Winning Opening Statements

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> *You can have the greatest close in the world, but if you haven?t won the case by the time that you get to the close, it?s too late. The opening statement is where you win the trial.*
>
> ?Gerry Spence

Is an opening statement really necessary?

In varying degrees, social scientists assert that 65 to 90 percent of jurors make up their minds after hearing the opening statement.1 It does not take a rocket scientist to figure out that if, empirically speaking, this many jurors are deciding a case based in large part on the opening statement, the chances of a first-place finish are drastically, even fatally, reduced by not giving one. After the prosecutor has told the jury all of the terrible things your client has done, this is your first opportunity to show there is another side to the story. As Paul Harvey said, it is your chance to tell ?the rest of the story.? In short, not only must you give one, but it also must be better than the prosecutor?s.

So how does this article help me?

Taking tidbits from famous cases tried by legendary lawyers, this article seeks to provide some insight into how the lions of the trial bar give opening statements. Those cases, the charges, and the lawyers are as follows:

? ***New York v. Sean Combs (aka Puff Daddy)***| Unlawful Gun Possession and Bribery | Benjamin Brafman2
? ***Texas v. Robert Durst*** | Murder | Dick DeGuerin and Mike Ramsey3
? ***United States v. Terry Nichols*** | Conspiracy to Use a Weapon of Mass Destruction and Murder | Michael Tigar4
? ***Oregon v. Sandy Jones*** | Murder | Gerry Spence5
? ***Virginia v. Marv Albert*** | Sexual Assault | Roy Black6

Drawing on concepts from these legends, and various other resources, what follows is a synthesis of how to give a powerful, effective, and (hopefully) winning opening statement.

How do I structure my opening statement?

Like many things, getting started can be the most difficult task. I find myself with so much to say, but I am unsure how to say it, usually resulting in a self-imposed writer?s block. This formula helps me get my thoughts down into an understandable, cohesive format:

? **Power Statement/Sound Bite/Why My Client Wins:** Typically between one and three gripping,

powerful sentences getting to the heart of your case.
? The Big Picture: Ten sentences or less tying in your power statement and providing a little more detail about your theory and giving context to your power statement.
? Cast of Characters: Introduce the main players and provide any relevant background.
? Tell the Story: Fill in all of the details that illuminate your power statement and theory.
? Conclude: Call the jury to action and empower them to say ?Not Guilty.?

The opening statement you ultimately give may or may not end up being in this format. This just helps me organize my thoughts. After getting my thoughts out in this format, a natural adjustment usually occurs. The story does not have to be linear or in chronological order. In fact, different parts of the story may be better told in another format. For example, a circular story?one that begins and ends in the same place?may be most effective. After organizing your thoughts in this way, a natural structure will emerge. For almost any case, though, the above format will work.

Write it out, but do not read it. I type almost everything, but for some reason when I make my first outline and write my first draft, I am more creative if I handwrite my opening. From there, I will type it on the computer. Then, I will type a final one- or two-page list of bullet points. Much of what I end up saying at trial is what I wrote originally, but with bullet points?as opposed to reading word for word?the delivery is much more genuine.

Power Statement/Sound Bite/Why your client wins

You must be able to distill your case down to one to three sentences that tell the jury why you win. A wealth of research reveals that jurors will remember best what they hear first and last?i.e., primacy and recency.7 Powerful opening lines are critical. Two examples illustrate this concept.

First, in Puff Daddy?s trial, one of the major issues was dealing with Puff Daddy?s celebrity. Brafman began his opening like this:

> Ladies and gentlemen, this is Sean ?Puff Daddy.? You can call him Sean, you can call him Mr. Combs, you can call him Puff Daddy, or even just plain call him Puffy, but what you cannot do in this case, you cannot call him guilty, because from the facts, from the evidence, from the law, you will conclude that he is not guilty. It?s that simple.8

The jury ultimately agreed and acquitted.

Second, in Terry Nichols? trial, the obvious goal was to save his life. Tigar?s opening statement was brilliant in playing on the fact that Nichols was not present for the bombing because he was at home with his family, tying in this one-sentence phrase throughout: ?Terry Nichols was building a life, not a bomb.?9 Nichols ultimately received a life sentence.10

Hopefully it goes without saying that knock-knock jokes are not a good way to start your opening statement. 11 But however you do it, make sure to say something that will grab the jury?s attention.

