OPENING TRIAL STATEMENT TIPS

“Advocacy is and always has been the art of persuasion”¹

A good Opening Trial Statement (OTS) will not win a case but a poor one will jeopardize its success. Despite being described as “the single most important phase of a trial”² it is also lamented as “the most misused, sadly neglected weapon in the arsenal of a modern-day advocate.”³

There is no universally accepted statement about the purpose and limitations of an OTS. In “The Trial of an Action” the late jurist, John Sopinka, quoted Halsbury’s as a “useful general statement”;

“Counsel in opening states the facts of the case, the substance of the evidence he has to adduce, and its effect on proving his case, and remarks upon any point of law involved in the case. Counsel may in opening refer to those facts of which the Court takes judicial notice. Neither in the opening nor at any stage of the trial may counsel give his own opinion of the case or mention facts which require proof, but which it is not intended to prove, or which are irrelevant to the issue to be tried...”⁴

The OTS is not just “one of the aids to persuasion”⁵ it is counsel’s first opportunity to tell a court why, and how, the issues in the case should be decided in the client’s favour,

“The objective of a good opening address is to seize the interest of the court…and instruct [it] as to the essentials of the case to be tried as to the facts and to the law: The objective as well is to persuade the court…as far as is possible of the righteousness and validity of your cause and to put [the court] in a receptive frame of mind to the evidence that is about to follow.”⁶

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³ Adair, supra at page. 47
⁵ Sopinka, supra at p.58
There is remarkably little guidance for practitioners in the Family Law literature about the elements of an effective OTS. Most, if not virtually all, advocacy texts deal with juryed and judge alone Civil (and Criminal) cases. Even so, there are many common features shared by an OTS (or Opening Address) in Civil and Family Cases. Both require thorough preparation, a focused selection on content and thoughtful presentation (or delivery).

**Preparation**

It is axiomatic that being prepared is critical to a successful outcome for your client. This involves more than knowing the pleadings, what your client and the witnesses will (or may) say, and even the relevant law. As soon as the issues are joined you should be pro-actively identifying what facts need to be proved, and you need to consider, and dispassionately weigh, the evidence supporting those facts. This is an ongoing task.

Under the *Family Law Rules*, each successive stage in the Case Conference process prompts counsel (and client) to think about what needs to be done. While there is no doubt that a negotiated settlement is almost always preferable to a trial, the Rules and the forms prescribed by the Rules are all geared towards streamlining any trial. In each of the prescribed forms for Case and Settlement Conference Briefs there are Parts dedicated to procedure (“Procedural Issues” in the Case Conference Brief and “Procedural Matters” in the Settlement Conference Brief). Requests to Admit (Rule 22) are encouraged, the Trial Management Conference Brief (Form 17E, paragraph 7) asks whether the parties have signed a Statement of Agreed Facts and Rule 23(1)2 requires that any agreed statement of facts be contained in the Trial Record. The TMC Brief (paragraph 4) also requires that an outline of counsel’s opening trial statement accompany the prescribed form. The typical “Endorsement-Trial Management Conference” Form filled out by counsel before or at the Trial Management Conference and endorsed by the TMC Judge also deals with filing deadlines for Case Books. In each of the prescribed Conference forms counsel is asked to identify the issues (paragraphs 11 and 8, respectively, of the Case and Settlement Conference Briefs) and then at the Trial Management Conference stage tell the Court about counsel’s theory of the case on the disputed issues (Form 17E, paragraph 4(b)).

The point to this abbreviated summary is that an effective OTS cannot be crafted without proper attention to creating a solid factual foundation for your case, isolating the disputed issues and
having ready for the court before trial the authorities on which counsel will be relying, highlighted for the court where needed.

**Content**

The OTS is a sales pitch disguised as an Executive Summary for the Judge. It should be informative and persuasive but without being argumentative. The *Family Law Rules* require that an OTS outline be included in a Settlement Conference Brief, the Trial Management Conference Brief expects it and many, but not all, Courts have forms that not only deal with OTS delivery times but also whether they are to be written, oral (or both) and whether, if written, they are to be included in a Trial Record or, if not, when they will be available for the Judge. The preferable approach, in the writer’s opinion, is a written OTS supplemented by an oral presentation that does not involve the reading of the OTS but serves to highlight other aspects of your case that are not necessarily, or perhaps more dryly, contained in your written OTS.

There are a number of tips which are worthwhile considering. The list which follows is not exhaustive but derives from the several more recent writings on Opening Trial Statements and the writer’s experience.

**Tip #1**: Avoid a narrative of the facts. **Use bullet form or short, numbered paragraphs.**

*Reason:* Quicker and easier to read and, if your written statement is on a disc, it may be easier to copy and paste by the court. This is especially important where there is no Statement of Agreed Facts (SAF).

