The Art of Trial Advocacy

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"It's Like Déjà Vu All Over Again!"[1] Yet Another Look at the Opening Statement

> Thank you, your honor. Members of the panel, I need your help. I don't know where to begin. I've been presented with this morass of inscrutable facts that the opposing counsel claims are the important points of this case and that will lead to a finding favoring her side, but believe me, it just isn't so. There are so many inconsistencies she didn't mention, so much evidence she's simply ignoring or, more insidiously, hiding. Her version of events is simply not worthy of belief. Thank you.

An objectionable opening statement? Certainly. How often is this approach used in courts-martial? Mercifully, probably never, although a few of its component parts may have crept into my own plaintive cries of despair before various panels over the years. Nevertheless, this rather extreme example represents what many counsel encounter during trial preparation: the visceral, voice-in-the-wilderness sensation that urges us to leap to our feet crying "Objection, your honor! That is not fair! Counsel knows those aren't the facts of the case!" Unfortunately, to represent our clients effectively, we must be slightly more articulate than that. Getting past such histrionics and presenting a plausible, persuasive opening statement of one's case must be the goal of every counsel preparing for a contested court-martial case.[2] All counsel can articulate the notion that the opening statement is based on facts, and that facts, not argument, must be the focus. But most counsel are occasionally assailed by unease, for how does one advocate facts? How do counsel avoid arguing?

One answer is this: do not talk about the law. Often, counsel feel bound, as part of describing the "roadmap," or theory of their case, to set out the elements of the offenses that the government has to prove and the burden the government bears. Virtually nothing could be more distracting to juries, potentially injurious to counsels' theories, and damaging to the smooth flow of counsels' presentation to the panels. For instance:

> It's my job, as the prosecutor, to prove to you beyond a reasonable doubt that the accused took the victim's motorcycle, and that he did so with the permanent intent to deprive the alleged victim of the use and benefit of that vehicle. The evidence will convince you that we have met our burden, because we'll show you that the accused was seen riding Specialist (SPC) Snuffy's motorcycle and that SPC Snuffy never consented to that, so you'll be able to infer that there's no way the accused could reasonably believe he had license to use the vehicle, so he must have had the permanent intent to deprive SPC Snuffy of–
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> Objection! Argument![3]

How negative this opening sounds! All the talk of "burden," what an uphill battle the prosecutor has. And those elements, so complicated. Moreover, they (the elements) are wrong: it's the *intent* to *permanently deprive*, not vice-versa, but I, for one, have heard it presented this way in court. What do counsel gain from this frolic into the law? Only an objection, to derail the already uneven flow of this opening statement.

The above rendition is also unappealing. It drives a wedge between the panel and counsel. The smooth flow of the story that should be interesting to the members is interrupted abruptly by argument that becomes jarring and bumpy as it clambers through the thicket of the elements. As we can see, there is truly an aesthetic component to opening statement that dictates giving the law a wide berth indeed.

Moreover, it is clear that when counsel start talking about the elements, they necessarily shift their focus from the facts to the *inferences* that the facts support and how those inferences fit into the requisite elements of the offenses. We have just hit upon the recipe for closing argument! So, because it is awfully difficult to talk about the elements and the law without straying into argument, counsel should save the elements, the law, and the inferences for closing. That is where they were meant to be.

Counsel should also consider what the opening statement is *not*. It is not just another military briefing. Counsel are not just members of brigade commanders' staffs giving informational briefings. Many counsel feel–and some judge advocates adopt this as an approach to advocacy–that they are in "briefing" mode when talking to panels. But that is a meaningless distortion of their role. For counsel in a military conference room describing rules of engagement, it may be true that the judge advocate is just another staffer, but in a military courtroom, counsel should reign supreme. Counsel are the advocates, the combatants, seeking victory on the field of honor, not mere functionaries on a staff. Counsel who lose sight of this fact will never achieve the vital transcendent sense of perspective one

1. "It's like déjà vu all over again." *Famous Yogi Berra Quotes* (visited May 5, 2000) <http://www.yogiberraclassic.org/quotes.htm>.

