

OPENING STATEMENTS

Juries decide cases based on how they react at a gut level to the plaintiff, the defendant, the attorneys and the issues. They instinctively decide who they trust and therefore who they choose to believe. They intuitively decide who they like and therefore who they want to help.

It is critical that all cases be prepared, presented, argued and tried on a gut-level basis. It is where the jury feels most comfortable and where they best understand what is happening. Although jurors may not be familiar with the science in question (the message), they surely do feel comfortable in deciding at a gut level which messenger they find trustworthy and believable.

With the above in mind, the goals of opening statements are:

1. To develop a strong, gut-level rapport between you and the jury.
2. To create an empathic understanding in the jury toward the plaintiff.
3. To communicate your proof in an earnest, straightforward and respectful manner.
4. To preemptively counter the strongest defense arguments.

The cardinal rules of opening statements are:

1. Absolutely never oversell, overpromise or exaggerate in any way the strength of your proof or the weakness of the defense;
2. Get to the point. The essence of your proof (the theme) should be expressed clearly within the first minute or two of opening.
3. Communicate your theme in words and phrases familiar to the jury, i.e. "The defendant can't have it both ways." "They had five golden opportunities."
4. Carefully and creatively frame the issues for the jury so as to counter defense arguments, i.e. you need to distinguish the damage done by the doctors from the damage done by the disease.
5. Speak only as long as is necessary. When carefully and creatively prepared, less really is more.

6. Repeat your theme at least several times in your opening statement. Never assume that simply because you said it clearly one time, that the jury will get it. The key to opening is to tie all the meaningful facts together into a well-defined image or series of images consistent with your proof.
7. Be strong yet gentle as you are attempting to develop a relationship with the jury that can only be earned.
8. Be a protector of your client at all times.
9. Remember, you are attempting to communicate in a heartfelt and creative way. Unless you can engage the jury so that they want to become involved, all the intensity, brilliance and competence you can muster will likely be to no avail.
10. Stress liability. In this day of skepticism of trial lawyers and plaintiff's lawsuits, it is important to prove early on that your case is fairly brought. Do not ignore damages--but stressing damages without first establishing entitlement is fraught with risks.
11. Use simple and effective exhibits to help engage the jury and to explain your proof. Pictorial displays, diagrams of human anatomy and surgical procedures, blowups of medical records and mockups of defective products/parts are useful tools.

Following are excerpts of the beginning and ending of an opening I recently gave in a medical negligence trial.

OPENING STATEMENT:

Ladies and Gentlemen:

The defendant DeZoglio did five (5) major things wrong which caused Ginger's injuries:

1. He proceeded with a vaginal delivery when it was clear Ginger's child was too large for her to deliver safely vaginally.
2. Having decided to do a vaginal delivery, he inadequately prepared her for the delivery.
3. He inadequately repaired the 4th degree tear which resulted from the risky vaginal delivery--and as a result, his repair failed--leaving the damage unrepaired.

4. He negligently issued post-op orders regarding diet and other matters.
5. He did not even one time speak with Ginger or Ted about what method of delivery seemed appropriate or what the risks were so that they could be informed and consent or not consent to what he was doing.

There were other areas of negligence as well.

As I mentioned, on October 28, 1988, Ginger DeNicola delivered her first child. She was 5'2" and her son, Teddy, weighed 8 lbs. 14 ounces. He was too large for Ginger to be able to deliver safely, vaginally. Despite this, Ginger's doctor, the defendant DeZoglio, ignored the clear warning signs telling of Teddy's size and proceeded with a vaginal delivery.

At delivery, after 29 hours of labor, because Teddy was large and Ginger too small for him, Ginger's skin, muscle and fascia tore apart rupturing all the way through into her rectum. Ginger suffered what is known as a 4th degree tear--it's the worst perineal tear possible--there is no 5th degree. 4th Degree is as bad as it gets.

All of Ginger's injuries, all of them, were preventable, if only the defendant had paid even the slightest attention to obvious red flags/warning signs. In this case, an ounce of prevention would surely have resulted in a pound of cure. The defendant DeZoglio had five golden opportunities--5 of them--to have prevented all that has happened to Ginger and Ted. If he had taken advantage of even just one of these five opportunities, if he had been careful and observed what was before his eyes, all this wouldn't have happened.

ENDING:

This is a very simple and straightforward case. The medicine may be interesting and new to some of us, but the issues to be decided are indeed simple and clear. Five good and strong opportunities existed to prevent Ginger's tear and other problems. The defendant failed to recognize these opportunities for what they were and Ginger and Ted have suffered dearly as a result.

Finally, Ginger and Ted are not here seeking sympathy, they have had all the sympathy they could ever want for a lifetime. They are here for one reason and one reason only--JUSTICE--100%! Not 98%, not 99%--100% justice, no more and certainly no less. Thank you.