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How To Deliver A Stellar Opening Statement In A Patent Trial

By **Matthew Bultman**

Law360 (September 16, 2019, 9:43 PM EDT) -- Opening statements are arguably the most important part of a patent trial. But attorneys who tell an interesting story, stay out of the weeds and make a connection with jurors are setting themselves up for success.

Opening statements are jurors' introduction to the case, providing a road map for the evidence that will be presented. These statements begin to shape jurors' impressions and set the tone for trial. A less-than-stellar opening statement can be tough to overcome.

"If you had to pick a most important part of the trial, that's the most important part of the trial," Fish & Richardson PC principal Douglas McCann said.

Here, experts share their tips for making a great opening statement.

Tell a Story

During opening statements, jurors will be hearing a lot of information for the first time. WilmerHale partner Louis Tompros said it is critical to present this information in a familiar way, preferably in the form of a simple story.

Tompros said he encourages students in his patent trial advocacy course at Harvard Law School to watch movies with great opening statements. One of his favorites is the opening of Capt. Jack Ross, played by Kevin Bacon, in "A Few Good Men." Prosecuting two Marines accused of murder, Ross tells the story of the night that a fellow Marine died in his barracks room.

"If you approach it from that structure, it helps you frame what you're trying to do," Tompros said.

It can be easy for patent trials to evolve into abstract fights between companies. Ted Stevenson, a principal at McKool Smith PC and faculty member of the National Institute of Trial Advocacy, said the most effective presentations turn the case into a story about people.

"The more you can make a case — and it starts in opening and goes all the way through the case — a story about people and their struggles and their aspirations, their mistakes and their victories, I think it is far more compelling to a jury," Stevenson said.

The story told in the opening will take different themes depending on which side of the courtroom you're on. For example, in a case where the validity of a patent is at issue, a patent owner may look to set the stage with a story about the problem that existed and how the inventor solved it.

"The climax of the story is that they got the patent and here it is with this seal and this promise from the patent office that it's new," Tompros said. "It's very challenging for a jury after they hear that story to question the validity of the patent."

On the other side, a defendant may start with a simple story about how the U.S. Patent and Trademark Office didn't have all the facts when it issued the patent, and point out that the jury now has the opportunity to consider whether the invention was actually new.

When addressing infringement allegations, the story may be that the defendant solved the problem in a different — and better — way and how the patent owner is turning to its patent because it is unable to compete in the market.

Regardless of what story is told, Stevenson said there is a level of anticipation before the opening arguments in a case. When attorneys stand up, other people in the courtroom are on the edge of their seats, waiting to hear what will be said.

Don't waste this opportunity by beginning with long-winded introductions and formalities.

"In the first few minutes you get right to it, you get your story out," Stevenson said. "You have a powerful 'This is what this case is about.' Don't squander your first two minutes. You'll never get it back."

Keep it Simple

Patent law and the technologies involved in a case are often complex. It can be easy for jurors to become overwhelmed.

Ease them into the case during the opening, experts said, by introducing them at a high level to the technologies that are involved, the key issues and the important players. Do this while speaking in clear language and short sentences.

"Use the opening statement as an opportunity to try to begin to teach the jurors about the law and about the technology, but don't try to teach too much," Tompros said.

One way to simplify matters for jurors is to use words that have been used before.

In many cases, for example, juries are shown a video about what it means to be a juror in a patent case. The video uses specific terms, like the file history of a patent. If the lawyer uses different terms for the same concept — like prosecution history or the patent's file wrapper — it can be confusing.

A similar idea applies when referring to the prior art.

"If one side is calling a piece of prior art the Jones prior art and somebody is calling it the '342 prior art, the jury is going to get lost," Tompros said.

It can be tempting for defendants to pull out all their defenses right out of the gate, ticking off the various reasons why there is no infringement, why the patent is invalid and why the patent owner is seeking an unreasonable amount in damages.

Stevenson said defendants need to "triage down" their defenses in their opening, or risk looking like they are throwing all sorts of things at the wall to see what sticks.

"The really good lawyers who present defense cases, they get it down to one or two defenses per patent," Stevenson said.

Most judges have some type of rule limiting the length of opening statements in patent cases. But as a general rule, aim for between 30 and 90 minutes. Even if given the option to go longer, doing so is probably a mistake.

"You lose the attention of the jury after some period of time," Tompros said.

Make a Connection

Opening statements are one of the first opportunities to establish a connection with the jury. Even seemingly simple things like looking jurors in the eye can go a long way. With that in mind, don't simply read the opening statement.

"You need to be continuing to connect with the jury, and I think that's really hard when you are reading," said Karen Boyd, co-founder of the IP boutique Turner Boyd LLP. "You will be more persuasive, you will be more trustworthy if you are talking to somebody rather than reading to them."

This doesn't mean attorneys must deliver their opening Perry Mason-style and abandon all notes. Tompros said there is still a need to be accurate on the points attorneys are making and the things jurors will see during trial.

"I tell my students to use whatever notes they need to make sure that they're making points accurately and precisely, but to do their best to get out in front of the podium and to look up from their notes and engage in a human way whenever possible," Tompros said.

PowerPoints are commonly used in opening statements. While these presentations can be effective, problems arise when the slides are crammed with text that is next to impossible to see from across the room. Jurors begin squinting, trying to read the slides, and stop listening to what you're actually saying.

McCann, who previously served as a faculty member of the District of Delaware Federal Trial Practice Seminar, said if there are going to be slides, use as few as possible.

"The second thing is make them readable from more than 20 feet away," he said. "That means a lot less on the slide and what's on there is a lot bigger."

This is also the time to build credibility with jurors. When making an opening statement, don't overstate your case. It's important to only make promises you can keep, experts said, noting that the other side is going to pounce on anything that goes undelivered.

"If you're out there stretching things, you're going to be caught stretching and it only takes one time for

them to think, 'I can't trust that guy,'" McCann said. "And that's it. You can't recover."

Also remember that this is not a stand-up comedy routine. Inserting pre-planned humor into the opening statement is almost always a mistake, Tompros said. Jokes can fall flat and that doesn't get you anywhere in terms of establishing a connection with the jury.

Another mistake is aggressively attacking the other side or their lawyers. While there may be opportunities to critique arguments, name-calling or telling jurors that they are being lied to can backfire, as the jury may end up thinking you are overstating or being unfair.

"What you want to be doing is building up credibility throughout the trial," Tompros said. "If you try to attack the other side too early, it could fall apart."

--Editing by Kelly Duncan and Aaron Pelc.