Elaborate: Give the big picture

At this point, you have the jury?s attention, but to keep it, you must provide context and give a little more detail about a critical moment in the case?one that if understood in any other way may cause you to end up with a second-place finish. You should tie it in to your power statement, if possible. Here is an excellent example from DeGuerin?s opening in the Durst trial:

> **[Power Statement:]**May it please the court. Self-defense/ accident, and no motive whatsoever. Why

did Morris Black die? How he died will not be an issue. Morris Black died as a result of a *life-and-death strug-gle* over a gun that Morris Black had threatened Bob Durst with. And as they struggled, the gun went off and shot Morris Black in the face.

[Big Picture Elaboration:]Bob had arrived unexpectedly at the apartment that he had rented in Galveston, a rundown $300-a-month apartment that he rented, dressed as a woman named Dorothy Ciner, a name from his past. He arrived unexpectedly. He caught Morris Black in his apartment. And he knew, because he knew Morris Black, that Morris Black likely had a gun. And he felt both fear and anger because he had kicked Morris Black out of his apartment. He knew Morris Black was dangerous. 12

But do not go too far. You want the jury to hunger for more of the story. Keep them on the edge of their seats. Fill in the details after you introduce your client and the parties?in the best light possible for you.

Introduce the cast of characters

Only introduce the main players. Obviously your client will be the main focus in most cases, so we will start there.

Humanize your client, but be careful. As Gerry Spence says, let them be real people; real people have faults. No matter who your client is or what they may have done, he or she possesses some qualities that people will identify with. Explore how to get these good character traits before the jury, without opening unwanted doors. Again, borrowing from Spence with a few additions, here are some examples:

- **?** Hard-working
- **?** Honest
- **?** Simple
- **?** Not the type to be on welfare
- **?** Worked with kids
- **?** Cared about the poor
- **?** Involved in church

But beware of *Bass v. State*, 270 S.W.3d 557 (Tex. Crim. App. 2008). In *Bass*, the defendant was a pastor at a church accused of indecency with a young girl on church property. During opening statement, his attorney characterized Mr. Bass as a ?genuine,? ?real deal? pastor, saying the allegations were ?contrary to his character? and ?not worthy of belief.? *Id.* at 557. The attorney went on to say the allegations were ?pure fantasy? and ?pure fabrication,? among other things. The trial court then allowed evidence of two extraneous uncharged offenses of extremely similar character, and the Court of Criminal Appeals ultimately upheld this type of evidence during the State?s case-in-chief. *Id.* at 563 (?Our case law supports a decision that a defense opening statement, like that made in this case, opens the door to the admission of extraneous-offense evidence, like that admitted in this case, to rebut the defensive theory presented in the defense opening statement?). Moral of the story: If you have extraneous offenses, be extremely careful.

For the other major players, try to theme the witnesses. Sometimes it is as simple as calling them by their title. For example, in a DWI, very rarely will you need to help jurors remember multiple officers; calling the lone officer by his or her name works just fine. But in multiple-officer scenarios, or for non-law enforcement, jurors are not going to remember names at the outset, but they will remember titles:

- **?** He was the detective who never made a mistake;
- **?** She was the witness with incredible vision;
- **?** He was the patrol officer who always went by the book.

After setting up the critical issues and introducing the characters, you are ready to give the jury what they have been waiting for on the edge of their seats?the ?rest? of your story.

Tell your story

To do this, according to Spence, you must first figure out where the injustice is in the case?what is it that turns you on as a human being?13 Where do you get passionate about the case?14 Because, ?if you don?t care, and if you?re not passionate about your client and your case, how can you expect a jury to care and be compassionate about your case??15 Put simply, caring is contagious. Once you figure out what turns you on, a theme will emerge.

And you must have a theme. Trials are story battles. Everyone loves a good story?one with any of these types of overarching themes:

- **?** Heroes vs. Villains
- **?** Good vs. Evil
- **?** Abusive vs. Fair
- **?** Tough vs. Terrorized
- **?** Greedy vs. Sharing
- **?** Manipulative vs. Trusting

We all know that sometimes it is hard to find good things to say about the facts of your case. In that scenario, tell the jury what it will *not* hear. In other words, contrast the facts of your case with just how bad it could really be. For example, in a plain vanilla traffic stop DWI, tell the jury about all of the drunk driving they expect to see but will not:

> You will not hear about a car that was weaving and serving all over the road; you will not hear about a car that spent more time on the sidewalk than on the street; you will not hear about a driver so drunk that he wrapped his car around a tree. None of that. Instead, you will hear about John, who drove perfectly normally but stopped too far over the line at a stop sign?according to the officer who arrested him. That?s it.

