

# **Anatomy of a Trial: Opening Statement and Closing Argument**

How to Make Proper Opening Statement and Closing Argument to Establish Why Fairness and Justice Require a Favorable Verdict for Your Client.

By: Imoh E. Akpan  
Mohamed N. Bakry  
Natasha Khachatourians  
Brooks Magratten  
Alonzo Washington

Opening statement and closing argument are the only chances counsel has to directly address the jury, tell their client's story and explain why they should win the case. Opening statement is the jury's first impression the case and should outline counsel intends to prove, how it will be proven and why it will be dispositive to the ultimate issue. Closing argument is the final opportunity to speak to the jury and should address what the evidence has and has not shown and explain why the application of the law to the evidence requires a verdict in their favor. This paper will discuss tips and strategies on how to make more effective openings and closings.

## I. Advocacy & Presentation

### A. Advocacy

1. Develop a theory of the case. A case theory should explain what happened and why your client is entitled to a favorable decision on an ultimate issue. The case theory should be a commonsense summation of the case merits that is synonymous with a layperson's everyday experience. Everything done at trial should further the theory of the case. Important case theory considerations:

- a. *Law:* Identify your strongest legal argument and make it the foundation of your case theory.
- b. *Facts:* The case theory should be consistent with the weight of anticipated evidence at trial. Focus on the most important facts five to ten facts of your case.
- c. *Opponent's Case:* The case theory should anticipate your opponent's version of events and exploit/highlight those weaknesses that would lead to a favorable decision on the ultimate issue.
- d. *Keep it Short & Simple:* Focus on the most important facts in your case and identify them in the case theory.

2. Language and Vocabulary. Words matter. How you describe your client, your opponent and the dispute at issue are important in how you frame the case and how the jury "hears" you. Examples: "Accident" v. "Crash"; "Plaintiff" v. "Ms. Smith"; "Defendant" v. "ABC Corporation" v. "My Client".

3. Primacy & Recency.

- a. *Start:* First impressions are important. The juror's focus will be at its highest at beginning of your opening statement and closing argument. Take advantage.
- b. *Finish:* Make sure the last thing the juror hears from you in your opening statement or closing argument reinforces your case theory and why you deserve a favorable decision on the ultimate issue.

### B. Presentation

1. Performance.

- a. *Notes v. Extemporaneous:* While using as few notes as possible is preferred, counsel should use the technique makes them most comfortable advocating in a clear, concise and persuasive manner.
- b. *Eye Contact:* Make eye contact with each juror and maintain eye contact with the jury throughout the opening statement or closing argument.
- c. *Simple words:* Plain English. No legalese.
- d. *Speech:* Vary your pace, pitch and volume to highlight important parts of your statement/argument and to signal transitions.
- e. *Demeanor:* Be positive rather than negative. Be confident not arrogant.



## II. Opening Statement

### A. Building Your Opening Statement

#### 1. Themes

a. *Not all cases require or are conducive to a theme, especially from the defense perspective.*

b. *If you use a theme, it should be applicable to and encapsulate your theory of the case.*

#### 2. Prepare an Outline

a. *Identify the key issues/topics that support your theory of the case*

b. *Outline the favorable facts and evidence that will be presented for each issue/topic*

c. *Develop transitions between issues/topics*

d. *Conclude with an explanation of why the anticipated evidence supports a favorable decision on the ultimate issue(s).*

#### 3. Chronological order.

a. *Organize:* The opening statement should be organized to have a beginning that flows naturally to the ending.

b. *Timeline(s):* facts or fact subsets should be discussed in naturally occurring order.

#### 4. Weaknesses/Unfavorable facts.

a. *Concede:* acknowledge the obvious weaknesses in your case that are relevant to ultimate issues in the case. Explain the weaknesses, if possible, but do not make excuses.

b. *Be First:* acknowledge the weaknesses in opening to take the sting out of any negative impact and garner credibility with the jury as an honest broker. This also allows for the closing to focus on your case strengths.

c. *Don't overemphasize:* Admit and pivot quickly.

### B. Objections

#### 1. When to object

a. *Discussion of witness credibility*

b. *Discussion of how the jury should resolve an issue*

c. *Mention of the lawyer's personal opinion*

d. *Misstatements of law*

e. *Inadmissible evidence*

#### 2. How to respond to an objection. "I am stating what I believe (or expect) the evidence will show."

### C. Do's & Don'ts

#### 1. Do's

- a. *Continue revising your opening, including seeking input from others*
- b. *Use a “hook” – grab the attention of the jury*
- c. *Tell a good story*
- d. *Use future tense when talking about what the evidence will show*
- e. *State facts affirmatively*
- f. *Personalize/humanize your client*
- g. *Emphasize favorable facts not in dispute*

