

OPENING STATEMENTS

The Importance of the Trial Theme and First Impressions

The opening statement is your chance to set the trial theme and make a first impression on the jury. The importance of the opening statement cannot be too greatly emphasized. In fact, “studies show that juries vote 80% of the time in accordance with their tentative impressions after hearing opening statements.”¹

Before you start drafting your opening statement, it’s a good idea to sit down and brainstorm about the trial theme of your case. It’s great if you can do this with other attorneys (as well as non-attorneys) to bounce your ideas off them and get feedback.

What is the message you want to convey to the jury? What evidence do you have to support your theme? You should try to pare down the trial theme to be as concise as it can be, while still effectively conveying your message. The theme should be short, uncomplicated and easy to comprehend. The opening statement will present this theme, which should then continue through the trial, reinforced by the testimony and evidence.

In employment cases, the plaintiff’s trial theme should of course support the elements of the causes of action. Keep in mind that the opening statement is not argument, but is meant to be a persuasive summary of the evidence. You may present what the evidence will show regarding the events and circumstances that support your theory of the case. But you can’t argue that the jury should therefore infer from that evidence a particular result or draw a certain conclusion. This is based upon the idea that the jury is supposed to consider all of the evidence presented

¹ Rosen, Rothstein, Aspen et al., RUTGER GROUP PRAC. GUIDE: FEDERAL EMPLOYMENT LITIGATION (The Rutter Group 2006) §12-114.

before they make their decision. Thus, at the opening statement stage, it is important to not overstep the boundary of persuasively presenting the anticipated evidence into the realm of arguing how the jury should ultimately interpret that evidence.

Degree of Detail

Another consideration in preparing your opening statement is how much detail you want to include. There are pros and cons to providing detail regarding anticipated evidence and testimony in the opening statement. More detail allows you to get the favorable evidence before the jury from the very beginning and to help them understand how that evidence supports your trial theme.² There is also the principle of primacy. That is, jurors tend to recall best and place most emphasis on what they hear first. However, as noted by Professor Keeton, there is the danger that the evidence and testimony that comes out at trial is not always consistent with what was promised in your opening statement.³ Another disadvantage of too much detail is that if you don't include every detail, then when something new is revealed at trial it appears that you are using unfair surprise tactics, which may put off the jurors.⁴ On the other hand, you may not want to play all your cards up front, and may prefer to save some facts or evidence that the other side is unaware of for a tactical advantage. Obviously, this is an analysis that should be made on a case by case basis, depending upon the confidence you have in the evidence and the strength of your case.

² Robert E. Keeton, "The Jury: §7.11 Opening Statements." Trial Tactics and Methods _Boston Toronto: Little Brown and Company, 1973.

³ Id.

⁴ Id.

Length

The length of your opening statement should not exceed 30 minutes, lest you lose the attention of the jurors. You also should strive for a concise presentation that reiterates the trial theme. Therefore, the length of the opening statement should be short and your theme simple and easy to grasp.

Using Visual Aids

If the court permits, you may want to consider using demonstrative evidence, such as graphs, charts, or computer generated overheads which list bullet points relating to the elements of the claims or defenses, or timelines of events.

In United States District Court cases, support for use of such visual aids may be found if they were part of the information provided in the required Rule 26 initial disclosures. Fed. R. Civ. P. 26 governs pretrial disclosure of all non-impeachment exhibits, including demonstrative evidence. Fed. R. of Civ. P. 26(a)(3)(A)(iii) provides that:

In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment: an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

If no timely objection had been made to that disclosure, it may have been waived by the other side. Fed. R. Civ. P. 26(a)(3)(B).

Conclusion

The above points represent just a brief overview of some of the things to think about when preparing an opening statement. Keep in mind that this is just a starting point. There are many other considerations and guidelines, as well as procedural and evidentiary issues which also have bearing upon formulation and execution of the opening statement.

HYDERALLY & ASSOCIATES, P.C.
33 PLYMOUTH STREET
SUITE 202
MONTCLAIR, NEW JERSEY 07042
TELEPHONE: (973)509-8500
FACSIMILE: (973)509-8501

FRANCINE FONER, ESQ.
for the Firm