In our hearts we all love to hear and to tell a good story. Stories, well told, are the engines by which we win.

—Gerry Spence

An opening statement is, above all, the beginning of a story. Experienced litigators often describe a trial as a competition between two stories with the jury as the ultimate arbiter. In that sense, the opening statement is the starting point; it serves as the first chapter of your narrative and a road map for what the rest of the trial will bring. It is here that the jury forms its first—and often its lasting—impressions of your case. Psychologically, we tend to remember the first and last things we hear.
Practitioners should take advantage of the opening statement to focus the jury on the themes and theories of the trial and on the facts on which they want the jury to rely, paving the way to a verdict in their clients’ favor.

Paramount to presenting a compelling narrative is the practitioner’s comfort—both with the material and with himself. This chapter provides guiding considerations for the practitioner to master in delivering his story—the opening statement—with ease and confidence at trial. It is never too early to begin thinking about your opening statement. It may be helpful to begin contemplating what you will include in your opening statement as you are learning the facts of your case. Beginning this process early ensures that you will have ample time to consider multiple themes and to discover the theme that best fits with the evidence you will present.

Reviewing the ideas presented here while planning an opening statement will assist the lawyer in delivering a statement that will leave a lasting impression on the jury. When issues such as the purpose of the opening statement, its target audience, the key elements of persuasion, the limitations of local rules, and the use of visual aids are considered methodically and well in advance of trial, the lawyer is able to more effectively tailor his opening statement for the jury, avoid wasting time on unnecessary details, and focus on the most important element of delivering an opening statement: finding his voice.

**Preliminary Technical and Tactical Considerations**

Lawyers commonly delve into constructing an opening statement without thoroughly considering all of the variables affecting its execution. In many instances, the case may be facing trial after months or years of litigation, and the lawyer’s familiarity with the facts makes it tempting to simply begin typing at his keyboard. However, much time could be wasted in constructing an opening statement that fails to comply with local rules, does not properly consider its audience, or otherwise overlooks a critical element of the particular trial at issue. Before constructing your opening statement, begin by considering its purpose in your trial and whether there is any strategic reason not to make an opening statement.

**Should You Make an Opening Statement?**

In most instances, your case will be well served by an effectively delivered opening statement. However, a practitioner should not take this conclusion for granted. Rather, a practitioner should carefully analyze whether there exists any reason to forgo delivering an opening statement altogether or to pursue an alternative to a traditional opening statement. For example, you may represent the defendant in a trial where the plaintiff’s case is likely to take days or weeks to present. Alternatively, you may represent the defendant in a case where you have been unable, for a
variety of reasons, to achieve clarity about the plaintiff’s theory of the case. In these cases, you may want to hear the plaintiff’s opening statement to better understand his theory before delivering your opening. You may therefore prefer that the jury hear your opening statement immediately before your case begins, rather than at the start of the trial. Your case may involve complex evidence requiring additional time to summarize at the end of trial, and thus your time for an opening statement may be best reserved for your closing. Facing a bench trial, you may decide that given the judge’s ongoing familiarity with the issues, she will react more favorably to a presentation that moves straight to the evidence. These are only some of the reasons that one might elect to forgo a traditional opening statement.

When considering whether an opening statement will best serve your case, first reflect on what you want the jury to understand about your case and whether and how an opening statement might detract from that purpose. For example, your case may involve the presentation of certain facts best heard for the first time through a particular witness. You may represent one defendant of many and seek to draw as little attention as possible to your client. In these cases, an opening statement setting the scene and introducing your client to the jury may be at odds with your trial strategy.

Next, carefully review all appropriate state, federal, and local rules to ensure that you are permitted to forgo an opening statement and pursue any alternatives. For example, if you seek to reserve some or all of the time allotted to the opening statement for your closing, ensure that you seek leave of court as appropriate. In addition, if the proceeding is a jury trial, consider submitting a curative jury instruction to ensure that the jury understands that failing to make an opening statement, or reserving the allotted time for closing, should not be held against your client.

Finally, counsel your client about the risks involved in forgoing a traditional opening statement. Juries are familiar with the model of trials shown on television and in films and may react negatively to your failure to follow this model. In addition, the opening statement offers the jury an opportunity to become familiar with the lawyer, the parties, and your client’s narrative unfiltered by witnesses, without the restrictive and tedious direct and cross-examination format that will follow for the remainder of the trial. Ensure that you will be able to effectively present this narrative in other ways, or that these considerations are strategically unimportant in view of the client’s desired outcome.

At the very least, the exercise of considering whether you should make an opening statement will crystallize in your mind its objectives and purpose in your particular case. To this end, considering the strategic reasons for not making an opening statement is a worthwhile exercise even if you are undeniably convinced that your case will begin with a traditional opening statement.

**Can You Make an Opening Statement?**

Once you have considered and rejected any strategic reasons for forgoing an opening statement, myriad issues still remain before you can begin constructing the statement itself. The most critical consideration is whether you are permitted to make an opening
statement and the types of limitations imposed on your ability to do so. Failure to be thoroughly familiar with these factors in advance could negatively impact your case. For example, if you are unfamiliar with local rules regarding time limitations and have prepared a persuasive opening statement that will run well over the judge's 15-minute time limit, the opening statement will be of no use at the time of trial.

