OPENING STATEMENTS: YOU NEVER GET A SECOND CHANCE TO MAKE A FIRST IMPRESSION

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Sincere Appreciation is Given to Robert B. Hirschhorn of

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O P E N I N G S T A T E M E N T S

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I. Introduction

As we begin the last decade of the twentieth century, we are experiencing a revolution in the courtroom. The techniques of the old guard must give way to new and innovative means of motivating our captive audience called the jury. Few cases have ever been reversed on error committed during the opening statement. Instead, I intend to address the humanistic factors that make the difference between a losing and a winning opening statement. Some cases have been lost because of an ineffective opening, but a disproportionate number of criminal cases have been won at the conclusion of this critical stage. Let me share with you my thoughts and observations on how to win your case by the conclusion of opening.

II. Many of the Jurors Have Made Up Their Mind

Many lawyers believe that summation is where your case is won or lost. Social scientists have taught us that this belief is erroneous. The reality is that by the time the attorneys finish voir dire and opening statements, a vast majority of the jurors have already made up their minds. The reality is that by the time the attorneys finish *voir dire* and opening statements, a vast majority of the jurors have already made up their minds. This conclusion is consistent with human behavior. Human beings have a natural tendency to be judgmental and to draw quick initial conclusions. I refer to this as the "sizing-up process." As attorneys, we constantly size-up our clients, peers, or adversaries. This exercise draws upon two distinct data bases: cerebral (what we think) and intuitive (what we feel.) Jurors go through the exact same process. Within a relatively short period of time, jurors evaluate you, your case, and your client. I remember my mother telling me, "Robert, dress nice, you want to make a good impression." Now I understand the wisdom of that statement. Likewise, in the context of a trial, the jurors size-up you, your client, and your case during *voir dire* and opening statements. The duration of the trial just confirms the initial opinions or feelings harbored by the jurors. Thus, in many ways the trial becomes a quest for support as opposed to a truth-seeking mission. Given the overwhelming significance of this stage of the trial, counsel must deliver a powerful, potent, and persuasive opening statement.

III. Length of Opening Statement

The length of the opening statement should be proportionate to the trial itself. If testimony is going to last four hours, a five minute opening statement is too short and a two hour opening statement is too long. In most criminal cases, the opening should last between twenty and sixty minutes.

Some lawyers believe in giving very long opening statements. Unless you are a fabulous storyteller, most jurors tell us they are bored by long openings. Other lawyers think that very brief (under ten minutes) opening statements work the best. Unless you intend to shock your audience (e.g., "This is the worst injustice in the past ten years..." or "You will be sick to your stomach when you hear what Billy Joe Bob has gone through since he was falsely accused of this crime"), most jurors get very little out of your offering. If you pursue the short opening on the basis of shock value and you fail in that quest during trial (or the prosecution diffuses it), this failure potentially will translate into a disastrous verdict.

When considering the length of the opening, counsel should be mindful of the impact television has had on our fact finders. Most of our jurors have had significant exposure to television. It should not surprise anyone to learn that the average juror watches at least two or three hours of television per day. Virtually all television programming is based on a thirty minute or one hour cycle with breaks every ten to twelve minutes. Ideally, you should structure your opening statement the same way. I am not suggesting that you move for a recess after ten to fifteen minutes, but I am recommending hat you allow the jury to absorb the points you are trying to make before you move on to your next topic.

IV. Name Your Case

We have found it particularly effective to give your case a name. Again, a juror's every day routine revolves around names or titles: lunch hour, coffee break, payday, laundry day, family day. These are small but significant portions of the day. The same holds true with trials. Several years ago, we were involved in a civil case in which an individual was severely injured when he hit a pothole in Houston. We named the case "the large black hole." Rather than beginning the opening statement by saying, "this is a case about a pothole," we started the opening statement with, "this tragedy is about a hole, a large hole, a large black hole that changed Billy's life..." This opening statement gave a graphic picture to the jury, and the City of Houston paid one of the largest verdicts ever in a pothole case. The same theory is absolutely true in criminal cases.

