

OPENING STATEMENTS

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Introduction

- ▶ Orem City
 - 18 years
 - Misdemeanors, Civil
- ▶ Judge Advocate General Corps
 - US Navy – 4 years
 - Civil work, defense, prosecution
 - UT Army National Guard – 18 years
 - COL – State Staff Judge Advocate
 - Combat Engineers, Attack Helicopters, Artillery, Homeland Response Force
 - Deployment to Afghanistan
- ▶ International Code Council
 - 14 years
 - Contract Instructor – Legal Aspects of Code Enforcement

Introduction

▶ WIIFM

- Learn something new.
- Apply new principles.
- Become better prosecutors.

**IT'S ALL ABOUT
ME**



Introduction

- ▶ Most important part of the trial.
 - REGARDLESS of what any other presenter tells you!!
- ▶ Jury interested and attentive.
- ▶ First impressions are lasting and powerful.
 - Competence
 - Preparedness
 - Knowledge
 - Personality
 - Confidence



Introduction



- ▶ You're a "story teller."
 - Tell a good "story."
- ▶ Well delivered, gets the facts out, sets the tone.
- ▶ Set up the rest of the trial to give the jury a reason to feel good about finding a defendant guilty.
- ▶ If you're confused, the jury will be confused which equals reasonable doubt.
- ▶ Be yourself and have fun!

BLUF

- ▶ Bottom
- ▶ Line
- ▶ Up
- ▶ Front



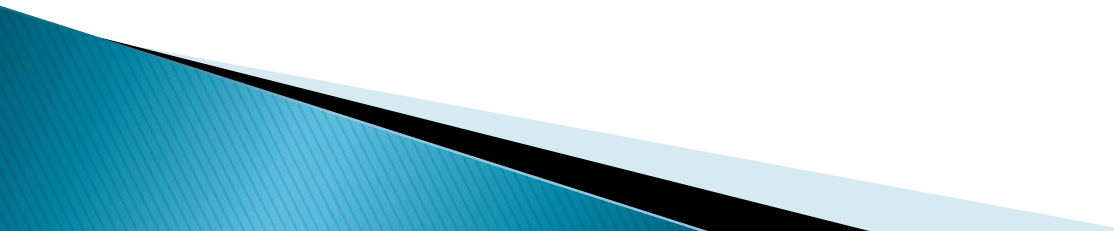
Tell'em what you got and what you want.

The Importance of the Opening Statement

- ▶ Jurors have to process large amounts of information quickly.
- ▶ Jurors will make immediate decisions based upon their widely held beliefs and preconceived notions based on past experiences.
- ▶ Short attention span.



Studies Show...

- ▶ T. Riley, “The Opening Statement: Winning at the Outset,” *American Journal of Advocacy* 225, 1979
 - ▶ Daniel Goleman, “Study Finds Jurors Often Hear Evidence With Closed Minds,” *The New York Times*, November 29, 1994
 - ▶ Dr. Donald E. Vinson, “How To Persuade Jurors,” *Vinson & Company*, 2012
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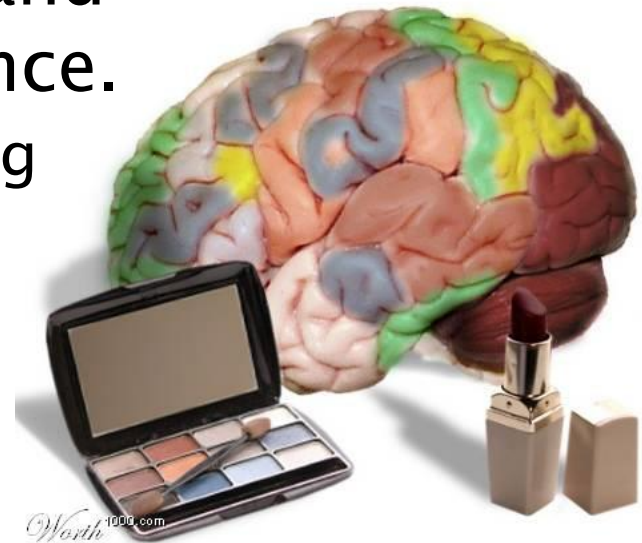
Immediate Decision

- ▶ Jurors make up their minds early as to the guilt or innocence of the defendant.
 - 80% of jurors form opinions following opening statements and do not change those opinions even after hearing all the evidence. (Riley)



Immediate Decision

- ▶ Whatever story is most convincing, often times delivered in opening statements, colors the jurors interpretation of the evidence so much that they seize on whatever fits their verdict and discount the rest of the evidence.
 - Will not change their minds during deliberations. Goleman