Gather all of the applicable rules (federal, state, local, and the judge's individual chambers rules) and review rules concerning trial practice with an eye toward those focused on opening statements. In most cases, these rules will focus on time limitations, constraints concerning argument and statements of law, restrictions on using particular materials (demonstrative exhibits, audio or video recordings, pleadings), and specific situations requiring leave of court (in some jurisdictions giving an opening statement itself requires leave of court). You should become familiar with these rules well before the pretrial conference or equivalent pretrial proceeding is scheduled, so that you can raise all such issues during that time and be prepared with the necessary motions. For example, the New Hampshire Rules of Criminal Procedure provide that “opening statements are not permitted in district court trials except with permission of the court for good cause shown.” In the U.S. District Court for the District of Connecticut, lawyers in civil trials are permitted to make opening statements, but these statements may be subject to particular limitations imposed by the trial judge. The sooner you become familiar with these limitations, the more effective your preparation will be.

If you are planning to present exhibits during your opening statement, discuss their use with the judge in advance and, whenever possible, obtain advance admissibility rulings as needed. Failure to obtain these admissibility rulings could lead to a potential loss of credibility with the jury when the promised evidence is absent from the jury room. More critically, relying on exhibits not ultimately entered into evidence could result in a mistrial in some jurisdictions.

Finally, if you do not have trial experience in the particular district where the trial will take place or before the presiding trial judge, speak to local lawyers who do. You may learn valuable information about the judge’s unwritten preferences or practices during trial that can assist you in preparing your opening statement.

**ELEMENTS OF PERSUASION**

Once you have carefully considered the limitations typically imposed on opening statements, reflect on the message that you want your statement to convey and how you can best communicate that message. A lawyer first contemplating his opening statement to the jury should begin by asking: Why should they believe me?

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Experienced practitioners and commentators alike routinely caution that the opening statement is not argument. As a matter of law, this is true; a lawyer cannot make argument in his opening statement. In practice, the standard is an elastic one governed by local rules and practices and subject to a judge's discretion. This rule notwithstanding, the opening statement necessarily begins the process of persuasion in the trial, and the practitioner should treat the opening statement as one of the most important things he will do during the proceeding.

Lawyers have only three opportunities to speak directly to the jury during trial: voir dire, the opening statement, and the closing statement. In view of the trial landscape, this reality is stunning: the people who will decide the outcome of the lawyer's case are those with whom he speaks the least during the course of the trial.

With voir dire occurring before the jurors have been sworn and providing only minimal interaction with them, the opening statement offers the lawyer the best opportunity to begin the process of persuasion: showing the jury why his client's narrative must be the one they adopt as their own. To effectively frame your client's narrative in this way, consider why he is proceeding to trial in the first place: some part of his narrative is inconsistent with his adversary's narrative. The process of persuasion must therefore begin with identifying this principal inconsistency for the jurors. Once they understand the tension between the parties' narratives, you are primed to begin persuading them to believe in the one you present.

Persuasion is often described as an art because it involves mastering the delicate balance between gently prodding one toward a point of view without overpowering her authority to decide. In a jury trial, this balance must be maintained with respect to a group of people coming to the trial with widely varying beliefs and values, most of which are unknown to the lawyer. This section, while not exhaustive, identifies some of the universal elements of persuasive presentations in the context of a jury trial.

**Authenticity**

There is no greater persuasive tool than authenticity. Beyond mastery of the facts of your case, focus on a manner of construction and delivery that makes you feel comfortable, authentic, and natural. The sense of authenticity that you exude will help you establish credibility with the jury, itself a valuable persuasive tool. In moments of doubt or confusion about the evidence, the jurors are likely to favor the lawyer they find most credible to guide their understanding.

**Primacy and Recency Effects**

A juror cannot be persuaded by information that he cannot recall. The twin effects of primacy and recency refer to one's ability to remember information presented first (primacy) and last (recency). In delivering an opening statement, a lawyer can exploit this cognitive bias by ensuring that key information is presented at the beginning or the end of his statement. For example, if you are representing a
criminal defendant who plans to testify, it is often useful to communicate this information to the jury in your opening statement so the jury anticipates his testimony through the remainder of the proceeding. Since your client in such a case would likely testify toward the end of the trial, you can exploit the jury's bias for primacy and recency by framing your case on each end with your client's own narrative.

**Scripts**

Jurors come to the jury box with preconceived ideas and biases. Script theory is a social psychology concept explaining the impact of these biases by describing the way individuals make sense of particular events. Script theory provides that individuals view their world through “scripts” or structures that serve as a shorthand for understanding events based on past experiences. For example, law professor Sara Gordon describes a social psychology experiment in which subjects were questioned about the characteristics of the crime of robbery.\(^3\) The majority of subjects conceived of robbery as involving the following characteristics: (1) the taking of something valuable; (2) use of a weapon; (3) occurring inside a home/apartment.\(^4\) These subjects called to mind a “script” of robbery that involved an armed perpetrator and the theft of a valuable object even though the crime of robbery does not always require proof of such elements.

