

The Resistance is Fueled by Fear



OPENING STATEMENTS

Prepared by: **Clay Steadman**

Law Offices of Jesko & Steadman

612 Earl Garrett

Kerrville, Texas 78028

Phone: (830) 257-5005

Fax: (830) 896-1563

Email: jesksted@ktc.com

Introduction

An opening statement can be intimidating and daunting, but it is your first opportunity to begin to explain to the jury your client's version of the events, as alleged by the State. It is your first and only opportunity, at the beginning of the trial, to give your client's opinion on the basic elements of the State's case (ie: who, what, how, when, and why). The opening statement is a special time because this is where you begin to tell his story to the jury. This is the jury's first introduction to your client on a personal level, and what you expect them to discover over the course of the trial. The jury does not know what happened yet, but they will, and the purpose of your opening statement is to have them realize that they will want to listen to our version of the alleged events and ultimately discover what happened.

During Your Initial Preparation Ask Yourself:

1. *What is your objective or goal in preparing an opening?*
2. *What should be your objective or goal in preparing an opening, and eventually what do you anticipate will be the theme of your closing statement?*

These are two especially important questions you must ask your during your trial preparations, but these two questions may have two very distinctive and different answers. While your opening statement may remain relatively unchanged during your trial preparation, the answer to these two questions may change somewhat for

your closing statement, based upon the testimony of the witnesses and the evidence which is admitted during trial. However, it is important that during your opening statement you remain consistent, as this will allow a smooth transition during the progress of the case, which can connect the theme and tenor of your opening and closing statements. This is accomplished by utilizing a common theme or strategy throughout the case, that the jury can **recognize, follow, and accept.**

Problem:

While you can develop a strategy that allows the jury to recognize and follow your theme, and the defense you intend to present, you do not know if it will be accepted.

Solution:

1. Start by telling a story about your client and the case facts that the jury can understand.
2. Tell this story regardless of the circumstances, based upon what you perceive to be the strengths of your defense.
3. Recognize and confront the weaknesses of the State's case.
4. Recognize and explain the weaknesses you believe exist in your defense.

Common Problems We Face

Impossible Facts

If you find yourself in trial with what seem to be nothing but bad or impossible facts, confront them head on.

I personally never attempt to gloss over these types of situations, because that will undoubtedly come back to haunt you during the trial.

Possibly one of the most difficult issues to confront in a criminal case, is your client's confession, or the existence of confirmed DNA or other undisputed physical evidence. You will have to address these issues, in some way during your opening, because the State will almost certainly make this the focus of their case. Unfortunately, the ostrich defense will not work, as there will nowhere to hide.

You are not the Best Storyteller

This is a fact that is probably true for most of us that are trial attorneys.

Fact is some attorneys have this gift without practice or hard work, but the rest of us, must perfect this art over time.

You cannot become a better storyteller, unless you practice.

Do not let the fact that you feel that you cannot tell a story very well, keep you from trying.

We all can tell a story. Some of us old enough to remember, used to have to give oral book reports in middle school,

or do a presentation in class (this is of course before the extensive use of computer presentations). Telling a story and connecting the theory being argued, is a matter of confidence and experience. Once you have given a couple of opening and closing statements, your confidence will increase, because you can see the connection you can make with the jury if you prepare.

The Need to Simplify Your Message

Never talk down to a jury. Do not try to over complicate the message by using "big" words, or multifarious statements. See I just did it by using the word multifarious. Have you ever heard anyone who is normal, other than an attorney, use the word multifarious?

Multifarious means: Having many different parts, elements, forms, etc.; numerous and varied; greatly diverse or manifold.

It is an adjective used to describe a set of circumstances. An example would be a multifarious question (ie: a compound question). But if I am trying to describe a set of circumstances to the jury, why not just simply state what I mean, "this situation has a lot of different moving parts". Jurors make the sole determination of credibility in the courtroom regarding evidence and testimony, but make no mistake, they are measuring you, as you defend your client. If you talk down to a jury, or try to show them how smart you are, you risk alienating the jury at the outset of the trial.

