rule of primacy. He was alert and took notes during the opening statements. He did not try to reconcile them with the evidence, by which point he had stopped taking notes. In his court, you never passed up opening statements. On the other hand, there are judges for whom opening statements are anathema in bench trials. They will listen if you force them to, but they will remember it as a waste of time. In a jury trial, however, it is indispensable to get your theory of the case in front of the jury as early as possible, even when you don't have a unified theory.

It is the author's view that the opening statement is of critical importance in a drunk driving case – potentially the single most critical element of the trial within counsel's control or influence – and should never be waived. This becomes even more true as courts across the country increasingly restrict the attorney's role in voir dire during the jury selection process.⁴

Your jury is searching for a structure into which it can place the facts of the case. If you do not supply them that structure, your adversary certainly will. I think most of us would not want to see that happen. You cannot pass up the chance to take the wind from your opponent's sails. The cases where you would appropriately waive opening are very rare. "Generally, it is better not to gamble that your waiver of the opening statement will produce a dramatic effect, unless you have total confidence in your ability as an advocate and are one of the few extremely skilled trial attorneys."⁵ Do not rush to assume that you are one of those few.

Giving a late opening or waiving opening is an unorthodox tactic; your jury may not fully appreciate the genius of your novel approach to your client's case.

Remember, as well, that the jury is measuring not only what is said but the lawyers who are speaking. They want to know what you feel about the case and whether you believe in your case. The opening is your first opportunity to lay the groundwork for proving your client's innocence; do not pass by that opportunity.

What to Talk About

Any intelligent fool can make things bigger, more complex, and more violent. It takes a touch of genius - and a lot of courage - to move in the opposite direction.

- E. F. Schumacher

If you can't convince them, confuse them.

-Harry S Truman

The uniform superior court rules specify that the defense's opening statement is limited to expected proof by legally admissible evidence, or the lack of evidence.⁶

Consider your objectives in determining the content of your opening. You certainly want the jury to know about the strengths of your case. Direct the jurors' attentions to the weaknesses in your opponent's case. In doing so, you must remember that it is not enough to poke holes in the opposition. This leaves you adopting the structure of your opponent's case. If this is the only structure the jury is given to put the case into, they will use it, holes and all. If it's cold, you will wear a holey sweater rather than no sweater. You must provide the jury with the alternative structure that they will be looking for, whether they realize it or not.

You also must consider disclosing some of the weak points of your case. This applies to the things on which you might get burned. If your client has a bad record and you know that evidence is coming in, the jury needs to hear from you on that point.

If your client is going to testify, then you should use opening statement to emphasize this to the jury. Explain that your client does not have to testify but that your client wants to make sure that the

jury knows his story.

Overall, you must provide the jury with an alternate view of the events that bring the case to trial. You must attempt to at least cancel out the damage that the prosecutor has done in his or her opening statement. “The prosecutor’s opening statement must be neutralized, for example, in effect cancelling any de facto “presumption of guilt” jurors may have acquired.”⁷

One of the best methods for putting together and delivering an effective opening statement is to use a story. The story method can help the opening to be smoother and more coherent; it will generate the interest of the jury and help you determine what facts to speak about.⁸

One element of a good story is suspense. Suspense is what keeps jurors listening. This is not simply a matter of holding back some particularly important piece of information – not usually, anyway. Suspense is the skill of building the narrative about plot and character in a way that the jury wants to know *what happened next?* You do this by constructing a story that has flow.⁹

Make use of themes, but make sure that your themes are consistent with your theory of the case. In using themes, you should try to limit yourself to a single theme. This theme must carry forward into your trial of the entire case and should be related back to in your closing. Jurors like stories that tie together in a neat package. We all remember “Murder She Wrote” where every week there was a murder that was solved within the confines of sixty minutes. This is a television formula that has been successful over and over again. It is a good model for you in the trial of a DUI case, because your client will get only the one episode. Make sure you tie your case together. Having a theme for your opening and for your case prevents you from simply being reactive to the state’s case. It sets your objectives and goals for the case.