2. *Cf.* Lieutenant Colonel James L. Pohl, *Trial Plan: From the Rear . . . March!*, ARMY LAW., June 1990, at 21-22 ("Opening statements are critical to trial success.").

3. Of course, the defense may not object. The first rule of trial practice is: when your adversary is self-destructing, do not interfere.

must have to achieve success, to appear believable and–most importantly–more *compelling* to the members than one's opponent. I am not suggesting that military panels want a dog and pony show from a smarmy snake oil salesman. But I am suggesting that, whether the panel members will admit it or not, they want a "hook"; they want to be presented with a recitation of the facts that will draw them in, effortlessly, and give them a vision of the case that they can believe in right from the start. It may be for this reason that most juries are usually convinced after opening statements of the outcome for which they will vote.[4] Basically, it is the judge advocate's job to make the factual retelling interesting.

Defense counsel have an especially difficult time constructing an opening statement, usually because they will not be presenting much evidence during the defense case.[5] Even if counsel plan to present evidence, a general theory of "reasonable doubt" probably will focus more on blunting the inferences the prosecution wants to draw than on presenting a completely new or different "story" to the panel. For trial counsel, the logical flow is usually more apparent. Trial counsel can build the facts into an opening statement in such a way as to leave the panel with a compelling, convincing picture of the government's theory without counsel ever explicitly commenting on it.

So how do counsel urge their version of the facts to the jury without embellishment or decoration, without directly telling the panel "Believe us, don't believe them"? The answer may lie, at least in part, in the way counsel present the facts in their opening statement and the way in which counsel highlight the facts that are important to their theories. Counsel may employ certain rhetorical devices that will help present forceful opening statements that remain factually-focused and help steer the ships of advocacy clear of the dangerous shoals of argument. Exploring rhetorical devices as potential aids could help counsel answer the questions "Why do I want to argue?" and, as importantly, "What would I want to argue?" Thus, it may be that we can recognize and avoid the tendency to argue, and, finally, create a more compelling, resolute opening statement.

Compounding the dilemma is the fact that, put plainly, counsel *like* to argue. It is what we, as counsel, do. We also like it because, in a way, it seems easy and because it is the indispensable bridge between the facts and the results counsel wish juries to reach. Counsel tend to gravitate toward argument because that is counsels' training and inclination. By the time counsel become judge advocates, the urge to argue, to clearly state one's position on the facts within the context of law, has become instinctive. Partly because of this instinctive desire to argue, opening statements present, in my estimation, the greatest challenge to counsel. Fortunately, some tools exist that can help deal with, if not completely suppress, the urge to argue. While these tools are not by any means foolproof, their use may prevent counsel from straying into objectionable argument during opening statements.[6]

Opening statement is especially demanding because it requires counsel to present facts in a compelling manner. Counsel must emphasize from the beginning that they are "telling a story" to the panel. "Telling a story" is the best way to structure an opening statement,[7] that is, to present the opening statement with a compelling recitation of the facts, using inflection and language[8] to highlight some facts and minimize others, and to create empathy with the panel for counsel's theory of the case. Counsel can also use devices to add emphasis and to suggest disbelief. Such devices include repetition, vivid imagery, and oratorical techniques such as dramatic pauses and pacing. Let us review some of those techniques.

Previewing Witness Testimony

"The evidence will show that . . . ." Many counsel dislike this rather shopworn prefix or "tag" as distracting to the members because it makes the "story" sound artificial. Moreover, it interrupts the flow of the story presented in opening statement (a less artificial tag might be "You will hear that . . ."). Nevertheless, it can be a useful tool for it forces counsel to speak with the voices of their witnesses and see the facts through the eyes of their witnesses. Its employment truly forces counsel to tell a story by reiterating the statements that the witnesses will make. It distracts counsel from the legal inferences that counsel inevitably want to argue in opening and which should be saved for closing argument. Finally, it is simply a better crutch than the oft-condemned "I think."[9]

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4. L. Timothy Perrin, *From O.J. to McVeigh: The Use of Argument in the Opening Statement*, 38 EMORY L.J. 107, 115 (1999) (stating that psychological and communications research suggests that many jurors make up their minds about the case after the opening statement) (citations omitted).