Keep your message personal, and to the point. This will in turn allow you convey

a simple message to the jury. After all the simplest message we want to convey to every jury is "Not Guilty". If it is a punishment case, that message is we want a probated sentence or a minimum prison sentence.

Keep your message simple by focusing on the theme itself.

Examples:

Arguing the Burden of Proof.

Not the jury's job to continue to investigate this case.

Avoid rushing to judgment.

Personalize your client.

Alleged victim is not reliable/credible.

Law Enforcement's investigation was not conducted properly. This can also be tied into "rush to judgment" argument, where you make the point to the jury that they should not make the same mistake law enforcement has made.

These are just a few examples of how you keep the message simple by focusing on the theme itself. These examples can be first raised, in a very general sense, during voir dire, and incorporated given specific facts throughout your opening. As such, when preparing your case for trial, and developing the theme for your opening statement, you will need to incorporate part of this theme into your voir dire, in a very general sense, without referencing any specific facts of the case. You cannot discuss specific case facts of the case during voir dire, but you can ask questions regarding a prospective juror's ability to make

decisions or stand in judgment of another, and how they would conduct themselves in that regard.

Voir Dire Examples:

Who here believes it is their job to further investigate or solve this crime?

Can you vote your conscience, not that of your neighbors?

(ie: I have used the argument "one juror, one vote").

Cautionary tale of jumping to conclusions.

If you will have to attack law enforcement's investigation in your case, you need to see if any prospective jurors are more willing to believe law enforcement personnel, over the testimony of a lay witness (ie: explore their connection to law enforcement, their biases, and how they feel about law enforcement's opinions on certain matters).

Basics of the Opening Statement

Energize the Jury

You must energize your base and get some if not all of those jurors on your side, so they will listen to you, and recognize what you are attempting to explain during your opening.

Humanize your client. The jury may not like your client, but they need to understand him, before they can understand why we are arguing he did not commit this act, or what the justification is for his actions and behavior. This will energize your jury, because they may be able to relate on a personal level as to what your client was going through or experiencing at the time, he is alleged to have committed the crime for which he or she is on trial.

Remind the Jury

Explain to the jury about why we are here and the circumstances surrounding this case.

There is a difference between offering an explanation and giving an excuse. I have found that when I open, I never want to offer an excuse for the circumstances surrounding the case, or my client's actions, but offer the jury an explanation. An explanation is always a stronger argument because it allows for the fact that the State's position and law enforcement's actions or investigation is wrong or mistaken.

During your opening you should, if possible, distinguish and separate the case facts into categories, and consider the following issues:

Establish an argument for those undisputed facts that strengthen your theory of defense.

Deflect facts that are obviously a weakness, in arguing your defensive theory.

Explain the strength of those undisputed facts.

Argue, how a perceived weakness, or bad fact, is in fact not reliable, nor does its establishment alone constitute guilt beyond a reasonable doubt.

Note:

In your opening without having heard any evidence, you may find yourself in a situation with several bad facts and I have found that relying on a burden of proof argument can be a useful method in explaining your position on such issues.

Repeat and Re-Rinse

During your opening incorporate a common theme of reminding the jurors of defensive theory's issues and facts, and what to look for as the case progresses. Again, simplify your message. As you start to explain these facts during opening, keep in mind the following:

Why some facts are relevant and require close attention.

Why some facts are not important and do not merit consideration.

Get out ahead of these situations during your opening, such that the jury is aware of your argument.

Warn the Jury

Warn the jury of the mechanics of the proceeding.

(The State gives its opening statement first, and has the last word during closing statements)

The purpose of this, is to caution the jury that the State has the burden of proof, and what the consequences would be in this case, and our system of justice, if a jury chose to ignore this burden. It is acceptable to warn and caution the jury of what the consequences are, when they do not apply and follow the law, and the instructions they are given by the court. In your opening explain to the jury why the State can go first and last, because they alone have the burden of proof, which is theirs alone to carry.

