The Opening Statement

Taking Control of the Narrative

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At trial, the parties grapple in the present for control over how the events of the past are to be understood. How do you take control from the start?

You have to rule the opening statement. After all, you give it at a moment in the psychology of the trial that never comes again. The jurors are in an unfamiliar setting and are a bit nervous or excited. They do not know the characters in the drama from the past that will be imperfectly recreated in the courtroom. And they do not know the characters in the present drama that is beginning to unfold before them, the professional battle between the lawyers. It is during these precious minutes at the start that the jurors are most willing to listen, to take in new information, and to consider new ideas.

To be sure, in a criminal case, some may have come into the jury box with the idea that the defendant is probably guilty. Some may be thinking why else would that nice, clean-cut prosecutor have brought the case? But, despite such unspoken thoughts, jurors by and large take their roles seriously and want to do the right thing. Your role, as defense counsel in a criminal case, is to persuade them that the right thing to do is to acquit. In your opening, you have to let them know that the case is not as open and shut as the prosecution has just claimed and that there is so much more to the story worth thinking about.

Some urge that it is wise to stress the government's heavy burden of proof rather than to be too specific about what the evidence will show. This reticence is born of the reality that counsel can never know for certain what will develop at trial. No matter how many documents and witness statements the government turns over, there will always be surprises, good and bad. And counsel cannot venture from where the evidence takes the case. The jury will never forget an unfulfilled promise. What's more, an excessively detailed recitation of the evidence in the opening statement may also have the subliminal effect of shifting the burden of proof from the prosecution to the defense. After all, if you know so much about the evidence and can make so many promises about the case, you'd better deliver. So, what to do?

Dampening the Flames

The prosecution has put forth an incendiary story, and you have to dampen the flames. You must explain why the prosecution's narrative should be rejected outright. An effective opening has to have real substance. It takes account of the "bad" proof and weaves it into a coherent account of events. In short, one way or the other, you have to offer a counter-narrative, and it must be

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A Judge Comments

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Ms. Brune offers thorough and comprehensive guidance. As she aptly emphasizes, opening statements are critical and often underused. They are critical because they are your first opportunity to present your theory of the case in a cogent and persuasive manner. They are underused because many attorneys fail to frame their cases effectively and thus actually cause jurors to miss the importance of evidence later presented.

It is often, and incorrectly, said that jurors are blank slates. Rather, each of the jurors has some information or experience that is already written on the slate. Added to that are the ideas about your case the jurors have gleaned through voir dire. Opening statement is your first and best opportunity to develop your theme of the case and to establish your credibility with the jury.

Jurors know that depictions of trials in movies and television dramas are inaccurate, but few of them are prepared for hours of detailed and disjointed information followed by a "test"—that is, their deliberations and verdict. Your job in opening statements is to give them the framework to distinguish key points of evidence and then, later, to recognize those key evidentiary points as the "answers" to the questions on that test.

Jurors are more likely to be persuaded that you are leading them through the fog of seemingly random details if they believe they can trust you. In interviewing thousands of jurors, I've found that there is no single style or mannerism that instills trust with a jury other than a perception of genuineness. Jurors have responded positively to serious, earnest, professorial opening statements as well as down-to-earth, simply stated openings. Jurors uniformly distrust forced drama and condescension toward anyone in the courtroom. You need to find the style that works best for you that is engaging, professional, and, most important, genuine.

As Ms. Brune details, a critical step in your preparation must be familiarizing yourself with the courtroom. In some courts, you will be confined to a podium; in others, you are free to move about the counsel table and even the well of the courtroom. If you are not confined to a podium, I highly recommend using physical space to punctuate your opening statement. Jurors' attention is automatically drawn to movement. It serves as a visual paragraph break in your presentation.

It is important to note that it is a paragraph break, not a word

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done at the earliest possible moment, else the trial won't be won.

The prosecution has an inherent advantage. The prosecution almost always has superior control over what evidence will be presented and, as a result, is naturally in a better position to predict in opening what will unfold through the testimony and the exhibits. But, today more than ever before, defense lawyers are able to make accurate predictions too and to make openings packed with persuasive specifics.

