

# The Opening Statement:

## *Don't Make it a Lost Opportunity*

By Jules Epstein

Jules Epstein is Associate Professor of Law at Widener's Delaware Campus, where he is also one of the faculty advisors to the Moe Levine Trial Advocacy Honor Society and participates as an instructor at the Intensive Trial Advocacy Program (ITAP) each spring.

### Which of the following is the most effective beginning for an opening statement to a jury?

1. Our country is a great nation, and unlike any other protects people with the presumption of innocence and the proof beyond a reasonable doubt standard. We are different from other lands . . .
2. Ladies and gentlemen, an opening statement is like the table of contents to a book, or a road map. It is your guide to how a case will unravel. It is not evidence; it is what we hope will be proved . . .
3. Members of the jury: Serving on a jury is a difficult task, but it is one of the highest duties of citizenry. Like the army or paying taxes, it is something we must do . . .
4. Everything you heard him say is b\*\*\*\*\*t.  
(Source: *My Cousin Vinny*)

The answer should leap off the page—it is number-four by a landslide. But the question we need to address is *why*?

Opening statements, like direct and cross examination, succeed most when the rules of primacy and recency are honored. These rules derive from the psychology of aural learning: People remember best that which they hear first (*primacy*) and last (*recency*). In these examples, the first three models tell the jurors nothing about the case and fail to whet their appetite to pay attention for more. However inchoate, Vinny's shock-opening was his defense—everything the Government claims is wrong.

### What other lessons are worth following when designing an effective opening statement?

Here are the basics:

- **There is no proof that 80 percent of trials are won or lost during the opening statement.** This myth has penetrated the lore of trial lawyers, but it is unfounded. At the same time, a well-designed opening can set the stage for a successful presentation or defense. Failure to open in a creative manner wastes a critical opportunity—for the plaintiff or prosecution—to lay out the case; and for the defendant, to remind jurors that much is not what it seems and that a valid defense exists.
- **Tell a story.** Visualize the opening as a conversation with a (*non-lawyer*) friend, explaining what happened and why your side should prevail. Omit phrases like “and the third witness will say,” and simply tell the story.
- **Don't promise too much.** Opponents (*and jurors*) will take notes on your opening and hold you to your promises. So don't offer more than you can guarantee.
- **Find a theme.** A simple sentence or a cluster of points i.e. “*There are three facts in this case that will show you my client is innocent . . .*” should identify the core of your case and establish a morally satisfying reason for a verdict in your favor. That theme/language should also be appropriate for use in your closing. (“*Remember when I told you in my opening that there are three facts . . .*”)
- **Don't waive the opening statement.** If you represent the defendant, get right up, skip re-introducing yourself, and utilize primacy to lay out your case. Pronto. And listen for an omission in your opponent's opening. If the other side failed to admit a critical injurious fact, get righteous. “What my opponent left out is that the plaintiff in this case had five drinks, and was on her way home from a strip joint, when . . .”
- **Concede your achilles heel(s).** Not during primacy or recency, but bring out (“*spin*”) your case's deficit before you appear dishonest for having omitted it, and before your opponent tells it in a much more damaging way.
- **Consider visuals** (*a chart, PowerPoint presentation or photograph*). You may need to pre-clear such items with the Court, as they are not yet evidence, but images that accompany a story make it more powerful and lasting.
- **Connect with the jurors.** Move, have eye contact, acknowledge their existence, intelligence, and concerns.

Opening statements, although not evidence, offer counsel the opportunity to provide a structure for the proof that is to come; to establish his or her credibility and professionalism, and to point jurors toward the desired outcome. Open wisely, or the jury will know that everything you say is “b\*\*\*\*\*t.”