Script theory provides a framework for understanding some of the jury's biases and addressing them in a meaningful way. A lawyer using script theory could take advantage of jurors' familiarity with certain scripts to steer them toward the narrative favoring his client, create a new script by relating particular anecdotes, or account for jurors' scripts when preparing an argument that may upset some of their preconceived notions. A lawyer can often determine how to best use script theory by accessing the typical script regarding a particular type of event. For example, given that an average person's script for the characteristics of a murder would likely involve a dead body, blood, a weapon, and a struggle, a lawyer defending a client accused of murder in the absence of a body and a bloody scene can exploit the jurors' comfort and familiarity with the aforementioned script to his client's advantage.

By contrast, a lawyer knowing that his client's narrative is at odds with jurors' familiar scripts (i.e., his case relies on the viability of a contract scribbled on a cocktail napkin; jurors expect contracts to be more formally drafted) can temper the jurors' resistance to this narrative by understanding the likely scripts jurors will bring to bear and subtly introducing viable replacement scripts. For example, a lawyer could begin his opening statement by relating the many famous contracts and other well-known ideas that began improbably scribbled on napkins. In this example, the opening statement provides one of the few opportunities for a lawyer to tell the jurors about the humble cocktail-napkin beginnings of famous song lyrics.

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4. Id.
or innovative smartphone applications, thus nudging them to adopt a new script favoring his client's narrative.

**Inoculation**

Analogous to the concept of inoculation in medicine, inoculation in a trial context involves anticipating the other party's theory and attacking a version of it, thus inoculating the jury against the other side's arguments. By the time the jurors are presented with the full force of the other party's theory, they have already been exposed to arguments in opposition and are primed to resist the theory being presented. This inoculation should involve not only anticipating the other party's theories, but also, to the extent possible, embracing any damaging facts that the other side will later cast as fatal to your case. A welcoming stance toward facts seemingly unfavorable to your case can serve to inoculate the jury against this belief.

**Visual Aids**

Using selected visual aids in your opening statement accomplishes in a few moments what might be impossible or unwieldy by speaking alone. Numerous studies show that individuals tend to recall pictorial information with far more ease than speech. In selecting persuasive visual aids for your opening statement, focus on conveying a critical theme or juncture of your story with simple, easy-to-grasp pictures, charts, or photographs.

One of our co-authors recalls an opening statement where a key element of his client's story involved conveying to the jury that the client, a defendant in a criminal case, was not acquainted with the dozens of state witnesses whose testimony would allegedly prove that he had committed multiple counts of larceny. In the opening statement, our co-author's trial team presented a slide containing approximately 25 squares, each colored green and each containing the name of one of the state's witnesses. Defendant's counsel then advanced the slide revealing the same visual with the majority of the boxes colored red to illustrate that the majority of the state's witnesses had never met or interacted with the defendant. A glance at the slide showed a few green squares in a sea of red squares. The chart gave the jury a comprehensive and memorable graphic overview of the relationships (or lack thereof) between the defendant and witnesses without requiring counsel to engage in a cumbersome recitation of names.

As discussed above, address evidentiary issues concerning the use of visual aids or exhibits during an opening statement with the court and with opposing counsel before incorporating them into your presentation.

**Simplicity**

Just as jurors cannot be persuaded by information they cannot remember, they will not be persuaded by information they do not understand. Simplicity is key in
delivering a persuasive opening statement. The concepts above will be of limited utility if the statement is long-winded, peppered with legalese, and filled with more information than the jury needs to absorb to understand the basics of your client’s narrative. To keep the jury engaged, use direct language, speak clearly, and use conventionally unfamiliar concepts sparingly. Jurors’ attention spans have always been short but recent studies report increasingly shorter attention spans. Your statement should therefore convey your client’s narrative as succinctly as possible. Avoid excessive detail in favor of key figures and events highlighting the principal elements of your client’s story.

CONSTRUCTING AND ORGANIZING YOUR OPENING STATEMENT

Armed with a sense of the process of persuasion, you are ready to begin constructing the opening statement itself. An effective opening statement will answer credibly the jurors’ basic questions about the case: What is this case about? What are the parties fighting about? Why should I care?

Devise Your Theme

Distill your case to its core elements and devise a theme or a message that can be extracted from the facts of your case. This theme is the conceptual framework for the rest of your case. Themes are psychological guideposts that jurors can latch onto in discerning what the case is really about. The use of a theme is what allows jurors to reduce the large amounts of information and unfamiliar legal concepts thrown at them during the trial into easily remembered words and phrases. Themes can be single words or short phrases, and should be based on universal truths or ideas. “This is a case about the American Dream.” “Fairness.” “Greed.” “Unchecked Power.” In devising a theme, consider why and how your jurors can relate to the facts of your case. To the extent possible, you should consider the jurors’ backgrounds, as learned through voir dire, in devising and modifying your theme. For example, assume you are defending a large corporation in a products liability case where the plaintiff’s counsel is characterizing the corporation as heartless and impersonal. You discover that several of the jurors are employed by similarly large corporations. Your theme might focus on humanizing your client by emphasizing the corporation’s strength as a sum of its parts: scores of hardworking people just like the jurors themselves. To assist you in devising your theme, consider the labels and language you will use during trial. Often, viewing these labels or words in cluster form may assist you in devising a theme reflecting the central concepts of your client’s narrative.
Control the Language of the Proceeding

As stated, for themes to be successful, they must be reinforced with appropriate labels. Labels are judgment-laden trial vocabulary used to refer to the parties, events, and key circumstances during a trial. The power of the label is in its capacity to convey certain attitudes and messages by consistently using particular words to describe people and events. In short, the label serves as powerful shorthand to communicate subjective ideas, influencing the jurors to view the people and events in the case through a particular lens. Used steadily throughout the trial, these labels will continually reinforce the trial's messages and themes in the minds of the jury.