Immediate Decision

- ▶ A trial boils down to two versions of a story
 1. The prosecution's;
 2. The defense's.
- ▶ And the significance of their efforts to win over the jury.
- ▶ The most dramatically compelling story is more likely to appeal to the poor decision-makers among a jury. Goleman



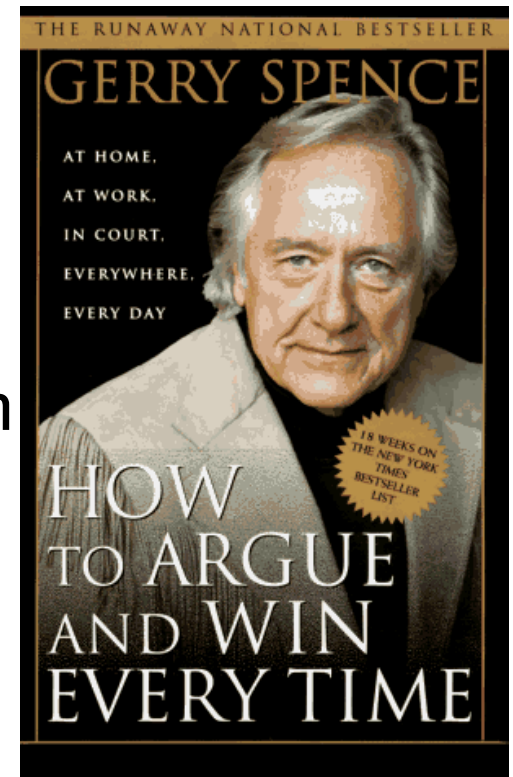
Immediate Decision

- ▶ Jurors are satisfied with the most seductive scenario, the one that at first glance seems to fit the evidence.
 - ▶ Once they've made up their minds, any further evidence is reshaped in their minds to somehow fit the story they've chosen -- or is ignored.
- Goleman



Immediate Decision

- ▶ "My experience is that jurors want to hear a complete story about what happened. When I make an opening statement, I always do it as a story. At that point, about 85 percent of jurors will come to a conclusion in that case. But you had better be able to prove your story, because if jurors who believed you find out you haven't told the whole story, then they turn against you." Gerry Spence as quoted by Goleman



Immediate Decision

- ▶ In pretrial group analysis, trial simulations and post-trial interviews, 80–90% of all jurors come to a decision during or immediately after the opening statements.
- ▶ “If you haven’t hooked them by then, it’s going to be an uphill battle. Witnesses, evidence and closing arguments still matter, of course. The fact that people come to quick decisions doesn’t mean those decisions are immutable. People do change their minds. But they usually would rather not, and if you haven’t hooked your jurors early, it may be hard to get them later.” Vinson

Immediate Decision

- ▶ Why do jurors make up their minds so early?
 - Jurors are brimming over with attitudes, beliefs and values based on their own life experience.
 - They are anxious to immediately use this background to come to terms with the trial and any anxiety/conflict they may have.
- ▶ Jurors want to come to a verdict that comports with their attitudes, beliefs and value system. Vinson



Repetition Breeds Retention

Opening

Direct

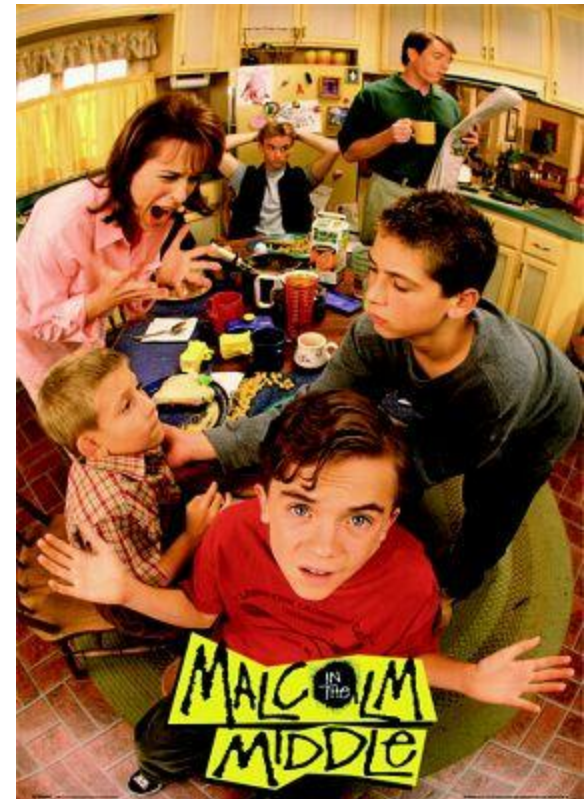
Cross

Closing



Primacy/Recency

- ▶ “During a “learning episode,” we remember best that which comes first, second best that which comes last, and least that which come just past the middle.”
 - David A. Sousa, “How the Brain Learns,” (2nd Ed.)