More and more, human communication is captured in one form of text or another; as a consequence, much of the available proof is static, right there on paper—or at least on virtual paper. Email and, increasingly, social network postings, instant messages, text messages, chats, tweets, and all the rest have changed how prosecutors make cases and how defense counsel can unmake them. There are millions and millions of pages of documents, and among them there is evidentiary support for the defense. So there is less reason to hold back and every reason to lay out a powerful case right from the start.

To succeed, though, your opening has to rest on accurate predictions of not only what the exhibits but also the testimony will be. That is not to say that you have to refer with any specificity to testimony, but you do have to take it into account. The good news is that you can also predict testimony fairly accurately. At the time of your opening statement, sometimes but not always you will have witness statements (what, in federal court, is called "3500 material"—a reference to the federal statute that requires the prosecution to turn over the content of prior statements by government witnesses). Prosecutors routinely delay turning this material over until the last moment they can get away with. And given how much else the defense has to do to make sense of increasingly intricate fact patterns, especially those that underlie most white-collar prosecutions, that practice really should be ended except in rare cases where there are legitimate concerns about witness tampering or intimidation. But whenever you get them, it is important to see that the witness statements are really just a part of the whole—a whole that often has more content in the emails and other electronic evidence than in the actual witness statements themselves.

The opening is a beginning, but at the same time it is a culmination, a moment when all of the preparation is distilled into a statement of intent. The lead-up to the trial has included countless hours with the client, listening and learning; pounding through tall waves of documents, all the while thinking about the prosecution and the defense narratives; visiting the places where the key underlying events took place and intuiting how it felt to be there at the relevant times. Investigating. Prying loose additional discovery. Reviewing what the prosecutors

have said and anticipating how they will put their own case together. Imagining where the surprises might lie. Deciding what to accomplish in each cross-examination. Identifying potential defense witnesses. Getting ready for expert witnesses. Drafting motions in limine, anticipating evidentiary issues, and writing proposed jury instructions. Planning for summation. In short, getting ready for trial has demanded nothing less than a complete obsession with the case. Preparation has consumed many months or even years. How can all of this detail, all of these possible ways to make sense of the facts, possibly be conveyed in an opening statement?

A good opening does not purport to catalogue the proof or to make every salient point. No juror could possibly absorb all of that in one sitting. You have to describe the proof accurately, of course, but ultimately what matters is that you offer a human story, one that resonates with real-world experience.

In opening, the prosecutor will have begun by talking about "lying," "greed," or the like and will have concluded by urging the jurors to "use your common sense." (The prosecutor almost always repeats this "common sense" admonition in summation.) This formulation amounts to little more than a thinly veiled invitation to use surmise and prejudice to fill in the gaps in the prosecution's proof. No matter. You, too, must advocate for the use of common sense, and you can do it by appealing to reason.

In your opening, focus on innocence—that is, on offering a reasoned and reasonable alternative to the sinister picture that the prosecution has just painted. That is not to say that you should be imprecise about the burden of proof or ever allow it to shift. There can be no suggestion that the jury has to decide which of two scenarios is more plausible or that the defense must prove anything at all. After all, by summation, the focus must rest exclusively on the prosecution's burden of proof.

The court's jury instructions on reasonable doubt will ultimately assist you in this. The judge will refer to "a doubt for which there is a reason." So you'd better make sure that there is a reason—and a reasonable reason at that. That means that your opening has to be grounded in the evidence. That does not mean that you must remove your passion in delivery. To the contrary. A defense lawyer must believe deeply in his or her case and convey that belief with every word and gesture during the opening and, indeed, throughout the trial. But the fundamental message has to be that acquittal is necessary not because of passion but because of reason.

As you think about how to lay out why the reasonable course—indeed, the right course—is to acquit, you have decide how many and which words to use; what to concede and what to dispute; how to move beyond words; and, finally, how to deliver your opening statement in a way that is compelling.

Often, prosecution openings are compact, with certain formulas built in. "This is a simple case." "This is a case about

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or sentence break. Pacing or casually strolling about distracts the jury from your message. Rather, you should divide your opening statement into its main sections: for example, recounting past facts, anticipating future testimony, and summarizing your theory of the case. When you complete a section of your opening, move, even just a little, to a different area in the courtroom and present the next section. This physical tactic signals to the jury that the focus has shifted, provides a brief mental break for them, and helps you present your opening in an organized and coherent manner.

