OPEN TO WIN: PERSUADE AT THE OUTSET

By: Douglas M. McIntosh[1]

INTRODUCTION

> **The mark of a master is, that facts which before lay scattered in an inorganic mass, when he shoots through them the magnetic current of his thought, leap into an organic order, and live and bear fruit.**[2]

Openings make or break business ventures, arrangements, and opportunities every day. The opening on Broadway is preceded by untold preparation, anticipation and trepidation. If successful, it paves the way for a longstanding success; a poor review kills the show forever. Restaurants depend upon stellar openings, often closing doors within weeks if not successful. In poker or bridge, the opening bet or bid can cause others to fold or raise the ante'. Either activity may be a desired reaction. In negotiations for purchases or sales, the opening sets the stage for all future discourse. It can open, or close, the door. So, too, is the defendant's opening statement in any civil trial a crucial and indispensable opportunity. It "is the most critical stage in the trial of lawsuit, as here the jury forms its first and often lasting impressions of the case".[3] Any defense lawyer who treats the opening as less is abandoning one of the most potent armaments in the battle of the trial.

PURPOSE AND SCOPE

> **THE COURT: It's not the purpose of opening statements to try the case. Its purpose is to give an outline . . . .**[4]

This is partly true, but mostly wrong. Fortunately, for the trial lawyer saddled with this trial judge's perspective on opening, the appellate court strongly disagreed and reversed for a new trial.[5] It is true that the opening is not evidence, and thus not "the trial of the case".[6] Openings, however, universally viewed by plaintiffs and defendants as the outcome-determinative portion of the trial in fifty to eighty-five percent of all cases.[7] The opening is a "soliloquy leading the jury to [your] desired result".[8]

During trial, the advocate has at least three opportunities to speak directly to the jury. The first opportunity occurs in voir dire examination and the third in the closing argument. The second opportunity is at opening statement.[9] This opportunity to communicate must be seized upon by defense

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2 Oliver Wendell Holmes, Jr., SPEECHES, 29 (Little Brown and Co., 1913).

3 Maleh v. Florida E. Coast Properties, Inc., 491 So. 2d 290, 291 (Fla. 3d DCA 1986).

4 *Id.* at 292.

5 *Id.*

6 Plaks v. Florida E. Coast Ry., 175 So.2d 216 (Fla. 3d DCA 1965), (In *Plaks*, the defense stated in opening that a certain individual was the engineer at the time of the accident. The plaintiff offered no proof of facts as to the identity of the engineer, and the Court directed a verdict against Plaintiff on the basis of absence of the critical fact. The statement by defense counsel in opening was not deemed an admission of fact for evidentiary and burden of proof purposes.), *cert. denied* 183 So. 2d 211 (Fla. 1965).

7 Lundquist, Weyman I., *Advocacy in Opening Statements* 8 LITIGATION, No. 3 (Spring 1982); *see also,* Dunne, Kevin J., *Defense Counsel Training Manual,* Chapter XII, "Trial Advocacy: Opening Statements for the Defense", 202-290 (International Association of Defense Counsel, Chicago, Illinois 1989).

8 Dunne, *supra* note 7 at 282.

9 *Id.* at 285. (citing, Julien, Al, Julien's 8-1/2 Rules on Opening Statements, TRIAL, October 1985, at 63).

counsel. There are ways to do this better than most.

The origin in the law for allowing openings was to permit each party with an opportunity to "briefly . . . outline what the party expects to prove in support of his cause of action or defense".[10] Today, the Florida Standard Jury Instructions provide the jury with the "standard" purpose of the attorneys' opening statements. The jury is instructed that the attorneys for each party "may *explain* to you the *issues* in the case, and *summarize* the facts that *they expect* the evidence will show".[11] The four emphasized words of this short instruction that is given in all civil cases reveals how subjective and compelling an opening statement can be. The acronym "I-SEE" illustrates the allowed persuasive uses that the opening can serve.