I will usually state my position in opening that the jury should decide the case based on the credible facts they hear, and not emotion. I sometimes explain to the jury that in our system of criminal justice it is easy to get caught up in the emotions surrounding the circumstances of the case, but that based on the credible facts they will hear, they will know and seek the truth in rendering a just decision.

Lay the Foundation and Connection for Your Defensive Theory/Theme

During your opening lay the foundation for a strong connection between your opening and closing. You can establish this connection early by using and establishing a consistent defensive theme in your opening and utilizing that

theme throughout your case and closing argument.

Establishing common statements or assertions.

Example:

When discussing the "truth", or what the truth is, during your opening, you may want to predicate your statement, by explaining to the jury that you believe at the conclusion of this case, the evidence will establish, that the truth is: (and use a bullet point list of facts that you are confident will be established that support your theory of defense). Thus, avoiding an objection from the State that your opening is argumentative because it assumes facts not in evidence and is conclusory. Truth be told I do not always remember to preface certain statements in my opening in this manner, and I do not particularly like to do qualify my opening in this manner. If I draw an objection I will generally apologize to the court and rephrase my statement with a simple qualification that I expect the evidence to show or demonstrate that, and I will usually offer an explanation tying in the burden of proof again and this is why you cannot jump to conclusions. That type of response will sometimes put the State back on their heels as they have just put a spotlight on their burden and how they must build a case against my client.

Relevant Case Law

Regarding Opening Statements

Article 36.01 ((a) (5)), of the Texas Code of Criminal Procedure, provides that the defense may give an opening statement, and similarly Article 36.01 (b), provides that the defense's opening statement may be made immediately after the State's opening statement. *See Love v. State*, 69 S.W.3d 678 (Tex. App. – Texarkana 2002, *pet. ref'd*).

A defendant is not entitled to make an opening statement, prior to the introduction of the State's evidence, unless the State (prosecution), has in fact made an opening statement. *See Boston v. State*, 871 S.W. 2d 752 (Tex. Cr. App. 1994).

In a situation when the State does not make an opening statement, the defendant is still entitled to make an opening statement upon the conclusion of the State's evidence or case. *See Moore v. State*, 868 S.W.2d 787 (Tex. Cr. App. 1993).

When a defendant makes a timely request to exercise his statutory right to make an opening statement before the jury, it is error for the trial court to deny the defendant's request. *See Espinosa v. State*, 29 S.W.3d 257 (Tex. App. – Houston [14th Dist.] 2000, *pet. ref'd*).

You need to keep these cases handy, if you are in a jurisdiction, where the court, may otherwise attempt to influence or limit your right to an opening statement. I personally, have never seen a case where the State has

not made an opening statement, but I know these circumstances do exist.

[Practice Tip]

If you waive your opening statement at the commencement of the trial, always reserve your right to make an opening statement upon the conclusion of the State's case.

Example:

If I have what amounts to a punishment case, strategically, I will sometimes waive my opening statement at the commencement of the trial but reserve my right to give an opening statement at the conclusion of the State's case. This is a trial strategy, as I do not want to unnecessarily "open the door" regarding any potential extraneous offenses, prior to the introduction of the State's evidence.

[Practice Tip]

Always have a theory and goal for your opening statement, and make sure that you implement that theory at the beginning of the case, or at the very least the conclusion of the State's case. It is rare where I will waive and reserve my opening statement, because part of conveying my client's story to the jury, is to stand up and reject the State's allegations. When a bully punches you in the nose, you do not run to the teacher, you pick yourself up, dust yourself off, and whoop their ass.

Limitations on Opening Statements:

You need to review Article 36.01 (a) of the Texas Code of Criminal Procedure in preparing your opening statement, as this code provision expressly limits what

you can state during opening. I have this code provision available at trial just in case I draw an objection in opening my opening statement. Upon an objection being made, I generally approach the bench, and argue to the court why my statements are not objectionable. Specifically, Article 36.01 ((a) (5)), provides that "The nature of the defenses relied upon and the facts expected to be proved in support shall be stated by defendant's counsel."