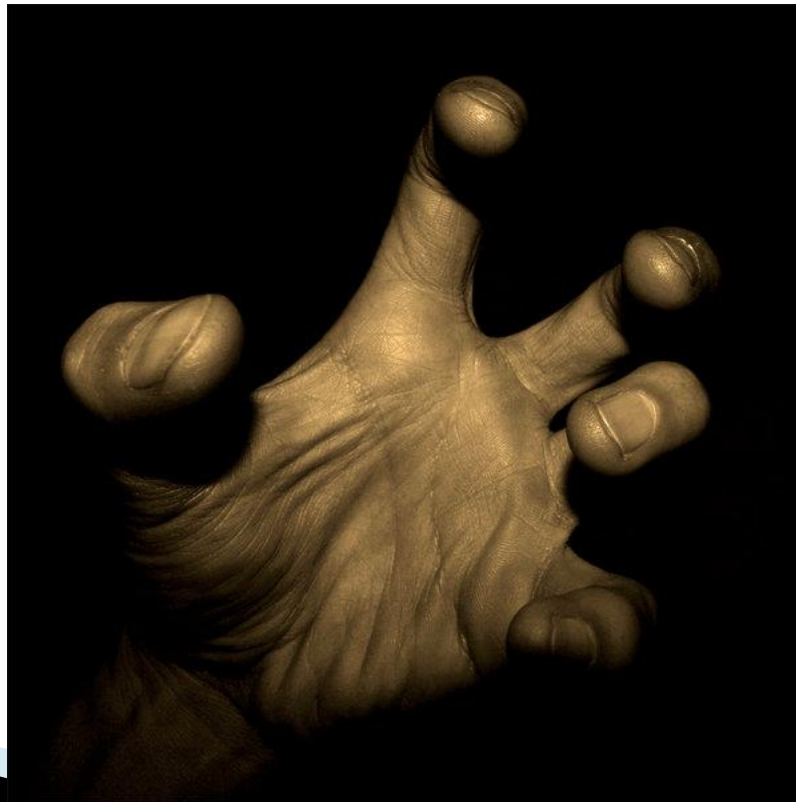


Learning Episode

Prime Times			Down Times	
Episode Time	Total Number of minutes	% of Total Time	Number of minutes	% of Total Time
20 minutes	18	90	2	10
40 minutes	30	75	10	25
80 minutes	50	62	30	38

First Impressions Count

- ▶ First 4 minutes of a social setting.
- ▶ You wanna GRAB 'EM
 - Happens all the time.
 - 1977
 - 2004
 - 1859



Recipe For Success

- ▶ Your professional responsibility.
 - The Utah Rules of Professional Conduct 3.4 (e) states that a lawyer shall not:
 - In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by the admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the *guilty or innocence of the accused (emphasis added.)*

Recipe for Success



- ▶ Facts
 - Will a witness testify to what you are saying?
 - If the witness will not testify and no exhibit supports your statement, chances are the statement is argument, opinion, or some other improper comment.
- ▶ Remember: You do not get to create a work of fiction at trial!



Facts of Our Case



Recipe for Success

- ▶ Elements of the offense.
 - Tie them to your facts and how they prove the elements of the crime.