5. LAWRENCE A. DUBIN & THOMAS F. GUERNSEY, TRIAL PRACTICE 36 (1991) ("The defendant has a tougher problem making an introduction exciting and interesting, because the story is usually not the defendant's to tell.").

6. "The preferred remedy for curing error by members hearing an improper opening statement is a curative instruction, so long as the instruction negates any prejudice to the accused." United States v. Castonguay, No. ACM 28678, 1992 CMR LEXIS 251 (A.F.C.M.R. Feb. 27, 1992) (citing United States v. Nixon, 30 M.J. 501 (A.F.C.M.R. 1989)).

7. *See* Major Martin Sitler, *The Art of Trial Advocacy: The Art of Storytelling*, ARMY LAW., Oct. 1999, at 30.

8. Language is critical to the opening statement. *See* DUBIN, *supra* note 5 ("[Y]ou can say, 'John Smith went from here to there.' . . . Or, you can say that John Smith 'ambled' or 'sashayed' or staggered' or 'stumbled' . . . The idea is to pick the word that conveys the feeling you want to convey.").

Confronting the Opposition

Confronting key pieces of opposing evidence can be an excellent lead-in for counsel because, without explicitly arguing inferences, it suggests immediately that there is something suspect about the other side's presentation. Thus, it allows one side to directly reference, and implicitly refute, contentions made by the other. It most often begins with a quote directly from the other side's opening and then juxtaposes that piece of evidence with evidence that seems to be contradictory. For example, in an indecent assault case, counsel could begin with:

> The government would have you believe that, after being sexually assaulted, traumatically assaulted, by my client, the alleged victim, Private (PVT) Snuffy, got back into the *same* HUMVEE where my client was sleeping. The evidence will clearly show, however, that there were several HUMVEEs containing his squad members only a few feet away. You will also hear that PVT Snuffy then went back to sleep after being–allegedly–assaulted.

While it may not win the case, this passage is rhetorically powerful, because it suggests that the government's evidence will be incredible or absurd. More importantly, by juxtaposing the opposing side's "story" (that the victim was assaulted) with the fact that victim returned to sleep in the same HUMVEE in which, supposedly, he had been assaulted, counsel presents two pieces of evidence that are seemingly irreconcilable. Such a presentation may sow the seed of reasonable doubt.

The Rhetorical Question

The rhetorical question can be a very important tool in an opening statement. Perhaps in recognition of this fact, courts are very leery of it and may impede its use.[10] Nevertheless, it is worth discussing, because it can lend strength to an opening statement and, as importantly, it can be done in a manner that is not objectionable.

The strength of this device lies in the fact that, in essence, without arguing the law or inferences based upon the facts, counsel can question the facts to insinuate that, for example, a witness is lying. Using a rape scenario, for example, counsel could say:

> You were just told the alleged victim was trapped by the accused in his bedroom. You have heard that she screamed several times at the top of her lungs before breaking free of the accused and running out into the hallway. Well, as we go through the facts of this case, ask yourselves: [Pause] What did she say to the other soldiers who rushed out of their rooms and were milling around her door after she screamed and then burst out of the room screaming? [Pause] What did those several soldiers, drawn to the sound of the victim's screams, do with the accused? [Pause] The answer to these questions is [Pause] . . . nothing. There was nothing to say, because there was no one there. You'll hear that no one was drawn out into the hallway by those supposed screams. No independent evidence will be presented that there was any screaming or that there were the sounds of running feet or slamming doors. But you will hear from the defense witnesses, from witnesses who live right across the hall from the victim's room, and how they heard nothing at all that night, until the military police arrived in the early hours of the next morning.

Without arguing the law or legal inferences, the defense has suggested that the alleged victim's version of events is unbelievable.