Note:

This can give you a lot of discretion in what to assert in an opening statement, because of how broad we can interpret the language to be applied to the nature of the defenses and facts expected to be proved. If you keep your opening statement in context in asserting those issues, it should not draw an objection. I do not believe you will draw many objections in opening statement, unless you go into an area of evidence previously ruled upon and excluded by the court, or if you allow your opening statement to become too argumentative and conclusory.

State's Perspective:

The courts have held that, "an opening statement in a criminal case is an outline of the facts that the prosecution in good faith expects to prove. Parra v. State, 935 S.W.2d 862 (Tex. App. – Texarkana 1996, *pet. ref'd*).

[Practice Tip]

If the State starts to make a conclusory argument during its opening, or references testimony or facts, which have been previously excluded or may

be ruled inadmissible by the trial court (ie: subject to a motion in limine), you need to: (1) object and approach the bench, and (2) request that the trial court give an instruction to the jury to disregard the State's previous statement, and (3) request an immediate mistrial. You will almost certainly lose this objection, but you need to make sure it is made to preserve this issue for appellate review.

The defense is not entitled to include in any opening statement matters which are not legal defenses to the charged offense. *See Boston v. State*, 871 S.W. 2d 752 (Tex. Cr. App. 1994).

Be advised that Article 36 of the Texas Code of Criminal Procedure, does not apply to punishment proceedings. *See Generally Penry v. State*, 903 S.W. 2d 715 (Tex. Cr. App. 1995); *See Love v. State*, 69 S.W.3d 678 (Tex. App. – Texarkana 2002, *pet. ref'd*). As such, there is no provision in the Texas Code of Criminal Procedure which requires the trial court to allow that opening statements be made at the beginning of the punishment phase of the trial. *See Love v. State*, 69 S.W.3d 678 (Tex. App. – Texarkana 2002, *pet. ref'd*).

[Practice Tip]

If you are not allowed to make an opening statement at the commencement of the punishment proceedings, and it is your desire to make such a statement, I would immediately, (1) object, and (2) if possible, have a written objection and motion, requesting that you be allowed to make an opening statement, ready to be filed. The objection and motion

should articulate the necessity of your request, and what you expect the sum and substance of your opening statement to reference. You should further argue that the trial court, by not allowing you to make such an opening statement on your client's behalf, the trial court is prejudicing your client's right to a fair and impartial trial, regarding the punishment phase, and this is a violation of his right to due process and due course of law. These objections will not require the trial court to reverse its position, because Article 37.07 of the Texas Code of Criminal Procedure, which pertains to the punishment phase of trial, does not require a court to allow opening statements to be made, however, it should be enough to preserve this issue for appellate review. I have never had a trial court deny me the right to make an opening statement at the commencement of the punishment phase of a trial.

[Additional Case Law Concerns]

The defendant does not have the right to make an opening statement in a case where he will not present any witnesses or evidence and is merely arguing that he is relying on his plea of "not guilty". Donnell v. State, 191 S.W. 3d 864 (Tex. App. – Waco 2006, *no pet.*); *See Norton v. State*, 564 2d 714 (Tex. Cr. App. 1978).

In a case where the defendant makes an opening statement immediately after the State's opening statement, the State may reasonably rely on this defensive opening statement as to what evidence the defense intends to present and rebut this anticipated defensive

evidence during its case-in-chief as opposed to waiting until rebuttal. *See Generally Bass v. State*, 270 S.W.3d 557 (Tex. Cr. App. 2008). In Bass, the trial court ruled that the defendant had opened the door to the presentation of an extraneous offense during defendant's opening statement. Bass v. State, 270 S.W.3d 557 (Tex. Cr. App. 2008).

