

1-1-1987

What Your Opening Statement Should and Shouldn't Do: Some Surprising Advice

Steven H. Goldberg

Elisabeth Haub School of Law at Pace University, sgoldberg@law.pace.edu

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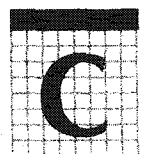
Recommended Citation

Steven H. Goldberg, What Your Opening Statement Should and Shouldn't Do Some Surprising Advice, *Crim. Just.*, Fall 1987, at 10, <http://digitalcommons.pace.edu/lawfaculty/414/>.

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What Your Opening Statement Should and Shouldn't Do

Some Surprising Advice



Civil trial lawyers long have touted the opening statement as the most important part of the trial. They contend that jurors inevitably reach a tentative conclusion about the case at the end of the opening statements and that this conclusion will significantly influence their final decision. Jury studies support this belief—jurors reach a conclusion after opening statement that is the same as their final decision in about eighty percent of the cases. Kalven & Zeisel, *The American Jury*, 1966.

Prosecutors and criminal defense attorneys would do well to consider how civil trial lawyers fashion their opening statements. As with any other part of the trial, the primary question to be answered in constructing an opening statement is: What do I want to accomplish? In civil cases the answer is almost always that each lawyer wants to persuade the jurors that the lawyer's version of the dispute is more likely to be correct than the opponent's. Opening statements in criminal trials, however, do not usually sound as if they were constructed with that goal in mind. Most fall into two categories: (1) long and detailed recitations of the evidence and the witnesses who will produce it, and

(2) perfunctory appearances to comply with the trial list of "things to do" that includes "give opening statement."

"Beyond a reasonable doubt" is not helpful

An opening statement goal of having the jurors reach a tentative conclusion that the proponent's "story" is more likely true than the opponent's makes sense only if one believes that in most criminal cases, jurors naturally follow a civil standard despite what court and counsel tell them about proof beyond a reasonable doubt.

I do not mean to suggest by this foundation assumption for criminal trials that jurors consciously ignore "beyond a reasonable doubt"; nor do I mean to suggest that they do not try hard to apply the standard and to explain their verdicts in its terms. I do suggest that the natural human pattern of decision making is to process information and reach a conclusion without precise concern for a conscious level of certainty and that the normal de facto standard for deciding matters of any importance is "more likely than not." The process is so natural and subconscious that it is unlikely to be "educated out" by a lawyer's en-

treaties. The criminal standard, therefore, is a poor guidepost for constructing the persuasive parts of the criminal trial for either prosecution or for defense.

The "burden," unfortunately, dictates the shape of most opening statements. Prosecutors, with a wary eye on what they perceive to be a difficult burden, present every available fact in the opening, no matter how slightly related it is to any element of the crime or to any possible counterargument that an overly creative defense might suggest. The law in many jurisdictions, that failure to allege sufficient facts in the opening to prove every element of the crime will result in dismissal, contributes to this passion for completeness. Concentration on the many trees of evidence, however, takes the prosecutor's mind and the jury's attention from the forest of the case. The "burden," as often as it seems unbearable to the prosecution, seems a treasure to the defense. Not wanting to squander the gift, the defense believes that its opening statement should begin to create doubt in the case by emphasizing what the prosecution has not done. This tendency to counterpunch and emphasize the negative is exaggerated because the defense either believes it has no story to tell

BY STEVEN H. GOLDBERG

or because it does not want to tip its strategic hand—a problem unknown to the discovery deluged civil system. Defense opening statements, therefore, rarely give the jury anything to consider and accept as plausible.

Sell one theme

The importance of a single theme applies equally to prosecutors and defense lawyers, though the defense must overcome some attractive distractions to accept the proposition.

The prosecutor's opening should concentrate on developing a theme that will cause the jury to want to convict in the particular case, rather than trying to cover all the bases and present very scintilla of evidence that will be offered at trial. "Law and order" as a general idea is insufficient. The prosecution's opening must wrap the people and the facts of the particular case around values that the jurors wish to preserve in their society: freedom from fear, sanctity of home, treasure of life, etc.