Emphasize Others

This technique highlights the role of the complainant or someone other than the accused as the active decision maker in the events leading up to the crime. The idea is that the shift diffuses the emphasis on one of the participants in the case. While often effective for the defense, this is not solely a defense approach. Government counsel could employ it also, to preempt the defense theory that the accused was merely carried along by a tide of events he could not control. Again, an example of a possible defense opening statement in a rape case:

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9. "It is unprofessional for trial counsel to state his or her personal opinion as to the truth or falsity of any testimony or evidence." United States v. Horn, 9 M.J. 429 (C.M.A. 1980) (citation omitted) (improper for trial counsel to state "I think" fifteen times in opening).

10. *See, e.g.*, United States v. Hoyle, No. ACM S289 58, 1998 CCA LEXIS 309 (A.F. Ct. Crim. App. Nov. 6, 1995) (military judge should have sustained appellant's timely objection to the prosecutor's rhetorical question on closing: "Did the defense offer you a negative urinalysis result?"). *See also* United States v. Gallagher, 576 F.2d 1028 (3d Cir. 1978) (stating that it was an error for the prosecutor to ask "What motive did [the government witness] have to lie against [one of the defendants]? There is none, because she was telling the truth."); Ohio v. Williams, 1997 Ohio App. LEXIS 1158 (Ohio Ct. App. Mar. 26, 1997) (stating that it was improper for prosecutor to ask, in opening, "Why is the defendant making [the child] go through this?").

It is not my purpose to suggest that counsel employ a tactic that courts perceive to be inappropriate practice, and I advocate that counsel not ask objectionable, inappropriate rhetorical questions. Rather, the purpose of this portion of the article is to point out the distinction between asking a question like "How do we know the victim is lying? Well, I'll tell you . . ." versus the more appropriate questions mentioned in the passage below.

> You will hear that *the complainant* was the one who told her friends, "I want to get a man tonight." You will hear that *she* then asked my client to dance. *She* chose the slowest song the band played that evening. *She* began touching my client. *She* struck up a conversation with my client when they returned to the table. *She* bought my client three beers during the time they spent together. *She* asked my client if she could ride back to the barracks with him when the bar was closing. *She* invited my client up to her room for a nightcap. *She* poured my client a glass of tequila. And *she* took their relationship to another level when she agreed to the heavy petting by responding to my client's kiss while they were sitting together on the sofa.

Should counsel take the final step and state that "the evidence will show that *she* consented to the sex that occurred that night"? Certainly, but only if there is to be direct evidence on that point (that is, from the accused). There are several reasons for this. If counsel does not believe the accused is going to take the stand and testify as to consent, and there is to be no other direct evidence of consent, stating "consent" based on the above passage is a legal inference that is otherwise argumentative and objectionable. Of course, the trial counsel may object and say "argument," but the military judge will not *know* if there is to be direct evidence of consent. The military judge may, out of necessity, overrule the objection, but if it turns out there is no such evidence produced, there could be stern admonitions from the judge. So long as counsel can state in good faith[11] that some evidence of consent will be presented (that is, to show that the statement in opening is more than an "inference" based on the complainant's conduct), an objection to this statement should be overruled.

Clearly, the emphasis on the complainant's active role alerts the jury that the complainant was an active and consenting participant in virtually all of the chronology leading up to the allegation of rape, possibly implanting in the jury's mind, if only tacitly, the notion that the accused could have reasonably believed that the two would have consensual sex that evening. And all without uttering a word of argument. Obviously, the facts here tend to favor the defense, but the role of any good opening statement is to marshal the facts that most support the proponent's theory and to present them in a clear, logical, unadorned–but inherently persuasive–fashion.