The media loves names (e.g., "Son of Sam," "Zodiac Killer"), and jurors gravitate to and remember these names. Most of the media-dubbed names are proprosecution. The name you give your case should represent the gist of your case. If the defendant's case revolves around self-defense based on disparity of size, you may want to call the case "David and Goliath - Two." In virtually any case, you can come up with a short but catchy name.

V. Theme of the Case

Every single case, regardless of its size, must have a theme that the attorney raises in *voir dire*, mentions in the opening statement, brings out through the testimony or exhibits, and hammers home during the closing argument. The theme of the case consists of a one sentence summary of what the case is about. It is best to employ one or more "feeling" words as part of your theme. The theme is not the legal or cerebral reason why you should win (insufficient evidence), but instead, it visually describes why you should win (e.g., "Keep your eyes on the weight of the evidence, not on the weight of the cocaine.").

VI. ABC's Not Legalese

Two of the most common criticisms about attorneys are that they are condescending and that they speak over the juror's head. The lawyer can easily solve each of these problems if he concentrates on making his presentation as simple as possible. For most attorneys, law school filled their heads with a new vocabulary and a new attitude. Many jurors have had a bad experience with an attorney or know someone who has had a bad experience. To overcome the inherent prejudice against our profession, we need to show the jurors that we are a lot like them. Hopefully, this process has started during *voir dire*, but at the very least you must demonstrate this to the jury during your opening statement. Nothing is more disconcerting or annoying than an attorney who makes an opening statement that is inundated with words the juror does not know. Practicing your opening statement on people who are not trained in the law is a good exercise for curing this problem. You should tell them to raise their hand anytime you use a word with which you are not familiar or do not understand. Lawyers are often surprised at the vocabulary level of the average juror. Keep it simple. Convincing the jury of your intellectual powers is unnecessary. You want the jury overwhelmed at the power of your case.

In some cases, there are going to be words of art that the jury must become acquainted with and understand. I recommend that the attorney prepare a glossary of terms as a visual aid. This document lists all fo the words of art and gives a simple explanation after each one. Let me emphasize

the word SIMPLE. If the definition is as complex as the word itself, your visual aid self-destructs and you lose your jurors. Display this visual aid throughout the opening statement so that when you make reference to one of these words or phrases the jury can instantly see what it means. Whenever your case involves words of art, technical terms, or legalese, it is critical for the jury to hear the words and definitions as well as see them during the opening statement. As with the party tree and chronology line, this demonstrative aid helps the jury tremendously, and they will reward the attorney who presents the clean, clear, and crisp case.

VII. Taking Control of the Courtroom

There are two basic forms of communication: verbal and nonverbal. Most lawyers focus exclusively on the verbal method of communication. Research shows, however, that much of what the jury learns comes in the form of nonverbal communication. For example, jurors have told us that a lawyer standing behind a podium throughout the opening statement has something to hide. Turning your back to the jury during the opening statement suggests to them disinterest or lack of respect for the jurors. Finally, reading your opening statement to the jury implies that it is a script, as opposed to something in which you truly and deeply believe.

Each of the above examples demonstrates the power of our physical presence coupled with our words. Sometimes, our demeanor is inconsistent with the words we preach to the jury. It is therefore important for the attorney to pay attention not only to his nonverbal signals, but also to nonverbals being conveyed by the judge, the opposing counsel, and the jury as well.

The first issue in courtroom control is where to deliver your opening statement. Many lawyers believe that an opening statement should be given from behind the podium. They argue that standing behind the podium represents a show of authority and that the lawyers must establish an authority figure in the courtroom in order for the jury to believe them. This logic probably stems from the impact of traditional education on lawyers, but the reality is that jurors view the podium as a barrier and not as a show of authority. We recommend that the podium be used as an anchoring point. In other words, counsel should occasionally go back to the podium to make sure they have covered the points on their outline to see what the next point is that must be addressed. If you are in a jurisdiction that has a podium rule, either explain that rule to the jury or stand to the side or front of the podium. Some judges may frown on this approach, but remember, the jury is vested with the ultimate power.