In all instances, and especially if you are confined to a podium, use visual aids as emphatic punctuation to your opening. Visuals should be used as you would use exclamation points or bold type—sparingly, for real effect. As with movement, overuse of visual aids is a distraction to the jury; targeted use effectively focuses jurors' attention and commits the point to their collective memory.

Finally, while cases cannot be clearly won during opening statements, there is one thing that can virtually guarantee a loss: overpromising. This is far and away the one flaw that affects jurors most strongly and negatively. It is a breach of the jurors' trust that discredits everything you presented.

Following Ms. Brune's preparatory steps and these additional suggestions about fine-tuning your presentation may require great effort, but a strong opening statement is essential to preparing the jury to sift through the details presented at trial and to understand your theory of the case. ■

lying" or "about greed" or "about cheating in the stock market." This brevity reflects a strategic choice or, at the very least, the prosecutor's world view. As the prosecutor would have it, there is not a lot of complexity or nuance involved. According to the prosecutor, the defendant is just plain bad and the crimes are obvious. It doesn't take much to lay out a "simple" case.

The length of your opening will depend, of course, on the facts of the case and the charges, but counsel with something to say should say it and take the appropriate time while saying it. You can gain the upper hand by informing the jurors of important facts that the prosecutor, in trying to present a crisp, compact opening, failed to present. Start by offering an implicit but powerful contrast to the prosecutor's opening. Don't be rigid, sticking only to prescribed formulas. Instead, tell a specific and resonant story, one that is reasonable and grounded in the facts.

Careful Word Choices

In telling the story, you must be cautious about your word choices. Who is the defendant? He is certainly not "my client" or "the defendant." All these constructions do is reinforce that he has been accused of a crime and now looks to you as the hired hand to get him out of trouble. No. The defendant is "Mr. Jones" or even "John," a person who has dignity, feelings, and humanity.

The same is true for the witnesses. Your introduction of each one must be done in a way that comports with your account of events. So, depending on your facts, the witness may be "a member of the clerical staff," "a sales assistant," or "a broker." And the next witness might be "the order taker on the trading desk," "a trader," or "the person responsible for making the trade." In both examples, depending on the facts, all three formulations can correctly be applied to the same witness.

It should be obvious, but it bears repeating anyway, that it is not particularly persuasive for defense counsel to state that the defendant is a "good" or "honest" person. Moreover, to make such an assertion is to take on a burden unnecessarily. Likewise, it is not ordinarily persuasive or useful to call someone in the fact pattern a "bad" person or "a liar"—such assertions can have the tendency to shift the burden to the defense. Jurors tend not to want to hear schoolyard name calling by the lawyers, particularly before the jurors have seen or heard any evidence to back up the epithets. What you want to do is to tell the story, with the right words and in the right detail, in such a way as to help the jurors reach those conclusions on their own.

While the word choices may seem subtle, they matter. Consider this: What is the difference between "a customer" and "a client"? In Wall Street parlance, these words are often used interchangeably, but they convey very different kinds of relationships. Or what about a document? Is it "a form," "an account opening document," or perhaps "a customer agreement"? Does a person "convince," "persuade" or "explain"? And what does it mean to do something rather than "to choose to" do something? The words are specific to each fact pattern, but they must be selected in a precise fashion, consistent with the defense narrative.

Your opening strikes a delicate balance of introducing the defense themes without becoming too bogged down in the specific details. You will have plenty of time for details, but now is not the moment. It is also not the moment to respond to every one of the prosecution's contentions. In fact, to structure an opening that way is to play right into the prosecution's hands. Your opening needs only to stake out where the battleground is going to be and to preview why, as a matter of reason, the defense should ultimately win.

Essential to defining the contours of the battleground is a considered decision about what territory to concede. Concede too much and the defense opening can become a second prosecution opening. Concede too little and the defense opening narrative has failed to take into account the prosecution's evidence and thereby loses crucial credibility. This is a case-specific determination, of course, but a rule of thumb is that there should be some or even much agreement on objective fact. And there should be plenty of disagreement on intent and, at times, on actions. The narrative arc should be compelling emotionally and take into account how people behave in the real world.

> Ultimately what matters is that you offer a human story, one that resonates with real-world experience.

