



# CENTER PIECE

The Official Newsletter of the National Child Protection Training Center

## We're Just Going To Talk: Presenting Your Case in Opening Statement

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### Introduction – the Importance of the Opening Statement

The importance of the prosecutor's opening statement in a case of child abuse cannot be overstated. At the close of voir dire, which can be a lengthy process, jurors are anxious to see what the case is really about and many jurors will develop a bias in favor of or opposed to the government's case based on the prosecutor's opening statement. Although an opening statement is not an argument for finding a defendant guilty, it can be equally persuasive.

### Persuading the jury through your opening statement

There are at least two things a prosecutor can do in his or her opening statement that can help persuade a jury toward the government's case.

#### 1. Present a narrative account of the facts

A narrative account of the fact pattern is generally more effective than a recitation of what each witness will testify to. It may be helpful to read a handful of newspaper accounts to analyze how reporters provide an objective recitation of facts while maintaining the reader's attention.

In developing a narrative, the prosecutor may want to simply provide a chronological recitation of the facts. The prosecutor may also want to do what many newspaper reporters do: provide a "teaser" to capture the attention of the audience. This is done by simply taking a portion of the fact pattern, usually from the middle or end of the narrative, and putting these facts up front in the presentation. For example, assume the victim was chained in a cellar for years.

During that time, the child was beaten, starved, raped and eventually murdered by her mother and father. After the killing, the parents tossed the naked body in a ditch where it was discovered the next day by a man driving home from work. A prosecutor could take the end of this "story," the discovery of the body, and place it up front in the opening statement as a means of capturing the attention of the jury. The opening statement might start like this:

*"On January 18, 2009, Robert Smith was anxious to get home from work. It had been a tough day at the office and he couldn't wait to get home, change clothes and make it to his weekly racquet ball game. On this particular day, though, Mr. Smith would not arrive home in a timely fashion. In fact, he never did make it to that racquet ball game. For as Mr. Smith was driving home on I-90, he saw out of the corner of his eye something that appeared eerily human. He slowed and then stopped his car. He got out, walked to the side of the road and there in the ditch he saw something he will never forget. He saw a girl. A girl not more than ten years of age. A girl that was obviously beaten, obviously emaciated, obviously dead. Who was this girl? How did she get there?"*

Although the "teaser" offered above is not an argument, it is a persuasive recitation of the facts in that it brings the jurors inside the mind of the man who discovered the body—a man that could just as easily have been one of the jurors. In all likelihood, the jurors are very attentive, if not on the edge of their seats, wondering who would commit such an atrocity—and what needs to be done to hold the perpetrator(s) accountable.

## UP COMING conferences

*When Words Matter*  
July 12-15, 2010

Location: Savannah, Georgia

When Words Matter is a 4-day National Conference hosted each year in a state that has implemented the ChildFirst® Forensic Interview Training Program. This year it will be held in beautiful Savannah, Georgia. When Words Matter brings together nationally recognized experts from all areas of the child protection field for this informative and innovative conference. The topics covered will be useful for prosecutors, law enforcement officers, child protective service workers, forensic interviewers, child counselors/ psychologists, medical professionals, victim advocates, and anyone else who interviews children or prepares them for court.



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## 2. Develop a theme and weave it throughout the opening statement

A second way the prosecutor can be persuasive during an opening statement is to articulate a theme for the case. A theme is a one- or two-word sentence or phrase that summarizes everything the case is about. Think of it as a bumper strip – a catch phrase that emotionally connects the jurors to the case.

A possible theme that works in many cases of child abuse is the theme of “family secret.” Think of all the things that are typically involved in a case of child sexual abuse that can be weaved in and out of this theme. For example, the prosecutor looking for a way to help the jurors understand the victim’s delayed disclosure can utilize this theme. A prosecutor might simply say in his opening statement “this is a case about a family secret. A secret so horrible, the victim could not and did not tell for a very long time.” A prosecutor concerned about the phenomenon of the family rallying around the perpetrator and ostracizing the child victim can also utilize the theme of family secret. The prosecutor might simply say “the evidence will show the code of silence was so deeply ingrained in this family that anyone who violated the code would be cast aside.”

Another theme that works well in most cases of child abuse is the theme of “vulnerable child.” This theme works particularly well in a case involving an older victim with a troubled history.

