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Litigators know how to open a show

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The old saying about first impressions appears to be a key component to winning over juries from the start. An opening statement allows an attorney to set the theme of his case and establish credibility. Though widely regarded as an all-important chance to make a positive impression on the judge and jury, opening statements weren't always viewed that way. Early in his career, when attorney John McEntee was in the Nassau County District Attorney's Office, he witnessed many defense attorneys waive their opening statement. "People for a long time believed it was the closing argument that was the most important part of the trial," said McEntee, now a commercial litigation partner at Farrell Fritz in Uniondale. "Attorneys traditionally didn't want to say too much in the beginning, because things could change during the trial." But in the 1980s, McEntee noted, research came out about "confirmation bias" with regard to trials. The term refers to the tendency of jurors to quickly and often subconsciously choose one side or the other, and then listen to the evidence that supports their position and disregard that evidence that doesn't.

Outline the case

The opening statement should be a bullet-point outline of what an attorney is going to prove over the course of the trial, said Giuseppe Franzella, a partner in the litigation practice group at Lazer, Aptheker, Rosella & Yedid in Melville.

"You want to communicate your unifying theory of the case – you should open and close the statement with that," Franzella said. "You want the judge and jury to keep whatever message you want to get across in the back of their mind throughout the trial."

McEntee was trained in the district attorney's office to tell the jury that opening statements are like a preview of a movie. But a quick-thinking defense attorney retorted, "You heard Mr. McEntee say the opening statement is like a preview to a movie.

Let's take 'Gone with the Wind.' In the preview, you would see the battle scenes and think it was a war movie, but in fact it's a love story." That's the last time McEntee used that analogy. But other lessons from the district attorney's office have stayed with him.

"We were trained not to use any notes for the opening statement," he said. "The thinking was, if you couldn't do it from memory, you didn't know the case well enough." Memorizing the opening statement is a helpful technique, he said, as it forces the attorney to know and understand every date and aspect of the case. Especially in a bench trial – which is before a judge only – a common mistake among inexperienced attorneys is assuming the judge has a familiarity or expertise with the law at issue in the case, Franzella said.

"That's not always true – there are many nuances, and laws change frequently," he said. "You want to explain the law succinctly and set forth how the facts you're going to establish relate to that law." Cullen and Dykman Partner Cynthia Augello is a fan of the catchy opening. "You need something that's going to grab your audience right away – something that, depending on the case, will startle them into paying attention," said the commercial litigator. "You want to make the jury feel you're a person, not just a lawyer, and that they're a part of the process. You want to personalize the case and make it something they can relate to."

A summary judgment motion precedes most trials, and Augello pays attention to what the judge focuses on in that proceeding.

"Whatever issue the judge had a problem with, I like to take care of that issue right off the bat in the opening statement," she said.

Make them believe you

Just as real estate purchasers care about location, for Robert Fallarino, success at a trial is all about credibility, credibility, credibility.

"In the opening statement, you tell the story of what you're going to prove and how you're going to prove it," said Fallarino, an attorney with Pegalis & Erickson in Lake Success. "If you prove one thing the next day and another thing the day after that, you build credibility."

While a judge and jury are supposed to be objective, "by virtue of human nature, they will form and solidify opinions of you during your opening statement," Franzella said. "You have to present your best self out there and form a connection with the jury. From your first utterances, the jury is forming an opinion of the litigator and the client, and it's hard to shake that first impression."

For instance, if an attorney who wants a jury to be sympathetic to his client comes across as too abrasive in his opening statement, he may hurt his case.

"Make eye contact and maintain a clarity of speech, which is often taken for granted, but it's imperative," Franzella said. "If you are not articulating or enunciating, the jury will tune you out."

Watch your language

In his opening statements, Fallarino, who represents plaintiffs in medical malpractice cases, doesn't use technical medical jargon. For instance, when discussing x-ray images, he'll mention "gray areas" that show up on the scans, but as the trial progresses, he'll move beyond layman's terms and use medical terms like "density," which the jury will slowly learn as the trial goes on.

While attorneys may have prattled on longer in the past, they are now more mindful of jurors' attention spans. "With our changing generation – 140 characters and all that – you don't want to lose their attention," Fallarino said. "You have to quickly get to the point, which is more challenging in complicated cases." The key, he said, is keeping an eye on the jurors' reactions.

"You have an audience – you have to watch for cues that show they are bored or excited and listening," he said. "If they're bored, you have to shift gears and get them excited again."

Extending an opening statement beyond 15 minutes is generally not a good idea, said Franzella, who noted a common mistake attorneys make is straying from their succinct bullet-point narrative. "As soon as you go off on tangents – whether from poor planning or trying to put too much in – the jury will lose the thread and the theory of your case," he said. ##