Word choice is important. Opening statements that impress lawyers will be misunderstood by jurors. So use ABCs, not legalese?or KISS, **K**eep **I**t **S**imple **S**tupid. Speak in language the jurors will understand?no lawyer talk.

Similarly, lose the ?I *believe* the evidence will show,? or ?I *think* you will hear,? or ?we *hope* to bring you.? If you believe, think, and hope you will prove something, the jury is going to give you less credibility?probably the most important thing the lawyer has going. You will also probably end up believing, thinking, and hoping you win your appeal. Of course, if the prosecutor objects and the judge forces you, you can use these phrases, but do it somewhat cynically. The jurors will think it is just as stupid as you should. Finally, do not tell the jurors that what you say is not evidence; this is another thing that makes jurors wonder why they are listening anyway.

Use trilogies to drive the point home. Some powerful three-word combos:

- **? Describing interactions between police and our clients:**abused, taken advantage of, violated;
- **? No loss of faculties:** reacted normally, walked normally, talked normally;
- **? Discrediting state?s science:** inaccurate, unreliable, and unscientific;
- **? Reasonable doubt:** wavering, unsettled, unsatisfied.

As an example, in describing Durst having Asperger?s as a reason for why he continuously ?retreated? from

and ?returned? to Galveston after throwing the deceased?s body into the bay, Ramsey said:

> And those people who are ***weak*** to begin with, who are ***broken*** to begin with, who are ***troubled*** to begin with, are much more likely to drift into that kind of state of reaction, an attempt to retreat.16

Use ?devil words? to describe the state?s evidence. This concept comes from Dr. Sunwolf?s book *Practical Jury Dynamics.*17 Some examples of devil words you can use:

? Contaminated
? Compromised
? Corrupted
? Infected
? Sloppy
? Dirty
? Garbage
? Invalid
? Rules were Violated, Trampled, Disregarded, and Ignored.18

Whatever you do, in the opening and throughout the trial, do not use police words.19 Figure out their lingo, and adjust it to your liking. For example, in a DWI, how many times do you read reports using words that make things sound much worse than they really are, or that are completely misleading? Here are some alternative words and phrases you can use:

? Standardized Field Sobriety Tests: Roadside Exercises, Coordination Exercises, Stupid Human Tricks;
? Refuse: Conscious, thoughtful decision;
? Intoxilyzer 5000 / Instrument: Breath box or government breath machine;
? Horizontal Gaze Nystagmus Test: Eye Test or the Trust-me Test;20
? Walk-and-Turn Test: Walk the fake balance beam on the side of the road;
? One-leg-stand Test: Balance on one leg.

Sometimes, it is as easy as adding the word ?government.? Calling a blood test the government blood test adds a level of skepticism, especially if you set it up properly during your voir dire.

Use those new words, and paint a word picture. Like Disney says, be an ?Imagineer.?21 Use descriptive adjectives, action verbs, and colorful phrases. Take the jury to the moment, as if they were there themselves. In the Durst trial, for instance, one of the major themes was separating the shooting, which was self-defense (the jury agreed and acquitted), from what happened after, Durst dismembering and discarding the body in Gal-veston Bay. To drive this point home, the lawyers split the opening?DeGuerin telling what happened before the shooting, and Ramsey telling what happened after. In concluding his portion of the opening, DeGuerin described Durst?s desperation after realizing what he had just done:

> And he went down to Morris [the deceased], and he knelt down, and he said, ?Morris, Morris.? And Morris didn?t move. And he could tell Morris was dead. And he thought, ?Morris is dead. He?s shot with my gun. He?s shot in my apartment that I rented as a mute woman wearing a wig because I was hiding from an investigation in New York. They are never going to believe me.? He went to his bed, and he sat down and put his head in his hands and he *descended into the depths of despair*.22

In doing this, sometimes it is difficult to invite visualization of a scene where you were not?and would rather not be?present. To help me, I think about the five senses and what would stick out: What did the witness see? What did the witness hear? What did the witness smell? What did the witness touch (and what did it feel like)? What did the witness taste (probably the least likely to help, but sometimes can). I have found that this technique helps me come up with a much more descriptive version of the scene.