Assume, for example, the victim is a 14 year old girl who developed a crush on her school teacher. The victim comes from a dysfunctional family and has a history of drug and alcohol usage, as well as delinquent behaviors. The teacher is very popular in the school and the community. Although the prosecutor has filed rape shield and other motions to exclude from the jury’s consideration the child’s troubled history, the defense attorney argues that his client was aware of the child’s history and reached out in kindness to address the child’s emotional and behavioral problems. According to defense counsel, the victim has retaliated for this “kindness” by making a false allegation of abuse. Under these circumstances, the judge concludes, the child’s history can be presented to the jurors as part of the defense case. With this ruling, the prosecutor is now certain that the child’s negative behaviors will come into evidence. In response, the prosecutor may choose to make these “negative facts” the heart of the prosecutor’s case. The theme of vulnerability might work very well in such a case. The opening statement might sound something like this:

*“This is a case about a vulnerable child. The evidence will show that she comes from a dysfunctional, troubled home. The evidence will show that she has turned to drugs and alcohol and promiscuous behavior—all in search of the solace that her family cannot or will not provide for her. And this is a case about a school teacher charged by the laws and the heavens with caring for all the children in his classroom. In this case, though, the evidence will show that this teacher did not care for his students. In fact, he preyed on the most vulnerable girl in his classroom.”*

In closing argument, when the prosecutor is free to argue, he can return to this theme and drive the point home:

*“The defendant knew exactly what he was doing. He was not going to target the homecoming queen or the ‘straight-A’ student. He looked around his classroom precisely in search of a child with a hole in her heart. He then filled that hole with his own lust and he did it all in the cynical confidence that if she ever dared tell, no one would believe her.”*

## The ten building blocks of a powerful opening statement

In addition to developing a narrative and having a clearly developed theme, there are ten building blocks to delivering a powerful opening statement.

### 1. Use descriptive language

In reciting the fact pattern to the jurors in opening statement, make a concerted effort to bring the fact pattern to life. If the child victim was curled up on a couch eating snacks and drinking a soda shortly before the sexual assault, describe the scene with enough detail that the jury can picture the crime, and the crime scene, in their minds. Under this scenario, the prosecutor might say:

*“On a hot summer afternoon in August, 15 year-old Shirley Smith was curled up on a beat-up beige couch in her basement watching tv. She was eating Pringles potato chips and drinking from a bottle of Coca Cola. At that moment in her life, she was completely oblivious to the fact that as her drunken uncle descended the staircase, he was about to steal her childhood.”*

In this narrative, the prosecutor provides enough detail to create a word picture of a typical teenage carefree moment. The prosecutor then uses the facts to create the image of a cruel interruption, even ending of the victim’s childhood by a man with lustful, criminal intentions.

In describing the actual sexual assault, the prosecutor should make a concerted effort to use adverbs and not adjectives. An adverb brings the event to life to a greater extent than an adjective and it more closely connects the defendant to the crime. For example, if a prosecutor simply says “the attack of this girl by the defendant was brutal,” the emphasis is on the attack and the connection to the defendant is awkward. The sentence can be shortened and made more powerful by using an adverb: “The defendant brutally attacked this girl.”





## **2. Avoid legal terms or a recitation of the elements of the crime**

Although it is proper to tell the jurors the defendant is charged with the crime of sexual assault (or whatever the offense may be), it is probably not helpful to detail the legal definition of what constitutes a sexual assault or to otherwise get bogged down in an explanation of legal terms or elements of the crime during the opening statement. These are issues best addressed in closing argument after the judge has instructed the jurors as to many of these issues. During opening statement, it is critical to give the jurors the context in which they will later apply the law. That context is the fact pattern, and a powerful presentation of these facts should be the prosecutor's focus during opening statement.

## **3. Don't ignore "negative facts" during the opening statement**

The prosecutor should at all times demonstrate the highest ethical standards possible. It is essential that the jurors understand the prosecutor is not working to "win" a case but to secure justice. Accordingly, if there are "negative facts" that may undermine the government's case, the prosecutor should be the first to point out these facts in her opening statement. Assume, for example, the child has recanted her allegation. If the prosecutor doesn't mention this fact in her opening statement, the defense attorney may appropriately attack the prosecutor's credibility in his opening statement by saying "There are some key facts the prosecutor 'forgot' to mention in her opening statement—such as the fact that her key witness has recanted the allegation of abuse."

Accordingly, the prosecutor should mention these "negative facts" in her opening statement. Having said this, the prosecutor doesn't necessarily have to treat these facts as negative. Instead, the prosecutor can place these negative facts in the context of the case as a whole and

thus help the jurors understand the recantation. For example, the prosecutor might say:

*"After Molly revealed the family secret, her world came apart. She was removed from the only home she has ever known and forced to live with strangers. In school, she was teased. In counseling, her mother called her a 'whore.' In church, her pastor urged her to confess her 'sinful' role in the sexual abuse. Eventually, Molly told her school counselor 'living with the lie was a lot easier than telling the truth.' Two days after she made this statement, in the office of defense counsel, Molly signed a written recantation. We will offer expert testimony about the issue of recantation: testimony explaining that recantation is not unusual in cases of child sexual abuse, particularly when enormous pressures are placed on a child."*

By putting the recantation in the context of pressures placed upon the child, the jurors can understand the need not to jump to conclusions but to examine the evidence as a whole.