The lawyer who gives the opening statement from inside the jury box or the attorney who paces like a caged lion during the delivery of this important message is equally ineffective. Lawyers must

recognize and respect the space that the jury desires before they attempt to intrude. Jurors will give very clear signals when the lawyer is too close. For example, if a lawyer has an elbow on the rail during the opening and jurors in the front row are leaning back in their chairs, this is a clear message that the lawyer has gotten too close. There are appropriate times for the lawyer to approach the jury rail, but this powerful tool should not be used prematurely. Wait for the jury to give you the signal. Look for jurors leaning forward, smiling, or giving you affirmations like nodding in agreement. When you sense the jury is ready, you may enter this sacred territory.

Pacing is generally a nervous habit. Counsel should either diffuse this by telling the jury right away that pacing is one of the ways they display their nervous energy or the lawyer needs to anchor himself. Use movements to send powerful signals to the jury. An opening statement does not necessarily have to be dramatic to be effective. When controlling the courtroom, counsel should make every step and every movement count rather than making them wasted efforts. You diminish the impact of powerful movements if the jury is exposed to needless wandering or pacing.

Effective courtroom control suggests that counsel share space with the judge. Opening statements should include a mention of the wisdom, significance, or knowledge of the judge, but the jury should look to you and only you for the pertinent facts in the case. The only portion of the courtroom that should be considered off limits is the bench. Counsel should feel free to stake out the rest of the territory just as all other members of the animal kingdom do. Whether it is planting yourself behind your client, standing next to the witness stand, going to the chalk board, easel, or overhead projector, or invading the prosecutor's turf, all of these areas are within your domain and should be under your control.

VIII. Gripping the Jury

A mundane and ordinary opening statement usually yields a common and ordinary verdict. To win a difficult criminal case, you are asking the jury to have the courage to say "not guilty." Except in rare circumstances, the typical jury initially believes that your client must have done something wrong or else this case would not have gotten this far. To change this cycle, we must grip the jury and vest them in our case from the very beginning. To accomplish this, the attorney should not see the opening statement as a factual resume or road map to the lawsuit, but instead as a story that should be interesting and easy to follow. Adjectives should be used to spice up the picture. The attorney should view the opening statement as an artist painting a picture. For example, in a traffic stop case in which a police officer arrests your client and the driver for drugs secreted in the trunk of the vehicle, it does not make any sense to say to the jury, "this case is about Billy being arrested because the police found

two kilos of cocaine in the trunk." Instead, counsel should grab the attention of the jury right off the bat with something to this effect: "Billy never imagined that when his friend offered him a ride early in the afternoon of April 20, 1991, that he would experience so much pain, grief, and frustration." Gripping the jury shortly into the case makes them want to hear everything you have to say.

IX. Planting a Hook

Human nature is such that we are all looking for a hook. By that I mean we spend our time looking for the missing piece of the puzzle. Jurors experience this search every day in the form of game shows, books, movies, and even in their personal relationships. Since trials are a microcosm of life, we should also plant a hook with the jury in the opening statement.

In planting the hook, counsel suggests to the jurors that throughout the testimony of the witnesses they should keep their eyes on a certain piece of evidence or lack of evidence. In the opening statement, give jurors an agenda of those things on which they should focus. If counsel suggests two or three hooks for the jurors, they will be predisposed to place added and significant importance on this evidence or testimony when it comes in.

In a criminal case, a jury could make a big issue out of an otherwise mundane fact if counsel gives it to the jury as a hook. For example, if the complainant's vehicle had a bumper sticker that helps the defense (e.g., "Shit happens," "Protected by Smith and Wesson"), you may want to tell the jurors to keep their eyes on the bumper sticker in this case, especially if your client is not testifying. If the victim has a lengthy driving record, you may suggest to the jury to wait for that testimony to come into evidence before deciding if your client was guilty of vehicular homicide.

Hooks should include major as well as minor points. You want to keep the jury interested in your whole case, not just during the important portions of it. Hooks are the equivalent to plots and subplots in any book or movie. In a typical criminal case, it is very difficult to have the jury assume that your client is innocent. One small hook may have the jurors keeping their eyes on the weight of the evidence not on the weight of the drugs. In a driving while intoxicated case, have the jurors pay attention to the answers your client gave to the officer (thereby showing your client was not mentally impaired). If identity is the issue, have the jurors focus on that portion of your identity that does not match.

