

Opening Statements in Asbestos Cases: What to Include and What to Avoid

By Jeanne Loftis and Monica Wells
Bullivant Houser Bailey

The basic rules of giving an opening statement apply in asbestos cases. A good opening statement, regardless of the type of case, tells an interesting story and captures the theme of your case. You should be yourself. Don't overdo it or be over dramatic as you will likely lose credibility with the jury and the judge.

This article discusses what topics should be presented and what should be avoided during opening statements in asbestos cases.

Educate the Jury

Your opening statement should be used to educate the jury about the case, asbestos, your client, and medical issues. Use tools to educate the jury, such as power point, demonstrative exhibits, and photos. People learn differently, and this will increase the likelihood that the jury will understand and retain the information. Also, use deposition testimony of plaintiffs and other witnesses to inform the jury about the facts in the case. It is more effective to use the witnesses' words than your interpretation of their words. Your opening statement should address the following issues:

- Facts of the case

Focus the jury on the exposure at issue for your client

What facts are not in dispute?

- Asbestos

What is asbestos?

Types of asbestos – amphibole versus serpentine (chrysotile), and the characteristics of each

Usefulness of asbestos

Types of products asbestos was used in

Permissible exposure levels and OSHA

- Product at issue

Inform the jury about the product, how it was used and what work was performed with the product. Don't assume the jury understands the product.

- Time period involved

Explain how technology, communication, approach and acceptance of risk have changed over the last thirty to forty years

- Defendant Company

Introduce the jury to your client. Humanize the corporation.

- Medical issues

What is mesothelioma or asbestosis?

Explain how the lungs work

- Epidemiology
- Dose response

Explanation of the Cause – Alternative Exposure

Be upfront with the jury that asbestos can cause disease in certain situations. But this statement should be preceded by the assertion that your client's product did not cause plaintiff's disease and explain to the jury what did cause the disease. Ideally, there is an alternative exposure to asbestos that you can point to as an explanation for the plaintiff's disease. However, don't panic if idiopathic is the only explanation that you can give to the jury. It was previously thought that juries reject the idiopathic or spontaneous explanation for mesothelioma. However, in recent cases and in particular female, mesothelioma cases, juries are more open to idiopathic or spontaneous as a possible and plausible explanation for the mesothelioma. It is important for the jury to understand that mesothelioma is like other cancers; that is, the vast majority of cancers do not have a known cause. Mesothelioma can be idiopathic or spontaneous and there is nothing to point to as the cause of it. It is also important for the jury to learn how rare it is for someone to be diagnosed with mesothelioma. An effective way to demonstrate this to the jury is by informing them of the number of cancer cases diagnosed in the prior year, how many of those cases were mesothelioma, and if the plaintiff is a female, the number of females diagnosed with mesothelioma. In addition, inform the jury how much exposure to asbestos the average person experiences (e.g. background levels) and how much exposure the particular plaintiff experienced. This helps dispel the idea that only those with mesothelioma are exposed to asbestos.

Things to be Aware of

- Multiple defendants – When more than one defense attorney is giving an opening statement, you will want to work with the other attorneys regarding who is going to address what issues in the opening statement. But always be prepared to give an opening statement on all topics. The other defendants may settle or be dismissed at the last minute.
- Be prepared – this should be obvious but it is very important. You should know as much as possible about the trial judge and his or her preferences at trial. You should know the local rules. You should also know the law. You should know the facts of the case. You should know what exhibits you can show to the jury without objection from opposing counsel.
- Be flexible and listen carefully to opposing counsel's opening statement. You may be able to use plaintiffs' themes or statements against them.

Specific Pointers

- Avoid giving preliminary comments to the jury about the importance of their service and thanking them for their time. Instead, start your opening statement with a strong statement about liability and causation.
- Do not overstate or misstate the facts.

- Do not discount what you are going to say. Do not tell the jury that your opening statement is not evidence. Avoid using “I think the evidence will show. . .”
- Examples from recent asbestos trials

Don't

“I want to start by thanking each of you for your service. This is a very, very important process, a right that we have as Americans to resolve disputes through the judicial process.”

“Again, I thank you, and just remind you folks that you have been carefully chosen by us, and that we spent a day and a half, and we had a room full of folks that we started with, and you are the persons we wanted to sit in judgment of this case; and [ABC] Corporation on whose behalf I'm speaking has got a dispute, certainly, with the Plaintiffs, and we're happy for you all to sit in judgment of the company, in this significant case.”

Do

“Mr. [Smith] has mesothelioma but [ABC Corporation's] product did not cause the disease.”

Don't

“And what I want to do is I will tell you what I think the evidence is going to show. I don't expect you to remember a lot of what I am going to be saying...”

In each of the above examples of what not to do, the attorney wasted his or her first critical moments with the jury. Prior to starting, take a few deep breaths and begin with a strong statement that your client is not responsible for the plaintiff's injuries.

Conclusion

In an opening statement, what you don't say is just as important as what you do say. Use the opportunity to educate the jury about your case while not educating opposing counsel about your theme. Although there is a popular perception that cases are won or lost in your opening statement, in many cases this is not true. It is important to be cautious about how much you disclose about your theme during the opening statement. Your words could be the most important thing that opposing counsel uses against your client. You do not want to hear your theme repeated over and over by opposing counsel as he or she presents a case against your client in direct examination of the opposing party's witnesses, cross-examination of your witness and closing argument. The more that you say in your opening statement, the more opportunities you give to opposing counsel. Sometimes the best and most difficult thing to do is to explain only what is necessary about your theme of the case to educate the jury. Use the opening statement to signal to the jury what they should be listening for and to provide a framework for the information that they will hear. At the same time, do not signal to opposing counsel the theme of your case. Save as much as possible of the argument in support of your theme for the closing argument. At that point in the trial, it is too late for opposing counsel to effectively respond to the theme.