

OPENING STATEMENTS

Why is it important?

- First opportunity for persuasion
- Opportunity to establish credibility
- Juror attentiveness

GENERAL CONSIDERATIONS

RIGHT TO GIVE AN OPENING STATEMENT

CCP § 607:

“When the jury has been sworn, the trial must proceed in the following order, unless the court, for special reasons otherwise directs:

1. The plaintiff may state the issue and his case;
2. The defendant may then state his defense, if he so wishes, or wait until after plaintiff has produced his evidence .
..”

Time limits

- Pay attention to court instructions
- Best to keep it brief

- No rebuttals, although the court may permit a reopening if there is a motion for a nonsuit/directed verdict
- Not a limit on evidence to be introduced

GENERAL STRATEGIES FOR AN EFFECTIVE OPENING

- Develop a case theme
- Tell a story chronologically
- Introduce key players and explain how they advance the story/case themes
- Address 'bad facts'

Basic opening statement in personal injury case (David Ball on Damages)

1. The safety rule that was violated
2. How the defendant violated the safety rule
3. Who you are suing and why
4. Address defense contentions
5. Causation and damages
6. Your client before the incident
7. What can the jury do about it?

IMPROPER OPENING STATEMENT CONDUCT

Mentioning matters previously ruled as inadmissible

- May be evidence that has been excluded based on in limine rulings or blanket exclusions by the court based on relevance/prejudice
- Willful violations may be punishable as contempt of court. *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108

Discussion of matters without a good faith belief of evidentiary support

- May violate Rules of Professional Conduct Rule 3.3 “Candor Toward a Tribunal”:
 - (a): “A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal . . .
 - (3) offer evidence that the lawyer knows to be false.

Stating personal beliefs or opinions

Rule 3.4 “Fairness to Opposing Party and Counsel”

“A lawyer shall not: . . . (g) in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.”

- Arguing the case
- Discussing applicable law

- Responding to improper conduct
- Strategic decisions

DO'S

- Use simple language
- Make appropriate eye contact
- Use an engaging, attention-getting opening
- Address 'bad facts' in the middle, with positive messaging in the beginning and end
- Be brief – should not exceed 30 minutes or so in most non-complex cases
- Use visual aids and exhibits – majority of people are visual learners
- Need it marked as an exhibit or agreed to by stipulation
- Keep the focus on the defendant's conduct
- Practice with lawyers and non-lawyers
- Be yourself

DON'TS

- Read your opening
- State at the outset that what you are about to say is not evidence – this is covered through jury instructions
- State “the evidence will show” with every sentence
- Make promises that can’t be kept
- Be theatrical, maudlin, inauthentic
- Prematurely argue the facts – will undermine credibility
- Use wordy/busy PowerPoint slides

The Intricacies of Voir Dire

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3 Types of Jurors; Beware of Another

- Persuader
- Participant
- Non-Participant
- *Stealth*



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Goal of Voir Dire

- Eliminate Biased
- Accept Flexible
- Non Negotiables: Poison Apples



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Prospective Juror Questionnaire, CCP 222.5(f)

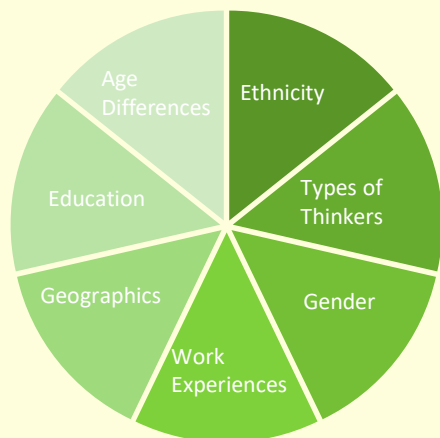
- Benefits
- Downside



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The Juror Questionnaire



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Questionnaire Probes

- Privacy
- 21st century issues
- Coping with COVID
- Nullification



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Evaluating Questionnaire Responses

- Demographics
- Comparative basis
- Hyper-individualism & societal changes



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Oral Voir Dire

- Promise of brevity
- Follow-up to Questionnaire
- Inclusivity
- Assurances
- Body language



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Effective Challenges For Cause

- Avoid certain words
- Quantify experiences & beliefs
- Forget useless demographics
- Arguing wastes time



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Peremptory Challenges

- Ferreting out Purposeful Bias & Discrimination
- CCP 231.7—Addressing unconscious bias



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Incorporating Voir Dire

- Themes
- Analogies