Note:

There is the danger in getting too aggressive in an opening statement because you can "open the door" regarding other issues, such as extraneous offenses, which may otherwise be inadmissible. It has been my experience during an opening statement, that I can relate my theory of the case, to the jury without delving into certain facts, which may allow the State to reference certain facts, which may be otherwise inadmissible.

Factors to Consider

Wasting Time

If you are wasting time, you are not just wasting your time, you are wasting the jury's time. Jurors do not want to listen to you, just to hear you talk. You need to be considerate of their time, as they have a family and a job to get back too. Your time is never more valuable than the jury's time.

Do not explain to the jury what an opening statement is or its purpose. If you must explain yourself, you generally have lost the jury already, and they do not want to listen to your client's story.

Don't try waste time explaining that nothing I or the State says, is evidence, as the trial court will notify the jury of that fact. You do not want to point this issue out, because it also may diminish your standing in the eyes of the jury. Remember, you represent a living, breathing, human being. Your client's story is one that must be told, and you establishing a good relationship with the jury is critical in telling that story.

Goals

Comprehension

Simplify your story, such that the jury comprehends and understands what you are trying to explain.

Credibility

Establish up front the importance of credibility and illustrate to the jury how you are going to help them identify and establish that your client's story is credible.

Support

In telling your client's story, find a way to pick up some momentum and support for your client. Seize on any opportunity or fact that will make the jury want to support your client.

Impact

The telling of your client's story in opening statement, needs to have impact. Your opening statement needs to leave a lasting impression, so much so it will cause the jury to refer to it, during the course of the trial.

Using Analogies

Why:

They work for two simple reasons:

(1) A good story requires the attention of the audience, because they do not want to miss any information. Simply put, the audience, which in this case is the jury, wants to find out what happened.

(2) An analogy can challenge the jury to test your defensive theory against the circumstances and evidence as the case progresses. The jury then can test your version of events, as reference in your client's story against the analogy you present.

Analogies Can Bridge Communication Gaps/Lapses:

A well-timed analogy during your opening statement can assist you in solving any communication problems that may come up during the case, regarding your arguments or contentions, concerning a complicated

piece of evidence or testimony. Specifically, by using an analogy in your opening statement you can sometimes make a rather complicated issue, seem much easier for the jury to understand as the case progresses. A good example of this is how we deal with and explain circumstantial evidence during trial. Circumstantial evidence can be a complicated issue to explain to a jury.

Effective Use of Opening and Closing Statements in Trial

At the beginning of this paper, I suggested that there were two especially important, but different questions you needed to ask yourself in preparing your opening statement.

- 1. What is your objective or goal in preparing an opening, and eventually what will be your closing statement?*
- 2. What should be your objective or goal in preparing an opening, and eventually what will be your closing statement?*

The only way you can start to answer these questions, is to know your case and the State's case, better than the State knows their case.

This requires: (1) great attention to detail, and (2) conducting a thorough investigation of the facts.

Some trial strategies and themes are easier to develop, based upon case facts and the witnesses involved. Your objective and goal, when we start out in preparing your case, is to tell a story the jury can follow, and for the jury to recognize the importance, or in some cases the unimportance, of the issues and facts, which make up the case.

Note:

Think about this fact, twelve randomly selected people, have several days or weeks to get to know your client, and the facts and circumstances surrounding his case, and make a decision which can

affect the rest of his life. Not only is that a situation which normally would scare and worry any defendant, it is responsibility which should weigh heavily on our minds, as well.

Example:

We have a small window of opportunity during trial, to cram in all the necessary information, which would not fit through a fifty-foot window of knowledge. This is sometimes a distraction, and can hinder our ability to make a point, but it is what makes this a human process, and allows us to further develop that personal connection between our client and the jury.

Checklist for Creating an Effective Opening

Know and investigate your case.

Develop a theme and strategy that is consistent between your opening and closing statements.

Tell a story the jury can recognize and follow.

In your opening it is imperative you are honest with the jury and can establish your client's vulnerability in this process.