The opening statement is one of only a few opportunities during a trial to speak directly to the jury without the restrictions imposed by direct or cross-examination. It is therefore a key opportunity to establish and control the language of the proceeding. Decide which labels you will use to refer to your client, key parties and witnesses, critical pieces of evidence, and pivotal events by focusing on your theme and the narrative you want the jury to absorb.

Effective labels personalize your client and his version of events to nurture familiarity and reliability in the jurors’ minds while depersonalizing the other parties. You may decide to refer to the company on the other side as The Company or The Defendant to depersonalize its presence. Conversely, you may decide to use a corporate party’s well-known trade name to evoke a certain image in the juror’s minds. If you want the jurors to feel the long-standing pain and anguish your client has suffered in an accident, use words that vividly invoke the impact of this pain. For example, rather than saying: “My client has suffered from severe back pain for six months,” you might say: “Every day for ten years, my client woke up in the morning and enjoyed a simple game of tennis with his wife of 25 years. After the accident, most of his days are spent in bed.” If you represent the defendant in a personal injury case, you might describe the central events of the case in a more neutral manner, drawing the jurors away from labels that compel conclusions about fault and pain. In a case where a certain document is critical to the jurors’ understanding of your client’s narrative, avoid referring to it as simply “the contract” or “the agreement.” Force the jury to absorb its importance by naming the document in a way that underscores its role in the case: “the 1995 Agreement,” or “the Uniform Supply Contract.”

Beyond using labels for critical events, people, or pieces of evidence, you can highlight the vitality of these elements through the use of repetitive and emphatic language. For example, if you want the jurors to absorb the importance of a particular document, you can pause and say: “This is important,” each time the document is discussed. Used conservatively, this type of language can work in tandem with your selected labels to ensure that the jury is focused on the particular elements of your client’s narrative.

Once you have devised the language and labels of the proceeding, use them consistently and diligently throughout. This allows you maximum control of the
mood and imagery of the trial by drawing out particular characteristics of the parties, witnesses, conduct, and evidence for the jury to focus on.

**Establish and Communicate Your Theory of the Case**

Equally important in constructing your opening statement is ensuring that the jury understands your client’s narrative of what happened, why it happened, and why your client should prevail. To accomplish this goal, establish your theory of the case and focus on emphasizing this theory throughout your opening statement. The opening statement is your side of “what really happened.” A good opening statement will clearly identify the principal factual contention between the parties and construct a comprehensive, logical marshaling of all of the facts of the case into an argument that is consistent with the legal requirements. The opening statement must be easy to understand and should comport with the jury’s common sense. It is easier for a jury to adopt your theory of a case when you present a compelling story. That means that your opening statement should be well organized, logical, and easy to follow. It should draw the jurors in and enable them to see the case from your client’s perspective.

In establishing their theory of the case, lawyers often fixate on the lack of a “smoking gun” to their detriment. If your case is proceeding to trial, it will almost certainly lack some ideal piece of evidence: the writing unequivocally confirming the parties’ agreement to changed contract terms, a DNA match, or the results of a specific product safety test. The other side will no doubt highlight this missing link for the jury. Instead of focusing your opening statement on justifying the absence of this evidence, show the jury offensively, through the power of your client’s narrative, why your client’s narrative is consistent and credible without it.

**Avoid Generic Introductions**

Once you have identified the theme and theory on which your opening statement will focus, shift your focus to the organization of the statement itself. Some lawyers, especially those with limited trial experience, prefer to begin their statements with a standard introduction: they introduce themselves and their client, thank the jury for their service, and recite an unmoving factual summary of the case.

While you should always focus first on your own comfort level with a particular approach, consider whether you might include the necessary introductions a few minutes into your statement. Jurors may have already been introduced to you, your client, and the basic facts during voir dire and are at peak attention during the beginning of your statement. Avoid squandering those first critical minutes on a stock introduction; focus instead on drawing in the jury by setting the scene for the story you are about to tell. For inspiration, reflect on the opening frames of a compelling film or the first few paragraphs of a gripping novel. The first few minutes of your opening statement should bring the jury into the narrative by giving life and color to the characters and plot details. The key is to describe the scene in its
appropriate context while ensuring that it conveys your theme and theory of the case. Think about the elements of your case that will make the jury want to learn more and endeavor to introduce those elements to the jury right away.

**Tell a Story**

After you have set the stage and established the necessary foundations, you have to create in the jury’s mind your picture of the events at issue in the case and how they unfolded. There are a broad range of storytelling devices available to assist in presenting a compelling narrative: modulating your voice, using particular body language, varying eye contact, and using visual aids can assist in drawing the jury into your story.