**Tip #2**: Keep it simple. State the issues, the essential facts and the relief sought.

*Reason:* Whether you agree with the analogy of a roadmap, sales pitch or even the inside jacket text of a novel, your OTS is not a Factum, and it should never be argumentative (save that for your closing). Simplicity and conciseness should be its hallmark.

**Tip #3**: Assemble your facts so that they argue your case.

*Reason:* Don’t be content with simply letting the facts speak for themselves. Depending on whether there is an SAF or, if there is, how extensively it deals with the facts, assembling and presenting the facts in a manner that leaves only one conclusion can persuade without arguing.
Tip #4: Leave bad facts or other problems that you may face in terms of, for example, evidence or credibility to your oral presentation.

Reason: It is not your duty, nor is it advisable, to identify weaknesses in your case in your written OTS but it is critical to defuse any flaws. Do that in your oral presentation. This allows you to recast those flaws in the most favourable light to your case and should enhance your credibility with the Court, as well as blunting your opponent’s cross-examination.

Tip #5. Selective use of highlighting or **bolding**.

Reason: In certain kinds of cases such as those dealing with interpreting Domestic Contracts or components of an Order sought to be enforced or varied, highlighting the impugned paragraphs, sentence or phrase focuses the court’s attention on the issue right away. AVOID CAPITALS.

Tip #6: Selective reference to documents.

Reason: There may be key documents critical to your case. These could be expert reports (which the Rules require be filed in the Trial Record) bank documents, photographs – the list is non-exhaustive. Pointing out these early alerts the Court about their importance to your case. Excerpting and referencing an expert’s concluding opinion in your written OTS is worthwhile considering too.

Tip #7: Never overstate your case.

Reason: Don’t make promises you can’t keep. Rarely are the facts in any case so incontrovertibly black or white that there are not many shades of grey in between. Rare too is the case that the client’s credibility or recall is wholly unimpeachable. A spartan but educative summary of the facts and the proposed evidence to prove them avoids disappointing the Judge’s expectations and risking your credibility.

On a final note, proofread your OTS carefully. A grammatically incorrect, misspelled OTS is an embarrassment and may give the Judge the impression that it’s a last minute patched-together effort which may only raise questions or other concerns in the Judge’s mind about the competency of counsel.

**Presentation**

There does not appear to be a hard and fast rule that written and oral Opening Trial Statements are disjunctive, i.e. one or the other. Certainly accepted practice favours the written format but given the importance of an OTS it is likely that most Judges will favour a combination of both
provided that the oral presentation does not involve simply reading the statement. Supplementing the written OTS orally must be approached carefully.

**Tip #1:** Personalize your client.

**Reason:** You will unlikely be on familiar terms with the other party (or parties) in your case but you will want to refer later in your examination, and those of your witnesses, to your client and, more often than not, the other party or parties by their first names. Introducing your client, referring to him/her in a personal way and, depending on the SAF, telling something about his/her background humanizes your client and sets the stage later for your direct examination.

**Tip #2:** Deal with the bad facts.

**Reason:** Nothing is more embarrassing or prejudicial to the success of your case than the disclosure later in evidence, during cross-examination of your client or other witnesses or when documents are being introduced, of damaging information that appears either inconsistent with, or contrary to, what you told the Court about your client’s case in your OTS. Judges do not like surprises. See Tip #4 Content – Reasons (above).

**Tip #3:** Avoid argument.

**Reason:** Counsel’s submissions, or argument, are not evidence. There is only one opinion that matters, and it is not yours. Do not tell the Court before it has heard the evidence what is not believable, and do not vigorously attack your opponent’s case. Save that for cross-examination and your closing address.

**Tip #4:** Refer sparingly to the law.

**Reason:** Don’t assume that the Judge has read the Briefs of Authorities if they have already been filed with the Court, and if you are filing your Brief at the opening of the Trial, don’t assume that the Judge is familiar with the authorities on which you are relying. There may be, however, one or more cases directly on point or of special relevance to your case. Point those out to the Judge, briefly explaining the relevance but do not argue or quote from them (again, save that for closing argument). This will give the Judge an opportunity to review the authorities during the Trial and will assist later if the relevance of a particular line of questioning is raised.

**Tip #5:** Always make some opening statement.

**Reason:** Don’t be content with relying on your written OTS. Save something to tell the Judge about your case – this is particularly important if you have never appeared before the Judge. Engage the Court.
Tip #6: If acting for the respondent ALWAYS open after the applicant.

