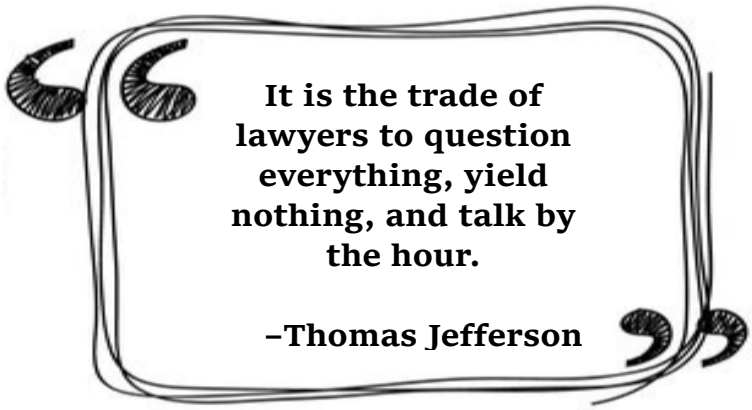
Chapter 4

OPENING STATEMENT

Opening statement is crucial. Not only should it foreshadow the facts to come, but it foreshadows the trial competence of counsel presenting it. A little show-and-tell, or tell-and-show, on how to do it best.



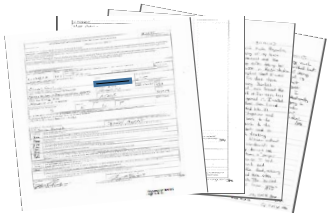
Chapter 4 – Opening Statement

As important as opening statement is, the lack of attention we tend to give it is troublesome. Opinions vary, but opening statement is often the most important aspect of trial litigation … after the facts of course, and pretty close to the importance of closing argument. But rather than recognize that and devote one of the top members of our trial team to opening statement, and have that litigator actually detail why our side will win the case to come, opening statement often becomes an afterthought. We send the most nervous, most inexperienced young on our trial team out to bumble through an instantly forgettable 3-5 minute monotone flyby that often devolves into a poor preview of closing argument. Let's not do that anymore … yes, let's send out the youngs, but let's arm them with the tools to engage and persuade.

Opening statements are boring. That is bad. The selected members have sat through the awkward *voir dire* process and won a coveted front-row seat for the opening day production of *United States v. Airman Smith*. They have some expectations at this point, usually not from real-life experience but from watching courtroom dramas on television. Yes, they know from the judge's instructions and common sense that this is a serious, real-world event to be taken seriously; that the trial is not being presented for their entertainment. But in the back of their minds they expect if not to be entertained with trial theatrics at least not to suffer in boredom.

Opening statements are boring usually for a number of reasons; first because counsel usually does not use props. Rather, it is a speech, likely delivered from notes, from a counsel anchored to a podium. Counsel stares at their notes, the members stare at counsel, no one leaves satisfied.

If I was on the panel of a murder case, I would expect to see the prosecutor waving the murder weapon around during opening statement (carefully). That is interesting; hearing about it but not seeing it not quite as interesting. Maybe your case is not as high-profile as that, but show me the sample bottle the accused peed into that



came back hot for methamphetamine. Use whatever you have and whatever you intend to use at trial. Let me see the security-camera video, let me hear the audio of the accused's incriminating statements, show me pictures of the crime scene or of the cast of characters I am going to be introduced to over the course of the trial. Or if you just have documents, display an extract of the accused's statement on a screen (or blown up on a poster board if you want to go old school), or the digital signature on a fraudulent travel voucher, or the forged signature on a doctor's note.

Besides livening up the presentation, my explanation of the "why" of using evidence during opening statement likely will not come as a surprise to you if you have been following along—it will enhance your credibility with the trier of fact (members or judge). A basic competence of trial lawyering is proficiently handling actual evidence. When you demonstrate this basic competence to the trier of fact, by weaving physical evidence into your oral presentation, you enhance your credibility. When you offer the trier of fact an opening statement that is interesting, you enhance your credibility. And then when your opening statement is delivered with passion and purpose, and reminds the members of the soaring oratory and commanding presence of *[insert your favorite fictional attorney character, e.g., Atticus Finch]*, you enhance your credibility. Come closing argument, you can hopefully trade those credibility chits earned in opening statement, and then over the course of a trial, for persuasion points during closing argument and into deliberations.