In constructing your opening statement, stay aware of the manner in which facts are conveyed. Avoid mechanical recitations of facts. Give color to key events in your narrative as supported by the evidence. For example, in a breach of contract case, relating that “the parties signed the contract on May 18, 2010” provides no element to pique the jury’s curiosity. Recounting the narrative by providing color to the day and surrounding circumstances is more likely to motivate the jury to keep listening: “Three years ago this month, Mr. Smith flew to Houston, Texas, to meet with the defendant, Mr. Jones, to discuss whether Mr. Smith’s company could provide Mr. Jones’ company with uniforms for 400 of its Houston-based employees. That evening, the gentlemen signed a one-year contract over drinks at the Four Seasons, and afterward, Mr. Jones sent Mr. Smith an e-mail message congratulating him on the deal. Today, three years later, Mr. Smith claims no such contract exists.”

Including a few additional facts quickly establishes the core factual contention and piques the jury’s curiosity. Why would Mr. Smith deny that the contract existed? What about the e-mail message? How will he respond to that? Is it real? Suddenly, an unremarkable event (an alleged contract signing) has been transformed into a story arc and, hopefully, one that the jury is interested in following to its conclusion.

**Employ a Consistent Narration Style**

A compelling narrative can be presented in myriad ways. The most common style is chronological, relating the events as they happened in time. However, an effective narrative can make use of short scenes (vignettes), flashbacks, a parallel framework, or various other methods as well. In some cases, these methods draw attention to key facts early, resulting in a more effective and memorable opening statement.

Cases where the heart of the narrative involves a continuous stream of communications between a select group of people (for example, cases involving fraud or breach of contract) may be best served by a chronological telling, since the order of the communications themselves is often critical to the story arc. By contrast, a personal injury case where the plaintiff’s injuries have severely affected her quality of life may lend itself to a flashback framework, where elements of her preaccident and postaccident lifestyle are juxtaposed in stark contrast.
In selecting the manner in which you will present your narrative in the opening statement, consider not only whether the facts lend themselves to one particular framework, but your comfort level with a particular method as well. Some lawyers may feel uncomfortable alternating between the past and present using a flashback model, while others may be skilled in communicating broad themes in short vignettes. Experiment with different styles if necessary to discern which method will work best for you and the facts you have to convey.

**Evoke Universal Images and Themes**

Human beings are self-interested creatures. As such, the jurors will be most likely to take interest in your client’s narrative if they are able to relate it to their own lives. Making your case relatable to individual jurors may seem like a Herculean task in some instances. If your case involves allegations of fraud against a corporate CEO, for example, it may be difficult to immediately discern how the average juror may best relate to this type of scenario. Evoking universal images and themes in your opening statement can assist in shifting the jurors’ perceptions about your case. Showing the jurors how the events of your case pertain to their everyday lives will transform the jurors from disinterested bystanders to attentive participants.

For example, one of this chapter’s authors previously represented a worldwide aluminum manufacturer in a toxic tort case where the plaintiffs alleged that the defendant’s products were hazardous. During his opening statement, the author began by showing the jurors a series of everyday objects containing aluminum: a roll of aluminum foil, kitchen utensils, soda cans, antiperspirant, and eyeglass frames. This presentation served to shift the jury’s perception: the client was quickly transformed from a faceless product manufacturer to the maker of everyday objects touching their lives.

If you struggle to conjure a universal image to invoke in your opening statement, ask friends or colleagues unfamiliar with the details of your case what immediately comes to mind when you mention certain elements of your case such as the client’s name, the core factual contention, surrounding events, products, or injuries. This free-association exercise will help you objectively assess how jurors might best connect to your client’s narrative. Where possible, account for the jurors’ backgrounds and demographics in determining whether an image or theme is truly universal for your group. For example, a jury composed primarily of members over 60 years old may not consider the use of smartphones as ubiquitous as a younger jury. The key in evoking an effective universal image is careful consideration and synthesis of all of the factors that might render an image universal.

**Address Bad Facts**

Every case proceeding to trial contains at least some unfavorable facts on both sides. If this were not the case, the matter likely would have settled long before trial. Bad facts elicited on cross-examination or even direct examination are presented in a vacuum, with limited ability to explain surrounding circumstances. The opening statement
provides the only opportunity to address the weaknesses in your case through the lens of your client’s narrative before the jurors are presented with these facts through witness testimony or other evidence. This is a chance not only to explain why a particular fact is not fatal to your client’s case, but also to build credibility with the jurors, nudge them toward your point of view, and prepare them for later testimony where the bad facts will be presented. Often, bad facts concern dishonorable conduct to which jurors can relate. Whether the bad fact involves driving drunk or committing fraud, evoking a universal theme, emotion, or struggle, as discussed in the preceding paragraph, may assist in framing a bad fact to elicit empathy from the jurors.

One of the authors successfully used this tactic in defending a large oil transportation company in a class action lawsuit brought by plaintiff homeowners who sustained property damage when the defendant’s oil barge struck a rocky ledge, causing oil to spill into the waters of their coastal town. The theme of the defendant’s case was simple: the plaintiffs were not damaged to the extent claimed because the defendant had conducted a multimillion-dollar cleanup effort to restore the plaintiffs’ properties. In the author’s opening statement, however, he showed the jury photographs of the large oil barge itself as well as photographs depicting some of the most heavily oiled properties before cleanup efforts began. As a result, the jurors were more likely to respond positively to later photographs depicting the properties in various stages of remediation and to accept the defendant’s overall narrative. This tactic also serves as a real-life example of the use of the inoculation method: the presentation of some of the most damaging photographic evidence early on reduced the inflammatory effect of such evidence when presented by the plaintiffs later on in the trial. In the example above, the photographs of heavily oiled beaches were the jewel in the crown of the plaintiffs’ case. By familiarizing the jury with these images early on, their later presentation elicited little shock value.

