

Kenya School of Law

ADVOCATES TRAINING PROGRAM

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Trial Advocacy

OPENING STATEMENTS

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OUTLINE

Definitions

Statutory basis

Why an opening statement?

What to have clear beforehand

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Exercise

Definitions

Black's Law online Dictionary 2nd ed.

“a term that is given to the initial statement of the attorney to the judge or the judge to a jury.”

Steven Lubet, “Modern Trial Advocacy”-

”Advocates' first opportunity to speak directly to the jury about the merits of the case”

Statutory basis-Civil

Civil Procedure Act and Rules

Order 18 Rule 2: *Unless the court otherwise orders—*

(1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

Statutory basis-Criminal

Criminal Procedure Code, Cap. 75

Sec. 300-Case for the Prosecution

“The advocate for the prosecution shall open the case against the accused person, and shall call witnesses and adduce evidence in support of the charge.”

Sec. 307 –Case for the Defence

307. (1) The accused person or his advocate may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution; the accused person may then give evidence on his own behalf and he or his advocate may examine his witnesses (if any), and after their cross-examination and re-examination (if any) may sum up his case

Why an opening statement?

Gives a “roadmap” of where the Advocate intends to go.

“Logic informs but emotion persuades”

<http://www.theatlantic.com/business/archive/2011/10/how-brands-were-born-a-brief-history-of-modern-marketing/246012/>

Role of opening statement(Steven Lubet)

- a) Opening moment: Helps create mental image that trier of fact holds as they hear the evidence.
- b) Legal function: Help reduce confusion in flow that arises in trial process, through sequence of witnesses and cross examination

Purpose of Opening Statement(contd.)

- c) Advocacy: Opportunity to advance theory of your case.
- d) Story arc: Change of characters from the start to the finish. *(Things were ok; something drastic happened; there has to be a remedy now)*

What to have clear before hand

- Have a theory to your case.
- Draw up a theme based on the theory.
- Know the strong points of your case.
- Know the weak points, and your mitigation strategy.
- Know the witnesses and the evidence, on both sides.
- Remember you are telling a story.

Steps in the Opening statement

Prof. Naomi Goodno, Pepperdine University, USA

1. Introduction

- a) Grab
- b) Summary of theory of case
- c) What evidence will prove.

2. Story

- a) Personalise client-background facts
- b) Client's point of view
 - Legally significant facts
 - Emotionally significant facts
 - Chronological.

Steps-contd.

3. LIST

- Avoid argument
- Persuasive and focused

4. Address anticipated counter-arguments

- Short, focused.
- Avoid argument.

5. Conclusion.

- Repeat theme.
- Tell what evidence will show.
- Be brief.

Things to Note-NITA

(National Institute of Trial Advocacy)

1. Have and explain a clear theory of the case.

- How the facts fit into the law so that your client wins.
- For example, a “theory of the case” for a criminal charge of assault might be:
 - Identification
 - “It wasn’t him.”
 - Self defense
 - “He was protecting himself.”
 - Alibi
 - “He wasn’t there.”

Things to note

2. Use a persuasive theme.

a) E.g., “Nude, but not Lewd”

b) Some methods to develop a theme:

- i. *Finish the statement*, “This is a case about...” to convey a theme that advances your client’s cause.

But do not actually use the phrase “This is a case about.”

- ii. Use a dramatic bit of testimony or statement from an exhibit.
- iii. Use an old saying
The “moral of the story”

Things to note-contd.

3. Tell an effective story.

4. Show a clear and effective organizational structure.

5. Effectively deal with the weaknesses of the case

- Turn them to strengths when possible.
- “Judo Law.”

Things to note-Part 3

6. Present **only** what you can deliver during the evidence.
7. Use “primacy and recency” by starting strong and ending strong.
8. Do Not use notes.
 - Demonstrate command of the facts and issues in the case.
 - Show confidence and belief in your client’s case.

Other Important points- Presentation

(Prof. Goodno)

- Be organised
- Focus on relevant matters.
- Good delivery.
- Passion for the case

Communication techniques

(Adopted from NITA method).

Use appropriate communication techniques of

- language and vocabulary,
- demeanor,
- eye-contact,
- voice projection,
- pace, cadence and silence, (cadence-rhythmic flow of a sequence of sounds or words: a slight falling in pitch of the voice in speaking or reading, as at the end of a declarative sentence. the general modulation of the voice.)
- facial expressions,
- posture and
- avoidance of distracting gestures and verbal habits.

Q and A

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