

Deflecting the “Reptile Approach” with a Good Opening Statement

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Table of Contents

I. Don't Try to “Win” With Your Opening.....	691
II. Introducing the Jury to Your Client	691
III. Introduce Concepts of Fairness and Justice	691
IV. Conclusion.....	692

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Many experienced defense attorneys agree that juries are biased against corporate defendants. As Merrie Jo Pitera from Litigation Insights has just explained, plaintiff attorneys capitalize on this bias by using a “reptile approach” at trial – appealing to jurors’ base instincts by presenting an overly simplistic, “good versus evil” depiction of the case. While there is no single, formulaic approach that can be used in every case to defray a plaintiff’s attempt to de-personalize your corporate client and paint them in a negative light, there are some general techniques you can use in your opening statement to humanize your client and to encourage the jury to consider the facts and issues in your case.

One cannot really fault a jury for sympathizing with an injured plaintiff who has brought suit against a large corporation. It is easy to understand why a juror would more closely associate with one person who has suffered injuries alleged to have been caused by a large corporation that can consist of thousands of individuals. A well-planned, well-delivered opening statement can go far to humanize a corporate client. By helping a jury to understand that your client is made up of a collection of well-meaning, hardworking people just like them, you can encourage them to consider the real issues of fairness and justice in your case, rather than stopping short with a gut reaction.

I. Don’t Try to “Win” With Your Opening

In order for a jury to trust in the goodness of your client, they must first trust you. If you argue too much in your opening, and make promises to the jury that you can’t keep, the jury will remember, and their faith in you, and your client, will be lost. It’s important to remember that any excessive “spin” that you try to use in your opening could very well backfire on you during trial – opposing counsel will not hesitate to remind the jury at every opportunity if you fail to deliver on your promises. A good opening presents a jury with the salient facts and testimony and suggests the importance of those facts and testimony, without telling the jury what to think or believe.

II. Introducing the Jury to Your Client

It’s important to establish with the jury that your corporate client is not just a nameless, faceless entity obsessed with making money at all costs. A good way to do this, when the facts lend themselves to it, is to discuss the history of the corporation – painting a picture of a hardworking group of people who succeeded in achieving the American dream, growing bigger and branching out through the years, led by their dedication and commitment to their products. A good way to create a positive image is to tell the story of the beginnings of your client – how they formed and why, where they were first located, and personal information about the founding members. It helps to identify your client’s trial representative, and to weave a part of his or her personal story into your opening where appropriate. For example, if your representative has worked for the corporation for a long time, you can tell the story of his or her advancement in the company through dedication and hard work. If the corporation began as a family business, try to include a corporate representative who illustrates these beginnings, and emphasize them in your opening.

III. Introduce Concepts of Fairness and Justice

The overly simplified, David-versus-Goliath appeal to a jury made by plaintiff’s counsel can be a compelling strategy – jurors can easily seize on this image and quickly determine that their role is to level the

playing field and make things “fair” for plaintiff. Your opening should include statements that show the jury you sympathize with the plaintiff, and that you understand the tendency to favor the “little guy.” Life is not fair – it is not fair that plaintiff has contracted a fatal disease, or that plaintiff has been irreparably injured or disfigured. Take the time to show the jury that you understand this, and that your client sympathizes with the bad cards life has dealt to plaintiff.

The next step, though, is to encourage the jury not to stop there. While it is not fair that plaintiff is facing a life-threatening disease, for example, it also is not fair to expect a company to pay the plaintiff when the company did not cause that disease. A simplified (but not condescending) discussion of the American tort system can help you to illustrate your point. Our tort system is designed to compensate injured parties and to pay them for the harms they have suffered. But the key is that the party or parties *responsible* for the harm must pay – not just anyone with a deep pocket. Otherwise, all concepts of fairness and justice are undermined, and our tort system fails. Sometimes, bad things happen to good people. This isn’t fair, but it also isn’t fair to make someone who didn’t bring about the bad things pay for them.

IV. Conclusion

Jury bias against corporations is a fact of life at trial, but you can use your opening statement to soften this bias and create a better atmosphere for your client. The plaintiff’s “reptile approach” may tempt a jury to instinctively favor a plaintiff, but those instincts can be overridden when you help the jury to understand the facts and true issues of your case. When you present the jury with concepts of justice and fairness, and the importance of holding only responsible parties – if there are any – liable, jurors can see past their initial “gut” instincts. Your opening statement often is an early step at trial that can lead jurors down this path.