

The Opening Statement: Taking Control of the Narrative

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At trial, the parties grapple in the present for control over how the events of the past are to be understood. How do you take control from the start?

You have to rule the opening statement. After all, you give it at a moment in the psychology of the trial that never comes again. The jurors are in an unfamiliar setting and are a bit nervous or excited. They do not know the characters in the drama from the past that will be imperfectly recreated in the courtroom. And they do not know the characters in the present drama that is beginning to unfold before them, the professional battle between the lawyers. It is during these precious minutes at the start that the jurors are most willing to listen, to take in new information, and to consider new ideas.

To be sure, in a criminal case, some may have come into the jury box with the idea that the defendant is probably guilty. Some may be thinking why else would that nice, clean-cut prosecutor have brought the case? But, despite such unspoken thoughts, jurors by and large take their roles seriously and want to do the right thing. Your role, as defense counsel in a criminal case, is to persuade them that the right thing to do is to acquit. In your opening, you have to let them know that the case is not as open and shut as the prosecution has just claimed and that there is so much more to the story worth thinking about.

Some urge that it is wise to stress the government's heavy burden of proof rather than to be too specific about what the evidence will show. This reticence is born of the reality that counsel can never know for certain what will develop at trial. No matter how many documents and witness statements the government turns over, there will always be surprises, good and bad. And counsel cannot venture from where the evidence takes the case. The jury will never forget an unfulfilled promise. What's more, an excessively detailed recitation of the evidence in the opening statement may also have the subliminal effect of shifting the burden of proof from the prosecution to the defense. After all, if you know so much about the evidence and can make so many promises about the case, you'd better deliver. So, what to do?