> **Opening statements are boring. That is bad. … counsel usually does not use props [or] counsel overly relies on developing a "cute" theme and theory, and then bashes the members over the head with it over and over again [or] counsel dispenses with any 'argument' and just recites facts**

The "how" to use evidence in opening statement introduces my favorite pre-trial motion—the Motion to Pre-Admit. My experience is that counsel do not use evidence during opening statement because they do not realize they can, if they do it right. A judge is not going to allow you to show something to the members that you intend to become a piece of evidence during trial until that something has actually been offered and

admitted as a piece of evidence. But there is no law that says you have to wait until trial to have a piece of evidence admitted. Quite the contrary, the interest of judicial economy, and the rules (*see* Appendix B—Example Motion to Pre-Admit), favor resolving issues such as admission of evidence in a pretrial session when feasible.

Doing so is particularly feasible when the effort is tacked on to resolution of a motion to suppress—when the motion to suppress is denied, most evidentiary objections to admission of the subject matter of the motion (*e.g.,* the evidence seized during a search of the accused's home or vehicle, the audio or video of the accused's "confession") are resolved and pre-admitting it at that point become perfunctory. Then, you can dramatically wave the murder weapon around during your opening statement, or play snippets of the accused's incriminating statements to enhance your presentation. If you can figure out how to have pictures of all the witnesses admitted (it is possible), you can put faces to names for the members early and sear in their minds what you want them to believe about these witnesses when they see them again during trial, then face-to-face.

Understand, however, that counsel's definition of "judicial economy" might not be the same as the judge's. It seems like it was never the same as mine. Particularly in short trials, such as your typical random urinalysis, drug-use case, the judge may ignore your pleas to litigate admissibility during a pretrial hearing and will elect to address admissibility during your case in chief. But do not let that stop you from preparing and offering the motion to pre-admit. Though a judge may not want to litigate admissibility pretrial, few judges will refuse to admit evidence pretrial when the parties agree, or at least there is no objection from opposing counsel. And the process of listing all the evidence you want admitted, and detailing the foundation, basis of admissibility, and relevance of each item (*see* Appendix B), helps define which evidence the opposing party may object to.

For example, in what was going to be a long murder trial (that ended up resolving through pretrial agreement on the eve of trial), we offered a motion to pre-admit that listed more than 70 pieces of evidence. Some had been the subject of unsuccessful motions to suppress; many were self-authenticating documents with the appropriate certification from the records custodian; many were items to which the

defense had no objection; and many were items that on further discussion with the defense we were able to amicable resolve preliminary objections and move those items into the "no objection" category (or we removed them from the list). In the end, we did not need to litigate admissibility during a pretrial session; rather the pretrial session simply confirmed the lack of objection (or overruled objections based on the outcome of previous motions to suppress) and powerful pieces of evidence came available for us to use during an equally powerful, not boring, opening statement.

Opening statements are also boring when counsel overly relies on developing a "cute" theme and theory, and then bashes the members over the head with it over and over again. Just because you have settled on a theme and theory for your case (and you should as it helps focus you and your team on what is important about your case), does not mean that you have to bludgeon the members with it.

You get seven seconds at the start and end of your opening statement to stray into argument (or "signposting" if you prefer)—no more, less is fine. Not only would you and should you draw an objection if you exceed this totally-not-arbitrary time limit, you will lose credibility with the trier of fact by doing so. The members know almost nothing about the case. They do not know who the witnesses are or what the witnesses are going to say or what the evidence is going to show and the judge has just told them that they need to keep an open mind until presented with all the evidence and that opening statements is intended to lay out the parties' versions of that evidence for them. And then counsel stands up, and after bumbling around for a moment getting organized, tries to demonstrate how their robbery case is like Goldilocks and the Three Bears, and the accused is Goldilocks, and the victims are the Three Bears, and the accused chose a house to break into that was not too hard or too easy but just right, and how … who knows at this point, the opening statement has veered so far from reality that the members give it as much credit as the fairy tale is based upon. Credibility crashes.

You get seven seconds at the start and end of your opening statement to stray into argument (or "signposting" if you prefer)—no more, less is fine

At the other extreme, opening statements are also boring when counsel dispenses with any "argument" and just recites facts, prefaced with "The evidence will show …" or "The witness will testify …" over and over and over again, without a coherent or interesting narrative that tells their story of the case. Somewhere, likely in law school from a professor who has not seen the inside of a courtroom in decades, the idea has taken hold that in order to properly present an opening statement and avoid objection, every sentence uttered by counsel must be prefaced with the phrases "The evidence will show" or "The witness will testify." Frankly, it is a dumb technique as it will not magically convert an opinion statement into a fact statement; the sentence "The accused is a pig" is not made better for opening statement by stating it as "The evidence will show that the accused is a pig." It is still opinion/argument, it is still objectionable (though prefacing it with "The evidence will show …" may temporarily confuse an inexperienced opposing counsel), and it is not going to impress the members who are expecting at that point to get a preview of facts on which they later can decide for themselves whether the accused is a pig or not.

