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Openings of openings

By: F. Dennis Saylor IV and Daniel I. Small December 15, 2016

This column continues our "point-counterpoint" format as we talk about opening statements.

Judge Saylor —

The opening of your opening is obviously important. You want to get off on the right foot, and you certainly don't want to confuse, annoy, bore or otherwise turn off any of the jurors. Lawyers use a variety of approaches to begin their openings, but there are three basic ones in regular use.

Consider the following examples:

1. At 9 in the morning, the sound of a gunshot echoed through a tranquil neighborhood on the north side of the city. When the police arrived at 922 West Elm Street, they found the bloodied corpse of Walter Smith in the study. This case is about the tragic accident that led to the untimely death of Mr. Smith.

2. This is a case about corporate greed. The defendant in this case, the Gigantic Insurance Company, refuses to pay on an insurance policy to Hilda Smith, a widow who tragically lost her husband in a gun accident. This case was brought to force the company to keep its promises.

3. My name is Jane Jones. I represent Hilda Smith. Mrs. Smith is the plaintiff in this case — the person who brought this lawsuit. The defendant is the Gigantic Insurance Company. This case is about a life insurance policy. Mrs. Smith's husband, Walter, bought the policy to provide for his wife if he died. He died in a tragic gun accident in November 2008. The insurance company, however, refuses to pay the amount of the policy to his widow, Mrs. Smith. They claim that it was not an accident and that Walter Smith committed suicide.

The first opening is the "dramatic" opening. The idea is that you have grabbed the jurors' attention, and they'll want to know what happened next.

The second opening is the "theme" opening. The idea is that you need to establish your theme up front, before you do anything else, so that the jury remembers it and connects to it.

The third opening is the "orientation" or "sequential" opening. The idea is that the jury needs to be oriented to the case and understand what it is about before anything else happens.

Because all three styles are in regular use, there are devoted adherents of each. My own (strong) preference is for the third approach. As a rule, if you're trying to get someone to understand something, you should begin at the beginning, not in the middle. But not everyone agrees.

> *You're there to win, not to prove some kind of a point. Can't you just prove the widow is entitled to the money? Do you really need to go after the entire insurance industry?*

Dan Small —

Imagine a TV news report that started out like this: "Hello, I'm Bob Jones. I work for WWWW. The station is owned by the CBA company and has a license from the FCC. This is a newscast. A newscast is an attempt to tell you about

things that happened today. To do that, we have reporters, camera people, writers, editors and lots of other people working. We work out of a studio. Our main studio is located at … ."

Viewers would be reaching for their remotes to change to another station. Jurors don't have remotes, but they can tune you out almost as well.

By the time you stand up to give your opening statement, jurors have already sat through hours — in some cases, days — of lawyers droning on about things that don't interest them and bear little relationship to why they thought they were there. Yet, the traditional teaching about openings often involves introductions, thanks, explanations and explanations of explanations.

In a world of increasingly short attention spans, skip it. Or fit it in later in your opening.

Think of it this way: How long does someone flipping through the channels stay on one before moving on? That's how long you have to grab and hold the jurors' attention. So plan the opening of your opening accordingly.

Stand up with energy, and dive right in. Like the lead-in to a good news story, grab their attention and hold their interest.

So I favor the "theme" approach. Call it a "Field of Dreams" approach: "If you build it, they will come!" If you set forth a powerful theme, you can draw the jury's attention to it, and then move forward with the story.

Judge Saylor —

Dan and I disagree, but neither of us favors the "dramatic" opening. In my experience, that approach is usually ineffective and often confusing. The jurors are as likely to be mystified as drawn in ("Why are we talking about a gunshot?" I thought this was a contract case").

A trial isn't a movie, and you don't have the cinematic and narrative devices that filmmakers have to help tell the story. It isn't a high school creative writing class, either; you won't get points for creativity.

The "theme" opening has its own problems. Let's take the "corporate greed" example. Right off the bat, you're making a pretty strong statement. Some jurors might interpret it as having political overtones. You don't know the politics of your jurors, and what might appeal to some might irritate others. Plus, you're taking on the burden of proving that the defendant acted intentionally (because of "greed"), as opposed to carelessly or foolishly, or simply in breach of contract.

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Finally, lawyers tend to try to make the facts fit the theme, rather than the reverse, which among other things leads to overstatement and exaggeration. If the case really is about corporate greed, it'll be pretty obvious soon enough.

Of course, themes come in many different flavors, and ones that are more grounded in the facts ("The safety guard was poorly designed") are less likely to be problematic. We'll discuss that in a future column. Still, in my opinion, themes follow facts, not the reverse, and that principle holds true for openings.

Anyway, whatever you do, the first rule is to make sure you aren't doing any harm to your case. Don't make the jurors tune out in the first minute of the trial. And don't lose their respect. If they don't respect you, they probably won't be listening.

Previous installments of Tried & True can be found here. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.