

## Opening and closing statements at domestic violence hearings

Toby Kleinman and Daniel Pollack | February 24, 2022



An opening statement should not be taken lightly. It is a calculated, vital first step. The purpose of an opening statement in every case is to provide a condensed version of the entire case. Unlike a movie trailer which will never divulge the ending, an opening statement is the attorney's critical opportunity to alert the court of the client's evidence, what the evidence will demonstrate, and to provide the court with a desired ending. In a case involving domestic violence there are critical

issues to master. This is true whether you are in court to obtain a restraining order or before a court on a child custody or child abuse matter.

Opening statements offer the ability for the use of language that a court will remember, often using a mantra that gets repeated during the testimony and at closing. One such mantra for domestic violence cases is to assert that the law provides three “Ps”: protection, prevention and punishment. The law in domestic violence is designed for protection. It is also designed for prevention and punishment for further victimization. An opening is the time to alert the court why the victim or victims before it needs court protection and to give the court all the historical and current facts to show why.

Because there is a known connection between adult interpersonal violence and child abuse, an opening also gives the opportunity to show at this early stage how the children, though they may not have suffered violence, are still current victims. For them, the case is about protection and prevention as well.

In a case for restraints against a violent partner, the temptation is to put the victim on the witness stand to tell a story of what occurred on a particular day. The facts will involve violence or threats of violence or some other statutorily designated domestic violence act. But the incident before the court is seldom the whole story. Some domestic violence statutes require the court to hear the history of violence. For example, NJSA 2C:25-29 states in part, “The court *shall* consider ... [t]he previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse ... (emphasis added).”

To provide the history of domestic violence even in an opening statement is important for many reasons. First of all, an incident standing alone may seem like a minor relational disagreement and not particularly significant. Yet, there could be a case where the history between the parties involved prior serious violence. The victim may have avoided seeking court intervention or protection before. On a particular day for which the victim seeks a protective order the violent partner may have given a “look” at the victim in such a way that always preceded prior other violent acts and threats of violent acts, but on the day the victim sought a restraining order there may not have been actual violence. However, there may have been recent violence preceded by that same “look” with a threat by the perpetrator that “next time” it would be deadly. By describing the history of other violent acts—all of which had a similar “look” before the act occurred—tells a different story than seeking restraints upon “only” someone’s look. Only testimony of the history will elucidate the actual understanding and reason for issuing such a restraining order in this type of circumstance. Thus, alerting the court in the opening statement to the history, with any particular idiosyncrasy or unusual circumstance, is important to create a context before the court hears any testimony.

Because violent perpetrators often look and sound “nice” in court, it is important to set a stage with an opening statement—describe what had been the norm by describing the person the victim fell in love with and explain how over time violence began, and later escalated, through physical violence, harassment or other prohibited behaviors.

If there are children, there may be a history where children were involved in violent episodes or heard threats. They may have seen a

parent brutalized. They may have been forced to participate. They may have been the victim of unreported violence or threats of violence by the violent parent. By presenting the overview in an opening, followed by testimony of the entire history, that information will be properly presented to the court. The opening statement gives that overview and the explanation for the history being presented.

If the victim believes that children are still at current risk, the opening statement gives the court advance notice, not only of the single adult victim, but presents children as victims as well. By giving the court advance notice through a detailed opening, the court will have the opportunity to hear details three times—at the opening, during the testimony, and at the closing. It creates the context for giving testimony the court is yet to hear and sets the stage for the closing to tie the pieces together.

If you are going to present expert witnesses, an opening gives the opportunity to alert the court to distinctions in the experts' expertise. For example, an expert in trauma may not be an expert in child development. The opening can give an explanation as to why a victim may sound robotic or why a child might seem fine with a perpetrator yet still be anxious and traumatized. The opening is a way of identifying witnesses and giving advance offers of proof and to explain what might otherwise appear counterintuitive to the non-expert.

After completion of testimony of both plaintiff and defendant and any other witnesses, the court hears closing arguments. The closing is your opportunity to summarize the evidence that has been presented and to show how the evidence comes together. Sometimes these closing

arguments are in writing and sometimes they are oral at the end of a hearing. After a hearing for a restraining order, closing statements are more likely oral. Counsel can ask to submit written closings for any hearing, however. A closing is not merely a time to reiterate the opening and testimony. It offers the opportunity to disabuse a court of the defendant's theory and presentation of the case and to demonstrate the strengths of your client's case.

While a closing can follow the outline of the initial opening by showing how each of the facts described in the opening statement were proved, it should iterate all statutory factors that must be considered by the court and how they have been met. It can also state requested findings and punishments as well as suggestions with regard to how to proceed with regard to children and any contact with a perpetrator.

A closing can also undermine the other party's case by showing how your case stands up on fact, science and opinion. It gives the opportunity to be specific as to each of the three "Ps": what are the actual facts—why this victim and children need protection; what is needed for future prevention; and what possible punishments are available.

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