1. "I": "ISSUES"

Your opening must frame the issues from your client's perspective. Explaining the case is basic. But more than that, *your* issues must be focused. Examples can include a plaintiff's opening which languishes over the facts that you as defense counsel don't feel the jury ought to focus upon. If your case is really about permanency of injuries or failure of the plaintiff to use an operational seat belt and the plaintiff has talked about the "wreck, impact, and horrendous event" in opening, diffuse this and direct the jury by stating your issue at the outset. An example might be:

> Ladies and gentlemen, the question for you in this case is whether or not Mrs. Grant would have received any injury if she had been wearing her working seat belt that was in her 1995 Lexus, or, the question in this case is not whether the accident was unfortunate and avoidable, as we admit Mr. Lee caused the accident, but whether Mrs. Grant was permanently injured in the accident.

By taking the issues straight to the jury, you begin a bridge of credibility and honesty with them.

2. "S": "SUMMARIZE" (Simply)

You are allowed to summarize and explain your case in opening. Consequently, set your goals and summarize all facts relevant to achieving those goals. To do this properly, the jury must understand you.

Law school teaches us to think and speak differently. You must leave "lawyer-ese" to the lawyers. You must talk to the jury. De-lawyerize your English by bringing familiar language to the jury in your opening talk. Some examples of this must be pointed out to those among us who are non-believers:

Lawyer Talk	Human Talk
1. "The incident/date in question"	1. "on September 12th last year"
2. "The vehicular incident"	2. "the accident"
3. "The plaintiff's own negligence"	3. "Mrs. Grant's fault/actions/words"
4. "The defendant's actions met or surpassed the appropriate standard of care"	4. "Dr. Jones did what an oral surgeon is expected to do"
5. "The plaintiff failed to perceive the consequences of her actions by imbibing in intoxicating beverage over the proscribed limits"	5. "Mrs. Grant was drunk/inebriated"
6. "Red herring"	6. "Smoke screen"

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10 Juhasz v. Barton, 1 So. 2d 476, 478 (Fla. 1941).

11 Florida Standard Jury Instructions, 1.1 The Florida Bar (1989) (emphasis added).

We are also guilty of spewing forth great gobs of medical mumbo jumbo. Again, some examples for the professionally unconvinced:

Mumbo Jumbo	Real Talk
1. "mastication"	1. "chewing"
2. "edema"	2. "swelling"
3. "patella"	3. "kneecap"
4. "the injury involved an exacerbation of preexisting temporo-mandibular joint disorder"	4. "Mrs. Grant had a frozen jaw before this event"
5. "the lower lumbar intervertebral disc is clearly not herniated"	5. "Mrs. Grant's spine was not injured permanently"
6. "the dermato-pathologist's microscopic examination revealed free margins in the excisional specimen"	6. "Dr. Smith confirmed that Dr. Jones removed all of the tumor in Mrs. Grant"

You must summarize your facts, but do it simply and in real talk for the jury. The worst thing a defense counsel can do is confuse difficult issues for a jury by using words that even the lawyer does not understand.

3. "E": "EXPLAIN"

A Defense counsel must explain the issues to the jury in the best light for the client. The judge will instruct the jury that is what you are expected to do, so be sure to do it. Your defense opening must be coherent and clearly communicate your client's theory and facts. A persuasive opening story should be told to the jury. Details from the witness stand during trial will bond the cement of veracity to your opening. Go directly to the most important and compelling part of your theory, and lay the groundwork for your closing argument. Two or three "buzz words" can be planted in the jury's collective conscience at this time. Over simplification or "talking down" to the jury is a big mistake. Simile-usage is often overplayed tremendously. The opening is not a crossword puzzle or confusing road map, so do not tell the jury it is. Telling any jury at any time "what you are about to hear is not evidence" is like inviting them to turn off the television set. You are telling them that nothing they are about to hear is worth listening to. The court will tell them once that "the statements [of course] . . . are not to be considered . . . as evidence",[12] so for your client's sake, don't say it again! Do not be tempted to fall into this trap, or you will surely lose the jury at the outset.