Trial themes are catch phrases that summarize the key elements of the case. Adages and proverbs make good trial themes. They will stick in the jurors' minds. Some examples include:

A chain is only as strong as its weakest link.

A small hole can sink a big ship.

Action speaks louder than words.

A picture is worth a thousand words.

The officer was looking for what he wanted to find.

There was a rush to judgment.

Garbage in, garbage out.

There are other tactics as well. You might argue “man versus machine” where you are going to go after the Intoxilyzer.

A wonderful anecdote is that of the rotten meat in the stew. Here you argue that the state’s case is like a bowl of stew with a hunk of rotten meat sitting in it. Most of us are not going to pluck out that one piece of bad meat and then eat the stew. If the meat is bad, then the stew is tainted as well.

Some have likened the case to the game show “Jeopardy!” and posited the questions for which the prosecution would need to provide the answers.

There are also the theme arguments like “it is a time for justice” and “fear, frustration and futility.” These are not addressed to particular evidentiary issues but simply provide an overall view of the case. Another example is “the invitation” where you invite the jury to do justice.

Make your “bad facts” work for you. If your client has past guilty pleas to DUI that are coming in, tell the jury about them. But explain to the jury that in the past when he was guilty, he “fessed up,” plead guilty, and took his medicine. This case is before them because your client is not guilty and is not going to plead guilty to something that he did not do.

Use opening to humanize your client and dehumanize the prosecutor. Let the jury know that your client is a real person. Do not be afraid to put your hands on your client as you would be a friend. Look comfortable with your client. In this way, you can create empathy for your client. You may not be able to make your client sympathetic, but you still want the jury to identify with the client. On the other side of the coin, you should try to get the jury to perceive your opponent in a negative way. You should not refer to the prosecutor by their name, but as “the prosecutor” or the “government lawyer.”

Remember the importance in every opening statement of informing the jury of the presumption of innocence.

When you are in the position of not having affirmative evidence and not wanting to disclose that you are simply there to capitalize on the state's missteps, you must approach the opening even more carefully. In this situation, the theme of your opening and, indeed, your entire case is the presumption of innocence. Focus on that issue and present the questions to the jury that the state cannot answer. One example of an appropriate opening statement in this situation is as follows:

Ladies and Gentlemen of the Jury, the prosecutor has just outlined to you what he intends to prove. Now, the defense contends that what happened in this case is not the way the prosecutor has described it. On the contrary, we contend most vigorously that the facts will show an entirely different version of what occurred, that the defendant did not do what the prosecution contends he did. All we ask is that you keep your minds open, and I am certain that after you listen to all of the believable evidence, you will say in your own minds that the prosecutor has not met his task of proving the defendant guilty beyond a reasonable doubt. You will say that the presumption of innocence in favor of the accused has not been overcome by the prosecutor and you will understand why I will ask you at the conclusion of this trial to return a verdict of not guilty.¹⁰

Always tell the jury that you are expecting a "not guilty" verdict. If you don't ask for it, they cannot give it. It is also a measure of whether and how much you believe in your case.

What Not to Talk About

There are no rules here - we're trying to accomplish something.

- Thomas A. Edison

To be upset over what you don't have is to waste what you do have.

- Anonymous

The more you know, the less you need to show.

- Anonymous

Avoid surprise and disappointment. Avoid surprise by previewing unfavorable evidence in your opening. Avoid disappointment by not promising evidence you cannot deliver or pitching a theory that the facts do not justify.¹¹

You cannot argue the merits of your case.¹²

You cannot discuss inadmissible evidence, evidence of doubtful admissibility or evidence you do not have good reason to believe will surface at trial.¹³

You should not discuss the applicable law.¹⁴

You should not express your personal opinions about the evidence or the case.¹⁵

You should not express your personal opinion of the credibility and character of anticipated witnesses.¹⁶

Don't narrate. Tell a story, but do not attempt to document every fact that will be presented over the course of the trial and every parry and thrust that may be anticipated

during the examinations of the witnesses.

