

Opening Statement



Chapter Three



29 March 1971. First Lieutenant William L. Calley, Jr. is escorted from the courthouse at Fort Benning after being found guilty of the premeditated murder of 22 Vietnamese civilians and assault with intent to murder a child of about two years. The crimes occurred at the sub-hamlet of My Lai 4 on 16 March 1968. The court-martial panel sentenced Calley to a dismissal, total forfeitures, and confinement at hard labor for life. In August, 1971, the general court-martial convening authority reduced Calley's sentence to 20 years confinement. In April, 1974, after the Army Court of Military Review (today's ACCA) and Court of Military Appeals (today's CAAF) both rejected Calley's appeals, the new Secretary of the Army, Howard H. Callaway, reduced Calley's sentence to 10 years. This made Calley eligible for parole in less than six months, and he was released from the U.S. Army Disciplinary Barracks, Fort Leavenworth, Kansas on parole in November, 1974.

Pictured from left to right are Major General Basilio J. Valdez, Major General L.B. Donovan, Brigadier General Arthur G. Trudeau, and Brigadier General R.G. Gard preparing for a military commission in Manila, the Philippines, 17 November 1945. After the defeat of Japan, the United States convened military commissions to try Japanese war criminals in the Philippines, China, and Guam. Military and political leaders of the Empire of Japan were tried for crimes against humanity and war crimes at the International Military Tribunal for the Far East; another 5,000 were tried at military commissions.

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I. SKILL OVERVIEW:

- A. **Goal:** Develop counsel's ability to prepare and deliver an opening statement.
- B. **Training Overview:** This chapter reviews the basic theory and practice of delivering an opening statement, and includes several exercises designed to facilitate practicing giving an effective opening statement. Some of these exercises can be conducted with only two people – a trainer and one counsel. Others require a group to listen to a practice opening statement and provide feedback.

II. THE LAW:

- A. **Rule for Court-Martial (RCM) 913(b):** “Each party may make one opening statement to the court-martial before presentation of evidence has begun. The defense may elect to make its statement after the prosecution has rested, before the presentation of evidence for the defense. The military judge may, as a matter of discretion, permit the parties to address the court-martial at other times.”
- B. **Case Law:** While there is little military case law that deals directly or primarily with opening statements, there is federal case law that explores this area of practice. Some of the concepts embodied in these cases include the following:
 - 1. Argument is inappropriate in an opening statement. *United States v. Zielie*, 734 F.2d 1447, 1455 (11th Cir. 1984), *abrogated on other grounds by United States v. Chestang*, 849 F.2d 528, 531 (11th Cir. 1988).
 - 2. Opening statements may not refer to evidence which will not be presented, or which the parties know, in good faith, is probably inadmissible. *United States v. Obregon*, 893 F.2d 1307, 1310 (11th Cir. 1990); *United States v. Brockington*, 849 F.2d 872, 875 (4th Cir. 1988), *abrogated on other grounds by Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995). References in an opening statement to evidence that is never admitted at trial may lead to a mistrial or reversal on appeal. *United States v. Novak*, 918 F.2d 107, 109 (10th Cir. 1990).

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3. Statements of personal opinion from the prosecutor are inappropriate. This is particularly true when the statements refer to witness credibility or the integrity of the government in bringing a case. *United States v. Smith*, 814 F.3d 268, 274 (5th Cir. 2016).
4. A prosecutor may not vouch for a witness's credibility. However, she may explain why, based upon evidence before the factfinder, that witness's testimony is credible. *United States v. Sevilla-Acosta*, 746 F.3d 900 (8th Cir. 2014).
5. If a defense attorney's opening statement includes an admission on an element of the charged offense, that admission is binding on the attorney's client, and generally eliminates the need for the government to present proof on the admitted element. *United States v. Margiotta*, 662 F.2d 131, 142 (2d Cir. 1981); *Dick v. United States*, 40 F.2d 609, 611 (8th Cir. 1930).