Embrace your weaknesses. If the case you are trying were perfect, you would not be trying it. You cannot run from your weaknesses; you have to confront them head on. Our brother defense attorney in Fort Worth, Wm. Reagan Wynn, calls it ?hugging the turd.? If facts are in dispute, tell the jury. Tell the jury your position and your opponent?s, and explain why your position is better. If you have facts that cannot be explained, tell the jury that too. According to Spence, ?There may be regrets that need be expressed, apologies made and shared with the jurors. But the overriding justice of the case still rests with our side.?23

If you suspect disputes will arise due to changing or evolving stories, you could handle it like Brafman in the Puff Daddy trial. There, the state?s star witness was the driver of Puff?s Lincoln Navigator. He had sued Puff Daddy already, and the prosecution claimed that Puff had tried to bribe him not to testify that Puff threw the gun out of the car window. Brafman primed the jurors for his impeachment:

> And [Mr. Fenderson, the prosecution?s star witness,] will tell you, because now he?s stuck with this statement, and if he deviates from it I?m going to put it in his face, and [remind him that] when he previously testified under oath, [he testified differently than we expect him to now].24

As is commonly the case when someone is falsely accused of child sexual abuse, you must confront the fact that a convincing child will come to the witness stand and testify. Here is one way:

> When Abigail [the complaining witness] testifies, you?re going to hear a child that is committed to her story. You?re going to hear a very intelligent, articulate young lady that, in her own mind, has convinced herself that these terrible things really happened to her. But what you?re also going to hear is how she has told this story over, and over, and over again. And the State?s expert forensic interviewer will tell you is that repeatedly telling a story causes a child, especially a young one with an impressionable memory, to begin believing things that are not true. The state?s expert will also explain to you how children come up with these terrible stories in the first place?a concept called suggestibility. When repeatedly questioned by a parent, young, impressionable children will pick up on cues that they are not giving the right answers. When Mom suggests an action and a person, like, ?Did Ted (the person) touch your private parts (the action)???instead of asking open-ended questions so the child can tell the story?children begin to integrate these things into their own minds, and begin thinking this really happened. Even when nothing inappropriate ever occurred, and even when Ted is totally innocent.

Finally, consider telling the story from a perspective other than your client?s, and always tell it in the first person. Identify which critical witness the jury would most identify with, and tell the story from that witness? perspective. Either way you tell the story, however, try to tell it in first person. Transition by saying at the beginning, ?Imagine I am Joe.? And then speak as if you were Joe and tell what you saw, felt, touched, smelled, etc., or transition by saying, ?If you were in Joe?s shoes, you would hear him say . . .? Differing perspectives and first-person point of view are much more effective in taking the jury to the moment.

Be the most credible person in the courtroom

This deserves its own section because it is so critical. Your credibility is the most important thing you have. Tell a compelling, convincing story, but do not overdo it. Make sure your story is true?and that you can prove it. If not, and the prosecutor capitalizes on exposing the defense lawyer?s questionable credibility, the case is lost. Whatever you do, do not overpromise and underdeliver.

Conclude, empower, and call the jury to action

There are many different ways to conclude. Remember the recency effect?jurors will recall most what you tell them at the end of your opening. As you will see from the final three examples, impassioning and empowering the jurors works best.

Brafman concluded his opening in Puff Daddy?s trial this way:

> We have an awesome responsibility. Yours is more awesome. You are sitting in judgment in a case where, at the end of the trial, you will conclude that a man has been falsely accused of a serious felony. You asked for it. You could have been excused. You said you would be fair. We trusted you then, and at the end of the case we will trust in your verdict. We trust that your verdict will be a verdict of not guilty.25

And Roy Black finished his opening in Marv Albert?s trial by suggesting the only way the jury would convict him would be because of his celebrity:

> You will see that Marv Albert did nothing with Vanessa Perhach other than what had been done many, many times before and [in] many, many different places. It was all consensual. There was no forcible sodomy. There was no forcing of oral sex. Any type of biting was done voluntarily and consensually. And it was simply not a crime. And hopefully in this country, being successful and being a celebrity and being well known is not enough to convict you of a crime.26

Finally, Gerry Spence shows exactly how to empower the jury to do justice:

> At the conclusion of this trial, I am going to ask you to do what no one else in this case has done for Mrs. Jones. I am going to ask you to protect her?to protect her as a citizen under the constitution. I am going to ask you at the conclusion of this case not to leave her any longer at the mercy of the state. I am going to ask you to rescue her from the mercy of the prosecution. That, ladies and gentlemen, is the great calling and the great function of an American jury. That?s what we?re here to do today?to do justice. Thank you very much.27

One final note on resources and borrowing

Nearly none of the material in this paper is my original thought. Take a look at the books and materials in notes 3 through 7, *supra*, for the full context of the things I have cited in this paper. More importantly, figure out who the best lawyers are and ?borrow? ideas, concepts, or word-for-word phrases from them. Every lawyer I have ever told that I stole something from them has been anything but offended; in fact, most are flattered to hear this?because they have done it themselves. We are all in this together, and we need to help each other. With that frame of mind, our clients and criminal justice system will be better off.

I would like to thank my partner and outstanding trial lawyer, Dan Hurley, who put together the original presentation from which most of the material for this paper was taken.

Endnotes

1. Gerry Spence, *Win Your Case: How to Present, Persuade, and Prevail?Every Place, Every Time* (St. Martin?s Griffin 2006), at 128; Dr. Donald E. Vinson, ?How to Persuade Jurors,? ABA Journal, The Lawyer?s Magazine (2014), [4]http://vinsoncompany.com/pdf/How_to_Persuade_Jurors.pdf; Robert B. Hirschhorn, ?Opening Statements: You Never Get a Second Chance to Make a First Impression,? 42 Mercer L. Rev. 605 (1991), [5]http://www.kearneywynn.com/Articles/Opening-Statements.pdf at 3.

2. Joel J. Seidemann, *In the Interest of Justice: Great Opening and Closing Arguments of the Last 100 Years* (HarperCollins Publishers, Inc. 2004), at 92.

3. Ray Moses, ?Defense Opening Statement: Robert Durst Murder Case,? *Criminal Defense Homestead* (Jul. 1, 2014, 4:37 PM), available at [6]http://criminaldefense.homestead.com/Durst.html.

4. [7]http://www.uchastings.edu/academics/faculty/adjunct/sotorosen/classwebsi....

5. Videotape: ?Spence in Trial: How to Win with Your Opening Statement? (produced, edited, and directed by Michael Shinn, Gerry Spence 1993).

6. Seidemann, *supra* note 2, at 68.

7. *See, e.g.*, [8]http://en.wikipedia.org/wiki/Serial_position_effect.

8. Seidemann, *supra* note 2, at 92.

9. [7]http://www.uchastings.edu/academics/faculty/adjunct/sotorosen/classwebsi....

10. [9]http://www.cnn.com/2013/03/25/us/terry-nichols-fast-facts/.

11. Adam Goldberg, ?George Zimmerman?s Lawyer Tells ?Knock-Knock Joke? at Trial,? *Huffington Post* (Jul. 7, 2014, 2:17 pm), [10]http://www.huffingtonpost.com/2013/06/24/george-zimmerman-knock-knock_n_....

12. Moses, *supra* note 4, [6]http://criminaldefense.homestead.com/Durst.html.

13. Videotape: ?Spence in Trial: How to Win with Your Opening Statement? (produced, edited, and directed by Michael Shinn, Gerry Spence 1993).

14. *Id.*

15. *Id.*

16. Moses, *supra* note 4, [6]http://criminaldefense.homestead.com/Durst.html (emphasis added).

17. Dr. SunWolf, *Practical Jury Dynamics 2: From One Juror?s Trial Perceptions to the Group?s Decision-Making Processes* (Matthew Bender & Company, Inc. 2007), at 174, 242.

18. Thank you, Deandra Grant, for teaching me about this concept.

19. Thank you, Lewis Dickson, for teaching me about how not to fall into this trap.

20. Thank you, Mark Thiessen, for teaching me about this gem.

21. [11]http://en.wikipedia.org/wiki/Walt_Disney_Imagineering.

22. Ray Moses, ?Defense Opening Statement: Robert Durst Murder Case,? *Criminal Defense Homestead* (Jul. 1, 2014, 4:37 pm), [6]http://criminaldefense.homestead.com/Durst.html.

23. Joel J. Seidemann, *In the Interest of Justice: Great Opening and Closing Arguments of the Last 100 Years* (HarperCollins Publishers, Inc. 2004), at 130.

24. *Id.* at 103.

25. Seidemann, *supra* note 3, at 75.

26. *Id.* at 108.

27. *Id.*

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