Periodic Table of Elements

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18														
1 H Hydrogen	2 He Helium											3 Li Lithium	4 Be Beryllium	5 B Boron	6 C Carbon	7 N Nitrogen	8 O Oxygen	9 F Fluorine	10 Ne Neon												
11 Na Sodium	12 Mg Magnesium											13 Al Aluminum	14 Si Silicon	15 P Phosphorus	16 S Sulfur	17 Cl Chlorine	18 Ar Argon														
19 K Potassium	20 Ca Calcium	21 Sc Scandium	22 Ti Titanium	23 V Vanadium	24 Cr Chromium	25 Mn Manganese	26 Fe Iron	27 Co Cobalt	28 Ni Nickel	29 Cu Copper	30 Zn Zinc	31 Ga Gallium	32 Ge Germanium	33 As Arsenic	34 Se Selenium	35 Br Bromine	36 Kr Krypton														
37 Rb Rubidium	38 Sr Strontium	39 Y Yttrium	40 Zr Zirconium	41 Nb Niobium	42 Mo Molybdenum	43 Tc Technetium	44 Ru Ruthenium	45 Rh Rhodium	46 Pd Palladium	47 Ag Silver	48 Cd Cadmium	49 In Indium	50 Sn Tin	51 Sb Antimony	52 Te Tellurium	53 I Iodine	54 Xe Xenon														
55 Cs Cesium	56 Ba Barium	57 La Lanthanum	58 Ce Cerium	59 Pr Praseodymium	60 Nd Neodymium	61 Pm Promethium	62 Sm Samarium	63 Eu Europium	64 Gd Gadolinium	65 Tb Terbium	66 Dy Dysprosium	67 Ho Holmium	68 Er Erbium	69 Tm Thulium	70 Yb Ytterbium	71 Lu Lutetium	72 Hf Hafnium	73 Ta Tantalum	74 W Tungsten	75 Re Rhenium	76 Os Osmium	77 Ir Iridium	78 Pt Platinum	79 Au Gold	80 Hg Mercury						
87 Fr Francium	88 Ra Radium	89 Ac Actinium	90 Th Thorium	91 Pa Protactinium	92 U Uranium	93 Np Neptunium	94 Pu Plutonium	95 Am Americium	96 Cm Curium	97 Bk Berkelium	98 Cf Californium	99 Es Einsteinium	100 Fm Fermium	101 Md Mendelevium	102 No Nobelium	103 Lr Lawrencium	104 Rf Rutherfordium	105 Db Dubnium	106 Sg Seaborgium	107 Bh Bohrium	108 Hs Hassium	109 Mt Meitnerium	110 Ds Darmstadtium	111 Rg Roentgenium	112 Cn Copernicium	113 Nh Nihonium	114 Fl Flerovium	115 Mc Moscovium	116 Lv Livermorium	117 Ts Tennessine	118 Og Oganesson

For elements with no stable isotopes, the mass number of the isotope with the longest half-life is in parentheses.

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La Lanthanum (138.90547)	Ce Cerium (140.12)	Pr Praseodymium (140.90766)	Nd Neodymium (144.24)	Pm Promethium (144.9127)	Sm Samarium (150.36)	Eu Europium (151.964)	Gd Gadolinium (157.25)	Tb Terbium (158.92535)	Dy Dysprosium (162.5001)	Ho Holmium (164.93033)	Er Erbium (167.259)	Tm Thulium (168.93032)	Yb Ytterbium (173.054)	Lu Lutetium (174.967)
Ac Actinium (227.03373)	Th Thorium (232.0377)	Pa Protactinium (231.03688)	U Uranium (238.02891)	Np Neptunium (237.04817)	Pu Plutonium (244.0642)	Am Americium (243.06138)	Cm Curium (247.07035)	Bk Berkelium (247.07031)	Cf Californium (251.0832)	Es Einsteinium (252.08322)	Fm Fermium (257.10528)	Md Mendelevium (258.10528)	No Nobelium (259.10528)	Lr Lawrencium (262.10528)

Table 1000

Recipe for Success

- ▶ Synopsis of expert testimony.
 - Keep it relevant and simple.



Case Language – You can...

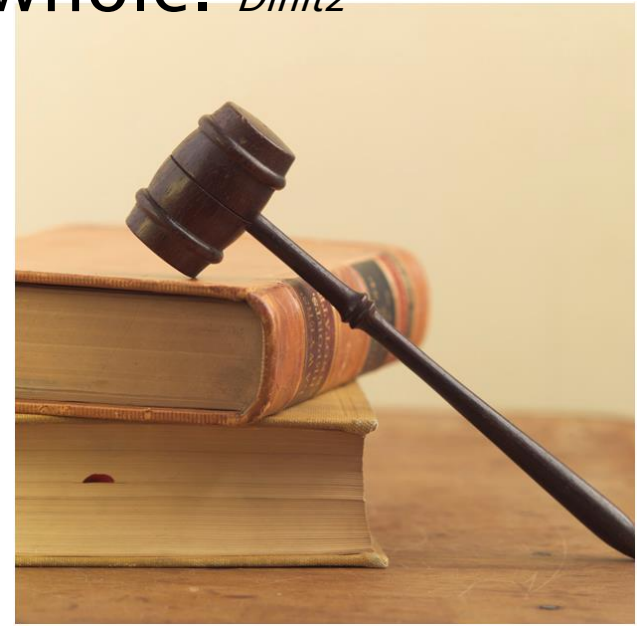
- ▶ Comparison between the defendant's life and the victim's was grounded in the evidence.
- ▶ Statement that crime was “cold and calculating” and stated that the defendant robbed victim “while blood spurted out her neck and celebrated the next morning” were grounded in evidence.
- ▶ Render a verdict you can be proud of, the correct verdict under the law and evidence.