The Sleazy Underworld

It should be self-evident that trial counsels' opening statements may benefit greatly from introducing the accused to the members in a context that suggests immediate condemnation. Trial counsel are allowed some latitude in presenting their initial theories, provided they do not abuse the necessary but apparently forgivable inferences they must make. Coupled with this latitude may be the need to account for damaging evidence. A prosecutor in a drug case, for example, may be stuck with the dilemma of how to handle her own witnesses' credibility problems. If the facts supported such an opening, she might state: "The evidence in this case will show that during the two-year period between January 1987 and January 1989, the accused virtually lived on methamphetamine, virtually lived on crank.[12]" This strong language sets the tone immediately for the panel members, depicting the accused as a shadowy, desperate character, and implicitly suggests that any associates he might have would be similarly afflicted denizens of the accused's underworld.[13]

The Dramatic Pause

Perhaps we remember our college English courses in which we studied poetry and learned of the caesura, or pause. This also is an excellent tool for an opening statement. Used properly, silence can be as powerfully articulate as language. Revisit the Rhetorical Question passage above and picture the silence in the courtroom as, during the dramatic pauses, the panel members lean forward, straining to hear what counsel discloses in response to the questions. And imagine the dramatic impact of "Nothing!"

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11. *See infra* note 13.

12. United States v. Toro, 34 M.J. 506 (A.F.C.M.R. 1991).

13. *Id.* at 512 ("[T]he evidence of other misconduct of the witnesses and the involvement of [accused's girlfriend] was inescapable and not inadmissible. Therefore, there was no error when trial counsel described the testimony expected in good faith.") (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 913(b), Discussion (1998); Annotation, *Prosecutor's Reference in Opening Statement to Matters Not Provable or Which He Does Not Attempt to Prove as Grounds for Relief*, 16 A.L.R. 4th 810, § 15, at 875 (1982); 23A C.J.S. *Criminal Law* § 1240 (1989)). *See* Wilhelm v. State, 326 A.2d 707, 714 (Md. 1973) (stating that defense objected to prosecution's reference in opening to purportedly inadmissible hearsay statement; judge instructed jury that opening statements are not evidence):

> While the prosecutor should be allowed reasonable latitude in his opening statement he should be confined to statements based on facts that can be proved and his opening statement should not include reference to facts which are plainly inadmissible and which he cannot or will not be permitted to prove, or which he in good faith does not expect to prove. . . . To secure a reversal based on an opening statement the accused is usually required to establish bad faith on the part of the prosecutor in the statement of what the prosecutor expects to prove or establish substantial prejudice resulting therefrom.

Id. (citations omitted).

Pacing the Opening

From the government perspective, pacing, in conjunction with other tools such as the dramatic pause, can be devastatingly effective in establishing the elements of a particular offense without requiring counsel ever having to mention the elements by name. The dramatic pause can be especially effective when counsel are trying to show deliberation or premeditation, whether as an element of an offense or in aggravation. Again, this requires only that counsel be conscious of the way in which the language and rhetorical devices they use can alter the way the facts are received. For example, consider a case in which the accused stole his roommate's automatic teller machine (ATM) card and emptied the roommate's bank account of several hundred dollars. Rather than simply stating that on 23 February 1999 the accused stole $600 from his roommate, and then trying to suggest how the elements are met, trial counsel could "pace" the opening like this:

> The evidence will show that, at approximately 2030 on 23 February, the accused, having seen his roommate depart for a field exercise only ten minutes before, walked the ten steps from his side of the barracks room to SPC Brushfire's desk. He went directly to the desk and opened the middle drawer. He then reached into the drawer and took out SPC Brushfire's wallet. Specialist Brushfire will tell you today that two days before this, he had told the accused that he always left his wallet in his desk when he went to the field. He had also told the accused that he was leaving his ATM card and the personal identification number (PIN) in his wallet so that his girlfriend could borrow it to get money if she needed any.
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> The accused reached into the wallet and seized the card. He took the card out, and placed the card in his pocket. He also removed a little piece of paper on which SPC Brushfire had written his PIN so his girlfriend could use the card. He remained in his room for only a moment or two after that, perhaps long enough to grab his coat, before he got in his car and drove away. He drove approximately one mile across post to an ATM machine. He drove to the ATM machine and he got out of his car. He walked up to the ATM machine and he inserted SPC Brushfire's card. He took out the small piece of paper on which was written the PIN of SPC Brushfire. The accused punched in four numbers–8-9-6-4. Those were the numbers on the piece of paper SPC Brushfire had left for his girlfriend, his PIN access number he had left for his girlfriend. His girlfriend, he will tell you, not the accused.
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> The accused punched in those four numbers. The testimony from Mr. Forbes, the bank manager, and the film you will see today will show that someone looking similar to the accused (and not like SPC Brushfire's girlfriend) inserted that card at 2045 on 23 February and told the machine to make a withdrawal from SPC Brushfire's account.
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> The accused then requested that the machine withdraw $200.00 from SPC Brushfire's account. This was the maximum amount permissible per transaction at that machine at that time. He pocketed the money and told the machine he was done. After he got the card back, he inserted the card again, for a second time, and again punched in the four numbers from the little piece of paper. Again, he told the machine to take $200 out of SPC Brushfire's account. Again, he received $200. He put the money in his wallet. Then he walked away . . . .