## **4. Show sincerity during opening statement – and throughout the trial**

Many years ago, I tried a difficult case of child abuse. After seven days of testimony, and a long deliberation, the jury returned verdicts of guilty on all counts. Early the next morning, a newspaper reporter called me at home asking for a quote. Off the record, the reporter said to me "The big difference between you and the high priced defense attorney is that you came across as someone who really believed in the case, someone who believed a wrong had been committed that needed to be righted. In contrast, the defense attorney came across as someone paid to put on a show for his client as he thundered about the courtroom shouting objections."

The comments from the reporter remind us that jurors and others in the courtroom are impacted not only by the evidence but also by the conduct and sincerity of the prosecutor or other attorneys involved in the case. Indeed, some studies have documented this phenomenon.<sup>2</sup> A prosecutor who is not prepared, who has not filed motions or taken other precautions to protect child witnesses,<sup>3</sup> or who is not functioning as part of an MDT and making sure his investigators respond promptly and thoroughly to allegations of abuse<sup>4</sup> may send to jurors the message "this case is not that big a deal."

## **5. Create a sense of rhythm in the opening statement**

A prosecutor with a monotone, one-pitch delivery style runs the risk of losing the attention of one or more of the jurors. Accordingly, make a concerted effort to speak more loudly at appropriate points in your opening statement, and other times to speak more softly. Similarly, make a concerted effort to speak more quickly and, at other times, to slow the rate of the presentation.

## **6. Consider adding a visual component to the opening statement**

We live in a media-driven age where jurors are used to color, sound and moving objects. Whether out of habit or their individual needs, some jurors are visual learners. These jurors will need more than a description of the crime or the crime scene during your presentation. Accordingly, consider utilizing a PowerPoint during your presentation that provides the jurors with a visual summary of the evidence. A prosecutor may also want to file a motion to admit certain documents or exhibits in advance so they can be used in the opening statement.

## **7. Personalize the victim**

In preparing the opening statement, look for facts about the victim which make her sound more human, more like a child who might live in the neighborhood, or even in one of the homes of the jurors. What grade is the child in and what does she like best about school? What does the child like to do when not in school? What's the name of her dog? In homicide cases, this may be particularly important since the victim will obviously not be able to testify. It is also important in cases in which the child is available. Defense attorneys are often quick to point out all the negative behaviors of a child abuse victim or otherwise suggest the victim is disturbed or somehow different from other children.<sup>5</sup> Unfortunately, many child abuse victims engage in behaviors that allow the defense counsel to create this caricature. I've worked with child victims who smear feces on bathroom walls, who drop their pants in the presence of strangers, who engage in delinquent behavior, and who have used drugs or alcohol. Although these behaviors can be explained as the result of victimization or perhaps as the reason a particular child was targeted, it also helpful for the jurors to see that there is more to this child.



In one case, for example, a teenage victim used drugs and alcohol and showed up to court wearing suggestive clothing and was quick to display bad language. When, however, the prosecutor put into evidence the cotton nightgown the child was recently wearing when her father sexually assaulted her, the jurors were able to see that, beneath the short skirts and beyond the potty mouth, there lived a girl. This is because the nightgown was covered with pictures of puppies. When the prosecutor asked the child about the puppies, she was able to explain her love of dogs was rooted in her experience that animals, unlike people, never lie or consciously hurt children.<sup>6</sup>

#### **8. Prepare the jury for the child's demeanor**

Even if a child has not engaged in delinquent or problematic behavior, the mere fact they are children makes them unpredictable. The child may not explain the abuse exactly the same way she did during the forensic interview, or she may display nervousness in an unusual way. Accordingly, it is best to remind the jury that children are unpredictable and they should not hold a child to adult standards when receiving their testimony. As an example, consider the following comments in an opening statement:

*"Members of the jury, this is not a Hollywood movie or a television drama. No one who testifies this week is following a script. Accordingly, I cannot tell you for certain what the child will say or do when she takes the witness stand. The evidence will show she has not seen her father for some time and that she loves and misses him. Perhaps she will run up to her dad and give him a hug. The evidence will show that when*

*this child is nervous, she laughs. Maybe she will sit in the witness box and answer every question with a nervous giggle. The evidence will show that she is scared of talking about her abuse in front of each of you. Perhaps she will curl up in a ball and not be able to speak at all. I can't tell you for sure what will happen because this is real life. However, I can promise you this. Irrespective of what the child says or does in this courtroom, I will return to you at the close of this case and, based on the entire evidence, ask you to return a verdict of guilty."*

In this opening statement, the prosecutor is not only preparing the jurors for the possibility the child may behave in a manner that is understandable for a child, but the prosecutor is also reminding the jurors that the child's testimony is only one part of the government's case and they should pay attention to all of the evidence.