The defense lawyer is tempted to wait and see what the prosecution does before committing the defense to any one theory. The government has the full burden of proof. Strange and unexpected things have been known to go wrong with government cases. The defense, because the government has little discovery in the criminal justice system, may have a rabbit that will have no hat to hide in if shown to the prosecution during opening statement. Conceding that both possibilities are occasionally realistic and acknowledging the rare "no defense" trial, in which the defense has no evidence and no chance, in most cases the defense ought to proceed on the assumption that it must prove to a jury that its version of truth is more likely than the prosecutor's.

"Its version of the truth" is not so simple for the defense as it might seem. It requires dismissing the ad-

vantage of "beyond a reasonable doubt" from the opening statement. Jurors are unlikely to be persuaded by a position taken in the alternative: "They did not prove it, but if they did, my client was crazy." "They did not prove my client shot him, but if he did, he was acting in self defense." "They did not prove it, but if they did, my client was acting under duress." Though no one would state the propositions quite so boldly, even the subtle suggestion of alternative positions is harmful. The advocate who tries to sell two ideas at once robs each of a measure of conviction and appears less than credible for the effort. Even the "no defense" position "he did not do it," is, as a matter of persuasion, inconsistent with the assertion that "they didn't prove it." Not even the best story teller can tell two at a time.

The opening statement is the first time that the lawyer has to sell the client's single theme to the jury. (Voir dire may provide a place for hints, but it is not a selling vehicle.) To take full advantage of the opportunity, the opening must grab the attention of the jurors, maintain their interest, and create a presumption that the presentation is "right." Nothing is more critical to that enterprise than an engaging first paragraph. If the persuasive rule of primacy is correct, if the first to speak about an issue sets the agenda for all, if the first impression creates the perspective from which the listener hears the remainder of the statement, then the first paragraph of the opening is the most important moment of the trial.

Consider the matter in context. The opening of the opening usually follows voir dire. Even in those jurisdictions in which voir dire is truncated by court rule or custom, the lawyers and the parties have been introduced to the jurors and the jurors have been told about the nature of the dispute. As the prosecutor approaches the jury to make an opening statement, the jurors' attention is as keen as it will ever be. They have just been chosen, the judge tells them that each

lawyer will now have a chance to tell them what this important matter is all about, and they see someone coming forward to shed the first light on the mystery.

For the prosecution

May it please the Court. Good afternoon, Ladies and Gentlemen of the jury. Let me reintroduce myself. I am Paula Prosecutor, and I represent the good people of the State of Confusion. As the judge told you, this is the time in the trial when I have the opportunity to make what we lawyers call an opening statement. An opening statement is a bit like the cover on a jigsaw puzzle. It is a representation of what the jigsaw puzzle will look like when all of the pieces are put together. But it is the trial that is the actual jigsaw puzzle box. Each piece of evidence will come in and will have a place in the whole picture. You should understand that it is those pieces of evidence that constitute the real picture and you should watch as they come together. What I have to say in this opening statement is not evidence. The evidence comes from the witnesses who testify. This opening statement is just a representation, like the cover of that jigsaw puzzle box, to help you put those pieces of evidence together.

Wasn't that a grabber? With a possible change of analogy from jigsaw puzzle to road map and a twist for the method of introduction, the preceding example captures the first paragraph of too many prosecution openings: unimportant, uninformative, unimpressive, unarresting, and condescending. The jurors have just learned that: (1) the prosecutor assumes they are incapable of remembering her name or what the judge just told them; (2) the prosecutor is a lawyer who, by virtue of that high office knows what "opening statement" means and is, by the by, apart (elevated?) from the jurors; (3) the opening statement, like a preview, is only an edited teaser with which the prosecutor thinks

she can "help" the not so bright jurors to understand the complicated evidence to come; (4) the time to pay attention is when the evidence starts coming in; and (5) the case may be about a jigsaw puzzle.