X. "The Evidence Will Show..." And Other Qualifying Phrases Have Got To Go

Nothing is more boring than a speech that constantly employs qualifying words or phrases. Statements such as "I believe the evidence will show," or "I think you will hear," or "we hope to bring you" are all phrases that cause the jury to be noncommitted as opposed to committed. Use these phrases infrequently if you must use them at all. If you cannot assure the jury of what evidence you will present, why should they believe you?

Another qualifying term many lawyers use is "what the lawyers say is not evidence in this case." I never understood why lawyers insist upon emphasizing this particular jury instruction. I want the jury to think that everything I say is gospel. Think about this scenario from the juror's perspective: The attorney stands up and says, "what lawyers say is not evidence." The lawyer then proceeds to give the jury a one hour speech. All the time the jury is thinking, "so what, it's not evidence." Thus, in order to accomplish effective communication with the jury, never short-change your client, your case, or yourself.

XI. Trilogies

One of the most powerful weapons in the communication arsenal is the use of trilogies. For some unexplainable reason, people learn in threes. I do not know why doubles or quadruples are not equally effective. Trilogies have been with us since biblical times (father, son, and holy ghost.) In school, we are taught the "ABC's" and not the "AB's" or the "ABCD's." Traditional wedding vows employ trilogies (honor, love, and cherish) and we even express allegiance to our country in a trilogy of colors (red, white, and blue). Within the context of an opening statement, the attorney should employ trilogies to convey the defense or the client's state of mind.

Another effective use of the trilogy is describing the fear or sorrow experienced by the client. Trilogies employing feeling words as opposed to thinking words will always be more effective and provide a hook for the jury to latch onto. Since your opening statement will be woven around your theme of the case, you should think about a trilogy that will interconnect the theme, the evidence, and the result.

XII. Humanizing Your Client

People are motivated and persuaded by feelings. In order for the jurors to return a "not guilty" verdict, they must see themselves in the shoes of the client. The easiest and most effective way of accomplishing this is by humanizing your client. If the lawyer stands up in the opening statement and says, "My name is Robert Hirschhorn, and I represent the defendant," and then gestures to his client,

the jury has little regard or feelings for our citizen accused. The lawyer is much better off starting the opening statement by introducing himself, walking over to the client, placing his hands on the shoulder of the client, and telling the jury, "I stand before you with Billy Joe Bob." I intentionally leave out the words, "I represent" because I believe juries see us as hired guns who are in the courtroom trying to beat the rap. Our goal is to show the jury that we care about our client and will do whatever it takes to right the wrong that has brought us to this point. Furthermore, humanizing your client by name instead of referring to him as "the client" or "the defendant" brings the jury one step closer to your camp. Finally, the simple act of placing reassuring hand on the shoulder of your client is one of those nonverbal messages that has a tremendous impact on the jury.

XIII. Client's Role During Opening Statement

I believe the client should play as active a role as possible in the trial. If you have a client that will make a good impression on the jury, maximize his or her role. On the other hand, if for whatever reason the client will not be particularly helpful, then minimize the participation.

With the appropriate client, you should consider the following ideas in the opening statement: 1) request that the client give his own opening statement; 2) if the judge denies the request, the client should hand the attorney a sheet of paper on which he has written out his opening statement. The lawyer could then read that as a part of his or her own opening statement; and 3) at a bare minimum, the client should assist the attorney anytime demonstrative or visual aids are used during the opening statement. Let me caution you, however, if the defense is inconsistent with the role or assistance you want the client to render, do not, under any circumstances, have the client participate. If the issue is competence, the client should not engage in artful, well-thought out, albeit simple, opening statement. This would clearly be counterproductive. Instead, the communication with the client (in the courtroom, hallways, and cafeteria) should be frequent and very simple.

Again, be mindful of our underlying premise: information is conveyed to the jury by what they see on the witness stand, in the courtroom, and in the courthouse. In determining your client's role during the opening (or for that matter, during the course of the trial), make sure it is consistent with your case.