This is a human process, and not a cookie cutter approach to jurisprudence.

Tell a story, given the circumstances of the case, the jury can and will accept.

Basic Concepts of Developing an Opening

All Stories -----

Have a beginning and ending. The story will start in the opening statement and will conclude in the closing statement. There must be a connection throughout the trial process that ties together the opening statement, the evidence, and the closing statement.

There is always a setting for our story, which involves a location, and time and place. During your opening you need to paint this picture for the jury and illustrate how the setting may influence their interpretation of the facts and ultimate outcome.

There are characters. This is a human process, and there will always be a cast of characters. During your opening it is your job to define and explain the role the various characters play, their importance to the facts surrounding the case, and whether they can be trusted.

An event has taken place. Recognize that if you are in trial, something has occurred, which has placed your client in this set of circumstances. Whether it is a case of mistaken identity, false accusation, misunderstanding, or some other situation, something has occurred. When you are making your opening statement, the transition and connection between the how and the why, as it concerns your client and his involvement, is critical to the beginning of their story, and a story the jury can follow and accept.

Breathing Life Into Your Client's Story

You must -----

Believe

You must believe in what you are arguing during opening. If you do not believe in your opening and the story being told about your client, the jury certainly will not believe and accept your client's story.

Stress Reliability

You must infuse the jury with confidence in you and your client's story, by creating a personal connection between the jury and your client. The jury needs to have a sense of reliability about your client, and that factor has everything to do with being able to relate and connect with your client and his life experiences on a personal level.

Have the Jury Identify With Your Client

In your opening the jury needs to be able to identify with your client. Remember, you are telling your client's story, and as such, the story must be told so that a jury can interpret and consider the evidence from your client's perspective. Perception is everything in a trial, and if the jury can identify with your client and his situation, they will likely perceive the circumstances surrounding the case from his point of view. This makes it that much easier for the jury to follow and recognize the story and accept the defendant's version of events.

12 Quick Tips for a Better Opening

1. Be sincere, and respectful to the trial court and jury.
2. Make eye contact with the jury.
3. Find a way to connect with the jury allowing them to identify with your client as you tell his/her story.
4. Always refer to your client by his first name, or his last name, such as, Mr. Smith. This allows you to personalize your client with the jury. The State will almost always refer to your client as the perpetrator, defendant, or the accused, so it is imperative that you refer to him by name.
5. Realize the importance of being honest, and make sure the jury understands that your client is here today facing these false allegations head on, and offering his explanation, not an excuse, of his involvement, if any, and the circumstances of the case.
6. Focus on Who, What, Where, When, How and Why when developing your opening statement, and weave this argument throughout your defensive strategy. This focus will allow you to make a consistent statement that the jury will **Recognize, Follow and Accept**.
7. It is okay to use notes or an outline, especially in a complicated case. However, you should never just read from your notes or outline because you lose eye contact with the jury, and you do not want to do anything which may diminish your standing with the jury. A credible and reliable person makes and maintains eye contact, and good body posture.
8. Focus on what you expect to be revealed during the trial of the case, reminding the jurors to look for the strengths of your defensive strategy.
9. Leave a clear path and logical connection from your opening statement to your closing statement, so the jury will follow your argument.
10. The State will go first, so do not react to the State's story, explain, and tell your client's story. Be respectful to the State, to the extent possible. Do not roll your eyes or get flamboyant with your body language. Jurors are not going to appreciate or like what they consider a sign of disrespect to the tribunal/court.
11. In a punishment case, it is often necessary to accept responsibility for the committed act, during your opening statement. This can often be a difficult set of circumstances, because there is usually a clear victim, and someone that has suffered at the hands of your client. Honesty is of paramount importance at this juncture, as the jury must understand your client's set of circumstances and what has led him or her to this point, in their life.
12. Admit your fears and your client's fears regarding this process. The jury should appreciate your candid nature and your client will hopefully come across as a genuine individual. The premise of this argument and the story to be told, is that the jury is here today to seek and find the truth.