

By || **DEBORAH CHANG**

6 Key



Ingredients

To get your case off to a good start, follow these tips for a strong opening statement that will empower jurors to right a wrong.

What makes a compelling opening statement? There are as many different responses to this question as there are trial lawyers, because everyone has their own style and particular way of delivering an opening. But we can all agree that opening statements are critical. As famed trial lawyer Gerry Spence said, “First impressions of a case are hard to overcome.”¹ By the end of opening statements, most jurors have already made up their minds about the case.² Here are six ways to build a strong opening.

1 Make a Lasting First Impression

Before you open your mouth, think about the jurors who are sitting in the jury box: They are tired after jury selection, bored from sitting in the hallway on hard benches, anxious about being away from work, and frustrated at not being able to use their cell phones in court. And during the COVID-19 pandemic, they have a host of other stresses that might be affecting them. They want and need to know that this case is worth their time and energy, and you are the first lawyer to speak in this trial.

Think hard about how you’ll spend the first 30 seconds of your opening: You’ll need a “hook” to grab the jurors’ attention. You want them excited and invested in this case from your very first sentence. What’s a compelling hook? Here are some commonly used first lines that are *not* good hooks:

“My name is _____ (insert name).”

You’ve been introduced before, on the first day of jury selection. The trial judge has likely just said your name—the jurors already know who you are and, frankly, they really don’t care.

“This is an opening statement.”

The judge has just instructed the jurors on what an opening statement is—this is a perfect way to bore the jurors.

“What I or defense counsel say is not evidence.”

This is even worse, yet lawyers often say it. Jurors may interpret it as “don’t listen to a thing we say, because it is not important.”

“An opening is like a jigsaw puzzle piece.”

I have heard versions of this that are OK, but I also have seen defense counsel turn it around and use it to their advantage later, explaining how some of the puzzle pieces just don’t fit. And it does nothing to excite the jurors about the case—now they are thinking about the 1,000-piece puzzle that their Aunt Dora used to put together at Thanksgiving.

Instead of these ho-hum starters, get their attention from the very beginning. Here are a few examples of some better hooks that immediately captured the jurors’ attention:

- Admitted liability: *“19 years old. That is how old Alan C. was when he became disabled forever.”*
- Disputed liability: *“Four decades. That is how long the defendant harbored a dark secret: Truck collisions on this roadway were predicted, expected, and preventable.”*
- Damages portion of a bifurcated trial: *“From the time he*

was a little boy, Jerry R. never wanted to be a cowboy or a policeman like many of his friends. Instead, he looked up—up in the air at the linemen who worked high in the sky like superheroes to make sure his family had lights and electricity on even the darkest nights. It is all he wanted to be.”

Make the most of those first 30 seconds—establish for jurors that every time you walk up to the podium, you will get to the point and reveal something interesting and important.

2 Distill Your Case to Its Essence

The worst thing you can do during an opening is to overwhelm the jurors with too many nonessential facts. Ask yourself: What is the case really about? And why should jurors care about it? Answer these questions to present your case in a way that will make the jurors feel empowered to right a wrong. It's not an easy or quick process—be sure to spend the necessary time to brainstorm your case.³

Unless the defendant has admitted liability, do *not* start with the incident. This is where the defense is strong and where comparative fault lives and breathes. Also resist the temptation to start talking about the plaintiff right away. Do not put the focus on his or her actions, choices, or motivations at this juncture—the jury is not ready to hear or care about the plaintiff yet.

Instead, go back in time—hours, days, months, years—to a time before the incident, and focus on all the systematic procedures that the defendant should have followed but did not. What “rules of the road” did the defendant fail to follow?⁴ Find every red flag that the defendant missed. Show how the defendant created a situation that made a tragic incident inevitable, and show that while it just happened to be the plaintiff who was harmed, it could have been any of the jurors or their loved ones.



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A great place to start your brainstorm session is with the applicable verdict form and jury instructions. Know exactly what you have to prove to win. Keep asking yourself: Who had a duty under the law, and who didn't do his or her job? Gather all the sources for the rules and procedures that the defendant should have followed but did not. Find a way to convey that the tragic outcome in this case was a foregone conclusion because of the defendant's deviations.

3 Use Well-Edited Depo Clips

Short, to-the-point video clips of depositions of the defendant's managers or employees support your claim that the defendant failed to follow systematic procedures devised to ensure safety. When you have obtained these golden nuggets during discovery, use them in the opening. Videotaped excerpts are much more effective than having jurors read printed excerpts—seeing and hearing the witnesses is invaluable.

It's easy to show and zoom in on exhibits on the video screen with devices that are widely available, affordable, and simple to connect to the video camera. Remote videotaped depositions, which have become even more popular during the coronavirus pandemic, make it simple to display exhibits by using the “share” feature on the Zoom platform. A good videographer can provide split screen displays from the Zoom platform that make it impossible to tell the deposition was taken remotely.