III. PRACTICE POINTERS:

- A. **Purpose of the Opening Statement:** At its most elemental, an opening statement should function as a road map. At the conclusion of your opening statement, the trier of fact should know what your case is about and what evidence you will present. Craft your opening statement to serve several purposes:
 1. Grab the members' attention and make them want to hear the whole story;
 2. Preview the evidence in accordance with your theory;
 3. Persuade each member that your theory of the case is correct; and
 4. Convince each member that your evidence should and will win the day.
- B. **Importance of Opening Statement:** Some practitioners believe that the opening statement is the most important part of the trial. Whether you believe this or not, there is no question that opening statement is an early opportunity to begin advocating to the panel. Delivered expertly, a prosecution opening statement can win the case for the government before it puts on a single piece of evidence; similarly, a compelling defense opening statement will leave the panel feeling skeptical and eager to find weaknesses in the prosecution's case. A skilled advocate can use the opening statement to persuade the panel to its side without straying into impermissible argument.

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- C. **Inform and Engage:** It is imperative that an opening statement capture the panel’s attention with a compelling story. From the moment you begin speaking, your opening statement should both inform and engage, simultaneously keeping the panel’s attention, while giving members factual information about the crime, the accused, and, where applicable, the victim.
- D. **You Are the Author:** The opening statement allows you to be the author of the story: you choose the theme, where to begin the account, what language to use, the point of view from which you tell the story, which facts to emphasize, and which facts to downplay. The opening statement allows you to create the prism through which the members will view all the evidence. So, in the opening statement, tell the story the way YOU want it told.
- E. **Humanize the Witnesses:** Every case is a true story about human beings behaving in the real world. Use the opening statement to humanize the players as appropriate. At a minimum, this means referring to the victim (if you are the trial counsel) or the accused (if you are the defense counsel) by name rather than as the victim or the accused. It also means bringing out facts that will be presented at trial that humanize the actors: jobs, family, education, and relevant background. Counsel should fill in human details about these individuals that will bring them to life and keep the panel invested in the outcome of the proceedings.
- F. **Things to Avoid During Opening:** While some military judges give wide latitude during openings and closings, opening statement should be limited to a recitation of what counsel believe the evidence will show. Thus, the following will almost always be deemed objectionable:
1. **Statements of Personal Opinion:** Statements such as, “*I think you will find . . .*” or “*I believe there is overwhelming proof of . . .*” are impermissible. As a good rule of thumb, eliminate the word “I” from your vocabulary during both opening statement and closing argument. Trial is about the evidence, not about you.
 2. **Statements about Credibility:** Comments—positive or negative—on the credibility of any witness or any piece of evidence are impermissible. Save them for closing argument.
 3. **Argument:** Remember that you are giving the panel a preview of *what the evidence will be, not what the evidence means*. While this can be a fuzzy line, be careful not to cross it. Strive to keep things factual during opening statement. This, of course, does not mean that you cannot make your opening statement persuasive; but you make it persuasive by

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- a. Grabbing the panel’s attention right out of the gate;
- b. Using plain, simple, and powerful language;
- c. Telling the story in a compelling way;
- d. Telling the story from a compelling point of view; and
- e. Using your theory and theme to get the panel seeing the case your way.

G. The Attention Step—Making the Right First Impression:

1. **What To Do:** The first words out of your mouth in opening statement should be carefully crafted to ensure that the listeners will want to hear more. You must get their attention immediately. This does not mean that you have to be particularly loud, or that you necessarily have to come up with a catchy, alliterative phrase. It simply means that you should start with an introduction that launches the panel into the story without getting bogged down in ritualized courtroom jargon.
2. **What Not To Do:** Many advocates are in the (bad) habit of delivering boilerplate, procedure-laden, sycophantic opening statements. These have a tendency to suck the life out of your case and bore the panel at the same time. Do not do this. Do not bury your compelling theory in customary legalese. Do not start off by introducing yourself, thanking the jury, or listing the witnesses who will testify and what they will say. Consider the following examples:

OPTION 1: The Boilerplate, Procedure-laden, Sycophantic Opening by the Government

Thank you, Your Honor. Good morning, ladies and gentlemen. May it please the Court. My name is CPT Robert Smith, and I represent the government in this case. Before we begin, panel members, I want to thank you for your service here today. This is an important job, and we appreciate the vital role you play in our military justice system. Over the next few days, it will be my job to prove to you, beyond a reasonable doubt, that the accused, SGT Daniel Brown, is guilty of the offenses charged. That is the burden of proof in a criminal case – beyond a reasonable doubt. And we, the government, do not shrink from that burden today. During this opening statement, I will give you an overview of the important evidence you will see throughout this trial. As the military judge will tell you, my opening statement is not evidence. It is merely a roadmap of what to expect over the coming days. I am confident that, after you have seen all of the evidence, you will be convinced, beyond a reasonable doubt, of SGT Brown’s guilt.....

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OPTION 2: The Compelling Account by the Government

(From counsel table.) Thank you, Your Honor. (Walks to central place in front of panel box, pauses for a moment before starting.) When Specialist Jane Satterfield woke up on the morning of June 4th, she had no idea where she was. She didn't recognize the room she was in. She had never seen that bedspread, or the posters on the wall. She tried to get up, but she immediately felt dizzy. Her head was pounding, and her vaginal area felt sore. She looked down, and realized that she wasn't wearing any clothes. She didn't see her pants or her underwear anywhere, and she couldn't find her purse or her phone. Jane felt nauseated, disoriented, and confused.

But her nausea and confusion quickly gave way to another emotion: fear. Because Jane realized that she was not alone. There was a young man in that unfamiliar room with Jane. He was asleep in that same unfamiliar bed. And she didn't recognize him either. It was only later that Jane found out that the young man she woke up so confused beside was SGT Daniel Brown, the man who had—just a few hours before—raped her.

H. Should the Opening Focus On the Characters or the Events? Whether your opening statement focuses on people or events will depend on the facts of your case.

1. **Character-based Opening Statement:** In general, cases where the narrative can be driven largely by the individuals involved often call for a character-based opening statement. This is particularly true of cases where the crimes are of a personal or intimate nature, or are especially violent or tragic. Consider such a style for assaults, sexual offenses, crimes against children, and homicides. In such cases, the opening statement can be used to flesh out one or more characters in detail, and thus help the panel feel a personal connection to the story of the case.

Example of a Character-based Opening Statement

Stephanie Martinez had always wanted to be a mother. Since she was a little girl, she had dreamed of the day that she would have a baby to call her own. So when, after trying for years to get pregnant, she found out that she was going to have a little boy, she was overjoyed. When her son was born, she named him Tyler, and Tyler became her entire world. She loved the little brown curls that grew down the nape of his neck. She loved the dimples in his chin and cheeks when he laughed, and the fat little rolls in his legs. She loved to dress him in the tiny sweaters and booties that her mother knitted for Tyler and sent him almost every week. With Tyler in her arms, Stephanie had never been happier.

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Until September 19, 2016. That was the day when the accused, SSG Andrew Thompson, decided to get behind the wheel of his pickup truck and drive drunk. SSG Thompson's truck plowed into the back of Stephanie Martinez's car going over 50 mph, and in that instant, SSG Thompson stole Stephanie's happiness from her. Stephanie will never get to feel little Tyler's curls again, or tickle his fat little legs. She will never get to see his dimples again, because he'll never laugh again. Instead, Stephanie buried little Tyler on what would have been his first birthday, in an outfit that her mother had made for him.

2. **Event-based Opening Statement:** Offenses that are technical or that focus on the actions of a number of characters may not lend themselves to focusing on individuals. In such cases, an event-based opening statement may be more appropriate. An event-based opening statement focuses more on the roles of the individuals in the story and how their actions establish the offenses, rather than on the personalities of the players involved.