I noted before that calling a witness a "liar" is rarely a helpful move, especially in your opening. Aside from it being a highly charged thing to do, you might box yourself in if you've designated a witness a liar but later are able to get valuable concessions on cross-examination. Depending on the circumstances, though, the case can be or may have to be positioned as rising or falling on the credibility or reliability of the government's cooperating witness. Doing that means you have conceded that you cannot win if the cooperating witness is credited. But, sometimes, it can be the right or even the only thing to do.

But what if there are multiple cooperating witnesses? Are they all incredible and unreliable? Coming at the problem of cooperating witnesses a bit less directly, with a strong coherent narrative, may be more effective. In this approach, the defense's account of events implicitly takes account of the cooperating witnesses' anticipated testimony but rests on something more reliable: the facts that can be gleaned from the documents and other surrounding context.

However you choose to deal with these witnesses, it is crucial to convey a sensible understanding of why the fact that a cooperating witness has chosen to plead guilty does not mean that your client has to be likewise guilty. Were the cooperating witnesses simply mistaken when they chose to plead guilty? That seems hardly plausible, although it is a possible approach, given the penalties the cooperating witnesses face and their obvious fear of prison. An easier and more intuitive path, if it is available, is to focus on how the cooperating witnesses differ from your client. Were they involved in wrongful actions that your client was not involved in? Does their anticipated testimony not actually bear on what is important about your client's role in the events? Depending on your facts, you may also be able to flag for the jurors that a cooperating witness felt compelled to "remember" new facts in order to please the prosecutors whose views will play an outsized role at sentencing. Key facts that jurors will hear in the cooperator's direct testimony are often nowhere to be found in the detailed notes of initial interviews of the cooperator.

Whatever choices you make, the opening should be more about the facts than about particular witnesses. Plenty of cases that feature dazzling defense cross-examinations also feature swift guilty verdicts. Jurors naturally enjoy the excitement of a good courtroom drama, but the drama that ultimately matters to them is in the past—in the facts—and properly so.

Engage the Jury Visually

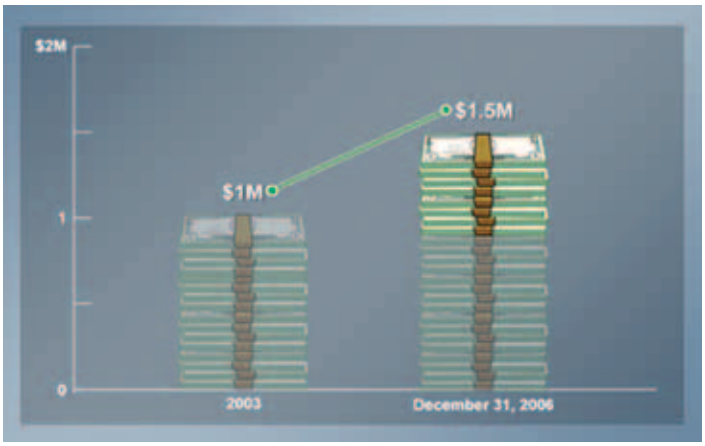
Trials in general and openings in particular are creatures of an age that has mostly passed. In what other context are people told to isolate themselves from Internet search engines and social media, and instead decide something important simply by listening and reading documents? In what other context are people forbidden even to discuss their thinking, let alone told not to "crowd source" their thinking using social networking? And in what other context are people told that they are supposed just to sit, for weeks or months at a time, and focus only on one thing, without the usual distractions and pleasures that come from electronic multitasking?

It has often been said that jury addresses have to be visual, and this is an occasion to say it again. Few among us in these modern times learn or are persuaded by listening to speeches. If the Lincoln-Douglas debates or FDR's radio fireside chats took place today, they would likely not be the same defining cultural phenomena as they were in their times. We form our impressions primarily by looking, whether at events as they unfold in front of us in real life, at the printed page, or at a television or computer screen. In fashioning an opening—and, indeed, throughout the trial—you have to take that reality into account and use appropriate visual aids.

For example, what if the defense's theory is that a particular hedge fund investment of $1 million in 2003 would have grown to $1.5 million by the beginning of 2007? Well, those are just words in a sentence and, worse, words in a sentence with numbers. The right chart conveys information in a way that words alone cannot.