Federal Rule of Civil Procedure 32(a)(3) allows you to use the deposition (or portions thereof) of an adverse party (party, agent, or designee) for *any purpose*. Under the federal rules, as long as the deponent is, or was at the time of the deposition, an adverse party or an officer, director, managing agent, or a Rule 30(b)(6) or Rule 31(a)(4) designee of the adverse party, clips from the videotaped deposition may be used in opening statement.

State corollaries typically also allow this. For example, California Code of Civil Procedure §2025.620(b) states: “An adverse party may use *for any purpose*, a deposition of a party to the action, or of anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent, or designee . . . of a party. It is not ground for objection to the use of a deposition of a party under this subdivision by an adverse party that the deponent is available to testify, has testified, or will testify at the trial or other hearing.”⁵

Plan ahead and file your designation of parts of depositions you intend to use at trial. Be sure to get rulings on every objection before you deliver your opening. To make this chore easier and faster, I recommend using programs such as the TranscriptPad app on your iPad to make designations and create a report. The program enables you to scroll automatically through depositions



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and makes highlighting, flagging, and searching a breeze. Designating portions are as easy as tapping your finger on the starting and ending points of a clip and assigning the clip a description. The app also enables you to instantly create a report to attach to your designation filed with the court and to provide to opposing counsel. Other programs are available for non-iPad users, including Digital WarRoom, a cloud-based software that can be used by any internet-connected device.

4 Tell the Plaintiff's Story

After discussing the defendant's negligence and the incident, then introduce your plaintiff and tell the jurors his or her story. Too often, we get stuck in the facts and details of how the incident occurred: the explosion, the car crash, the horrific fall. But that's only part of the story—you also need to discuss the plaintiff's life experiences that made her the unique person she was at the time the incident occurred. Our brains are hardwired to learn from and respond to stories. A great story is your most powerful weapon—and the best part of your opening.

When I think about a plaintiff's story, I think about a case we handled involving a fighter jet that crashed into a family's home. The photos of the plaintiff's home as a fiery inferno are dramatic and an important part of the story. But what happened next will always resonate with me. The firefighters at the scene found burnt photographs that had fluttered onto the ground, and they picked them up and put them in a little box. They felt devastated for the poor man who had lost everything: his wife, his newborn baby, his 2-year-old daughter,

his mother-in-law who had come from Korea to help with the new baby—as well as his home and every personal belonging the young family owned. The firefighters gave him this box and apologized profusely for having salvaged nothing more.

This was before the days of digital photographs, smartphones, and cloud storage—and to the grieving plaintiff, this box was the most precious thing in the world. He never let the box out of his sight and spent weeks calling photograph experts to find out how to repair the burnt portions. What was in that box—the extraordinary, heart-wrenching story of love, sacrifice, hard work, his beautiful wife and children, and the importance of family—was what led the federal judge in the case to award substantial noneconomic damages.

Jurors receive very little guidance or instruction on how to come up with a number for past and future noneconomic damages—they are told to base their verdict on the evidence and common sense. You cannot expect them to award noneconomic damages to compensate for what the plaintiff has lost unless you present compelling evidence of what she had before the incident. The story is what will justify the damages you seek.

Spend as much time on the story as you do on liability. Go to the plaintiff's home and spend time with his family and friends. Bring the list of noneconomic damages that are recoverable for your particular case, and get details that reflect these elements (such as loss of love, companionship, affection, assistance, protection, and moral support in a wrongful death case). Find photographs, letters, cards, and videos to help tell the story. Ask for photographs and videos

from the cell phones of your client, friends and family, and (if applicable) the decedent.

Then reflect on the facts, and the story will emerge. Consider your client's life experiences that led him to the point right before the incident. Why did this loss hit him so hard at this particular time in his life?

Focus on the elements of noneconomic damages. Use the five senses to bring the story details to life: the feeling of the bone-crunching hugs, the smell of the turkey with his special sauce on Thanksgiving, the taste of the special homemade burritos she made, the sound of the piano or singing that brought such peace and joy. Jurors love to be taken on a journey and to see and learn about food and customs that may be different from their own. And they love to hear about a plaintiff's quest to secure the “American dream” by overcoming great adversity.

5 Address Your Case's Weaknesses

As human beings, we all have a tendency to want to be well-liked—and as lawyers, we don't want to expose the bad parts of our case. But if we let the defense get to them first, we will look untrustworthy. Never be caught telling only part of the story.

Fortunately, we get to address these weaknesses first in our opening. By the time we are done, nothing the defense lawyer says will be new to the jury. We will have addressed these issues and responded to each of their contentions with the evidence that counters them. By the time defense counsel gets to the issue in his or her opening, it will sound like old news and perhaps even petty. Watch your time carefully and plan ahead to

devote enough time to the defendant's contentions and your responses to them.