4. "E": "EXPECTED FACTS"

The other part of the court's preliminary instruction to the jury clearly indicates that you may only discuss what you "expect the evidence will show".[13] Consequently, you cannot argue. You cross the line from explanation to argument when you suggest to the jury how they should reach a decision. This occurs when you draw inferences, comment on the importance of various facts, or comment upon the weight of certain testimony that will come from the witness stand.[14] Present your facts as facts, not as you interpret them.

It is critical not to refer to a fact that you cannot or do not intend to prove. Not only will this destroy your credibility with the jury, it can be a violation of ethics to allude to irrelevant, peripheral

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12 *Id.*

13 *Id.*

14 *See generally,* Lubet, Steven, *Modern Trial Advocacy Analysis and Practice,* "Opening Statements" Chap. 9, (National Institute for Trial Advocacy, 1993).

facts that you have no intent of proving.[15] Personal knowledge or experiences is inappropriate comment, and therefore, it follows that calling witnesses "liars", commenting that your experiences tell you that the plaintiff is faking it, or other personal opinions, are totally improper.

The use of "fighting words" in an opening statement is totally improper.[16] For example, the attorney cannot state, "I'm here to tell you the truth," followed by, "the Plaintiff should be thankful she wasn't hurt more seriously rather than wasting your valuable time", or "you are the conscience of the community and the sentinel in this Court." These inflammatory remarks will be objected to by prudent plaintiff's counsel and may lead to the attorney bringing his toothbrush to court the next day. It is rare for a trial court's ruling concerning opening comments to be overturned.[17] Do not run the risk of negative commentary by the court by enhancing the facts.

In order to explain the facts to the jury, you need to set your theme and with use of certain buzz words or key evidentiary items that will come out during the trial. This will give the jury a feel for the your story and credibility for the remainder of the trial. Use of demonstrative evidence stipulated to or allowed can help explain facts best. These *are* the facts that the jury will see in black and white during trial.

STRUCTURE AND CONTENT

> **The law pursuing its course of specification . . . decides what is the tendency of representations in certain cases . . . . Beyond these specific rules lies the vague realm of the jury.[18]**

Most important to structuring your opening is knowledge of your local court policies and procedures for opening. It is imperative to learn whether exhibits will be permitted. Use of exhibits is strongly encouraged, as all jurors, in this day and age, are visually oriented.

You must learn whether time constraints placed upon your opening. A limitation on the opening that is unreasonable is reversible error, and you should preserve your objection in the pretrial conference or at the start of trial, to an opening that is too restricted.[19] You must also learn if the judge is going to require that you stand at the podium, or allow you to freely move about the courtroom. Too much movement can distract a jury. If exhibits are going to be used, the appropriate movements at the appropriate time can add inflection to your point being delivered, and can bring the "sleepy" or distracted juror back into your presentation. Knowing your court and having all questions answered about local custom guides your presentation, and molds your opening statement.

The plaintiff, in opening, will often accuse your client of wrongful conduct of an egregious nature. Your opening should not ever echo the plaintiff's accusations. Instead, you should respond directly to the main theme and central fact that the plaintiff has used in the opening, use your demonstrative exhibits where helpful, and where possible juxtapose the "written word" with the plaintiff's oral accusations. If the plaintiff has suggested that certain facts or evidence will be unequivocal and clear, and you can demonstrate controverted facts on this issue, bring it up in opening. Many times, you must mention negative-impacting evidence that will come up in the case, which helps build integrity and honesty with your jury.

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15 *See e.g.*, Schubert v. Allstate Ins. Co., 603 So. 2d 554 (Fla. 5th DCA 1992), *rev. dismissed* 606 So. 2d 1164 (Fla. 1992).