Show rather than tell may work better to emphasize these points. A couple examples of opening statements—you chose which is better …

Example 1

Judge: Trial Counsel, do you wish to offer an opening statement?

TC: Yes your Honor, thank you.

[Counsel walks to the podium pre-positioned three feet in front of jury box, binder and glass of water in hand, sets water down, sets binder down, opens binder, takes note pages out, sets them at different places on podium, applies a white-knuckled death grip to the edges of the podium, looks up and says after this awkward 15 seconds of silence…]

TC: Mr. President, members of the panel, this is a case about broken glass, broken promises, and broken dreams. On February 2nd the accused *[pause, turns, points robotically at the accused]* began a rampage that started by breaking through a glass window at Jane Doe's house and ended with her dreams of a peaceful life likewise shattered. The accused's violent attack that evening broke a promise …

DC: Objection your Honor, I thought this was supposed to be opening statement, not closing argument.

Judge: Sustained, though Defense Counsel in the future state your objection more succinctly. Trial Counsel, please focus on the evidence to be presented in this case.

TC: Yes your Honor. *[Shuffles through notes for an extended period]*. Members, the evidence will show that on February 2nd the accused broke a window at the house of Jane Doe. Jane Doe will testify that she knew the accused from work. She will also testify that she had rebuffed advances the accused had made to her. The evidence will show that the accused had been drinking during the day of February 2nd. Witnesses will testify that he was at a party that evening and asked Jane Doe's friends where she was. Members, the evidence will show that he left the party at about 11 p.m. …

NOTE: I will spare you the rest at this point and jump to the end. It is too painful to continue typing "The evidence will show" and "The witnesses will testify" over and over again.

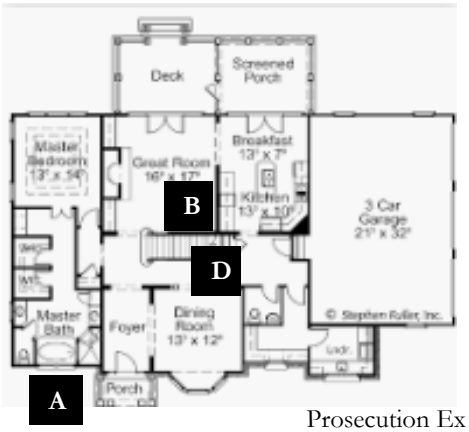
TC: … Broken glass, broken promises, and broken dreams. Mr. President, members, based on the evidence at the end of this case the only decision you can make is that the accused is guilty beyond a reasonable doubt.

Example 2

Judge: Trial Counsel, do you wish to offer an opening statement?

TC: *[Nods, stands up at counsel table and faces the members]*. On February 2nd, the accused struck Jane Doe in the head with a rock, leaving her bloodied and bruised on the kitchen floor in her home. *[Walks to spot in front of members, grabs evidence bag with rock in it on way, a pre-admitted picture of a broken window comes up on the courtroom drop-down screen]*. Late that night, the accused came to Jane Doe's house with bad intentions and this rock, Prosecution Exhibit Number 12, dressed all in black, black shoes, black pants, and a black sweatshirt with a hoodie pulled over his head. On arriving at her home, he took this rock and used it to break through a pane of glass in the back door of her home, a picture of which is shown here on Prosecution Exhibit 8. He reached through the broken pane, unlocked the deadbolt lock, and opened the door.

Prosecution Ex 8



Prosecution Ex 32

TC: Jane, who had been in bed asleep, had been awakened by the noise of the glass breaking and, not knowing what the noise was, walked downstairs to investigate. *[Floor plan of home replaces picture of backdoor on drop-down screen, TC walks over to screen]*. Thus, as the accused was coming through this back door, here at the spot marked "A" on Prosecution Exhibit Number 32, Jane had come down these stairs, marked here as "B," entered the kitchen and confronted accused here at the spot marked as "D." Though it was approaching

midnight and thus dark, the oven's night light here at spot "E" was on. Jane saw the accused in her house. Heard the crunch of broken glass as he stepped toward her. Felt the cold wind from that harsh winter night blowing through the open door. She yelled at the accused: "Get out my house!" He stepped toward her. She could see his eyes, wide with anger. Her breath caught, her heart pounding almost out of her chest. Out of the corner of her eye she sees a shadow coming toward her, pain explodes at her temple, her vision narrows, everything goes dark, she falls to the floor, unconscious, blood pouring from her head. The accused turns, runs through the door, drops the rock, escapes into the cold darkness. *[TC heavily places rock, with an audible "thud," on the ledge in front of jury box]*

TC: *[Picture of Jane Doe's head taken when paramedics arrived comes up on drop-down screen]*. After laying unconscious on that cold kitchen floor, Jane awoke, blood pouring from this deep gash to her left temple, shown here on Prosecution Exhibit Number 5. Slowly coming to her senses, knowing she needed medical assistance, she crawled to the phone and dialed 9-1-1. Paramedics arrived at 12:15 a.m., stopped the bleeding and transported her to the hospital, where she required 12 stiches to her temple, was diagnosed with a Stage 2 concussion and spent three days in a hospital bed recovering, hoping hour by hour that her head would stop throbbing.