Without belaboring the point, the language of this opening has broken one transaction into a multitude of small transactions, each one requiring deliberate thought and action. This painstaking exposition of the facts will suggest to the panel the deliberation, intent and, ultimately, culpability on the part of the accused, without arguing about the elements of the offense. Perhaps equally important, counsel has laid the groundwork for the sentencing argument by setting up some of the offense's aggravating circumstances (such as, the suggestion that the accused had planned the theft and that he waited until his roommate had deployed on an exercise; the deliberate nature of the theft; and the apparent lack of remorse or guilty conscience along the way).

Marry Rhetorical Tools with the Facts

Ultimately, the rhetoric counsel use is just a tool for making more compelling the facts that will present counsel's theory to the members. There are no shortcuts to creating a sound theory that highlights the helpful evidence and accommodates or explains away the detrimental evidence. A good theory must account for all the evidence, and the rhetorical devices help marshal the facts that will support the theory to present it in a persuasive manner.

Counsel should always remember that they have to make the opening statement their own, and that they have to practice, practice, and practice their opening if it is to flow as a compelling narrative for the panel. The techniques suggested here may assist counsel in focusing on their theory and the evidence they wish to highlight in support of that theory.

> [O]pening statement does not need to be limited to a factual recitation of what is expected

to be elicited from the prospective witness. Counsel are entitled to make what rhetoricians call an exordium–that part of the opening statement intended to make listeners heed you and to prepare them for what is to follow. We do not mean to suggest that the performing artists be given a "broad range" in their efforts at advocacy. Each case must depend on its own peculiar facts and both counsel–for the prosecution as well as for the defense–are enjoined in their eloquence to circumspection, lest in their enthusiasm for their cause they create a condition that is likely or apt to instigate prejudice against the accused–or the prosecution.[14]

I make no guarantee about either the effectiveness of these "exordia" before a particular panel, nor do I warrant that each one will survive the military judge's scrutiny (with some military judges the techniques will be acceptable, with others not).[15] As a final disclaimer, this note is not advocating that counsel present information in opening unless they have a good faith basis to believe such evidence may be admitted.[16]

The role of rhetorical devices is not to trick or hoodwink the panel. Ultimately, it is to steer counsel away from argument, to focus them on developing the facts of their case in a clear, compelling manner and, to help all of us improve our advocacy skills. Major Saunders.

14. *Wilhelm*, 326 A.2d at 727 (citations omitted).

15. *See* Perrin, *supra* note 4, at 117 ("[M]ultiple test (or, more accurately, rules of thumb) are used to identify argument, none of which are adequate to provide lawyers with the guidance they need. As a result, application of the rule against argument varies widely from jurisdiction to jurisdiction, from courtroom to courtroom and judge to judge.") (citations and footnotes omitted).

16. *Id. See supra* note 13 (citing cases which reviewed the propriety of counsel's opening statements); *see also* United States v. Matthews, 13 M.J. 501, 515 (A.C.M.R. 1982) *rev'd on other grounds*, 16 M.J. 354 (C.M.A. 1983) (stating that in an opening statement, trial counsel must avoid including or suggesting matters as to which no admissible evidence is available or intended to be offered; opening statement should be limited to matters which prosecutor believes in good faith will be available and admissible).