# The Dirty Dozen:

## 12 Rules of Opening Statements in a Criminal Case


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1) **TELL A STORY**. Forget the shopworn analogy to a book's Table of Contents or to a road map. Opening statements are about *story-telling*. Even the most mundane case has the potential for drama and excitement. You need to find it. You need to create it. It's a story. *Your* story. If you can't make it exciting, they won't listen. A story has conflict (e.g., a problem) and characters (heroes and villains). It should incorporate an element of suspense – what will happen to the hero or heroine in this story? It may be a story of wrong-doing and guilt, or it may be a story of mistaken identity, or self-defense, or botched investigation, (and)/or of an innocent person falsely accused. A story is told from a point of view. Whose point of view will you tell your story from? The point of view of the victim or the accused? Who is your central character? Some cases will demand multiple points of view. All of these choices may vary case by case, but never forget that your primary purpose is to *persuade*. The opening is your first chance to tell your story to the jury. Start the story at an exciting spot (you can do a flashback later if need be). Organize your story in a way that makes sense – often, but not always, chronologically. Don't organize your opening around a list of witnesses, stating their names and what they will say. That's painfully boring and destroys any sense of story. The best openings weave the witnesses (characters) and what they will say into the story.

2) **DO NOT READ**. You can prepare for your opening by writing out your entire opening. Read it, edit it, and hone it. Then use it to make notes – an *outline* only!! Then throw away everything except the outline. Rehearse it a few times. If you can do your opening without any notes, bravo! You will keep constant eye contact with the jurors. If you can't, then use paper or cards with bullet-pointed notes in outline form. If you have more than one page, number all. Have your notes with you on the lectern, but refer to them as little as possible. If you are the prosecutor and you choose to read the indictment to set forth the legal elements, don't be tied to it for long. Read only as much as you need to, and then get back to your story. Reading kills eye contact. Eye contact = opportunity to persuade. No eye contact = losing. By relying on occasional glances at your notes, you will be free to interact with the jurors in a more natural way. This isn't a speech! It's a conversation (although you will be the only one actually talking).

3) **BE CREATIVE**. Think outside the box, especially for the prosecution, who has the burden of establishing a prima fascia case (establishing all elements, including jurisdiction). Find a way to grab their attention! For example, you could organize and present the facts in a manner that the jury imagines themselves watching a film. Generally, you can start by setting the stage (the place and time of day, using details to make it feel real to the jury). Bring out all the facts (e.g., lighting, distance, etc.) that are important to your story. Then get into the action. But there are many variations, limited only by your creativity and imagination – as long as they are persuasive. For example, consider using present tense to make the jury feel the action is happening *now*! "Ladies and gentlemen, picture a little girl's room with white lace curtains and a Beyonce poster centered above the bed with pink pillows…" Or even consider using a first-person voice (voice of the client or complainant). True, the opening is about what the evidence will show, and you can mention that hoary phrase, but saying "the proof will show" with mindless repetition will be unnatural, distracting and boring! Remember, this is a conversation! While uncommon, in

certain cases you might consider using visual aids such as charts or diagrams in the opening (if they will be part of the evidence), but you should always discuss it with the judge and opposing counsel first. Recognize that visual aids can sometimes be distracting from the story – jurors will be examining the diagram rather than listening to a word you say! If you do use a visual aid, be sure to show it only when you want to, then put it out of sight.

4) **BE YOURSELF**. Everybody is different. We have our own unique styles of delivery. It's great to watch experienced trial lawyers open, and collect effective techniques from observation. But then adapt them to your *own* style. Use your *own* voice. Don't try to emulate anyone else's style. Authenticity persuades. Be yourself, and you will feel comfortable, but be your *best* self. So, if you tend to be soft-spoken or shy, make a point to raise your volume. Push yourself from your comfort zone a bit, but still be yourself! Whatever your personality, you need to exhibit a sense of confidence – confidence in what you are saying, confidence in your case. Plan out where you will stand. Some people like to stay behind the lectern, near their notes. But standing directly in front of the jury at a comfortable distance – not too far and not too close – permits a more natural conversation.