The best that the prosecutor can hope for is that the jurors have not lost all of the anticipation they felt before she started to talk. Why not begin by saying something important and interesting to the jurors who have just been picked for the express purpose of deciding whether Benny Burglar broke into the house of Harry and Hilda Homeowner and took jewelry, electronic equipment, paintings, and other assorted items of personal property? The prosecutor should acknowledge the court by a courteous, "Thank you, your honor," when the court asks the prosecutor to make an opening statement and then begin by talking to the jury, not to the court:

Hilda and Harry Homeowner drove into their garage at 11:30 p.m. on Wednesday, July 8, 1987. They were happy, returning from a rare evening with their grown children, all of whom had come back to Chaos for a summer visit. Hilda was first to get out of the car and go towards the house. At the backdoor her happiness ended. Her heart jumped to her throat as she realized that the door was already open and that rooms in her home that had been dark when they left were now lighted. She called to Harry, and then in fear that someone might hear, she hurried back to the garage. The Homeowners decided to go to a neighbor's house to call the police—better to risk a false alarm than enter their home and be attacked by a stranger. It was not a false alarm. When the Calamity County sheriff's deputies arrived, they found the home had been forceably entered, and that a number of valuables, including Mr. Homeowner's great grandfather's retirement watch and Mrs. Homeowner's coin collection had been taken. Four weeks later, Benny Burglar was arrested and charged with breaking into the

Homeowner's home and taking Hilda and Harry's personal possessions. As the people's attorney for Calamity County, it is now my privilege to tell you about the evidence we will present to prove to you that beyond a reasonable doubt, Benny Burglar broke into the Homeowner's home, took possessions they held dear, and is, therefore, guilty of burglary.

The storyteller's approach allows the prosecutor to convey a number of things that are important for persuading the jury. The jury knows immediately that someone was hurt and that the hurt included a reasonable fear in addition to a personal loss. The jurors are put into the victim's shoes because it is a scene that most jurors have experienced, at least up to the discovery of the break-in. Although there are details to be provided in the remainder of the statement and in the case, the jurors have a complete idea of the problem and the solution. Further, some of the details that cause prosecutors to begin with introductions and formalisms have been covered. The jurors know that the lawyer, even if they have forgotten her name, represents the "people" and talks like a person—like one of them. For those prosecutors who believe they are required by law or custom to tell the jurors that they are not presenting evidence, but only a description of the evidence they anticipate, it is covered without effectively telling the jury that it is all right to tune out because the evidence that will come in later is more important than the opening statement. The first paragraph puts the jurors in the mood to hear any details that the prosecution decides to include in the remainder of the opening statement and will have a context to which those details can be attached.

The defense's opening

The same principle of a useful first paragraph applies to the defense, though the defense must make a different assessment of the context. The defense rises after the prose-

cutor has succeeded in putting the jurors tentatively in the government's corner. It is tempting to begin to counter the points that the prosecutor has made. It is a bad idea. The defense cannot afford to let the prosecution set the agenda and define the jurors' perspective. If the defense has a theme to sell to the jury—self defense, alibi, mental illness, justification, mistaken identification, police vendetta, sloppy investigation, or even "reasonable doubt"—the defense should begin the positive presentation of the idea in the first paragraph of the opening. Even the "reasonable doubt/no defense" defense, though it is not as amenable to the positive approach or to storytelling as any of the other defenses, can be presented with a positive first paragraph that begins to tell the jury about the American system of justice and the burden of proof:

Benny Burglar will not testify in this trial. Benny Burglar will not present any witnesses in this trial. Benny Burglar's life, reason, excuses, friends, likes, and dislikes are not here for you to judge. Someone broke into the Homeowner's house and took their things. The only question before you is who did it. The prosecutor will not present a single witness to tell you that he or she saw Benny Burglar in the Homeowner's house. No one will tell you, with the certainty of sight, what took place or who it was that committed the crime. Under the American system of justice, it is the prosecution's job to present other evidence that will persuade you beyond a reasonable doubt that you, the jurors, not the police or the prosecutor, but you know who it was that broke into the Homeowner's house—know with the certainty that comes from no reasonable doubt.

