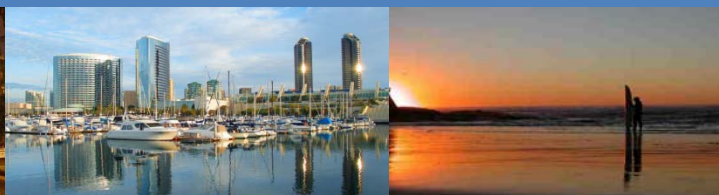




Opening Statements

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**WEST VIRGINIA PUBLIC DEFENDER SERVICES
MANUAL FOR TRIAL LAWYERS**

CHAPTER 11

**OPENING STATEMENTS
AT TRIAL**

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I. Should We Make an Opening Statement? Waive It? Defer It?

A. Always Open. Never Waive. Never Defer

1. Opening Statements Are the Lens Through Which Jurors View the Evidence

The most important thing to understand about opening statements is that they establish the context in which the jurors will interpret all of the evidence they hear during the trial. Here is an example of why establishing the context is so important:

Assume your client is charged with battery. You are going to claim self-defense. The prosecutor opens by telling the jury it will hear testimony that your client shot the victim in a bar, caused serious injuries, and was arrested. If you do not make an opening statement immediately, the jurors will listen to the testimony of the State's witnesses, and fit it into the narrative of the prosecutor's opening – a tale of attack and injury. Studies of juror behavior and decision-making show that by the time you get around to putting on your case, most jurors will have already accepted the State's version. On the other hand, if you immediately make an opening statement telling the jury your client's story of self-defense, they will still hear the State's testimony before yours, but will evaluate it within the context of self-defense. This gives you a much better chance of convincing the jury to reject the State's story.

The same principles hold true even if you don't have an affirmative defense like self-defense. Here's an example of why using your opening to establish a context for the jury is just as important when there is no affirmative defense:

Assume your client is charged with robbing the 7-11. He does not have an alibi for the time of the robbery, but your theory of defense is that the store clerk is making an honest mistake of identification. The prosecutor will open by describing how terrible the robbery is, how certain the victim is of his identification, and what a great job the police did of investigating. If you do not make an opening statement immediately, the jurors will listen to the testimony of the State's witnesses, and fit it into the narrative of the prosecutor's opening – a tale of a vigilant victim and thorough police officers. Those same studies of juror behavior and decision-making show that by the time you get around to attacking the prosecution witnesses most jurors will have already decided to accept the State's version. On the other hand, if you make an opening statement telling the jury about the inconsistencies in the victim's ID, his prior convictions, and the ways the police screwed up the investigation, you will have provided a much more favorable lens for the jurors to evaluate the State's direct case. Again, this gives you a much better chance to convince the jurors that they should reject the State's story.

2. Doesn't Making an Opening Statement "Give Away" My Case to the Prosecutor?

No. Everything we know about jury decision-making shows that it is far more effective to get our story to the jury as early as possible than it is to spring it on everyone after the State's case is done.

B. Does This Apply to Bench Trials as Well as Jury Trials?

Yes. Although judges like to think they are immune to the persuasive techniques that affect jurors, in reality, judges are affected by the same things. If we don't make an opening statement that establishes a context for the judge to view the evidence, it is likely that the judge will use the prosecutor's opening (or court papers and police reports the judge has already read) for context.

If you think your judge will be annoyed if you ask to make an opening for a bench trial, there are a few tactics that might minimize his hostility:

1. Keep it very short – just tell him what is essential to establish the context in which you want him to place the State's case.
2. Keep it very factual – a short factual story is more likely to keep the judge's attention than a polemic, an argument, or a lot of speculation.
3. Tell the judge in advance that it will be very short.
4. Tell the judge in advance that it will just be about "a few things it is important to know about this case before the State calls its first witness."

II. What Exactly Is An Opening Statement?

An opening statement is defined both by what it is and what it is not. There is a whole lot of mythology and just plain bad lawyering that confuses the question of what an opening statement is. Here is a brief rundown on what an opening statement should be:

A. An Opening Statement Is:

- The first opportunity to communicate your theory of defense to the jury.
- It is a shortened form of the story of your case -- a story of innocence or reduced culpability.
- It is like the prologue to a play -- an introductory speech that gives the audience pertinent facts necessary for them to understand the characters and action they are

- about to see.
- It is factual, not conclusory, argumentative or legalistic.

B. An Opening Statement Is Not:

- An argument -- You should be telling a factual story, not arguing law or conclusions.
- A road map.
- The table of contents of a book.
- An explanation of how trials proceed.
- An explanation of the burden of proof or presumption of innocence.
- A request that the jurors keep an open mind.
- A collection of buzzwords, fungible devices and gimmicks.