In addressing unfavorable facts in your opening statement, concentrate on those facts that are critical to the arc of your narrative. Avoid wasting valuable time enumerating all of the weaknesses of your case. Once you establish trust and credibility with the jurors by presenting a cohesive, if blemished, story, they are more likely to overlook or reconcile minor weaknesses revealed later on in the trial.

**Finish Strong**

With the jury’s attention likely waning, keep your conclusion brief and simple. Tie your story back to the core theme, confidently assert that the facts favor your side, and ask for a verdict in your client’s favor.

**Avoiding Pitfalls**

Equally important in presenting a compelling narrative is avoiding the use of elements that will confuse or mislead the jury, engender distrust of the lawyer or client,
or otherwise interfere with the jury's ability to appreciate and understand what the case is about. This section addresses some of the common pitfalls lawyers face in constructing and delivering opening statements.

**Overstating or Ignoring Evidence**

Overstating or ignoring the evidence is the most common, and most fatal, mistake that a lawyer can make during his opening statement. The jury is looking to use the opening statement as a guide to understanding the rest of the trial. As the trial unfolds, jurors will look to your representations from the opening statement to determine if they comport with the testimony being presented. If they do not, you will lose valuable credibility with the jury. To avoid falling prey to this common mistake, assess your evidence objectively. Review the most damaging facts of your case and plan on presenting them in your opening statement through the lens of your client's own story. Doing so may feel counterintuitive in the short run, but you will ultimately earn the jury's trust for presenting a credible and cohesive narrative that does not conceal unfavorable facts.

**Excessive Detail**

In an eagerness to showcase the most compelling parts of a case, lawyers often riddle their opening statements with excessive detail. Weighing down your opening statement with extraneous facts, figures, dates, and times is likely to cause the jury to tune out quickly. As the case begins, the jurors have only one principal question: What is this case about? They will be unable to appreciate certain details without first understanding the answer to this basic question. When deciding which details to include, ask yourself if they are necessary to establish the natural arc of the narrative. For example, if you are trying to paint a picture of your steel manufacturer client as a community fixture with humble beginnings long serving the local area, it is necessary to name the founders, the year of the company's founding, and the number of jobs it currently provides to the area. However, details about its name or logo changes, names of directors or officers, and yearly sales are likely irrelevant to this theme and can be introduced at a later point as necessary.

In cases stretching over months or years, lawyers are often so highly conversant with certain details that including them in an opening statement may feel deceptively natural. If you have a long history with a particular case or client, consider tempering this effect by seeking feedback from a colleague less familiar with the facts of your case.

Finally, being mindful of the length of your opening statement, and focusing on brevity in your delivery, is another way to ensure that your statement is not peppered with superfluous details. One simple way to gauge whether your opening statement is sufficiently brief to hold the jury's attention is to deliver it aloud to colleagues or a focus group where you will be able to solicit critical feedback about where in your presentation a potential juror's attention might wane.
Statements of Law

Seasoned and novice practitioners alike should review all applicable rules addressing the use of statements of law in opening statements. Each jurisdiction’s rules differ regarding the extent to which a lawyer may discuss the law in his opening or closing statement. In most cases, a statement of the law should not go beyond stating the claims in the case.

Praise or Condescension of Jurors

While it is important to briefly and sincerely thank the jurors for their service, excessive praise is likely to backfire. As with any face-to-face interaction, jurors are searching for authenticity. Your excessive praise or fawning over their devotion to civic duty will be seen for what it is: an attempt to curry favor for your client. In delivering your opening statement, and throughout the trial, use the power of your narrative itself, and not personal opinion or praise, to persuade the jury to decide the case in your favor.

Similarly, while it is important to educate the jurors about the basic elements of the trial, your focus should be on assisting them in understanding your client’s narrative, not in teaching them legal terms or trial procedure. Avoid references that single out lawyers as a group (i.e., “we lawyers call this ‘evidence’”) which jurors are likely to perceive as elitist and condescending. Remember that the judge and the court are in charge of ensuring that the jury is aware of courtroom procedure and for passing along any questions. Although forging a trusted rapport with the jury can be challenging given the necessarily one-sided interaction, you are far more likely to earn this rapport by focusing on telling a compelling and relatable narrative rather than engaging in well-intentioned legal instruction.

Personal and Ad Hominem Attacks

In their zeal to communicate the weaknesses of the other party’s position, lawyers may unwittingly turn these statements into an attack on the other party’s lawyer. In addressing weaknesses, focus on the substance of the other side’s case and avoid ascribing any particular weakness to the lawyer himself.

If you represent the defendant and will be delivering your opening statement after the plaintiff’s counsel presents his statement, be mindful of your emotions. Resist the urge to be reactionary in your opening statement. It is easy to become fixated on what plaintiff’s counsel said about your case, particularly with little time for reflection between his opening statement and your own.