A more helpful example is the mistaken identity defense. It is almost as hopeless as the "no defense" defense and it is, therefore, tempting to think of it and present it as another version of the "prose-
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cution has the burden" theme. A more positive storytelling approach will work better. The defense should begin its opening to the jury with the idea of selling the idea that a mistake has been made, rather than trying to get the jury to find a "doubt" because the prosecution, by virtue of the possibility of a mistake, has not met its burden:

Nosey Neighbor was dozing off in front of her television set at

about 11:00 on Wednesday, July 8, 1987. She had spent the entire day working at Emily's Dress Shop in Disaster, just outside of Chaos, had spent most of the evening at her bridge club, and was not succeeding at staying up to see Johnny Carson. Something interrupted her nap—she doesn't know if it was a loud outburst of laughter on the T.V., the cat knocking something over, or

whether it was something outside. But she did awake with a bit of a start. Nosey lives directly across the street from the Homeowners. Both houses are on large lots, so as Nosey sat near the front window in her living room, she was about one hundred and fifty feet—roughly five times the length of this courtroom—away from the front of the Homeowner's house. She thought she saw

a figure leave through the side door of the Homeowner's residence. The street is not particularly well lighted, but there was enough moonlight so that Nosey could tell with certainty that it was a man. Although it makes no sense to speculate about what she might have seen or not seen, we do know that Nosey was not sufficiently alarmed about the event nor certain about who or what she saw to call the police to report a disturbing event nor to identify or describe the man she saw. Four days later, in response to an inquiry from the police, Nosey explained that she saw a tall man she did not know leaving the Homeowner's. When she was asked to come to the police station because the police thought they had the man who broke into Homeowners, she agreed to see if she could pick out the man she saw. Nosey was taken into a room and five men were brought out and stood up against a wall for Nosey to look at. After some time, Nosey identified the tallest man as the one that she saw coming out of the Homeowners. . . .

If the beginning of the opening statement is properly constructed, the remainder will flow naturally, simply, and effectively. There are three storytelling rules that are imposed by the forum or set by the rules of persuasion that are worth a brief review: (1) never argue in an opening statement; (2) never deliver more opening statement than you have case; and (3) handle your case's problems in the opening.

Persuading not arguing

It is well known that an opening statement may not be an argument. Many judges enforce the rule strictly. It is important for the advocate to distinguish between argumentative and persuasive; stay away from the former and be the latter. Judges and lawyers often confuse the two, sometimes to the detriment of a lawyer who is "winning the argument" without being impermissibly "argumentative." The statement that, "Nosey Neighbor

could not have seen the person leaving the Homeowner house well enough to identify him," is a conclusion to which no person can testify. It is argument and has no place in an opening statement. "Nosey Neighbor was 150 feet away from the house, the street was poorly lighted, she had just awakened from a sound sleep, and did not have time to put her glasses on," is something that someone can testify to and is not argument. It also can be very useful in achieving the opening statement goal—a jury with the tentative conclusion that this is a case of mistaken identity. The second example does all the first does, arguably does it better, and it is entirely permissible.

There are substantial reasons of persuasion for using facts rather than argument in an opening to a jury. It is too early for the jurors to accept a conclusion without a factual basis. The jurors have only the attorney's avowal that Nosey could not have seen well enough to make the identification. Even if they are going to have confidence in and believe the lawyer at some point in the trial, it is not going to be at the beginning, at a time when they have no experience with the lawyer. Further, it is more effective persuasion to have the jurors reach the conclusion for themselves. A conclusion accepted from the advocate's assertion will not be held as dearly as one reached by the juror from a personal processing of the facts. The key to a persuasive opening is the "argumentative" organization of admissible facts.

