

OPENING STATEMENTS IN EMPLOYMENT CASES

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I. Introduction

Employment cases are like no other cases. Every member of the jury will have had experience with employment, either directly or indirectly. In fact, most likely every member of the jury will have had direct positive and/or negative experiences with an employer. The uniqueness of employment trials, regardless of the claims asserted, therefore distinguishes these cases from every other type of case before a jury, in which some, but not all, of the jurors will have some familiarity with the type of case presented. The recognition of this distinction not only requires as extensive a voir dire as permitted by the court to determine the jurors' biases and prior experiences, but an acknowledgement by plaintiff's counsel that the jurors will bring with them their prior experiences and biases and that they likely will have divergent views about employers even before plaintiff's counsel begins his or her opening statement. It is with this unique circumstance in mind that the following tips are given. Although many of them apply to any type of case, some of them are unique to concerns for plaintiff's counsel in an employment case.

II. Sincerity/Being Yourself

Although some of the tips contained in this section may be controversial, in the author's experience, following these tips is much more important than being "smooth" or "perfect" in an opening statement (as well as the rest of the trial).

1. *Do not use notes!* While it may be difficult to feel comfortable, particularly the first few times opening statements are made, without the crutch of notes, connecting with the jury right from the start and telling them your client's story in a nonlawyerly, sincere manner is much more important than remembering every detail of the case or presenting it in a smooth way (which reminds the jury that you are a paid advocate).
2. Do not stand behind a podium or a table. Stand several feet away from the jury

- box, but not so close as to make the jurors feel uncomfortable. Make eye contact with each of the jurors in turn, even it requires moving around (assuming that this is permitted by the court). If you are uncertain as to whether a particular court will allow these actions, ask permission in advance to do so. This early connection with the jurors is critical.
3. Because sincerity is all-important, tell the story of your client's case from your gut—sincere belief in your client's case—rather than from an intellectual understanding of the law or the facts. In other words, resist your lawyer-like inclination not only to use big words and legal terms, but to intellectualize the case, as opposed to telling a compelling, heartfelt story.
 4. Thank the jurors for their service and let them know that no matter what happens, it is appreciated, as this is the only time that your client will be able to tell his or her story. Introduce the client and tell the jury that it is a privilege to represent him or her. Use the client's first name in the opening statement (and in all references to the client throughout the trial). The jury needs to know that you are invested in the client as a person who you care about, not "Ms." or "Mr." Smith.
 5. The longer the trial, the more likely it is that the jurors will be affected by their impressions of you, which they will identify with your client. It is extremely important for the jurors not only to like your client, but to like and respect you, and to believe that you will tell them the truth and not try to hide anything from them. In a long trial, it often appears that the connection between the attorneys and the jurors is much more important than the jurors' connection with the plaintiff or their dislike of the defendant. Therefore, it is important to begin with credibility in the opening statement and to maintain that credibility with the jury throughout the trial.

III. The Theme

While much can be written about themes for an employment case, obviously the theme will vary tremendously depending on what kind of case it is, whether it be a sexual harassment case, a retaliation case, a discrimination case, or a contract claim.

1. Regardless of the type of claim, the theme must be clear and memorable. It should be something that sticks in the jurors' heads from the first time it is mentioned in opening. It must be able to be concisely repeated throughout the trial in various ways, with each witness, without getting to the point where it is hokey or obvious.
2. Counsel should begin the selection of the theme from the first day he or she decides to take the case, and that theme should be revised and developed as discovery proceeds.

3. Keep the theme simple and easy for the jurors to remember. Some examples are: “This case is about fairness,” or “This is the story of a company that used [plaintiff] for 25 years and then threw her out like garbage.” Some counsel will begin with a very clear statement that “This case is about _____.” Often, one-word themes are the simplest and easiest for the jurors to remember. Others will begin by asking a question to demonstrate the theme, such as: “Is it okay in this day and age for an employer to fire someone because she stands up for what is right?” Still others will incorporate the theme into the opening by repeating certain words after critical points counsel makes, such as: “They used her up, then threw her out” or “She stood up for what was right and lost her job.”
4. Attempt to develop a theme that will strike a chord with as many jurors as possible, such as a fairness theme.
5. Do not portray the plaintiff, particularly in a sexual harassment case, as a victim. Concentrate on what the defendants did or did not do. Concentrate on how the defendants were wrong, not on how the plaintiff was a victim.
6. Do not whine, but present the theme as a strong denouncement of what the defendant did.

IV. The Story

Regardless of the fact that openings are not permitted to be argument, as argument is to be reserved for closing, if a plaintiff’s lawyer does not strongly “argue” in his or her opening statement, he or she is missing the first and best opportunity to convince the jurors of the injustice done to the client. If objections are made to the opening (which they often are not, because opposing counsel will not want to appear to be stifling the truth), counsel should immediately continue with the required, “The evidence will show” or “We will show you that.” It is a terrible mistake to hold back in an opening. By the time you get to closing, when you are permitted to “argue,” it will be too late to make the impact that you need to make on the jury right from the beginning.