5) **HAVE A THEORY**. Every case requires a theory (on each side). Your theory adapts your story to the legal issues of your case. The best story in the world won't get you a favorable verdict if it doesn't offer a theory of the defendant's guilt or innocence. It must be simple and logical. "The defendant did it because..." is a motive. You don't need a motive, necessarily, but you always need a theory of guilt or innocence connecting the facts to the law. i) What happened? ii) Why did it happen? iii) Why does that mean my side wins? E.g., the facts show the complainant was the aggressor and the law provides a theory of self-defense; or, the defendant's blood was found at the scene and DNA analysis establishes guilt. Prepare your opening statement, and all of your case, with a theory in mind. Recognize that by going first the

prosecution has already set forth its theory; the defense must set forth its own theory even if it focuses only on what's wrong with the prosecutions' case. Each side must highlight the facts it wants the jury to focus on, with attention to the theory. Your theory must be the more logical and likely interpretation of the facts. If it is, you win!

6) **FIND A THEME**. Your theme is different from your theory. Your theme should be expressed in a single sentence that captures the *moral* force of your case. The injustice of the situation! It is the psychological "anchor" that summarizes what the case is *really* about. E.g., "No good deed goes unpunished" or "Revenge is a dish best served cold." The theme should *feel* familiar to the jury. It isn't tied to the law like a theory is. It can be effectively taken from art, literature, history or music. It can be a saying, a verbal hook, expression or meme. In the prosecution of a date rape case, perhaps the hook is the "man who wouldn't take no for an answer." In the defense of a case involving an informant, it might be "Liar, Liar." You can have more than one theme (maybe 3 or 4), but only one theory of your case. You can reference your theme in other parts of the trial – during examinations, for example, and then revisit it during summation.

7) **DON'T ARGUE**. Argument is for summation. State the facts, not what they mean. You can't voice your personal opinions about facts or witnesses during your opening. You can't tell the jury to draw inferences from the facts to reach conclusions, or comment overtly on the credibility of witnesses, or try to explain the law. So, for example, you can say, "It was midnight. There was no moon. The nearest streetlight was 500 feet away." But you can't say, "Ladies and gentlemen it was so dark that nobody could possibly have seen what happened!" You can say, "He was driving 97 mph." You can't say, "He was racing like a maniac, a dangerously loose cannon." That's argument. But how can you persuade if you can't argue? Through your credibility, through the facts, and by your choice of words to describe the facts.

E.g., use action words ("he staggered across the street" is better than "he went across the street"). Some lawyers call the opening statement the "Opening Argument" because of its inherent persuasiveness.

8) **MINIMIZE BAD FACTS**. No case is perfect. There are strengths and weaknesses in every case. The prosecutor is required to open, and obviously will focus on the strengths of the case. But the defense misses a golden opportunity by waiving an opening, even though he or she will need to acknowledge some harmful facts. To avoid mentioning the weaknesses at all may detract from your trustworthiness as a reliable presenter of information (this is true for both sides, although remember that the prosecutor cannot comment on any facts other than those he/she will present as the defense has no burden to present any evidence or witnesses). E.g., if your chief prosecution witness has a criminal record, it's better that they hear it from you (otherwise, the defense in their opening will be quick to point out your omission!). But not only do you look more trustworthy by revealing your bad facts, you also have the chance to present them in a way that is minimally harmful. *Inoculation* is the concept of giving the jurors just enough of the bad stuff to lessen its impact. It's like a vaccine, given to minimize the bad facts they will hear. You don't need to inoculate against *all* the bad facts! Choose which ones you need to reveal, and then gently weave them into the story. Let the jury hear them, but don't highlight them. The rule of primacy and recency applies in openings, as it does throughout the trial – people tend to remember the first and last things they hear. So put the bad facts in between, where they are addressed but least remembered.

