

A person wearing a white button-down shirt is sitting at a wooden desk. They are holding a green pen over an open notebook. To their right is a white coffee cup on a saucer. A laptop is partially visible on the desk. The background is a blurred office setting.

# CRAFT YOUR NEXT OPENING STATEMENT WITH CONFIDENCE

 **NITA**<sup>®</sup>



## Introduction

The Legal Advocate blog is a great tool for teaching and learning advocacy skills. Since the blog's introduction to the NITA community in 2012, we have enlisted many of our outstanding faculty members, authors, and guest speakers to submit articles on a wide array of topics to enhance reader's advocacy skills. Here, we have compiled three articles which will give readers guidance on crafting a winning opening statement for their next trial.

# Distilling Effective Rhetoric for Persuasive Opening Statements

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## Sara Jacobson

*Director of Trial Advocacy Programs and Associate Professor of Temple University, Beasley School of Law*

**Opening statement is the first time a lawyer gets to lay their case out to the jury.** It is the first impression you make, and the first impression the jury takes about your case. You want the jury to believe you, to understand you, to be moved by you such that when the introduction of evidence begins as the witnesses are called, they understand what the case is about and are, at least, amenable to your client's perspective on the facts. In short, you want to persuade.

A good opening statement sets the context of the story of the case, such that when jurors receive pieces of evidence during the trial, they fit those bits of information as into the framework you built in your opening. But how best to persuade? Aristotle spoke of three



types of persuasive appeal, and these three remain instructive to anyone preparing to open. We examine each in turn. They are:

**LOGOS:** persuasion through the logic of the argument.

**ETHOS:** persuasion through the integrity of the person arguing.

**PATHOS:** persuasion through the emotional connection of the argument, but at its most effective when the person arguing is as emotional in delivery as the argument itself.

First consider logos, the attempt to persuade through logic. Many traditional notions of opening statement, like speech structure, fit here. By giving the jury a logical structure to follow, you will better hold and keep their attention. The constructs of storytelling, always critical to effective opening statements, fit here as well. A story has distinct elements: exposition, an inciting incident, rising action, the turning point or climax of the story, falling action, and ultimately, resolution.<sup>1</sup> Imagined then through the lens of opening statement, that structure might look like this:

**EXPOSITION:** brief introduction to background of events, scene, and parties;

**INCITING INCIDENT:** identification of the issues at stake and their relation to the people in the case;

**RISING ACTION:** narration of main action or conflict;

**CLIMAX:** turning point of the issue at question;

**FALLING ACTION:** discussion of any weaknesses; and

**RESOLUTION:** wrap-up of the speech and request for the verdict you'll want at the end of the trial.<sup>2</sup>

Note that your brief introduction or exposition section should encapsulate the notion of primacy—that starting strong matters—

and means that your introduction should include both a clear case theory and a theme that resonates.

Choice of case theory and theme also resonate with ethos, or persuasion through the ethical integrity of the speaker. You want the jurors to believe you and therefore to believe your side of the case. Ethos includes both speaker and speech, though, as for the jury to best believe you, your case theory must also have integrity. That means it needs an internally consistent narrative that also conforms to community notions of common sense. Put simply, the jurors need to be able to relate to it, which means you must consider the community to whom you are opening when shaping your message. Your theme is the value you associate your case theory with, and it, too, must work well within the integrity of your approach in an opening. Of course, the notion of integrity means more than your message. It means you must comport yourself, both in opening and across the trial, as a person of good faith, hiding nothing, and embracing your case's weaknesses as best you can, rather than ignoring them. Which leaves with perhaps the most important piece of the persuasive opening, the pathos or emotion in it. Jurors are motivated by the desire to do justice, to do good. In that quest, jurors can be moved to act by their emotions. To make an effective emotional appeal first, look for the humanity in your case, for the people driving the action. An opening with lasting

impact centers around the people affected by the transaction, not on the pieces of paper themselves. Second, remember that effective delivery matters when it comes to emotional persuasion. Effective storytelling in an opening allows the lawyer to speak from the heart. For the jury to feel that impact, the lawyer should: deliver with passion, without relying on notes; ensure that the tone of their delivery matches the emotion in language of the speech; vary the emotion in the speech so it doesn't stay in one place too long, and finally remember to use their whole selves including movement, gestures, eye contact, and pauses, to build drama into the story.