Case Language – You Can...

(Some Cases Pertain to Closing Argument)

- ▶ An opening statement has a narrow purpose and scope. *US v. Dinitz*
- ▶ It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole. *Dinitz*



Case Language – You Can...

- ▶ Outline what in good faith you expect the evidence to be, even if some of it is not later admitted. *Frazier v. Cupp*
 - But...
- ▶ “I think our evidence is strong and you will be convinced and I will ask you to convict...” not clearly erroneous. *State v. Larsen*



Case Language – You Can...

▶ Proper statements:

- Comparison between the defendant's life and the victim's was grounded in the evidence. *Humphries v. Ozmint*
- Statement that crime was “cold and calculating” and stated that the defendant robbed victim “while blood spurted out her neck and celebrated the next morning” were grounded in evidence. *Smith v. Mitchell*
- Render a verdict you can be proud of, the correct verdict under the law and the evidence. *US v. Allen*



Case Language – You Cannot...

- ▶ Misstate the law, including the burden of proof. *State v. Hovater*
- ▶ Call the juror's attention to matters the jury would not be justified in considering:
 - Unadmitted or inadmissible evidence.
 - Evidence not supported by facts.
- ▶ It is NOT an occasion for argument.

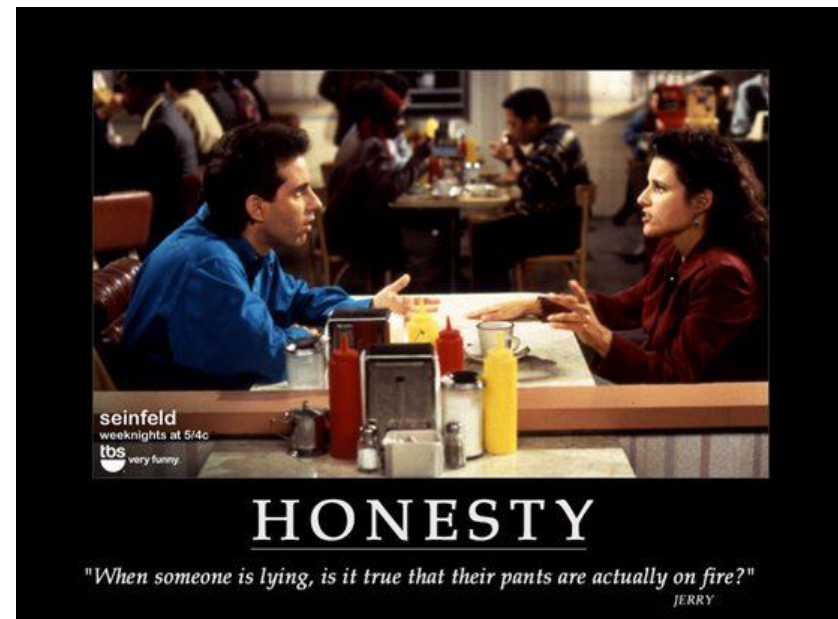
Case Language – You Cannot...

- ▶ Refer to defendant's sexual orientation, national origin or citizenship. *State v. Blomquist; Abiodun v. Maurer*
- ▶ Reference a court's denial of defendant's motion to suppress. *US v. Washington*



Case Language – You Cannot...

- ▶ “Throwing mud” at defendant rather than focusing on the evidence.
Brewer v. state
 - Calling defendant a liar. *State v. Graves*
 - Alibi was a lie. *Allen v. State*
 - Asking defendant whether a witness had lied. *State v. Carey*
- ▶ Vouch for or bolster a witness’ credibility.



Case Language – You Cannot...

- ▶ Inflame the passions of the jury.
 - Referencing the plight of “crack–addicted babies” when no evidence was presented about babies. *US v. McLean*
 - “Here is a man that should never, ever be permitted to walk among free people again...He has forfeited his right to live as a human being because he chooses to live as an animal—to engage in savage animalistic conduct.” *State v. Gann*

Case Language – You Cannot...