XIV. Eye Contact

As discussed earlier, nonverbal communication is a powerful tool that lawyers must use more effectively. Eye contact with your jurors solidifies the bonding process. Most public speakers have a tendency either to favor one side of the room or simply pick out several people and focus on them. From the juror's perspective, each and every one wants to feel important. Each juror wants to know that you value their assessment of your case. Therefore, it is important in the opening statement to attempt to have eye contact with all of your jurors. Terence MacCarthy, a brilliant trial lawyer from Chicago, taught me that one simple way of doing this is in your initial salutation to the jury. Rather than standing up and saying, "Good morning ladies and gentlemen of the jury," the lawyer is better off standing up and saying, "Good morning ladies," and looking at each one of the women on the jury and then saying, "Gentlemen," and looking at each one of the men on the jury. The lawyer should then begin the case.

Another common problem is that lawyers have a tendency to look only at those jurors who are giving them positive feedback and to ignore the rest. It is easy to talk to jurors who are either nodding their head in agreement or who are leaning forward while you are talking. It is much more difficult to want to communicate with jurors who either look away or seem to have a disapproving look on their face. In reality, these are the jurors that you must pay attention to or else they will punish you in the jury room.

One technique used is dividing the jury box into halves or quarters. The lawyer begins to rotate systematically his discussion around the jury box. Another technique is to use the juror's names during the opening statement (or closing argument) as a method of catching their interest and having the juror pay attention to the particular point you are making.

Lawyers must be very careful about flirting with or staring at the jurors. A fine line exists between establishing good eye contact with your jurors and making the audience feel like you are staring at them. After establishing eye contact with the juror, you may want to give an affirmative nod and then move on to the next juror. Flirting can be a very dangerous tactic or subconscious communication that could cause resentment in other jurors. For example, if the female attorney appears to be directing most of her attention and arguments to one good looking male on the jury, other male jurors may feel jealous or resentful. This problem will also occur if a male attorney pays most of his attention to an attractive female juror. We have seen numerous cases in which lawyers doing this, either intentionally or subconsciously, have paid dearly for it when the jury returned with their verdict.

XV. Visual Aids

Another important lesson we gleaned from television is that people learn with their eyes. When someone speaks to a jury for an hour without interruption, you can reasonably expect that the jury will recall and retain fifteen percent of everything they heard. When a lawyer, however, employs visual aids to assist or enhance the learning process, juror recall increases dramatically to sixty-five percent.

Hundreds of post trial interviews with jurors taught us one unequivocal lesson: Jurors respect and follow the attorney who simplifies the case for them. Any case, regardless of how complicated the lawyer perceives it to be, should be susceptible to being boiled down to a three sentence summary that does not include any legal or technical terms. Two simple and highly effective demonstrative aids include the party tree and chronology line.

The party tree simply outlines for the jury the key players and familiarizes them with names and roles that each person played in your case. The jurors greatly appreciate this simple and fundamental information. Remember, you put numerous hours into your case. The jury, on the other hand, has had the case for less than an hour. Obviously, you do not call your outline of the parties the "party tree" in front of your jury.

The chronology line is an equally important demonstrative aid because it puts the relevant events into perspective. Since juries in most cases are not allowed to take notes, lawyers normally rely on repetition and closing argument to order sequentially the relevant events. The problem with this approach is that in many instances, it falls upon deaf ears because most jurors have already made up their minds. To guard against this problem and to communicate its case more effectively to the jury during the opening statement, counsel is well advised to prepare and use a chronology line. This puts before the jury the relevant facts and dates in a simple, easy to understand fashion.

XVI. Multiple Party Cases - Division of Opening

Lawyers involved in a case with multiple defendants must be careful not to step on each other's toes or to bore the jury. To avoid this, divide up the issues. The concepts of primacy and recency may also play a part in deciding the order of opening statements. If you believe that the final words are most likely to be remembered by the jury, then the most powerful lawyer should go last. Let me clarify what I mean by the word powerful; this does not necessarily mean the lawyer with the most experience, best reputation, or best defense. Instead, I am referring to the lawyer who will have the most persuasive impact on the jury. Even if that lawyer represents a nominal defendant, the power of the lawyer's

argument inures to the benefit of all defendants. In most multi defendant cases, the judge will want the lawyers to go in the same order as listed in the charging instrument. Counsel should resist this process because it lends credibility to the indictment. The defense should choose how it wishes to proceed.