16 *Id.*

17 Durocher v. State, 596 So. 2d 997 (Fla. 1992).

18 OLIVER WENDELL HOLMES, JR., THE COMMON LAW, 134-135 (Little Brown & Co., 1881).

19 Maleh v. Florida E. Coast Properties, Inc., 491 So. 2d 290 (Fla. 3d DCA 1986) (requiring openings of five minutes in a medical malpractice case is reversible error); Bullock v. Mount Sinai Hospital, Inc., 501 So. 2d 738 (Fla. 3d DCA 1987).

Although rarely done, a defendant in a civil case may reserve opening until the conclusion of plaintiff's evidence.[20] At least one commentator offers four distinct reasons to do so: (1) a wish to conceal strategy or theory from the opposition; (2) to demonstrate passive posturing; (3) the plaintiff's case is so forceful, the "thunder" of your opening will be lost; or (4) to force your adversary to prove side issues because they won't have benefit of your summary of the issues.[21] With liberal and comprehensive pretrial disocvery, reasons one and four seem left with no merit. An obvious downside strategy to reserving opening is that it leaves the jury with one side of the case explained before evidence is presented and the assumption that there is no rebuttal.[22] Delivering a "second" opening later in the case, and following with your evidence, obviously provides food for thought. As it is somewhat antiquated, clearing the reservation of opening with the court before trial is prudent.

The defense lawyer needs to consider when, if ever, to talk about damages and sympathy in opening statements. Some cases, such as where liability is admitted, require a discussion of damages in the opening. Also, when the chance of a total defense verdict, damages may have to be addressed. However, sticking to the facts in the contested case, with no comment on damages, best serves the defense. Sometimes just a reference that damages may have to be considered only if liability is found first, can suffice if one deems it imperative to address damages. However, you are there selling the jury that your client is *not liable* to the plaintiff. Bringing up damages here only deflates the liability facts you seek to explain and summarize.

Talking about sympathy is more difficult in the defense opening statement. In a catastrophic injury case, or wrongful death case, every juror will have sympathy for the injured party despite being instructed otherwise in voir dire, and at the close of the case. Sometimes, a reminder in opening that sympathy is to be discarded plays well, especially when it is followed in closing and the judge instructs of this requirement during the charge to the jury.

Not all defendants appeal to the average person. Confronting the notion that all parties in the courtroom are equal and entitled to the same fair trial, both in voir dire and in opening, can be mandatory. This, of course, becomes critical when defending a corporate entity in most cases. Again, overkill with simile can ruin your integrity with the jury. Rather, you should discuss the facts and evidence which demonstrates that the corporation is acting through persons and representatives much like the plaintiff and everyone else in the courtroom. One must be careful not to comment on the weight or credibility of the facts when dealing with the corporate or unappealing defendant.

CONCLUSION

We don't see things as they are, we see them as <u>we</u> are.[23]

Defense counsel basically has one goal to achieve in any good opening. This goal is to persuade the jury at the outset. The best manner to persuade (without arguing) is captured in the phrase "see, see, easy see [C,C,E,Z,C]". The defense lawyer must demonstrate commitment [c], credibility [c], energy [e] zeal [z] and courtesy [c] to persuade a jury in opening. With thorough grasp of all the facts and adequate preparation this goal can be met. The opening statement is where the first and most lasting persuasion takes place. Have the jury see it your way, and your case can be won at this critical phase of trial.

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20 Allen v. Hooper, 171 So. 513 (Fla. 1936); *Fuller v. State*, 540 So. 2d 182 (Fla. 5 DCA 1989).

21 RASICOT, JAMES, JURY SELECTION, BODY LANGUAGE AND THE VISUAL TRAIL, 120 (AB Publications, Minneapolis, 1983).

22 *Id.* at 121.

23 Nin, Anais (French/American Writer) (1903-1977) (emphasis added).