- ▶ “To believe his testimony...to believe anything that he told you from this witness stand is to allow yourself to engage in an academic exercise into a realm of reality where the Easter Bunny is real and the Tooth Fairy is alive and well.” *State v. Gann*



What Makes a Great Opening Statement?

▶ Theme

- Short, colorful synopsis describing what the case is about.
- Single sentence that captures the moral force of your case.
- Attention grabber.
- “Life-line” throughout the trial.
 - Be sure to weave your theme into the tapestry of your case.
- ▶ (Shhh. The reality is though, you may not always be able to come up with a theme.)

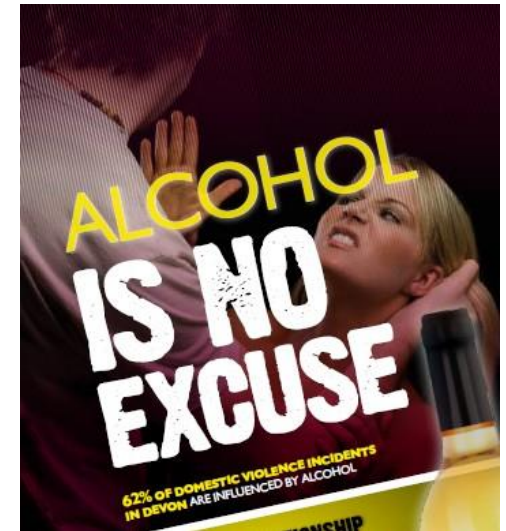


What Makes a Great Opening Statement?

- ▶ Frame your theme as fact as opposed to opinion or characterization.
- ▶ Sample Themes
 - Don't mind me, I'm just asleep.
 - Schoolyard bully.
 - Party on wheels.
- ▶ Beware of themes that can work against you
 - Puzzle
 - Roadmap
 - Math
 - Connect the Dots



Potential Themes

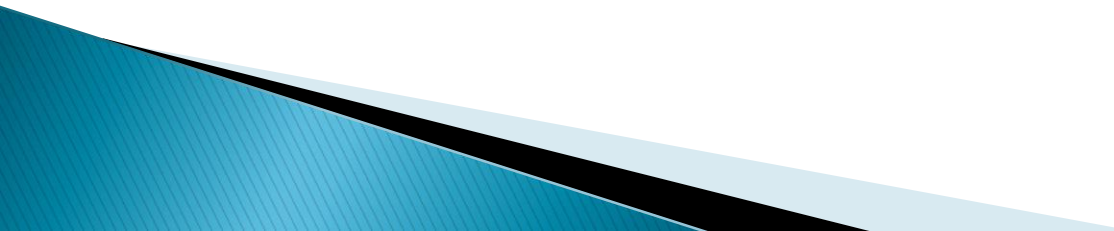


He says
it won't
happen
again

What Makes a Great Opening Statement?

- ▶ Story Teller – Be the best that you can be!
 - Interesting story.
 - Pictures
 - It's all about presentation.
 - Even the best steak in the world, when served on a garbage can lid, lacks in presentation. Bill Cosby
- ▶ Tell your “story” in a way that will make the jury WANT to convict.
- ▶ Be clear, succinct and persuasive.

What Makes a Great Opening Statement?

- ▶ Beginning
 - Grab their attention with the theme.
 - ▶ Middle
 - Provide the facts, theory and elements of your case.
 - ▶ End
 - Dramatic, powerful and connected to your opening.
 - Call to action!
- 

What Makes a Great Opening Statement?

- ▶ Engage the jury.
 - Eye contact – include every juror.
- ▶ Use the “well.”
 - Don’t be afraid to approach the jury.
 - Don’t turn your back to them.
 - Don’t pace, rock back and forth.



What Makes a Great Opening Statement?

- ▶ Get the defendant into the picture early.
 - Especially if identification is an issue.
 - Leave no doubt as to what he/she did:
 - Been out drinking.
 - Trying to steal his wife's company laptop.
 - Beat his wife.
 - Children saw the beating.
 - Drove the car – actual physical control.
 - Failed FST's.
 - .07 BAC
 - Name v. “defendant.”