Use principles of logos to guide your structure. Use ethos to ensure that both your case theory and you speak with credible integrity. Use pathos to build emotional impact and effective delivery into your opening. Each will help you build the context of the narrative for the jurors, such that by the end of your opening they will be moved to fit the facts into the strong framework you built for them.

<sup>1</sup> Ann Aubrey Hanson, 7-Step "Freytag's Pyramid," The Writing Itch, August 21, 2014. Available at: <https://writingitch.com/2014/08/21/7-step-freytags-pyramid/>

<sup>2</sup> A similar version of this organization is found in Gerry Powell's excellent piece on openings. Gerald R. Powell, Opening Statements: The Art of Storytelling, 31 Stetson L.Rev. 89, at 96-97 (2001). 4 Id.



## How I Learned to Love the Opening Statement

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### Amy Ferrin

*Senior Deputy District Attorney*

#### I love Brussels sprouts.

Tossed with olive oil and seasoning. Roasted until the edges are a bit crispy. Fantastic. Maybe I like them because they are so good for me, or maybe I truly enjoy their unusual flavor and texture; but I am the exception, not the rule. Most people offered Brussels sprouts have the same reaction as my husband: “Mini death cabbages. No thanks.”

Nearly every trial attorney, every member of a mock trial team, everyone who enjoys watching TV courtroom dramas delights in the “sexy” parts of the trial: cross-examination and closing argument. And while those parts of the trial make for interesting watching, I want to talk about the part of trial advocacy that is passed over like Brussels sprouts at a cook-out: opening statement.



Very few attorneys jump at the chance to give an opening statement; most see it as a necessary but undesirable part of the trial. Some of you reading may say, “That’s not true. I’ve known for years that opening statement is one of the most important parts of the trial.” You are correct. That is what you were told and it is what you repeat aloud when important people are listening. But let me ask you this: if you were trying a case with another attorney, and the division of labor is split such that one attorney gives opening statement and the other gives closing argument, which would you prefer to give? How many of you would feel a tinge of disappointment upon being assigned to give the opening statement? All good trial attorneys are told the value of opening statement, but very few of us actually internalize that value.

If you are in that camp—disappointed to be “left with” opening statement—I challenge you to rethink how you think about opening statement.

I’m not sure when I came to love opening statement. I learned how to do it well on my law school’s mock trial team. But learned to love doing it a few years into my first job as a trial attorney – when I was trying terribly difficult, but terribly worthy cases involving all types of child abuse. All of the sudden, the opening statement wasn’t just a phase of the trial that needed to occur so we could

move on to the “sexy” parts of the trial. It was a phase in the trial that could truly make a difference.

Opening statement—for plaintiff’s counsel and prosecutors in particular—is your moment to take control of the trial. You get to set the stage, to give the jury the framework they should use to listen to and analyze all the evidence they are about to hear, and—significantly—you have the invaluable opportunity to frame all of those “bad facts” exactly the way you want to.

## Framing of the Story

This “framing of the story” is crucial for so many reasons. First, it means you get to set the tone, the emotion for the trial. If your client is sympathetic, you get to set that stage. If your theory is about keeping emotion and sympathy out of the trial, you get to set that stage. If your opponent’s theory (and facts) are full of holes, you get to conjure the jurors’ skepticism before a single witness is sworn. Second, it makes the presentation of evidence easier. If you have given the jury a roadmap for the story, it doesn’t matter if you have to call a witness (or five) out of the preferred order. The jurors already know where to plug this witness into the framework you provided. Finally, if the story you framed for the jury fits with the evidence and fits with their reason and common

sense, you are going to win. I know jurors are told repeatedly that they may not make a decision until all of the evidence is closed and they are deliberating with their fellow jurors. But, I also know that most jurors reach a conclusion after opening statement, and are simply waiting to see if the evidence fulfills the framework you created for them.<sup>1</sup>

Finally, and I cannot emphasize this enough, an opening statement need not be flashy or catchy; it simply must tell a good story. One that is easy to follow and easy to fill in the facts as the evidence is presented during trial.

### I am a realist.

I don't expect good trial attorneys to prefer opening statement to closing argument; closing argument is simply more fun. But increased appreciation for the value of opening statement combined with enthusiasm to do it well will serve you well: I believe you will win more trials.