9) **ESTABLISH CREDIBILITY AND AUTHORITY**. Remember, your mission is to persuade (but not argue). So, why should they believe your version? Why should they believe *you*—or your witnesses? The prosecution has a potential "moral high ground" advantage, as the "People's" or "Government's" representative (along with idea that if you've been arrested and come this

far in the system, where there's smoke, there's fire). The defense attorney may be seen by some jurors as a hired gun. Despite the presumption of innocence and the burden of proof, it may well be that it is defense counsel who has an uphill battle – you have to assert your own moral authority believably and you must *humanize* your client. Use his/her name, stand near him/her (especially in a case of alleged violence). If you seem not to like your client, or even worse, to be afraid of your client, you (and your client) will be at a great disadvantage. Righteous indignation has long been an effective tool for the prosecutor, but the defense must also try to stake claim to a position based on morality (i.e., the prosecution is the injustice here). [Note that while we are presuming a jury trial, all the same rules generally apply for a bench trial as well. Know your judge, however: many expect shorter opening statements due to their greater familiarity with the legal and factual issues.]

10) **MIND YOUR MANNERISMS**. We all have little ticks and vocal or physical characteristics. Often they are borne of self-consciousness. They may be less apparent in ordinary social settings, but highlighted in the formality of the courtroom. Be aware of your body. Do you use your hands appropriately and naturally? Be mindful of pacing, stance (e.g., "Adam and Eve"), hands, pockets, pen in hand (put it down!). Move for a reason – e.g., use a physical transition (walking from here to there) to reinforce a transition of topic (to talk about something new). What about your voice? Modulate your voice (volume, cadence) – it's a tool for effect! Do you attempt to fill the space between sentences with "crutch words" like "and" or "so"? Do you fall back on phrases like "you know" or do you pepper your speech with "uhhhhs"? If you have some significant mannerisms, be aware of them, control them, and establish good habits early on. With a little experience, you will pay less attention to your body. One way to overcome mannerisms is to keep your mental focus on the jury. Focus not on you, but on them. Really concentrate on how *they appear* as opposed to how you are appearing to them.

11) **USE SIMPLE LANGUAGE**. Make it conversational! The jury will not be impressed by your extensive vocabulary or legal jargon. Talk with them as if they were your neighbors. "Car" not "vehicle." "See" not "observe." Keeping it simple will help the jury better identify with you. Never talk down to them or appear condescending. And choose the *right labels* to create the images that are favorable to your theory. "Pool hall" (disrespectable) vs "billiard parlor" (fancy) – two very different impressions are created by choice of "label" words. "Jimmy Johnson" vs "the Defendant" – one humanizes, the other dehumanizes. And don't fall into the excessive use of adjectives. Persuade by strong nouns and verbs. "He forcefully hit him in the mouth" or even "brutally punched" isn't as strong as "His fist connected with the boy's mouth, smashing his lips against his teeth and spattering his T-shirt with blood" (note: no adjectives).

12) **END STRONG**. Alec Baldwin in the film "Glengarry Glen Ross" said "Always Be Closing." You have to close the deal. And while your real "ask" will come at the end of summation, even in the opening you must ask for what you want, without fear or hesitation. Consider creating a standard line to close every opening. E.g., "As you hear all of the evidence, I will ask you to use your head, your gut, your heart and your common sense and you will come to only one conclusion. As the close of the evidence, I will come before you and ask you for a verdict of…" Having a memorized standard ending to the opening will avoid wandering or fumbling at the critical point. You must appear confident. You must *be* confident!!! *You* must believe in your case!! If you don't, they won't! No good trial lawyer ever truly thinks he or she will lose. Know *when* to end your opening. Research suggests that jurors' attention begins to waiver after about 20 minutes. End, like you began, on a strong and powerful note! You have presented the jurors with the facts and witnesses that they will encounter during the trial, and you have framed it all within your theory of the case. Now, go do your opening!