TC: How do we know that it was the accused who struck Jane Doe in the head with this rock? Well, Jane recognized him, his height, his build, his eyes. More than that, a subsequent search of the accused home retrieved black shoes, black pants, and a black sweatshirt with a hoodie. *[Discussion of additional evidence, you should get the idea by now]* …

TC: Why did he do this? Why was he there that night? Why did he take this rock *[retrieving it from the edge of the jury box]* and smash it against Jane Doe's head? She had recently spurned his sexual advances and he stewed about this perceived humiliation, his anger growing, confessing to friends who knew of her rejection that she "would get what she deserves" *[uses air quotes]*. At a party at Frances Green's house earlier in the evening of February 2nd, a house only three blocks from where Jane Doe lives, he drank and drank some more, hurling invectives about Jane Doe's sexuality at Jane's friends who were at the party. And then he disappeared, no one can account for his whereabouts after 11 p.m. *[Discussion of additional evidence on this point, which is corroboration of identity though it sounds like motive … always nice to provide evidence of a motive even when it is not an element of the charged offenses]* …

TC: The evidence and the witnesses will tell you this story. It is a story that ends with you finding him *[gesturing]* guilty of burglary and aggravated assault.

/fin/

If you have not figured it out by now, Example 2 is better than Example 1. It does not bash the members over the head with theme or theory, or require them to

draw a flowchart to follow the analogies and metaphors a "cute" theme and theory of presents. It crosses into argument here and there, but not excessively (or for more than seven seconds). It drops the unrequired repetition of the affectation "Mr. President" or "Members" every time you start talking to the members and then sprinkled throughout the presentation (counsel who constantly preface statements with these affectations always sounds like used-car salesmen, trying to ingratiate themselves with a customer by repeating the customer's first name throughout a conversation—once is polite, best at the start of *voir dire*, thereafter it is overly indulgent). Example 2 tells an interesting and compelling story, concisely, presently dramatically from the start, and weaves in pre-admitted evidence—it shows as well as tells. It previews evidence and testimony without devolving to a bulleted list of "The evidence will show …" or "The witness will testify …" sentences. It is not boring. And thus the counsel who delivered it has gone far to establish credibility with the members. Counsel who delivered Example 1, not so much.

You can persuade without resort to (overly) argumentative language. A strong opening statement persuades without obviously arguing, but by presenting an "argument" through effective story telling. If you are effective, and have the facts on your side, the members will subconsciously know after your opening statement that they will bring back a conviction or acquittal not because you told them to do so, but because the evidence as you eloquently described it will require them to do so.

In a sense, you are making the members a promise with a more robust opening statement. You are promising them that the evidence will support the compelling story you have just told them. You should not be afraid to forcefully make that promise. You should have prepared to the point that you know the facts and evidence better than every person in that courtroom and so there is little risk in making promises about what is to come. These promises are not detailed, line-by-line assertions about what a particular witness is going to say. Rather, they are the narrative that tells the compelling story of the case—not at the treetop level, not at the 30,000 foot level, but at a level of detail between these extremes that allows you to explain why the evidence will demand the result you will ask for in closing argument.

Do not be afraid. Though you will sometimes hear the caution to under promise during opening statement in the hopes of over delivering during the course of trial, this is bad advice if taken to mean that an instantly forgettable 3-5 minute monotone flyby is an appropriate format for an opening statement. Under promising (though often appropriate for defense counsel opening statements) will leave the members unsatisfied and disappointed, will squander an opportunity to prepare the battlefield, and will fail to take advantage of an opportunity to build credibility with the members. "Under promise/over deliver" will cost you more than it will earn you. Make a robust promise (by telling the members in opening statement a story about what the evidence will show), deliver on that promise (by presenting that evidence), and then reap the benefit of promises kept (in closing argument and into deliberation)

.

A basic competence of trial lawyering is proficiently handling actual evidence. When you demonstrate this basic competence to the trier of fact, by weaving physical evidence into your verbal presentation, you enhance your credibility. When you offer the trier of fact an opening statement that is interesting, you enhance your credibility. And then when your opening statement is delivered with passion and purpose, and reminds the members of the soaring oratory and commanding presence of Clarence Darrow, you enhance your credibility. Come closing argument, you can hopefully trade those credibility chits earned in opening statement, and then over the course of a trial for persuasion points during closing argument and into deliberations.