I challenge you to add some bacon and hot sauce to those Brussels sprouts – they may never be the best thing on your plate, but make sure they get some much-needed love.

<sup>1</sup> William L. Burke, Ronald Poulson & Michael J. Brondino, Fact or Fiction: The Effect of the Opening Statement, 18 J. Contemp. L. 195, (1992) (80% of jurors decide the case for the party for whom they tentatively decided for after opening statement).



## Opening Statements – The Opportunity to Tell Your Client’s Side of the Story: A 12-Step Guide

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### **William T. Webb**

*Founder and Principal Attorney at Webb Legal Group*

**When we stand up to provide an opening statement, we want to tell the jury our version of our client’s story.**

But, how do we tell a story?

Think back to a time when you knew nothing about your case. You are leaning back in your chair, reading the newspaper, your feet on your desk, perhaps. The silence is split by the sound of the telephone. It’s a new client, claiming they have been wronged! But how? They explain, haltingly. You probe with questions. You hang up the phone, confused as to what the case is really about, or if there is one worth taking.



Over the course of the next months, you meet with the client, gather documents and talk to witnesses. Finally, you have a sense of what the case is about. If someone were to list each discrete fact that comprises your case, there would be 937 of them. You are convinced of the rightness of your cause. And so you prepare for your opening statement. Is it OK to just spout the 937 facts, in no apparent order? No, of course not. But how does one marshal the facts into a cogent story that will persuade? This blog post discusses the 12 steps to doing just that.

## STEP 1

### Arm yourself with two tools: words and images

Your audience will be comprised of human beings. (We're starting with the basics here.) If you are presenting a case to a judge or arbitrator, congratulations. They are legally trained, and know that their livelihood depends on knowing what is going on in their cases. They will pay attention, and will follow to the extent that they are able. You can lead them to the water. Jurors, on the other hand, do not suffer from the infirmity of a legally-trained mind, and have little incentive to pay attention to every word and follow every argument. They have to be enticed to the water. I am convinced that a jury trial boils down to a continuous struggle to capture and maintain the jury's attention.

Once at the water, whether anybody slakes their thirst is up to you. But the same technique works no matter your audience. In my experience, the best way to engage someone's attention is by telling them a story, not by appealing to their reason or intellect, without providing the proper context.

We also have a great tool available to us that you must use in every opening statement: the ability to reinforce our words with visual images. These might come in the form of our body language and movement, a visual timeline, photographs, e-mails with call-

outs of critical language, "the" gun, and whatever else we can do to hold the attention of the fact finder.

So, armed with these tools, let's talk about using them to weave a story that will persuade the jury to act for your client.

## STEP 2

### Decide what the story is

This is often easier said than done. You may need to dig a bit with your client in order to craft your opening statement, so that you can see what your story is. Ask them what the case means to them. How has their life or their business been affected by the events leading up to this lawsuit, or by the lawsuit itself? Ask your client open ended questions, and get a conversation going. Let the client lead the conversation as much as you can.

## STEP 3

### Visit the scene

Wherever the story took, or is taking, place, go there. And it may have more than one location. A plaintiff permanently injured in a serious accident may require several site visits. Go to the intersection at the approximate time and anniversary date of the accident. Go to her home to see how she deals with activities