Reason: There are usually two sides to any story. You need to balance the applicant’s description of the facts and the reasons why the applicant should succeed on the disputed issues. On a more practical, visceral, level your failure to say or do anything after the applicant opens may unsettle your client and raise questions in the client’s mind about your preparedness and competence, particularly if, after an adverse ruling or result on some of the issues, your client complains that the Judge only heard the applicant’s side of the case at the outset.

Some leading authorities on advocacy have written about the symbiotic relationship between an OTS and Closing Argument.⁷ Although the latter is sometimes described as the “advocate’s finest hour”⁸ that is unattainable if there is an indifferent, confused or exaggerated OTS poorly delivered. Before signing off a written OTS, or when considering its oral supplement, counsel should critically eye the OTS and checkmark the following questions:

1. have I laid out the issues clearly and succinctly;
2. have I set out, and organized, sufficient facts that are relevant to the issues and the relief sought;
3. have I taken advantage of the best snippets of the documentary evidence, including experts concluding opinions. Is it necessary to (or should I) make some (modest) reference to the caselaw important to proving the client’s case; and,
4. has the relief sought by the client been clearly spelt out.

If, after having critiqued your written OTS and oral presentation notes, you can answer these questions affirmatively then that should enhance your confidence, the Court’s assessment of your case, and your credibility as counsel.

A sample OTS involving a Court Order and its variation is attached.⁹

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⁷ Olah, supra at p. 8-21
⁸ Adair, supra at p.481
OPENING TRIAL STATEMENT OF ROBERT SMITH

I, David A. Jarvis, advise the Court that I will be acting as counsel for Robert John Smith ("Robert") at the Trial of this action and that my client’s position with regard to all issues are as follows.

ISSUES FOR TRIAL

1. A MOTION was brought by Bonnie Smith ("Bonnie") for an Order quantifying, retroactively and prospectively, Robert’s spousal support obligations pursuant to an Order of the Honourable Mr. Justice Cronkite dated April 1, 2004, AND A CROSS-MOTION by Robert to, among other things, vary that order to terminate or reduce spousal support, and to vary his obligation to provide life insurance.

2. On February 14, 2009, both Motions were argued before the Honourable Madam Justice Couric, who
reserved her Decision. On May 24, 2009, Her Honour directed a Trial of the following issues:

(a) the alleged arrears of spousal support for the period January 1, 2005, through December 31, 2008, pursuant to the Order of Justice Cronkite dated April 1, 2005;

(b) whether the spousal support being paid by Mr. Smith ought to be terminated or reduced;

(c) whether the obligation of Mr. Smith to maintain life insurance payable to Mrs. Smith ought to be terminated or varied.

BACKGROUND

3. The parties are former spouses. They married on October 18, 1973 and separated on November 11, 1995.

4. There were two children of the marriage, both of whom are adults (the youngest is now 28 years old) and none of whom is, or should be, financially dependant on either parent.

5. Robert was born on November 20, 1948. He was 47 years old when the spousal parties separated, and he will be 61 years old as of the date of Trial.

6. Bonnie was born November 20, 1947. She was 48 years old when the spousal parties separated and will be 62 years old shortly after the Trial in this matter is heard.

7. On April 1, 2004, the Honourable Mr. Justice Cronkite made an Order ("the Order") that, among other things, dealt with division of the parties’ property, child and spousal support and life insurance.

8. Paragraphs 3 and 4 of the Order dealing with spousal support provide as follows,

"3. **THIS COURT ORDERS** that commencing on May 1, 2004, and on the first day of each subsequent month, the Husband shall pay to the Wife, the sum of $3,500.00 as spousal support. The level of spousal support was fixed in an amount that, after payment and receipt of child and spousal support, and the resulting tax consequences, each party is left with approximately equal net disposable income. In this regard, the Husband’s disclosed income of $150,000 and the Wife’s disclosed income of $1,000 have been adopted. The spousal support payments in this paragraph shall be in two equal monthly installments of $1,750.00 to be made on the 1st and 15th day of each month commencing May 1, 2004.

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4. **THIS COURT ORDERS** that the suspension or termination of child support for Robert is a material change in circumstances. *The parties agree that once the Husband is no longer obliged to pay child support, the amount of spousal support shall be varied so that after payment of spousal support the Husband has 60% of the parties’ net disposable income and the Wife has the remaining 40% of the parties’ net disposable income.* (bolding added).

9. Paragraph 16 of the Order is also relevant to the issue of spousal support, and provides as follows,

"16. **THIS COURT ORDERS** that the Wife’s present intention to apply for Canadian Pension Plan benefits when she is sixty years of age is recognized."