Example of an Event-based Opening Statement

On the evening of September 19th, Stephanie Martinez was driving home after a long day. She had worked a full shift as an operating room nurse, and then had picked up her eleven month old son, Tyler, from his babysitter's house. Stephanie went for dinner with a friend, and then ran a few quick errands to pick up diapers and baby formula before she finally turned her car in the direction of home. While waiting at a red light on Miller Road, Stephanie noticed a large truck coming up behind her. He seemed to be going at too high a rate of speed, but Stephanie was boxed in by other cars and had nowhere to go. Before she had time to react, the truck plowed into her tiny Hyundai Elantra, crushing in the hatchback trunk and collapsing the backseat, killing little Tyler instantly. The rear impact immediately launched Stephanie's car forward into the cross-traffic, where it was hit again from the left side by another car, knocking Stephanie unconscious and fracturing her pelvis and femur in two places. Stephanie awoke several hours later in the hospital. Tyler's tiny, lifeless body was later recovered from the backseat of Stephanie's totaled car, still strapped into his little car seat.

I. Practice Pointers on Content

1. **Primacy & Recency:** Start strong and end strong. Carefully plan the first words out of your mouth to be attention-grabbing. Then conclude with something that loops thematically back to your first words. Capture the panel's attention from the outset, and then bring it home when you conclude. *"Jane Satterfield's nightmare began on June 4, 2017. . . This nightmare ends with a just verdict: a verdict of guilty."*

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2. **Use Simple and Powerful Language:** Your main goal in opening statement is to communicate a compelling story to the panel. And so your language choices matter.
 - a. Use simple, straightforward language that every member will understand.
 - b. Do not use legalese such as “ostensibly,” “heretofore” or “to wit.”
 - c. Do not use law enforcement jargon – no one in real life exits a green in color suspect vehicle on the west side of the thoroughfare.
 - d. Use powerful words for emphasis: consider the difference between “car accident” and “crash.”
 - e. Use military terminology correctly, including both official nomenclature and simpler phraseology (e.g., “junior enlisted,” as opposed to “lower enlisted,” and “weapon,” as opposed to “gun”).
 - f. Explain all but the most common acronyms.
3. **Provide Enough Detail, Not Too Much:** The opening statement is a story, and therefore some contextual details will be necessary. However, if your opening statement gets bogged down in too many unnecessary details, the thrust of the story will get lost. So consider carefully what details need to be included to tell a short, compelling story.
4. **Legal Concepts:** When a case turns on a significant legal concept (e.g., knowing use of marijuana, consent in a rape case, divestiture in a disrespect case), be prepared to explain the law to the panel. It is important to call attention to these concepts during the opening statement, so that the panel will make note of testimony and evidence related to these issues during the trial.
5. **Highlight Strengths.** The opposing side will hammer at your weaknesses throughout the case. So when you have a particularly strong aspect to your case such as an extremely sympathetic victim, DNA evidence, or a confession, you should hit this hard and often. If you have such strong points, organize your opening statement around highlighting them.

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6. **Acknowledge and Explain Weaknesses:** Do not let the other side be the first one to tell the panel about a bad fact for your side; you will lose credibility. Preemptively address obvious, important weaknesses in your case such as lab errors or major inconsistencies from a central witness. But do so with a plan. Couple the weakness with a compensating strength that diminishes the damage and gives the panel some context in which to place the weakness. Draw the sting, then supply the cure.

Example: *“When the pediatrician examined little Jasmine, he found no evidence of injury. And Dr. Orville will explain that the kind of penetration SGT Mallick inflicted on Jasmine would normally not result in any physical findings, even though it caused her a lot of pain.”*