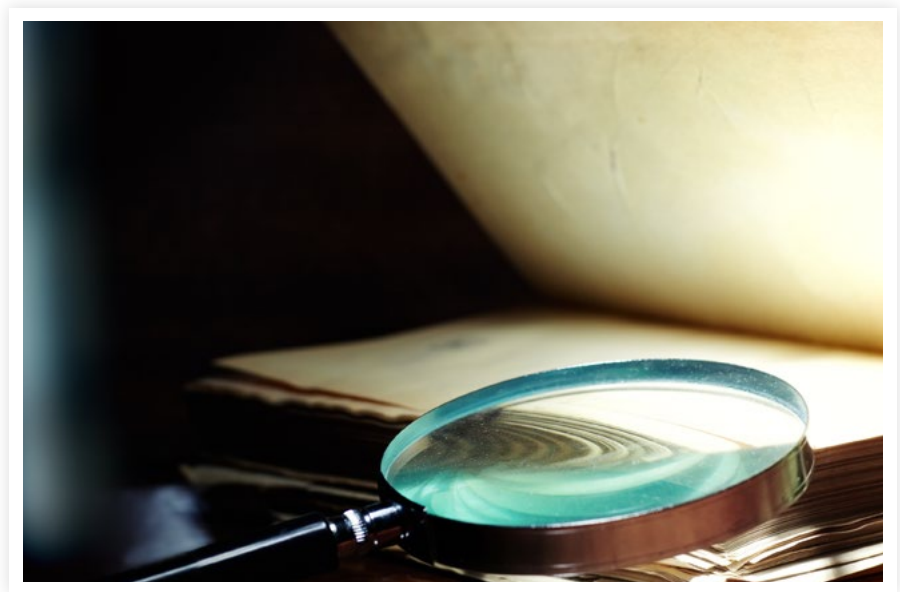
of daily living. Go with him to work to see how his job has been affected. Go with her to places she used to enjoy, but can no longer, and talk to her about her memories of teaching her daughter to play golf, of skiing with her son. Only then can you begin to understand the story well enough to tell it.

#### STEP 4

##### Select a point of view

It is important to tell the story from your client's point of view. Don't just tell an alternative story from the other side's point of view. That is simply re-telling your opponent's story, which is not persuasive. And this is especially important when your client is a corporate entity. Even companies have stories, and we need to tell them. But we also need to tell the story from their point of view.

If you have attended a NITA program, you know that there are a number of different fact patterns developed in order to practice trial skills. One such case is *Jamie Taylor v. Pinnacle Packaging Products*, an employment case involving allegations of quid pro quo treatment. The case boils down to "he said/she said" recollections by various witnesses as to whether John Hamilton asked his subordinate, Jamie Taylor, out on dates, only to be refused. Ultimately, of course, Jamie Taylor was fired, and the rest is hypothetical history.



So, if we are representing Pinnacle Packaging, we need to tell its story. Its story involves its founding, several decades ago, and how it gainfully employs people, and has done so for quite some time. 21 years ago, it hired John Hamilton on a probationary basis. Mr. Hamilton worked his way up the ladder and ultimately became the operations manager, etc. One day, Mr. Hamilton received an application by a Jamie Taylor... and we're off to the races.

Notice how that point of view invites the jury to see the case from your client's point of view, something that is expressly forbidden by the Golden Rule, which says that you can't ask the jury to put

themselves in your client's position. But there is no rule against telling a story so effectively that it paints an unmistakable picture in the jurors' minds. Well done; the jury will "see" the case in their mind's eye, meaning that they will have subconsciously put themselves in your client's position, just the vantage from which you want them to view the trial.

## STEP 5

### Build your story, brick by brick.

Remember that the fact finder has no idea what the story is before the case is called. If we want to persuade, we have to explain the story as we go along. We cannot assume or hope that the jury is going to be able to understand the case and the factual nuances to the story – we have to express them. Remember, you have been to the scene; they have not. You have been to your client's bakery; they have not. You have spoken with the experts; they have not. So you need to build your story like a house. We can't start building the second floor until we have finished the first floor, and we can begin work on the first floor until the foundation has been poured, etc.

So, when you are crafting your story, think about the tools the jury is going to need in order to understand how the story unfolds. List these tools out, and make sure to give them to jury – before they need them.

For example, one of the factors the jury in the Taylor case is going to weigh is whether she was capable of doing the job. Well, in order to understand that, it will be necessary for the jury to understand that Jamie Taylor is but a wee lass and that the job involves some heavy lifting. It's one thing to say this – "the job requires some heavy lifting." But, this statement is not terribly memorable, and therefore not persuasive. What if a juror sneezes or is distracted at the exact point when you utter those words? They have not been persuaded. But, what if we carried on our story begun above:

Members of the jury: You might not know this, but there are companies whose sole role in our economy is packaging. Pinnacle is one of those companies. Other businesses send unpackaged products in huge crates, and Pinnacle opens the crates, and takes the things out. Working on assembly lines, Pinnacle's employees take these products and put them in boxes, and then they seal them up. Sometimes these smaller boxes are put together into larger boxes, too. This is what a packaging company does, and this is what Pinnacle does. It makes money by quickly, and carefully, packing products. Sometimes these products are light. But often, they are quite heavy, requiring strength to pack the boxes.