6 Use Powerful Slides and Graphics

Studies have shown that jurors will remember what they see far more than what they hear,⁶ and if you couple effective words with powerful graphics, they will remember even more. Today's jurors are used to sophisticated technology in games, apps, social media, and movies—they expect the same in the courtroom. Because I am a visual learner, I have spent a considerable time studying, learning, and trying out different types of slides.⁷

I typically have slides that address each section of the opening (when liability is contested):

- the hook (the first 30 seconds of your opening)
- the defendant
- the defendant's duties (systematic procedures/rules)
- the defendant's failures
- the incident
- the plaintiff
- compensatory damages
- defense contentions.

I have found that the slides that work best are clean and free of clutter. I either use a white background with black text or black background with white text—if you plan to stand in front of the screen, use a white background so you stand out in front of it. Use the 16:1 widescreen format to make use of every edge of the high-definition display (either the courtroom's or that you set up yourself), and fill every inch of that space.

I don't recommend using bullet points. Instead, tie a graphic to what would have been a bullet point. Use as few words as possible: one thought, one slide. I don't use clip art; I prefer beautiful photographs. Great sources of stock photographs are easy to find,⁸ but don't forget the power of your phone or tablet. Some of the photographs and videos I have taken with my phone were better

than those from expensive professionals.


Sometimes the best slide is no slide. Have spaces in your presentation with a blank black slide, or hit the “blank screen” button on your remote advancer.

This can help you get a point across and make important eye contact with the jurors. Use focus groups to evaluate your slides, graphics, and any animations or illustrations you use. Medical illustrations should also be easy to see and understand, and they should be informative. If slides do not move the ball down the playing field, delete them. Remember, when in doubt, cut it out.

Always know how much time you have for the opening (if you are given time limits) so you can plan how many slides to use. And plan beforehand how much time you will spend on each slide.

Even though I'm a true believer in slides, I have seen many successful lawyers who don't use slides. Instead, they go “old school” with nothing more than a piece of chalk or a marker. A carefully crafted opening with no graphics, delivered by a skilled orator, can be extremely powerful—but such oratory skills rarely are more persuasive than the double whammy of powerful words and compelling graphics. Since our brains store what we see more efficiently than what we hear, jurors may appreciate hearing the beautiful words as they are being delivered but then forget them during deliberation. I have, however, also seen the opposite: lawyers who overuse slides and totally lose any personal connection with the jurors. The key is finding that perfect balance that works for you.

If you use slides, have a Plan B. In some jurisdictions, I have proudly walked in with beautiful slides and then had the trial judge grant defense counsel's objections to my slides. Even if this happens (or if technology fails you), you will be able to use a marker on a board during your opening to get your points across if you know your slides well.

By taking these tips and tailoring them to your case, you can concoct your own “secret recipe” for a strong opening statement in your next trial. 



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NOTES

1. Gerry Spence, *Win Your Case: How to Present, Persuade, and Prevail—Every Place, Every Time* 128 (2005).
2. *Id.*
3. To learn more about this important part of case brainstorming, explore litigation consultant Rodney Jew's seminars and consulting sessions.
4. Rick Friedman & Patrick Malone, *Rules of the Road* (2010).
5. “At the trial . . . any part . . . of a deposition may be used against any party who was present and represented at the taking of the deposition.” Cal. Code Civ. P. §2025.620 (2020). This is similar to Fed. R. Civ. P. 32. In California, a “trial” is “deemed to actually commence at the beginning of the opening statement.” Cal. Code Civ. P. §581(a)(6) (2020).
6. See, e.g., James Bigelow & Amy Poremba, *Achilles' Ear? Inferior Human Short-Term and Recognition Memory in the Auditory Modality*, PLOS One, Feb. 26, 2014, <https://tinyurl.com/y37ympou>; Susan Hagen, *The Mind's Eye*, 74 Rochester Rev. 32, Mar.–Apr. 2016, https://www.rochester.edu/pr/Review/V74N4/pdf/0402_brainscience.pdf; Denise Grady, *The Vision Thing: Mainly in the Brain*, Discover, May 31, 1993, <https://tinyurl.com/y5x76fsj>.
7. To learn more about powerful slides, see Cliff Atkinson, *Beyond Bullet Points: Using PowerPoint to Tell a Compelling Story That Gets Results* (4th ed. 2018); Nancy Duarte, *Slide:ology: The Art and Science of Creating Great Presentations* (2008); Nancy Duarte, *Resonate: Present Visual Stories That Transform Audiences* (2010); Garr Reynolds, *Presentation Zen: Simple Ideas on Presentation Design and Delivery* (3d ed. 2019).
8. These include 123rf.com, Shutterstock, and Getty Images.