1. The art of telling a story is the art of a trial lawyer. Practice telling the story of your client’s case to friends, family, children, older adults, and people of all occupations. However, “practice” does not mean memorization. Tell them the story in a conversational tone, with the sincerity of your conviction about the merits of your client’s case, not in a rehearsed manner.
2. Do not memorize your opening statement. *Do not use notes.* Tell the story as though you were telling it to someone that you know and care about.
3. Make sure you know all the details of your client’s story, not necessarily to use them all in the opening, which would be a mistake, but so that you can feel that you’ve lived that story with your client.

4. You cannot ask the jurors in most jurisdictions to stand in your client's shoes. That will constitute reversible error. However, you can personalize your client by telling personal details about the client, using his or her first name, and explaining what kind of person he or she is. You can put the jurors in his or her shoes without violating the rule by having them walk with you through the events of the story.
5. If possible, tell the story in the present tense. For example: "Mary walks into the room." "Frank Smith, the human resource person, and her boss, Jack Jones, are sitting there. Mary wonders what is going on. The next thing she knows, she is out of a job."
6. Start with something that grabs the jurors' attention. Do not start with telling the jurors what their role is, what the law is, what the judge will say, or any of the other stereotypical introductory remarks for an opening. Start immediately with your theme or with such a short encapsulation that they can remember it, so that they are caught up in the story.
7. Concentrate the story on the defendant and its conduct, not on the plaintiff.
8. Use adjectives that help the jurors become aware of the various parts of the scene, as though you were stage managing a play. Talk about not just what people said and did, but what they saw and how they felt.
9. Because it is important to be sincere, emotion should not be stifled; in fact, it is encouraged. Showing that you are sincere and that you are truly invested in the case, without becoming overly dramatic, is critical.
10. Do not mention every detail, including dates and times. The jurors will not remember this. What they want to hear are the highlights of the story. Do not simply revise events chronologically, but explain their connection and how they tie in with the theme.
11. It is critical to anticipate the bad parts of your case. Every case has its difficult aspects, and to allow the defense counsel to be the first person to bring these issues before the jury is a huge mistake. You do not want the jurors to hear from defense counsel that there are things you did not tell them that are bad about the case, or about the plaintiff. Hit *all* the bad points of the case in your opening statement, and explain them. Tell the jurors exactly what they're going to hear from defense counsel. Tell the jurors why they are going to hear these things from defense counsel. For example, if you have a sexual harassment case and the defense is going to focus on issues of credibility with the plaintiff that have nothing to do with the case, but that the judge has allowed after motions in limine, tell the jurors that the defense is going to offer that evidence in order to distract them from the true issues in the case, which involve defendant's conduct. The more you can tell the jurors about what they're going to hear from the

defendant and why they are going to hear it, as well as the plaintiff's explanation, the less they will rely on what they hear from defendants. The more that you can steal defense counsel's thunder in your opening statement, the better.

12. Let the jurors know that it is difficult for an employment plaintiff to come before them, as his or her whole life is explored. Let them know that it is hard for a plaintiff to do this, that the defendant has treated him or her badly before, and that by coming before the jurors, he or she is going to be treated badly again, and that that is a very difficult thing to do.
13. If it is a retaliation case, even if other claims are included (such as sexual harassment), normally jurors will be much more receptive to a retaliation claim than to the underlying claim. Jurors do not like retaliation by employers. Therefore, this should be the thrust of your case. "Standing up for what is right" is a very important theme, particularly if the plaintiff has complained on behalf of someone else or because of the treatment of other people, in a whistleblower or other type of retaliation claim.
14. If defendant did not follow its own policies and procedures, emphasize that from the start. If defendants never investigated a discrimination or sexual harassment claim, emphasize that from the start. If defendants never had any training, emphasize that from the start. Let the jurors understand that these kinds of issues are never a priority for the defendant, and that in this day and age this conduct should not occur. An example of this might be, "In this day and age, our daughters and sons should not have to be touched in the workplace." "In this day and age, our daughters and sons should not have to put up with sexual comments and jokes on a daily basis in the workplace." "In this day and age, our daughters and sons should be able to stand up for what is right without fear of losing their jobs."
15. Use how the employee felt about his or her job prior to the adverse action in contrast with how the employer, particularly a large corporate employer, treated the employee badly. An example might be: "John wakes up every single day for 25 years and loves going to work. He misses baseball games with his son, concerts at his daughter's school, family time that he can never get back, to work 12 hours a day for 25 years for defendant "x" company. On May 15, 2007, John gets his reward for all of that hard work and sacrifice. He is fired. And why is he fired? He is fired because he tried to do the right thing [or whatever facts are appropriate]."
16. The corporate employer and an individual defendant, if there is one, should be dehumanized. They should be referred to as "the defendant" or "the defendant 'x' company", or "the defendant John Smith." In many cases, the jurors do not particularly like the plaintiff, but hate the individual sexual harasser or other discriminator.