7. **Do Not Over-Promise:** In opening statement, limit your discussion to evidence you are confident will be admissible and will be presented at trial. There is no surer way to lose credibility with the panel – and to play into the hands of an alert opponent – than to fail to deliver something you promised in opening.
- J. **Practice Pointers on Physical Delivery and Style:** Your physical command of the courtroom speaks volumes to the panel. Owning the room has many intangible aspects, and there are several techniques you can consciously develop to improve your physical presence:
1. **Eye Contact:** Make eye contact with the panel: look directly from one member to another.
 2. **Move with Purpose:** Any movement around the courtroom during your opening statement should be purposeful and aimed at emphasizing certain points for the panel.
 - a. Try choosing a central place in front of the panel—not too close—and using that as your base of operations.
 - b. Take a deliberate step away from this spot only for emphasis.
 - c. Make sure not to pace incessantly or to take steps randomly during your opening.
 - d. Do not walk and talk at the same time: Stop talking, take a purposeful step or two, then resume talking.
 - e. Never turn your back to the panel.

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3. **Trial Counsel Addressing the Accused:** Trial counsel should directly reference the accused during the opening. Feel empowered to point and look directly at the accused; make it clear that there is an adversarial relationship in the courtroom and that the government aims to convict.
 4. **Defense Counsel and Client:** Conversely, the defense should begin humanizing the accused by referencing him or her repeatedly, and by rank and last name. Step over and put a hand on your client's shoulder while talking about him or her.
 5. **Never Read:** While opening statements should be prepared well in advance, they should not be read to the panel. Opening statements are not spontaneous but your presentation should appear natural. Commit the opening statement to memory and practice in front of a mirror.
 6. **Get Rid of Distracting Mannerisms:** The panel closely observes everything the lawyers do in the courtroom. Thus, be cognizant of things that you may be doing which are competing for the panel's attention. Such tics as incessantly clicking a pen, randomly shuffling through papers at the podium, habitually saying "um" or "OK," are common and are easily eliminated; try practicing in front of a colleague, a family member, or a mirror. You might even record yourself on your cell phone and then watch it.
 7. **Passion is Good:** Whether you are a prosecutor or a defense attorney, you are an advocate. You have a position to present and defend to the panel, and you should do so enthusiastically. Show the panel that you care strongly about your case and that you believe sincerely in your position. Demonstrate your passion through your powerful words, your command of the courtroom, and your eye contact.
 8. **Anger is Bad:** While passion is essential to good advocacy, be careful not to let your passion spill over into anger. Elaborate hand or arm gestures, yelling, slamming things on counsel table, will potentially intimidate the panel and hurt your credibility. So recognize the line between passion and anger and do not cross it.
- K. **Using Visuals Aids in Opening Statements:** A powerful opening statement can be made more so by the effective use of visual aids.
1. **Importance of Visuals:** Not only will visual aids assist the trier of fact in understanding your case, they will also make your opening statement appear much more professional and polished. Visual aids will also allow you to highlight important pieces of evidence or complicated aspects of your case so that, when they are presented during trial, the panel will be prepared for them and understand them better.

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2. **Some Visuals to Consider:**
 - a. **Physical Evidence:** If you have a particularly compelling piece of physical evidence such as a bloody knife or the deceased victim's bloody clothing, consider showing it to the panel right way.
 - b. **Photos:** Photographs of victims or crime scenes may prove useful.
 - c. **Diagrams:** In cases that involve detailed analysis of a location, a schematic may help the panel visualize the scene during testimony.
 - d. **Demonstratives:** If you are dealing with a particularly complex set of facts involving, for example, numerous associated individuals in a large blended family or a complex legal concept, a demonstrative chart or timeline may be appropriate.
 - e. **Digital Display:** Be prepared to present any of the above on the monitor with a digital display. See Chapter 8 on trial visuals.
3. **Get Clearance:** Prior to using any visual aid, alert the court and, where appropriate, move to have the item pre-admitted. You may also be required to have certain items marked as appellate exhibits. If you do not do so, you run the risk of an objection during your opening statement. More importantly, if you utilize visual aids in your opening statement that are not later admitted, you risk a mistrial. Avoid these potential pitfalls, and simply account for these visual aids appropriately prior to trial.