Do not give an opening statement that is just a list of witnesses and what you think they will say. The jury will quickly tune out of this monologue. Tie it all together into the story of the case making references occasionally to who will say what. Moreover, this method puts you at risk of committing that a witness will say one thing and the witness gets on the stand and says something different.

Maximize your credibility in every way. As one commentator put it:

The jury's assessment of your truthfulness often spills over to the jury's assessment of your client, your witnesses, and the entire case. If the jury suspects that you are lying, then it is likely to presume that everything associated with the case came from the same tainted cloth.¹⁷

Take the high road. Do not make personal attacks on opposing counsel or anticipated witnesses. You have to give the jury the opportunity to form their impression of witnesses from their testimony. Nastiness in the opening statement is likely to backfire upon you. The only exception to this is where you have solid and incontrovertible evidence that the witness is lying, and, if that is so, then why is the case being tried.

While you cannot ask the jury to place themselves in your client's position, you can certainly tell them enough of your client's story to help them identify with his situation.

If your client is not going to testify or you are not sure about whether your client will testify, do not mention this fact one way or the other in your opening. This will keep the prosecutor guessing and it maximizes the dramatic impact if your client does take the

stand.¹⁸

Don't make promises in opening that you cannot or will not deliver. This is a breach of trust that the jury will hold against you. You need the jury to view you as 100% honest, "not like most other lawyers."

Don't make admissions during opening statements. One example is that the defendant's opening admitted that he was "behind the wheel" was held to establish that element of the crime. State v. Cassandra, 58 Or.App. 84 (1982).

Never adopt the state's theory of the case.

Do not speak in legal talk. Use ordinary language that ordinary people will understand. If technical or legal terms are absolutely necessary, make sure that you explain to the jury what the term means. The exceptions to the no-"legal talk" rule are "burden of proof," "presumption of innocence," and "beyond a reasonable doubt."

Do not use trite phrases. Examples are "that dog won't hunt" and "the bottom line is."

Paying Attention to the State's Opening

The man who removes a mountain begins by carrying away small stones.

- Anonymous

It is the province of knowledge to speak and it is the privilege of wisdom to listen.

- Oliver Wendell Holmes

In paying attention to the state's opening, you must also focus upon the jury. At this stage of the proceedings, the jury's attention is probably at its highest. They are still pretty much in the dark about the facts of the case. They are not yet bored with being in court. You need to watch them to see what facts or points seem to interest them the most. You may need to adjust your case and possibly your opening to respond to these issues.

Look for prejudicial remarks made by the prosecutor. If this happens, do not be afraid to object and move for curative instructions or a mistrial. Your client only gets one real shot at a fair trial. Do not compromise his interests for the sake of expediency or not wanting to seem difficult. Who cares if they perceive you as difficult. Next time, the prosecutor will think twice before he says something even close to the edge. He doesn't want to get called up to the bench. Eventually, the prosecutor may decide that it is easier to resolve your cases than to go through motions and trials with you. By difficult, I do not mean lack of professionalism or lack of courtesy. In court and in front of a judge or jury, you should always be both professional and courteous. By difficult, I mean knowing the limits of the state's opening and holding them to it and not being afraid to object. It is not impolite to interrupt opening statement for a legitimate objection.

Do not be defensive in your opening statement. If you are simply responding to the state's case and trying to chip away at it, you will rarely succeed in eliminating the state's case by the end of the trial. You need to put away the little hammer and use a sledge hammer instead. To do so, you must give a strong and persuasive opening statement.

Does the state have a theme to its opening? If so, is it something that you can use. Several years ago in a civil trial, the insurance lawyer told the jury in opening that the case was like a baseball game where you have to touch all the bases and that my co-counsel and I would not touch all those bases. By Friday of that week when closing argument came, we had a blow-up of a baseball diamond on hand with magnetic labels to put over the bases to show how we had indeed touched all the bases and that based upon what the insurance lawyer had told them in opening, if we touched all the bases, then we won. The jury ended up returning a half-million dollar verdict in that case. Using the state's rhetoric against it is both satisfying and effective.

How to Talk About the Law and Your Case Without Arguing

Use soft words and hard arguments.

