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Opening Statement – Establish Credibility Immediately

PITFALLS TO AVOID FOR AN EFFECTIVE OPENING STATEMENT.

BY DAVID J. BRADFORD AND CRAIG C. MARTIN

The opening statement is your first comprehensive opportunity to start to win your case. And, unlike the vast majority of the trial, the opening statement is focused on the lawyers. It is the first time the finder of fact will be able to observe your presentation, hear your overview of your case and evaluate your credibility. Simply put, it is one of the few times you will communicate directly, plainly, persuasively, and candidly with the fact finder – whether it be the judge or the jury.

Of course, you must be circumspect and somewhat cautious not to cross the lines by violating one or more of the generally accepted principles of opening statements. So, do not preview inadmissible evidence; do not embellish; do not argue the law; do not argue the facts, indeed, do not argue; do not vouch for your client; and leave the untested to be tested some other time. Equally important, every courtroom, arbitral panel and judicial body has its own spoken or unspoken rules of decorum. It's your job to figure them out before your begin.

Likewise, preparation is paramount. Your opening statement should not be your first run through. And, all the usual substantive advice applies to the opening. It should be thematic, you should be simple and clear, you should explain your core theory, you should tell a story, you should humanize your client and you should provide a common sense and logical way for the judge or jury to hear and understand the evidence.

You can find hundreds of columns, op-ed pieces and even law review articles to tell you all that. However, what is really critical about the opening statement is that it is the opening statement. After the opening statement, the judge or jury will hear testimony on direct and cross examination and will assess credibility of witnesses; the judge or jury will review documents; and the judge and jury will watch you as the evidence unfolds. If you were a truth sayer in your opening statement, the judge or jury will know that. If you were an exaggerated, embellished, acted, overpromised, mischaracterized or just plain got it wrong because you did not know any better – well, the judge and jury will know that as well. If you fall into the former category – truth sayer – everything else you do will be enhanced; and if you fall into the latter category – buffoon, for any reason – everything else you do will suffer.

Think about the profound effect your credibility will have on the manner in which the judge or jury evaluates your witnesses, your cross examinations and your argument on closing. Do you want the judge and jury to believe you're probably wrong again because you overpromise, under-deliver (or for any of the myriad of reasons listed above)? Or, do you want the judge and jury to believe that what you say must be the truth because in their albeit limited experience with you, that has been the case.

Finally, and by now it should go without saying, but we'll say it anyway – be yourself.

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