This directive extends not only to ad hominem attacks on opposing counsel but also on witnesses, the judge, courtroom staff, your co-counsel, and the jurors as well. While most lawyers cannot imagine themselves engaging in such conduct, the stress of a trial can lead to unpredictable bouts of impatience or anger. Whether you are instructing your associate at counsel table to advance to the next slide or
responding to the judge’s ruling on an objection, remain focused on being courteous and civil to everyone in the courtroom. The less you call attention to your personal behaviors the more the jury will be able to focus on the substance of the story you have to tell. The jurors expect a certain level of civility between the lawyers; running afoul of this basic expectation can swiftly and irreparably damage your credibility in their eyes. If you will be trying your case in an unfamiliar jurisdiction, speak to area lawyers about the local customs and practices regarding these issues and how you should respond if you are on the receiving end of uncivil conduct from opposing counsel.

**Statements Outside of the Relevant Evidence**

While the opening statement presents one of only a handful of opportunities to speak directly to the jury and relate the client’s narrative, a lawyer is still obligated to stay within the bounds of the evidence in making his presentation. Not only will your failure to do so invite an objection from opposing counsel, disrupting the flow of your opening statement, but also the jury may be left to distill the real story from a confusing mass of information including personal opinions or superfluous anecdotes.

Absent a strategic reason for doing so, the lawyer should tell his story by focusing on the substance of what will be presented to the jury at trial. Some examples of statements that stray outside of the evidence include (1) expressions of personal opinion about the facts of the case, (2) discussions about the lawyer’s past experience with similar types of cases, (3) statements about a party’s finances and ability to pay damages, and (4) emotional appeals untethered to the facts of the case. There are, of course, infinite examples of the types of statements that could reach outside of the relevant evidence. In constructing your opening, consider whether the jury will be able to see the narrative you share come to life through witnesses and exhibits presented later in the trial. If there are elements of your statement that are not tied to any specific piece of evidence, give these statements careful consideration before including them.

**Delivering Your Opening Statement**

Once you have constructed an opening statement that communicates the themes and theories of your case, you need to consider how you will best communicate this statement to the jury. Your delivery of the opening statement should be a principal consideration, not an afterthought, in your trial preparations. In large part, how you deliver your statement is a matter of strategy, personal style, and comfort. Your primary objective should be to present your client’s narrative in a way that makes you feel confident and at ease. This section addresses some of the issues you should consider in evaluating your delivery style.
Use of Notes/Script

Whether to use a written script, an outline, bullet-pointed flashcards, or some other method to deliver your statement is one of personal preference. The key in deciding which method to use is assessing your own comfort level both as a practitioner and with the material to be presented. Commentators typically advise against writing or typing the entire opening statement verbatim, pointing to the possibility of a stilted and unnatural delivery. Still, some practitioners feel uncomfortable with only bullet-point notes or flashcards, and a full script simply provides psychological comfort.

Relying on flashcards or outlines may result in inconsistent preparation if not anchored by thorough mastery of the ideas the outline represents. To avoid this pitfall, first draft your presentation, in full text, to ensure that the facts and evidence cited are accurate and sufficiently detailed to tell your story. Use the written version for practice and, over time, you will likely no longer need more than a shorter outline or list of bullet points to guide your presentation. This method ensures that you are not simply improvising based on an outline form without obtaining true mastery of the underlying material.

Practicing Your Delivery

Even if you have thoroughly mastered the underlying facts and organization of your statement, this mastery will be of limited use if the jury cannot hear you or if you fumble at a critical juncture of the story. By the time you are standing before the jury in the courtroom, you should have delivered your opening statement several times already, even if only to your bathroom mirror.

Some lawyers find it useful to record their delivery using a smartphone or other recording device and to play it back so they can assess weak areas. Not only will listening to a recording allow a lawyer to identify weak spots in his delivery, it also will assist the lawyer in mastering the factual material by forcing him to listen to the facts repeatedly. In high-stakes cases, some lawyers find it useful to hire a jury research firm or use focus groups to assess the strengths or weaknesses of the case overall. Gauging the reception of your opening statement is an ideal exercise for a focus group. Since you can interact directly with the group members, you can benefit from candid feedback from a broad swath of individuals about everything from the narrative itself to your body language.

Videorecording one’s performance and rehearsing with colleagues provides another opportunity to receive holistic feedback about content and delivery. Many law firms have mock-trial rooms equipped with camera equipment for this purpose. When you are rehearsing with colleagues, your audience should include at least some colleagues who are nonlawyers and/or relatively unfamiliar with your case. This will ensure that you simulate the jury experience as closely as possible.

Whichever method you choose to assist in your preparation, begin using it well before the trial is due to begin. Receiving extensive feedback from colleagues one
or two days before delivering your opening statement will be of limited use and is likely to cause confusion and nervousness at a critical juncture of your preparation.

**Objections**

As a general rule, lawyers rarely object during an adversary's opening statement. However, this rule is somewhat fluid and varies by jurisdiction. Review your local rules and learn the local customs and practices surrounding objections during opening statements. This will ensure that you are prepared to make and respond to objections appropriately.