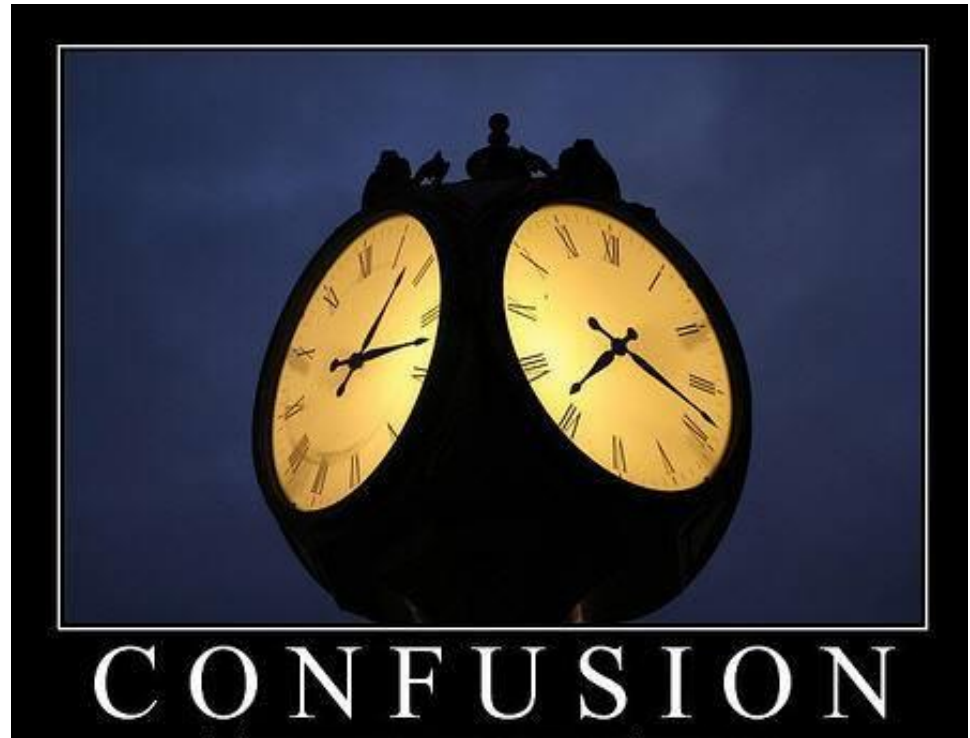
What Makes a Great Opening Statement?

- ▶ Charts, Diagrams and Demonstrative Aids
 - Interesting
 - Immediately connect the jury to the evidence.
 - Helps jurors remember the evidence.
 - Self-explanatory.
 - Beware
 - Defense counsel using against you.
 - Objections
 - Not in evidence, prejudicial, etc.
 - Get them preadmitted.



What Makes a Great Opening Statement?

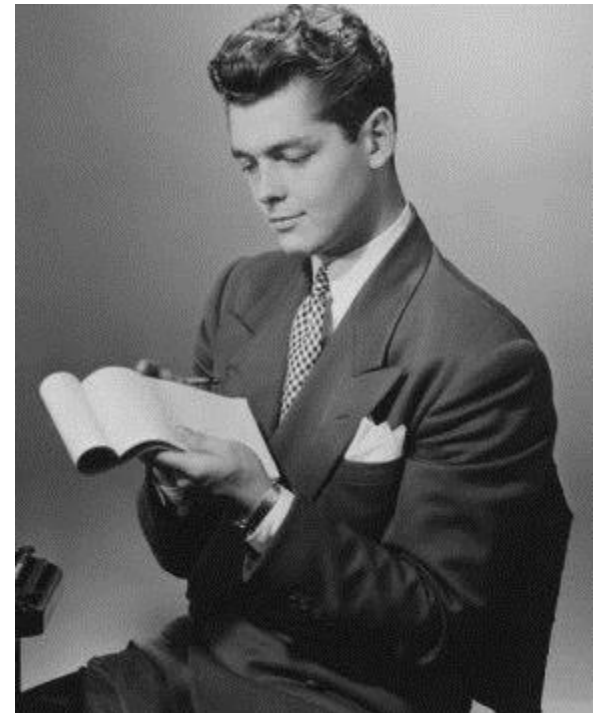
- ▶ Organization
 - Logical presentation of the facts.
 - Chronological v. topical.
 - Clarifying statements, not confusing.



What Makes a Great Opening Statement?

► Preparation

- PREPARE, PREPARE, PREPARE
- Interview your witnesses early on.
- Know the names of your witnesses.
- Be familiar with your visuals and how to use them.
- Do NOT read your notes.



What Makes a Great Opening Statement?

- ▶ Mastery of your facts.
- ▶ Never EVER, EVER EVER state fact or evidence in your opening statement that you will NOT be able to prove.
 - Don't tell them every fact you plan to introduce.
- ▶ Be sure to introduce all the facts/evidence you say you're going to admit.



What Makes a Great Opening Statement?