The "no defense" defense presents the one situation in which the lawyer is likely to creep over into the argument realm by talking about things that will not come out as evidence. To some extent this is recognized and tolerated in most courts—so long as the lawyer does not abuse it. Even in this situation, it is more useful to think about the failure of proof in factual terms, and to either discuss the "fact" that you will present no evidence, or detail the "facts" that the prosecution will not be able to present—no eyewitness, no fingerprints, etc.

Don't promise without delivering

The opening statement that promises what the advocate does not eventually deliver in the case causes the lawyer more trouble than the benefit that might come from the jurors being confused about whether something was actually in evidence or just mentioned by the lawyer in opening statement. Though it is not clear that a lawyer must develop a positive credibility with a jury, it is clear that a lawyer who is viewed as trying to deceive the jury will scuttle an otherwise airtight case.

This problem exists almost equally for prosecutors and defenders. The prosecutor offers most of the evidence and is, therefore, more likely to be the victim of the slip that often occurs between cup and lip. The defender, on the other hand, will often be offering facts in an opening that can only be developed through cross-examination. The volume of evidence is less than the prosecutor's, but the chance of a slip is considerably greater. There are two ways to diminish the risk. (1) Button down as much as possible before trial so that the risk that you will predict something from cross that does not happen can be offset by impeachment material. (2) After you have written and at least twice delivered your opening statement (to a human being, not to a lawyer), scour it for risk and remove the offending allegations.

Handling problems

It is by now axiomatic that an advocate ought to put the bad parts of the case before the jurors before the opponent does. The opening statement is the one place where the lawyer is almost assured of being the one to raise the problem. (It is difficult, without being argumentative, for the prosecutor to raise defense "problems" in the opening.) It is not sufficient, however, to be the lawyer who raises the problem. It may solve the problem of jurors thinking the lawyer is trying to hide some-

thing, but it does nothing for the damage the information could cause. The trick is to present the bad information in the opening without acknowledging that it is "bad" and with the most positive slant available. In the current jargon, with a "positive spin." The prosecutor who has a plea-copping three-time loser fence as the major witness must, in the opening statement, set up the "crooks hang out with crooks" argument that will be made in the closing, and simultaneously deny the defense the pleasure of "disclosing" the unsavory character to the jury:

Benny Burglar knew exactly what to do with goods he could neither use nor sell to honest people. Two days after the Homeowner burglary he was meeting with Freddie Fence—a man so long established in the business of buying and selling stolen goods that he had been three times convicted of receiving stolen prop-

erty—what most of us call fencing.

The defense is more often in need of positive spin for a bad fact:

The prosecution has not charged Benny with being a burglar. And it is just as well, because Benny has three times before admitted and, therefore, been convicted of breaking into houses and taking things that did not belong to him. He has been a burglar and if that history were a crime, he would be guilty again. But the prosecutor has charged Benny with this specific burglary—with breaking into the Homeowner's house. In our society we do not convict people of being bad people, we convict them of specific bad acts. The importance of that for fairness will be demonstrated in this very case. The three previous times that he was accused, Benny admitted that he had done what was charged, pleaded guilty, was convicted and took his medicine. To this charge

that he broke into the Homeowner's home he—for the first time—said, "No," when he pleaded "Not Guilty." He will say "No," again today when he testifies. He will not only tell you "No, I did not break into the Homeowners," he will tell you that he has been a burglar in the past—a fact that you would never have known, but for his testimony today.

No suggestion is made that a positive spin on a bad fact will change a losing case into a winning case. But the lawyer who puts the bad things forward avoids appearing to be hiding things, gains points for being forthcoming, and is able to set the perspective from which the jurors will view the bad fact.

Make sure your opening statement tells a positive story. Use a storytelling technique. But be sure not to tell the jurors that you are telling them a "story." A "story" is what the other lawyer is handing them. CJ