17. It is extremely important to set up in the opening statement that the focus should be on the defendants and their conduct. If there is an issue as to the plaintiff not complaining, the mechanisms for complaint should be shown to be ineffective, unused, untrained, or a combination thereof. If the plaintiff did not complain to anyone (including, as is often the case, even to a spouse or close family member), that issue should be addressed up front with the jurors and the explanation should be given (“I was embarrassed,” “I was afraid of my husband’s reaction,” “I was raised not to complain,” and so forth).
18. If family members are expected to testify, talk about those family members and their observances of the plaintiff’s emotional distress, and how he or she changed as a result of the conduct.
19. Do *not* recite a list of witnesses and what each witness will say. Concentrate on an overall story that the jury can follow that will be easily recognizable when each person comes to testify.

V. Tone/Mannerisms/Level of Voice

While every person has to develop his or her own comfort level with how he or she approaches an opening statement, the most important thing is to be yourself. While short sentences usually resonate more with a jury, some of us tell stories that roll along like a machine that is difficult to stop. You should develop your openings in a way that makes you most comfortable. However, some general things should be noted.

1. Try not to talk so fast that the jurors will not be able to follow you (or, in the case of the author, that the court reporter has to tell you to slow down). Don’t be so measured that you sound like you have rehearsed, but attempt to make sure that the jurors can follow you.
2. Again, *do not use notes*.
3. Make eye contact with the jurors throughout.
4. Remember that you are telling your client’s story like you were telling it to your friends or relatives.
5. Change your volume level to keep the jurors’ attention. Be passionate, but not dramatic. Consider lowering your voice, not raising it, when you want to place particular emphasis on a point.
6. Remember that there is a beginning, middle, and end to the story. At the end of the story, the jurors should be told that they are the ones who hold justice in their hands. The way that this is said may vary depending upon the case. For example, in a retaliation case: “The company didn’t do the right thing, but we

know that you will.” Or, “Joan stood up for what is right and she was crushed by the defendant. Now she looks to *you* to stand up and show the defendant what is right.”

VI. Visual Aids

While many lawyers may disagree, it is the author’s experience that a few visual aids on opening (assuming that advance permission has been gotten from the judge) are helpful. The area of disagreement may be in the sophistication of those visual aids. While many jurors, particularly younger jurors, are used to sophisticated media, it is the author’s experience that sophisticated visuals are not necessary and, in fact, tend toward a “smoother,” practiced presentation, which reminds the jurors that the lawyers are simply there to represent clients, not for the *simple* dispensation of justice. Therefore, the author suggests that the visual aids be relatively unsophisticated and simple, but clear—just like the case for justice. Some suggestions follow.

1. In a retaliation case, do a time line that shows all of the positive performance reviews, raises, promotions, and so on, for the plaintiff prior to the protected complaint, and then the downhill course of plaintiff’s career thereafter. Make a very clear delineation of “before” and “after.”
2. If the plaintiff was with the company for a long time, use as blowups the evaluations that show the excellent performance before the act at issue. These blowups will not only stick in the jurors minds, but will aid you in presenting an opening without the use of notes.
3. If there are critical documents, such as the plaintiff’s internal complaint, blow them up using a simple board, but make sure that the critical sentences are highlighted and are easy for the jurors to read from all angles.

VII. Damages

In many jurisdictions, specific damages cannot be requested. Moreover, the author suggests that plaintiffs’ counsel avoid any detailed discussion of damages. While other plaintiffs’ counsel may disagree, the author believes that once the jurors believe that the defendant is liable, damages will follow.

1. If plaintiff’s counsel focuses on the conduct of defendant, a damages discussion in an opening can be as simple as the following: “Mary loved her job. Mary lost her job. Mary lost her security. Mary became so depressed that she had to go to a doctor and take medication. She couldn’t eat. She couldn’t sleep. She couldn’t function on a daily basis. Mary couldn’t pay her bills. It took her ‘x’ amount of time to get another job and even then, it wasn’t the same job, with the same pay

- and benefits. Mary was never the same after what defendant did to her.”
2. If punitive damages are permitted to be discussed (i.e., it is not a bifurcated trial), they should be discussed in the context of punishing the defendant. An example might be: “[Defendant company] put money before decency. The only thing that will make them put decency first is by making them pay money.”

VIII. Length of Opening

These cases are often complicated and last for a substantial period of time. Therefore, it often happens that the opening is much too long. If possible, limit your opening to 30 or 45 minutes, no more. If necessary, sacrifice some of the details of the case (although not the critical ones) in order to drive home the sincerity of your belief in the plaintiff’s case, the theme that the jurors will be hearing over and over, and the main points that you want to make about defendant’s conduct, while stealing as much thunder as possible from the defense counsel, who will be forced to speak after you and hopefully will have nothing to say!