#### **9. Do not overstate the case**

Because children are unpredictable, a prosecutor may need to be cautious in stating in detail what the child will testify about. If the prosecutor tells the jurors the child will testify about multiple acts of sexual abuse and then details each of these acts in his opening statement, he may lose credibility when the child testifies and forgets about a certain incident or the details of a certain incident. Unless the prosecutor is absolutely certain the child will be able to recount the abuse exactly the same way she did in the forensic interview or on prior occasions, it may be best to summarize what the child will say and otherwise avoid an excessive amount of details in the opening statement.

#### **10. Conclude your opening statement with confidence**

If the prosecutor conveys doubts about his or her case, jurors may understandably conclude there is a reasonable doubt. Comments such as "this is a tough case" or "I wouldn't want to be in your shoes" convey to the jurors the sense the government is not confident it has a strong case. If a prosecutor has genuine doubts about the guilt of the accused, the case should not be prosecuted. If, though, the prosecutor is confident the case is appropriately charged and that the evidence he will present is sufficient to find guilt beyond a reasonable doubt, it is appropriate to convey this confidence.

For example, a prosecutor may want to conclude an opening statement by saying "That is the case of the State in a nutshell. I am now eager to present it to you in detail. I ask only one thing. I ask that you remain attentive throughout these proceedings and carefully consider all the evidence that is presented. If you do this, you will do justice in the end." A statement along these lines is not an argument. Moreover, it is hard to imagine defense counsel objecting to the government's request that the jurors remain attentive or that they carefully consider the evidence. In making these statements, though, the prosecutor is subtly communicating confidence in his case.

### **Conclusion**

This article should be considered a general outline for prosecutors or child protection attorneys in preparing an opening statement. Obviously, prosecutors should be fully apprised of local rules and court decisions that may govern what they can or cannot say in an opening statement. Also, local judges often have their own nuances that may be taken into account. A new prosecutor should always have his opening statement, and certainly his closing argument, reviewed by an experienced child abuse prosecutor in his or her state to help ensure the presentation is fair and within the bounds of local rules and court decisions.

### **End Notes**

- <sup>1</sup> Director, National Child Protection Training Center at Winona State University
- <sup>2</sup> For example, in a study of the trial transcripts of 45 child sexual abuse cases, researchers concluded that defense attorneys who asked complex questions of child abuse victims, or were otherwise perceived as attempting to confuse or intimidate the children, were "over two times more likely to achieve a conviction of their own client..." Angela D. Evans, Kang Lee, Thomas D. Lyon, *Complex Questions Asked by Defense Lawyers But Not Prosecutors Predicts Convictions in Child Abuse Trials*, 33 LAW & HUM. BEHAVIOR 258 (2009).
- <sup>3</sup> See Victor I. Vieth, *A Child's Courtroom Bill of Rights: Seven Pre-Trial Motions Prosecutors Should Routinely File in Cases of Child Maltreatment*, 1(2) CENTERPIECE (2008).
- <sup>4</sup> See Detective Mike Johnson, *The Investigative Windows of Opportunity: The Vital Link to Corroboration in Child Sexual Abuse Cases*, 1(9) CENTERPIECE (2009); Victor Vieth, *Picture This: Photographing a Child Sexual Abuse Crime Scene*, 1(5) CENTERPIECE (2009).
- <sup>5</sup> See generally, *Abbott v. State*, 138 P3d 462 (Nev. 2006) (appellate court agreeing with defense counsel that there was a "reasonable basis for believing that the victim's mental or emotional state may have affected her veracity" and thus granting a request for an adverse psychological examination).
- <sup>6</sup> This is a case in which I was involved.

# For More Information

The National Child Protection Training Center (NCPTC) at Winona State University is a training program of the National Association to Prevent Sexual Abuse of Children (NAPSAC). NCPTC provides training, technical assistance and publications to child protection professionals throughout the United States. In addition, NCPTC assists undergraduate and graduate programs seeking to improve the education provided to future child protection professionals. In partnership with CornerHouse, NCPTC also assists in the development and maintenance of forensic interview training programs utilizing the RATA<sup>C</sup> forensic interviewing protocol. For further information, contact NCPTC at **507-457-2890** or visit our website at **www.ncptc.org**. For further information about NAPSAC, call **651-340-0537** or visit our website at **www.napsac.us**.

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