XVII. Dealing With Objections

Our experience teaches us that when an attorney gives the kind of opening statement we are suggesting, the other side is so surprised they generally just sit there. On the other hand, some prosecutors will object for two reasons: 1) you are effectively selling your case to the jurors, and they want to try to stop your momentum; or 2) the opening statement just sounds objectionable.

Should the prosecutor object on the grounds of improper opening statement, do not apologize and go back to the old style of opening. If you do this, you will lose control, continuity, and credibility with both the jurors and the judge. Instead, consider the approach taken by Terence MacCarthy, who suggests the following: First, go to counsel table and pick up your copy of the ABA Standards relating to opening statement; second, hold this document in your hand and say to the judge, "As your Honor well knows, the ABA Standards define the purpose and scope of the opening statement and say we are permitted to recite the facts and discuss the issues of the case. The issue I am now discussing is one of the key points in our litigation;" finally, while saying this to the judge, you should nod your head affirmatively. The combination of quoting the ABA Standards and gesturing affirmatively will often result in also getting the judge to nod and say something to the effect, "well, go ahead but make it brief." Regardless of the ruling, you should not go back to the old technique. Gerry Spence set the tone in the *Marcos* case will a brilliant opening statement. Despite repeated objections, Gerry knew the power of this kind of opening statement. Do not let objections sidetrack your mission. View the objection as encouragement that you are winning your case. If the judge overrules the objection or if a ruling is not obtained, repeat the relevant point before moving on to the next topic. If the judge sustains the objection, you should use the phrase, "the evidence will also show ..." *sparingly* and *infrequently* before you make your point. Recreating the events (or as we say, "painting the picture") is proper provided you are not arguing the case. Do not let the objections change the substance or delivery of your message.

XVIII. The Law

We in the legal profession often forget how complicated the law is to understand. In relatively short periods of time, we expect our jurors to absorb and understand various concepts of the law. If

understanding the law was that easy, law school would not take three years. By the same token, jurors have difficulty understanding even the most fundamental legal concepts.

With this in mind, counsel should be very cautious not to dwell on legal concepts or legal terms during the opening statement. As discussed earlier in this Article, you should place any legal concepts or terms on the demonstrative aid entitled glossary of terms so that the jury can hear the words and definitions as well as see them. During *voir dire* and the opening statement, counsel is ill served by hammering on legal concepts or definitions. Spend no more than ten to fifteen percent of your time during opening on legal issues, concepts, or definitions. Furthermore, tell the jury the story first. Only after doing this should you add the ingredient of law and explain how it pertains to your case. This serves the added benefit of telling the pertinent portions of the story again, but this time within the context of the law.

XIX. Making Your Record

Always make your opening statement on the record. I cannot think of a single exception to this rule. If you observe inappropriate conduct during the opening statement, either stop at that time or at the end of your opening statement, approach the bench, and put it on the record. For example, if opposing counsel is snickering, laughing, or making other disruptive gestures during your opening statement, put that on the record immediately. It places opposing counsel on notice that you will be grading his conduct throughout the trial and will also make him appear foolish in front of the jurors or the trial judge. By the same token, if you notice that the trial judge made inappropriate gestures during your opening statement, we simply suggest you tactfully put this on the record as well. For example, if the judge taps a pen or pencil during your opening statement or physically turns away from you or the jury during your opening statement, I recommend you approach the bench and say on the record, "I am sure your Honor was not aware of this but ..." and proceed to put on the record that conduct which you felt was inappropriate or distracting. Again, the primary purpose achieved by this is acknowledging that you are aware of everything that goes on in the courtroom, and it may keep the judge from repeating his behavior at other critical points in your case, because the judge knows you will put it on the record.

XX. Conclusion

The opening statement is a powerful tool that lawyers must use to their full advantage. A warm, sincere, and authoritative opening statement sets the stage for the jury to return the verdict that you want. Do not be afraid to tell the jury exactly what you want in your case. Be concrete and specific with

your jury. By employing the techniques set forth in this Article, you convey to the jury that you are genuine and that you believe in your case. This message encourages the jury to return the only just verdict in your case - not guilty.