▶ Language, Mood and Tone

- Plain language.
 - Just because you speak the same language, doesn't mean they understand what you are saying.
- "Speak American"
 - Exit the vehicle v. Get out of the car.
 - "Surveil" the house v. Watch the house.
- Don't ass-u-me.
 - i.e. Jurors know language/terms of the predominant religion of the state.
- No "legalese."

What Makes a Great Opening Statement?

- ▶ Facts, not conclusions.
 - “We believe the evidence will show that the defendant tried to avoid detection.”
 - Officer Krupke found the defendant hiding in the house.
 - The officer will explain that the defendant had a bad driving pattern.
 - The defendant was speeding, weaving all over his lane, crossed over the fog line, hit the curb and drove up over the sidewalk.



What Makes a Great Opening Statement?

- ▶ Tailoring your tone, mood, attitude, etc. to the facts of your case.
 - Murder trial v. retail theft.
 - First time offender v. career criminal.
 - “Innocent” victim v. scumbag victim.
 - Housewife driving on her prescribed medication is NOT a capitol felony case.



What Makes a Great Opening Statement?

- ▶ Right choice of words.
 - Wasted words.
 - The evidence will show...
 - Whatever I say here is not evidence.
 - Filler words.
 - Um...okay...you know...
 - Too many words.
 - Don't' give too many details.
 - Pique the jurors interest.
- ▶ Confidence!

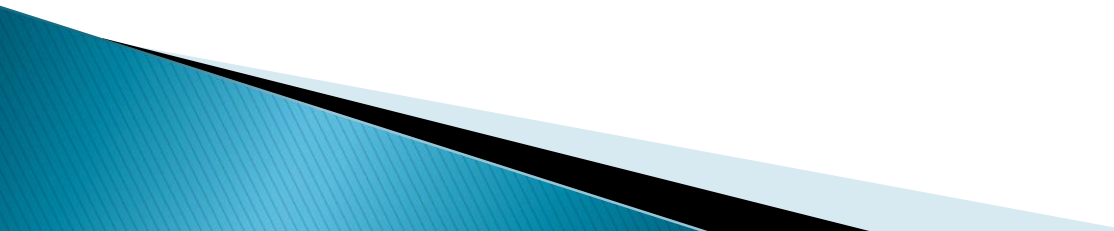


Do NOT!

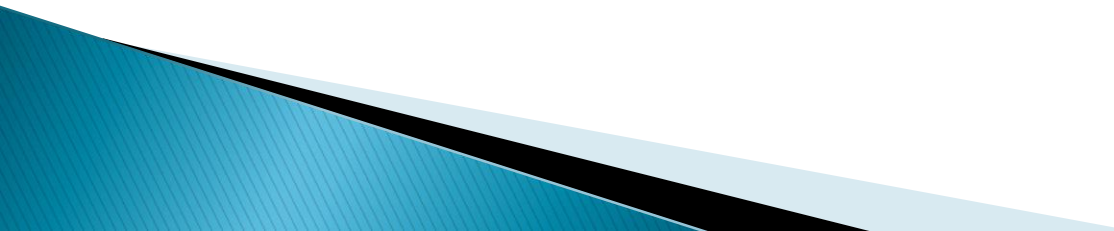
- ▶ Patronize, pander or try to ingratiate yourself to the jury.
- ▶ Testify yourself.
 - My client was born deaf. No one else in his family is deaf.
 - When I visited their apartment.
- ▶ Use aggressive body language.



Do NOT!

- ▶ Use annoying habits.
 - Fidgeting, pen tapping, change in pocket, etc.
 - ▶ Get caught up in extensive metaphors.
 - Bird's eye view, puzzle, road map, civic duties, American judicial system.
 - ▶ Waive your opening statement (except traffic court.)
- 

What Will Draw an Objection

- ▶ Matters ruled inadmissible prior to trial.
 - ▶ When counsel is referring to evidence that can only come in through the defendant and counsel has already stated that defendant will not testify.
 - ▶ Complete misstatement of the facts.
 - ▶ Prosecutor shifting the burden of proof.
 - ▶ Argument v. statement of fact?
- 

It's Your Credibility

- ▶ Be:
 - Sincere
 - Credible
 - Convincing
- ▶ Don't:
 - Exaggerate
 - Overstate your case.
- ▶ Admit your mistakes or weaknesses.



BE YOURSELF!

- ▶ Hands
 - In your pockets.
 - Wildly moving around.
- ▶ Podium
 - Or not to podium.
- ▶ Gifted story teller or not.
- ▶ Don't be someone you're not.
 - Find your strengths and maximize them!





Have Fun!