Plan and prepare not only how to respond to the other side's objections and how to react to any resulting ruling, but also how to transition seamlessly back into the flow of your statement. Jot down a few transitional phrases that will help you return to your statement gracefully regardless of where you are in your statement. These notes will ensure a strong finish and set the tone for the rest of the trial. The jury's reaction to an objection is likely to mirror your own. If you are able to handle the interruption gracefully and return quickly to your story, the jury is less likely to remember it or to discredit the parts of your narrative surrounding the objection.

**Body Language and Voice**

Like the words you use to tell your story, your body language is a matter of personal style. While the manner of delivery will largely depend on this personal style, certain body language can be universally unappealing to a jury. In particular, avoid body language that makes you appear overly closed, disinterested, or apathetic, such as crossed arms, downcast eyes, or a monotone voice. As discussed above, practicing your delivery with colleagues, family, or friends will help you identify if you exhibit any of these behaviors.

Beyond addressing these behaviors, take some time to assess your personal communication style. Picture yourself in situations where you are most comfortable: among friends or family telling a humorous anecdote or engaging in a lively conversation. If this is difficult to picture in the abstract, observe yourself the next time you are in such a situation or ask a spouse or close personal friend to honestly characterize your communication style. Do you speak loudly or in softer tones? Do you gesture frequently with your hands or are they mostly at your sides? Do you move in close or lean back in your chair? Do you often speak too slowly or too fast? Once you have a sense of your own style range, you are in a position to meaningfully insert variety within that range when delivering your opening statement. Resist the urge to dramatically change the way you carry yourself. Instead, exploit your personal style in a way that will suit your narrative. If you are naturally soft-spoken and mild-mannered, your soothing demeanor can soften the delivery of damaging facts. If your style is animated and makes use of frequent hand gestures, use this tendency to keep the jury engaged during the more mundane parts of your story.
Observing and understanding your personal style will serve you far beyond the delivery of a single opening statement, providing valuable insight for your long-term personal and professional interactions.

**Effective Use of Props, Exhibits, and Multimedia**

As discussed above, ensure that you have considered and addressed evidentiary issues before using any document, including visual aids, in your opening statement. Have a hard copy of the document available as you discuss it, but avoid holding it too close to your face or losing eye contact with the jury while doing so. Even if you will be projecting documents on a screen, make individual copies available for the jurors to ensure that a juror who has difficulty seeing the screen is able to follow along. If a colleague or outside vendor is assisting you with the use of trial presentation software, or simply with advancing slides, rehearse your statement together with your colleague several times to ensure that the order of documents and timings are accurate and flow naturally with your statement.

If you are relying exclusively on electronic media to present documents or other visuals, have backup paper copies of these documents available. Ensure that you or a colleague have these copies readily accessible at counsel table or nearby and prepare how you will react to any technical malfunction and transition to using paper copies of the documents. While having the copies handy will help to minimize disruption to your statement, this backup plan will fall flat if you become visibly frustrated with an equipment failure or fumble with your words. Prepare for any contingencies that might arise concerning the use of documents, including the possibility of proceeding without them. If you are comfortable doing so, consider using a remote to advance the slides yourself instead of tasking a younger colleague with this role. Not only is this type of arrangement often cumbersome because of the extra communication required, it also may be off-putting to a jury to see a younger person operating equipment for a senior lawyer.

Similar directives apply to the use of props, demonstrative models, or pieces of evidence other than documents (i.e., a weapon used during a crime scene or a sample of your client’s product). Clearing all procedural hurdles to the object’s use, rehearsing the introduction of the object, and keeping the object readily accessible on a nearby table or under the podium will ensure that you can easily retrieve, use, and replace it without distracting the jury from your presentation.

In addition, as courts become increasingly wired for technology, lawyers have the option of using more personalized media, such as individual screens or tablets for each juror, to present exhibits. If you plan on using this type of media during your opening statement, consider in advance how you want to direct the jury’s attention and choreograph your presentation so that the jurors are engaged with your statement, and not focused on their screens, as appropriate.

Finally, it may be useful to call the court where your trial will be taking place and ask the presiding trial judge’s clerks or other court personnel what facilities the
court has and will accommodate (e.g., projector, wireless Internet) and what the presiding judge prefers or allows (whether for a jury trial or bench trial). The judge’s clerks and other court staff can be a valuable source of information in this regard.

Conclusion

Everything in life is a story. Everything. We are born—which is a story—and we die, the end of that story and perhaps the beginning of another. Our life in between was a story, a book, in fact, every day a page of the story.

—Gerry Spence

A quick peek into a café window or a visit to your office water cooler reveals a basic truth: human beings are natural and eager storytellers. Our daily interactions typically involve telling and listening to dozens of stories with little conscious thought about how we construct them. We easily engage friends with tales of a bad day at work or our children’s antics on a recent family vacation without contemplating the nuances of structure or delivery. When it comes to telling stories in the courtroom, however, the lawyer’s voice is often stifled or overwhelmed by the limitations imposed by the trial process itself. The considerations outlined in this chapter are designed to assist the practitioner by identifying and addressing these limitations. While seeking to methodically guide the practitioner through the process of constructing, organizing, and delivering an opening statement, this discussion is intended to be neither exhaustive nor prescriptive, but to serve as a starting point for the practitioner in finding his own voice.

Further Reading