***If you give the same opening statement in every case,
you are doing something very, very wrong.***

Your opening statement must focus on the particular facts and theory of defense in your individual case. You should not be stringing together the same collection of phrases and arguments in every opening. If you are giving the same opening statement in every case, you are not saying anything that will persuade the jury that this particular client deserves to be acquitted.

C. What If the Court or Prosecutor Objects to This Kind of Opening?

Be sure to tell them *on the record* that everything you are saying in your opening will come out in the evidence, either through direct examination of your witnesses or cross-examination of the State's witnesses. If the judge insists that you use the phrase "the evidence will show," then use it.

So now that we know what an opening statement is, and what an opening statement is not, the big question is "how do we put together a good opening?"

IV. Preparing to Draft Your Opening Statement

1. Know Your Theory of Defense Before You Prepare an Opening

Remember – if you don't know your theory of defense, you don't know what to say during opening.

2. Think in Terms of Telling a Story

- a. What genre of story am I telling? (See the chapter on Storytelling)
- b. In what sequence will I tell the story? -- Put the important things up front. A good way to prepare is to ask yourself what facts must the jurors know in order for you to win -- that's where the story should start.
- c. Who are the characters in this story? How do I want to portray them?

3. Think About Emotional Themes

- a. Ask yourself how you want the jury to feel about the case -- On a gut level, what is this case really about?
- b. What facts can you tell the jurors about the case that will make them feel that way?

4. Think About Language

- a. What words or phrases can you use that will make your theory of defense and emotional themes more powerful to the jurors?
- b. Always try to use clear, graphic language. Draw word pictures.
- c. No legalese -- use plain language, not lawyer-talk.
- d. No exaggeration -- don't overstate your case or promise things you can't deliver.
- e. Say what you mean.
- f. Shorter is always better.
- g. Simpler is always better.

V. Drafting Your Opening Statement

- 12. **The Hook** -- Start with a thirty to sixty second statement that encapsulates your theory of defense and establishes the emotional theme that will make the jury feel it is right to accept your theory. This is the most important part of your opening, because it sets the tone and determines whether the jurors will listen to the rest of your statement. The hook should be factual. It should tell the jurors in factual

terms exactly why you should win. It should not be an argument.

EXAMPLE: John Smith is not guilty of battery. Yes, he shot Bob Green. But only because Bob Green started the fight, pulled his own gun, and fired the first shot at John. John Smith is not guilty because he acted in lawful self-defense.

QUESTION: WHAT IF THE PROSECUTOR OR JUDGE OBJECTS, SAYING THAT THIS IS TOO ARGUMENTATIVE? (They would be wrong, but being wrong never stopped a judge or prosecutor in the past).

ANSWER: RE-START YOUR OPENING LIKE THIS:

John Smith is not guilty of battery. The evidence will show that he shot Bob Green. That same evidence will also show that the only reason he shot Green was that Bob Green started the fight, pulled his own gun, and fired the first shot at John. The evidence will conclusively show that John Smith is not guilty because he acted in lawful self-defense.

13. **The Story** -- The main part of your opening, in which you tell the jury the factual story of your client's innocence or reduced culpability. Your opening should not contain the entire story of the case, in all its detail. It should, however, hit the high points, and tell the jury everything that is essential to reaching the right verdict.

EXAMPLE: Five minutes before the shooting, John Smith was sitting quietly at the bar, drinking a beer and watching Monday night football. He was not drunk. He was not loud. He had never even heard of Bob Green. . . . etc.

14. **The Conclusion** -- In which you tell the jury what you want them to do.

EXAMPLE: After hearing all the evidence, you will find that John Smith shot Bob Green only because Green pulled his gun and fired the first shot. You will find that John Smith acted in lawful self-defense. And you will find that the only fair verdict is not guilty.

15. **Keep it Short.** You don't have to tell the jury everything they will hear during the case. Just hit the highlights. Just tell them about the facts you think are necessary to set the context in which they will hear the evidence.
16. **Keep it Factual.** Remember, it is the factual context that is important in opening, not the interpretations and conclusions you want them to reach. You will argue those interpretations and conclusions in your closing. In opening statements you just want to create the lens through which they will be viewing the evidence.

VI. Delivering Your Opening Statement Effectively

A. Don't Write It Out

You don't want your opening to sound like a prepared speech. You want it to be conversational, as if you were telling a friend about the case. So don't prepare as though you were memorizing an oration. Try the following suggestions:

1. Don't write your opening out verbatim. If there is a particular phrase or sentence you need to say in a specific way, it's OK to write that out verbatim in your outline. What you want to avoid is writing out an entire speech.
2. Instead, use an outline. Remember, you know your theory of defense and the facts of the case well enough to talk about it without reading from a script.

B. Don't Do It Alone

- a. Practice before other people -- particularly non-lawyers.
- b. Ask for other people's suggestions and criticism.
- c. Follow other people's suggestions.