- Anonymous

Never argue with a fool. Someone watching may not be able to tell the difference.

- Anonymous

Just because you cannot argue the law does not mean that you cannot acquaint the jury with the law. You are simply limited from telling the jury how to apply that law to the facts of the case. In order to begin to persuade the jury about your case, they must know what the rules are. If you had never seen a game of football and had never read a rule book or heard about it, you would have a hard time keeping score. Most of our jurors have never been in that box before and know nothing about the rules of a DUI case. If we do not tell them what those rules are up front then they will have to guess about what the rules are. At the end of the trial, the judge will tell them the rules and you and opposing counsel will argue the case but you are then asking them to look back and remember and apply the rules to what they remember. That is not a very effective tactic.

“Everything you say during trial should be designed to persuade the jury that your side of the case is the right one. This is especially true of opening statement, which is often your first extended opportunity for persuasion. The facts you select, the details you emphasize, the picture you draw of the

people and events involved should all be designed to persuade the jurors that your side should win."¹⁹

You will tell the jury in your opening statement not only what the facts will be but what facts are important and something about why they are important. If you do not do so, you have given up your chance to persuade and truly inform the jury.

At the conclusion of your opening statement, the trier of fact must have a crystal clear knowledge and understanding of who you are and what you are and what your case is all about and why you are here (in the courtroom). The jury should be told not only the facts but also why certain facts are important and perhaps more important than others – keeping in mind that you can do this in a persuasive manner without getting into argument.²⁰

Show the jury that you genuinely interested in and believe in your client's case. Tell the jury the reasons that you believe in your client's case. If you are credible and the reasons that you set out are reasonable, you likely will persuade the jury.

Talk about the facts in a way that incorporates the law but doesn't mention it. One good example involves reminding the jury of its duty. An example from the 2001 NACDL DUI seminar is as follows:

The State's opening disclosed to you - the number - .148. This is the "magic" number the prosecution will use to attempt to overwhelm you. But, it is not "magic" and we intend to prove its fallacy. Thus, if you decided this case

when you heard the “number,” I have to remind you – you’ve broken your promise made in the voir dire this morning. You promised Lori Ledford and I that you would be fair and would wait to hear it all before deciding. I trust you will do that.

Without ever mentioning the law, this argument conveys the elements of the law that are important. It tells the jury about the facts and what facts are important and why one of the state’s facts is not important.

Remember, if you do not have the prosecuting attorney objecting to your opening, you are not doing your job. You have to skirt that edge of argument to persuade the jurors to find your client not guilty.

Conclusion

Never forget your goal in opening statement.

The goal of the opening is to win or at least help you win your case by the time opening statements have concluded . . . If it is not enough to make you win, then you should have a significant head start by the conclusion of opening statement.²¹

Go out and win, and win in the beginning by giving a positive and directed opening statements with your eyes steady upon the goal.

Outline of an Opening Statement

1. Introduction
 - a. Thank the jury
 - b. Describe the process and the significance of opening
 - c. Emphasize that your client was arrested, taken to jail and when given the first opportunity to do so asserted his innocence and that is what brings the case before them
 - d. Give a brief review of the laws that apply
 - e. Describe the presumption of innocence and that the state's evidence must eliminate all reasonable doubt that your client was guilty.
 - f. Introduce your theme of the case
2. Review of the Evidence
 - a. Tell the jury what happened
 - b. Use descriptive terms
 - c. Attack the State's weaknesses
 - d. Emphasize your strengths (except where they will be a surprise)
 - e. Deal with your weaknesses
3. Wrapping Up
 - a. Tell the jury that you are sure that the evidence is going to show a reasonable doubt in the case
 - b. Tell the jury that you are going to ask them to find your client not guilty

Endnotes

1. Sean A. Black is a 1992 graduate of the Emory University School of Law. He is a member of the American Bar Association, the State Bar of Georgia, the Georgia and National Association of Criminal Defense Lawyers, the Association of Trial Lawyers of America, the Georgia Trial Lawyers Association, and the Federal Bar Association. His practice includes federal and state criminal and DUI defense as well as personal injury matters.
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