Now, the jury knows that the company stays in business by ensuring that its employees are strong and work efficiently. The jury is now ready to hear about how Jamie Taylor did not measure up.

**STEP 6****Tell the story chronologically**

This should go without saying, but don't skip around when telling your story. Lawyers do this when they remember that they forgot to tell the jury something critical to their understanding and so they have to backtrack a bit and provide some more critical information. It's better to pepper this information throughout the story in a logical buildup.

Sometimes, in order to do this, there may be several tracks to convey. "Meanwhile, back at the ranch..." You may consider helping the jury by talking about events taking place in one location while standing to the right of the podium, and moving to the left when you're talking about something going on at another location. But, to the extent possible, keep it chronological. It's how we have been trained to understand story, *The Curious Case of Benjamin Button* notwithstanding.

**STEP 7****I want to start off this post with one of the most important. Use head notes effectively.**

If you tell your story to the fact finder in one long, uninterrupted



paragraph without any signposts as to where we are in the story, you will lose them. Head notes are a great way of keeping everybody on the same path. Shameless plug: I presented a webinar on NITA's Studio 71 that goes into more detail than you ever thought possible about the use of head notes in openings, closings, directs and crosses, and I commend it to you – if you learn to use head notes throughout your trial presentations you will improve your advocacy immeasurably.



A headnote is a short persuasive statement as to what is about to happen in the courtroom. It alerts the listener that we're shifting gears, but, more importantly, into which gear we're shifting. Even, "Meanwhile, back at the ranch" is a kind of head note, isn't it? It tells the reader that we're now going to be shifting our perspective to a different location.

## STEP 8

### Don't argue

At NITA, we're fond of telling people not to argue in their opening statements. But we don't always say why this is to be avoided. The reason is that in order to argue persuasively, the listener has to actively engage their consciousness to consider the merits of the argument. And it's too early for this. We have not provided the jury with any reason to care about our arguments; they don't even know what happened, or whose side they are on.

But if we're telling a story instead, they will be engaged in taking in the events, and wondering what happens next. So indulge them. Tell them what happened next. And then tell them what happened after that. Lather. Rinse. Repeat.

By the time they have heard your entire, well-crafted story, they will be motivated to help you. They will see the injustice that has

befallen your client. And they will say to themselves, consciously or otherwise, "how can I help?" Having had their passions aroused, then is the time to argue. But that comes much later, in closing argument. For now, don't argue. It will literally fall on deaf ears.

## STEP 9

### Don't refer to the facts as your "story"

As much as I love stories, and the concept of story, bear in mind that it has a negative connotation. While stories themselves have great power to persuade, most people feel that a story is something that is made up, fictitious, and therefore, not "true," in that things didn't really happen that way. So don't refer to the facts you relay, and will elicit at trial, as a "story." You can refer to your opponent's story as such, though.

## STEP 10

### Include all elements you need to prove in your opening.

In some jurisdictions, your opponent may be entitled to a directed verdict after the opening statement, so be sure to touch on all elements to at least some degree so as to stave off this approach. And you might even want to use head notes in order to alert the judge as to each element you've ticked off:

Now I want to talk about causation. You are going to hear from Dr. James Yergler. He is an orthopedic surgeon who operated on Ms. Johnson's knee...

### STEP 11

#### Use exhibits and other visual aids.

If you want the jury to remember something from your opening statement, show them something that reinforces the point. The importance of doing so cannot be overemphasized. Most of us are visual learners, and are unlikely to understand or remember something that is taught to us only orally. Confucious said, "Tell me and I will forget, show me and I may remember; involve me and I will understand." So by showing the jury something, you involve them to a greater extent, and they will be more likely to remember it, and be persuaded by it.

### STEP 12

#### Involve the jury by showing them how they can help.

So if you want the fact finder to understand your case, you have to involve them. How do we involve the jury? Well, we can't argue with them. But we can involve the jury in the story-making process.

By telling them a compelling story, we can involve the jury in the story-making process itself. If the jury's emotions are engaged and aroused, the jurors will be motivated to provide the happiest ending they can.

So when you finish with your story, you can end your opening statement with a preview of the request you will make after the evidence has closed. "Members of the jury, if the evidence is just as I've laid it out for you, I will ask you to return a significant verdict for the plaintiff."

Now, time to call your first witness.