L. Special Considerations for the Defense:

1. **Should I Wait to Open?**
 - a. **Generally Open Right Away:** Generally, the defense will want to present its statement immediately after the government's opening, on the theory that minds are made up early.
 - b. **Rare Exceptions:** However, there are occasions when the defense may want to consider postponing its statement until the beginning of its case. For example, when the defense does not plan to contest the major facts in the case, but does intend to present an affirmative defense, it may be advisable to wait; in such a circumstance, the defense would have raised the affirmative defense during cross-examination of the government's witnesses, and can use the opening statement at the start of their case as a preview into the closing argument.

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- c. **Think Carefully:** Keep in mind, however, that waiting to open until after the government has presented its case is exceedingly risky and should only be done with clear strategic justification after discussing it thoroughly with your client and seeking the guidance of an experienced attorney.
2. **Promises that the Accused Will Testify:** Never, under any circumstances, promise in your opening that the panel will hear from the accused. Plans often change during trial, and strategy must adapt to the evidence as it comes in. You will lose substantial credibility with the panel if you promise that they will hear from the accused, and then have to break that promise later.
3. **Admissions are Dangerous:** Similarly, be cautious about making admissions about facts during your opening. There are times that it will be tactically sound to do so, in order to focus the panel on the truly disputed issues in the case. However, keep in mind that admissions in the opening may be binding on the defense, *i.e.*, the government may no longer be required to put on evidence of any conceded fact.

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DRILLS

I. GOAL OF THE DRILL:

The goal of this drill is to train trial and defense counsel to

- A. Draft and deliver a powerful opening statement; and
- B. Use at least two visual aids, one of them a PowerPoint slide.

II. GENERAL INSTRUCTIONS:

- A. **Case Materials:** Counsel may use as a fact scenario either *U.S. v. Mallick* or *U.S. v. Anderson* from the Appendix, or counsel may use a pending case. Counsel should familiarize themselves with the fact pattern and visual materials available.
- B. **Instruction (30-40 minutes):** On week one, the supervisor should give a 15-30 minute instruction on the law and art of opening statement and give counsel a chance to ask questions.
- C. **Preparation:** Between week one and week two, counsel should prepare an 8-10 minute opening statement using the instructions from week one and the material in this chapter. Counsel should write out the opening so that it may be reviewed by the supervisor, but plan to deliver it without reading.
- D. **Practical Exercise (20 minutes per participant):** On week two, counsel will deliver the opening statement in front of peers. The classroom will be set up with non-performing participants arrayed as a panel. Counsel will give the opening statement in front to of the panel using at least one PowerPoint slide and one other visual aid. Where possible, the supervisor should arrange to have the opening videotaped.
- E. **Live Critique:** Each participant will be critiqued by the supervisor, who will have the option of allowing a maximum of two additional participants to deliver critique of their colleague. Each critique will focus on no more than one or two aspects of the opening statement. (See the critique method discussed in the Introduction to this manual). The live critique will focus on substantive aspects of the opening statement:

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1. Use of an attention step at the outset to get the members' attention;
 2. Ability to tell a compelling story;
 3. Ability to humanize the victim or the accused;
 4. Use of simple and powerful language;
 5. Use of a compelling theme;
 6. Use of a strong start and strong finish;
 7. Accuracy on the law;
 8. Factual accuracy;
 9. Use of visuals.
- F. **Video Critique:** After the live critique, the supervisor should make time to meet with the participant separately one-on-one to go over the video to critique physical movements and style issues. (Where videotaping is not possible, the movement and style critique should be done as part of the live critique). This critique should focus on
1. Ability to make eye contact with the panel members;
 2. Physical command of the courtroom;
 3. Delivery without reading; and
 4. Distracting mannerisms.
- G. **Follow-up Performance:** On week three, the classroom will be set up exactly as on week two. Each participant will integrate the critiques from week two into his or her opening statement and repeat the opening. The supervisor and one or two fellow participants will critique as before.

View Video Vignette #1, Opening Statement in *U.S. v. Anderson*, available on the digital version of *The 2018 Advocacy Trainer* or on JAGCNet.