Take this chart for instance:

Fund Gains



With a simple picture, you've just brought your words to life in a way that may be much more meaningful to the jury, particularly if core defense themes are riding on your statement. Here, the investors were big players, able to take risks for which they had been well rewarded. And it was reasonable for anyone, especially the defendant, to believe that the fund's prospects would continue to be favorable: The fund had an admirable three-year-long track record.

Of course, each theme need not be put into words every time a visual aid supporting it is shown. Sometimes, making a point and then reinforcing it using a visual aid or, better, a series of such aids is the right way to go. You can use timelines, charts, pictures, diagrams, or just about anything. One of the most powerful visual aids is the actual evidence itself. Making use of such aids during the opening sends the message that the defense is not afraid of what the evidence will show, that, in fact, the evidence supports the defense.

Showing a document in your opening should not be objectionable, provided the document will later come into evidence. After all, outlining what the testimony is expected to be has

long been a standard part of opening statements, even though in actuality no lawyer can know in advance exactly what words the witnesses will use when they finally speak from the witness stand. With a document, in contrast, there is no need for guesswork or prediction. It says what it says.

Technology, now available in many modern courtrooms, makes this much easier for you to accomplish. Typically, there is a projector screen somewhere in the courtroom, and some courtrooms provide an individual television-type monitor in front of each juror's seat. This convenience makes viewing demonstrative aids much more natural and comfortable. In fact, a personalized screen makes your evidence more compelling to review, so much so that most jurors will tune you out while taking in what's on the screen. That doesn't mean you should avoid visual aids, but it does mean that you should be aware of their power and that you should have them removed when they are no longer essential to your presentation. Remember, you control the visual aids; the visual aids do not control you. There should be plenty of moments when no visual aids are displayed and all eyes are on you.

Preparation

Your opening must be given from memory and from the heart. But how do you move from making the crucial choices about how to structure the opening, how to choose specific words, how to order all of the visual aids, to delivering it in a way that compels?

Once you have written out the full text, as is most certainly necessary, review it again and again and again. There is no substitute for saying the words out loud, not only so that you become familiar with what you plan to say but also so that you catch clumsy phrases, clunky transitions, and pointless observations. After each review, the opening becomes tighter and more comprehensible.

Then take that draft to task. Present it out loud and with the visual aids before others who have been primed to offer unsparing comments about what was boring and what did not make sense. Your audiences should include lawyers and non-lawyers, and for some of the sessions, you should leave the room to create a more candid environment for feedback. In those sessions, ask a colleague to take the audience's feedback and report it to you. Run-throughs will generate changes and then more run-throughs, but there will come a moment when you will know that the text is almost ready.

Take the close-to-final draft and cut it down to a very sparse outline or perhaps no outline at all. Take reduced-size versions of the visual aids, perhaps along with a few key phrases distilled from the outline, and put them into a notebook to be used in practice and ultimately at the podium. That way, you see what the jurors will see without unnecessarily breaking eye contact to read from a screen. Unless you have a truly photographic memory, what you say in the moment will differ from the text of the draft. That is OK. After all, you are not trying to make a perfect stenographic transcript. You are communicating, and your words have to come out naturally and conversationally.

Another essential part of the preparation is to go to the courtroom a few days in advance. Figure out where the podium will be. Look to see if it has a microphone. Can the podium and microphone be adjusted? Find out what rules the judge imposes about where to stand and how far you can stray from the podium. Are there monitors to display the visuals and, if so, where are they? Consider where poster-size visual aids will be stored and how they will be displayed. Imagine yourself giving your opening and anticipate where it could go wrong. Imagine yourself giving the opening and anticipate how it will go right.

Your opening must be given from memory and from the heart.

The final part of preparation happens right in the courtroom. Listening—and listening intently—to the prosecution's opening and that of counsel for any codefendants, is a nerve-wracking but indispensable part of preparing. After listening, you must adapt. You may have to address new prosecution theories or, sometimes even more important, omit responding to prosecution theories that seem to have been dropped. You may have to eliminate material already covered by cocounsel or to harmonize the presentation to account for what has already been said. As a result, almost inevitably, you may decide to jettison whole sections of the opening or to add or subtract demonstrative aids. Depending on the number of visual aids, and if you have not previously obtained consent from the prosecutor or permission from the court, you may need to request a break to permit the prosecution time to review your visual aids.

Then let the opening flow, as it must, from the heart, imbued with a strong sense of exactly why facts and reason dictate an acquittal. ■