2. Don'ts

- a. *Argue the case*
- b. *Exaggerate*
- c. *Overpromise, misstate or mischaracterize anticipated evidence*
- d. *Read your opening*

### III. Closing Argument

#### A. Building Your Closing Argument

1. The Introduction. The attention span of jurors is short. Take advantage of the opening moments of the opening to communicate why you should win.
2. Theory of the Case. Reiterate themes and your theory of the case from opening.
  - a. *Use analogies to communicate or explain difficult concepts with common experiences.*
3. The Evidence.
  - a. *Emphasize favorable evidence and explain why it is important.*
  - b. *Give the jury specific references, including exhibit letters or numbers, to the evidence favorable to your case.*
  - c. *Use visual aids (charts, blown up pictures, timelines) to highlight and emphasize the most important and most favorable evidence.*
4. Opponent's Case.
  - a. *Spend time arguing your own case, not refuting your opponent's case.*
  - b. *Briefly refute certain aspects of your opponent's case if necessary and pivot back to the strengths of your case.*
5. The Law. Explain the law and how the favorable evidence requires a favorable decision on the ultimate issue(s).
  - a. *Burden of proof*: explain the burden of proof
  - b. *Jury Instructions*: incorporate and reference the specific jury instructions which impact the ultimate issues and corresponds with the evidence favorable to theory of the case
  - c. *Verdict Sheet*: tell the jury how to answer the questions on the verdict sheet.

#### B. Anchoring

1. Plaintiff's Anchor. Several studies show that the jury's damage award is strongly affected by the number suggested by plaintiff's counsel.
2. Defense Counter-Anchor. How do you counteract the plaintiff's attempt to anchor with a high demand? Will a counter-anchor be interpreted as a concession on liability? Social science studies have shown:
  - a. *Anchoring works and lead to higher damage awards*
  - b. *Credibility effects outweighed by anchor effects*
  - c. *Making a lower counter-anchor to a high anchor was more effective than ignoring the high anchor or attacking it as unreasonable*
  - d. *Avoid making a counter-anchor in a strong defense case*
  - e. *Anchoring is more effective against a strong plaintiff's case*
3. Other Strategies.

- a. *Remove the anchor – inform the jury that they are not bound by the plaintiff's numbers, which are completely arbitrary and suggest that the jury give no weight to the figures that are merely requests.*
- b. *Expose the anchor – inform the jury that plaintiff's counsel is attempting to influence the jurors with an anchor.*

C. **Objections**

1. When to object

- a. *“Golden Rule” – asking the jurors to put themselves in the position of a party*
- b. *Appeals to punish, vengeance or to “send a message” (Reptile Theory)*
- c. *Inflammatory remarks – bias/prejudice against a class of individuals*
- d. *Appeals to financial bias against “big corporations” or the ability to pay*
- e. *References to insurance*
- f. *Nullification – asking the jurors to ignore the law*
- g. *Expressions of counsel's personal opinion*
- h. *Misstatements of law*

2. When not to object

- a. *Multiple objections have already been made and/or you have been overruled several*
- b. *Statements which are trivial to the important issues in the case*
- c. *Arguments which are irrelevant to your case theory*

D. **Do's & Don'ts**

1. Do's

- a. *Practice, practice, practice!*
- b. *Track the evidence admitted at trial – use a flow chart of checklist*
- c. *Review your opening statement*
- d. *Write an outline for your closing before the trial starts*
- e. *Continue revising/editing your closing throughout the trial*
- f. *Use past tense to describe what the evidence has shown*
- g. *State facts in the affirmative*
- h. *Emphasize favorable, undisputed facts*

2. Don'ts

- a. *Cover each and every fact, no matter how mundane*
- b. *Read your closing*
- c. *Always use a theme*
- d. *Save the best for the middle*

- e. *Always use PowerPoint*
- f. *Ask rhetorical questions*
- g. *Play a lawyer on "Law & Order"*
- h. *Express your personal feelings*
- i. *Avoid the weak parts of your case*
- j. *Yell*
- k. *Demonize your opponent*

## References

- J. Tanford, *Everything You Ever Wanted to Know About Trial Procedure and Tactics*, <https://law.indiana.edu/instruction/tanford/web/reference/basicactics.html>
- J. Campbell, B. Chao, C. Robertson & D. Yokum; *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damage Arguments*, 101 Iowa L. Rev. 543 (2016)
- C. Marinakis, *How to Counteract the Anchoring Effects of Plaintiff's Damage Request*, <https://www.expertservices.com/insight/how-counteract-anchoring-effects-of-plaintiffs-damages-request/>
- T. Walthall, *The Closer: A Step-by-Step Guide to Delivering the Perfect Closing Pitch*, Virginia Lawyer (2018)