10. Paragraph 1 of the Order is relevant to the issue of Robert’s life insurance obligation, and provides as follows,

"1. **THIS COURT ORDERS** that the Husband shall keep the Canada Life Assurance Policy number L4789004 ("the policy") on his life in an amount of not less than $350,000.00 naming the Wife as the irrevocable beneficiary for the term of the policy. The Husband shall not borrow against the designated $350,000 in coverage while he is obligated to pay spousal support."

11. As of the date this Trial, the parties will have been separated for about 14 years, and over 5 years will have passed since the Order of the Honourable Mr. Justice Cronkite was made in April, 2004.

12. Bonnie contends that Robert owes her arrears of spousal support (as calculated to December 31, 2008) of $23,000.00. Robert contends that, calculated to and including December 31, 2008, he has overpaid spousal support anywhere between $15,000.00 to $21,000.00. An Income Analysis prepared by Best Valuations Inc. (Bill Best) dated May 1, 2009 has been filed with the Trial Record (Tab 9). Bill best is available to testify in the event that Bonnie disputes his conclusion.

**ROBERT’S EVIDENCE**

13. Robert will testify about the following issues:

(a) his financial circumstances during the period leading up to and following the 2002 Order and, in particular, his bankruptcy in July, 2002. A 2003 Arbitrator’s Report (included by Bonnie in her Affidavit) commented upon Robert “making every effort to avoid that eventuality” and contributing “over and above” his financial obligations to the children’s expenses. Bonnie was left with the matrimonial home and an RRSP portfolio while Robert had virtually no assets having cashed in all of his RRSP savings, paying a significant mortgage on the matrimonial home and funding the bulk of the expense of Mediation and Arbitration;
(b) his expectation that Bonnie would make a reasonable effort to contribute to her own support. The 2004 Order based spousal support on the “parties’ net disposable income” not his income alone. Robert will testify about, and document, his communications with Bonnie about this issue and the evidence will be that Bonnie did not accept, or believe, that she had any kind of an obligation to contribute to her own support;

(c) Bonnie’s failure or refusal to access available sources of income such as her Canada Pension Plan or to seek a contribution from an adult child residing with her who earned income;

(d) the costs of maintaining life insurance which is in addition to spousal support is not tax deductible to Robert, and will soon escalate dramatically upon Robert’s 65th birthday;

(e) in light of his earlier bankruptcy, over which Robert will say he had little control, and his financial commitments to his family, Robert has been unable to save for retirement. There is simply no “light at the end of the tunnel” for him. There is no evidence that Robert has not worked, or is not now working, to the best of his ability, and as hard as he possibly can, or can be expected to work.

14. The court will also hear evidence from Best Valuations Inc. (Bill Best). Mr. Best is a qualified business valuator and has provided expert evidence on income analysis for child and spousal support determination purposes. Mr. Best has reviewed the income tax returns for Bonnie and Robert for the period 2005–2008 and concluded that Robert has overpaid spousal support anywhere between $15,000.00 to $21,000.00.

15. Mr. Best’s Report dated May 1, 2009, was served on Bonnie on or about May 1, 2009. No contrary or supportive expert income analysis has been tendered by Bonnie.

16. It is Robert’s position in this case that, taking into account the spousal support objectives contained in the Divorce Act, and the objectives governing variation of spousal support, he has met, even exceeded, his obligation to Bonnie and that, conversely, Bonnie has failed to accept responsibility to realistically and reasonably contribute to her own support.

ORGRESS REQUESTED

17. That the Motion brought by Bonnie be dismissed.

18. That paragraph 4 of the Order of the Honourable Mr. Justice Cronkite be varied to reduce the amount of spousal support payable by Robert to Bonnie to $1,500.00 for a period of one year and, thereafter, to $500.00 monthly until the earlier of Robert’s death or November 20, 2013 (Robert’s 65th birthday) after which the Order shall terminate.

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19. That no Order be made at this time requiring Bonnie to repay any of the spousal support overpaid by Robert pursuant to the Order, and that any obligation to repay terminate when spousal support terminates on November 20, 2013.

20. That paragraph 1 of the Order of the Honourable Mr. Justice Cronkite be varied to reduce the amount of life insurance required to $200,000.00, such obligation to end on the earlier of Robert’s death or November 20, 2013.

I, DAVID A. JARVIS, have advised my client that if not settled, the Trial herein will probably take 2 days and I have given him my best estimate of what Trial costs he may incur.

DATED at Toronto this 16th day of October, 2009.

David A. Jarvis
Solicitor for the respondent.
Opening Statements: Demonstration and Commentary

Tips on Opening Statements

David Jarvis, Beard, Winter LLP

Demonstration of Opening Statement

Evelyn Kohn Rayson, Rayson & Associates

Judge’s Commentary

The Hon. Justice David Aston, Superior Court of Justice