5-8-2019

A Rhetorical Analysis of Opening Statements in Trial: Reconsidering the Classical Canon of Invention

Andrew Chandler
achandler03@bellarmine.edu

A Rhetorical Analysis of Opening Statements in Trial: Reconsidering the Classical Canon of Invention

Andrew Chandler

Bellarmine University

Abstract

This analysis of 21 opening statements probes at current persuasive practices employed by trial attorneys through the lens of mainstream legal advice and an expanded definition of rhetorical invention – one which includes both discovery and creation. An evaluation of such practice reveals the utility, and furthermore the duty of the advocate, to draw upon an expanded realm of available arguments.

CHAPTER 1

Aristotle defined rhetoric as "the faculty of discovering in the particular case what are the available means of persuasion" (Arist. *Rhet* I.2, 1355b41-43) The American courtroom represents a critical modern venue for persuasion. We would expect that attorneys argue their cases effectively; however, current legal education instructs attorneys to look only to the case facts as a source of persuasion. Such a practice ignores creative arguments which may exist outside that narrow scope. Trial advice from James W. McElhaney and an expanded definition of rhetorical invention from Peter Simonson serve as the theoretical basis as I evaluated 21 opening statements.

A fascination with the art of public speaking and its effects on the listener drove me to join my institution's mock trial program during the first year of my undergraduate term. I have since both created and delivered opening statements in intercollegiate competition. Public speaking in the legal setting is of particular interest as a venue for persuasion, given that there is always a measurable outcome in the form of a win or a loss. These results, of course, can carry heavy repercussions for the community at large. One need look no further than the unrest caused by the decision in the case against the police officers who brutalized Rodney King.

Mock Trial, which follows the Federal Rules of Procedure and adheres to standard courtroom practices, introduced me to the restrictions on what a litigator may say or do in an opening statement. The goal of an opening statement in a trial is to persuade without having the appearance of doing so – not only to the jury, but also to the perception of judges and opposing counsel. Explicit argumentation is prohibited by the rules of the court. Hence it requires the

speaker to take an oblique approach to persuasion. Literature, from fields of legal thought to studies in psychology, asserts that opening statements affect jury decisions, which is before any evidence has been offered. Jury decisions ultimately affect all of us, given their impact on our communities, and that is why opening statements are worth studying.

Trial rules dictate that one cannot argue in opening statements. An evaluation of common legal educational practice reveals that, “Most law schools and CLE trial-advocacy courses teach opening statement is not the time for argument. They say that argument comes at the end of the case, after the jury has heard all of the evidence, not at the beginning” (Fine 35). Some may argue, and our current adversarial system of justice seems to suggest, that the primary function of an attorney is to advocate on behalf of their client. However, the conventional instructions given to attorneys for opening statements seem to push the notion that litigators ought to act as mere conduits for information on the case, rather than providing a vigorous presentation of their client’s side of the case.

Conventional advice to attorneys teaches that the litigator is limited to the case facts for all arguments. Their representation of the client in opening statements must rest entirely upon the facts, along with any reasonable inferences that may be drawn from them, as generated during the discovery process of the case. Legal discovery entails the fact-finding portion of litigation. Far before a case reaches trial, attorneys are to collect evidence and hard facts in their pursuit of justice for their client. According to Federal Rule 26(b)(1), "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Typically, this may include interviewing witnesses, retaining experts, collecting relevant documents and records, etc. The advice from current doctrine is consistent that attorneys may not rely upon information outside of what is obtained during discovery.

Maureen Howard, the former Director of a National Institute of Trial Advocacy program, further articulates this view about opening statements:

> A general rule of thumb is that argument is anything other than a recitation of evidence, whether testimonial or exhibit, that the advocate has a good faith belief will be admitted at trial… If you cannot point directly to a witness or exhibit, then you are arguing. (Howard 335)

Since explicit argumentation is prohibited, attorneys following such guidelines would be pigeonholed into advocating for their clients by means of regurgitating the facts of the case as they are laid bare. A text from the National Institute for Trial Advocacy dictates that "every fact you include in your opening statement must be true and provable" (Lubet 416). While this does prevent attorneys from making statements that contradict the known evidence, it also keeps them from offering case theories which are not immediately suggested by the hard facts of the case. Providing a story that cannot explicitly be proven by the facts of the case, although such a story may be presented without contradicting a single fact, is off limits according to the professional advice.

The constraint of sticking to the facts permeates much of the known literature in the field. Mark Dombroff (1984) refers to the "simple statement of the case" during his discussion of opening statements as he admonishes against the use of what he suggests to be unfair tactics (Dombroff 341). Weyman Lundquist (1988) declares "the facts can speak for themselves" (Lundquist 426). David Lopez (2011) similarly reminds the litigator to "let the facts speak for themselves" (Lopez 36). Maureen Howard (2010) dictates that "trial lawyers do not create the story, but methodical preparation can vastly influence how that story is perceived by the jury" (Howard 357). James McElhaney (2005) writes, "you don't create the facts. You can't invent

evidence. But you do select which facts to present and which to omit" (McElhaney 185). This advice implies "belief in the possibility of making knowledge claims that accurately reflect, or represent, an objectively existing world" (Mumby 15). Jane Baron, Professor of Law at Temple, refers to these as "what really happened stories:"

> 'What really happened' stories present themselves as factual, true in the sense of being empirically verifiable (at least, if you had been there at the time to witness the events in question). They aim to demonstrate the real fact of the matter, and in assuming that there can be such a thing, they reflect what might be called a foundationalist perspective. 'Many realities' stories, in contrast, aim to highlight the absence of any neutral position from which we could ever discover the fact of the matter. (Baron 69)

We see that even the most foundationalist advocate still ultimately participates in interpretive arrangement through their selection of a "realist" version of events to present.

Some written authorities in the legal realm recommend that storytelling may be the means by which attorneys can persuade the jury during opening statements without the outward appearance of arguing. Organizing the facts into a story, one which depicts the client in a favorable light, allows for an attorney to "influence what jurors attend to, how they interpret testimony and exhibits, who they find credible, what they recall later on, and what stories they form to explain the evidence" (Devine 182). If the attorneys trying the case do not provide the jury with a story they can believe, research shows that juries will write their own story, and so it is paramount to the attorney's advocacy of the case that they attempt to frame their client's story in the mind of the jurors. The question in contention is about what sort of content may be included within that story.

The authoritative doctrines of the practice declare discovery – "just the facts" – to be the material with which attorneys may construct their opening statements. This just-the-facts approach is consistent with the traditional interpretation of invention. If one subscribes to this understanding, the story is constrained by the case facts. Such a perspective would account for those authors who treat stories as an effective way of presenting the only version of the facts. According to Katherine Miller, "a social realist sees both the physical and social world as consisting of structures that exist 'out there' and that are independent of an individual's perception" (Miller 2005).

We know from Aristotle that rhetoric exists as the faculty for discovering all available means of persuasion for a given case. The classical canon of invention, one of the primary pillars of this foundational understanding of rhetoric, is referred to as the "art of discovering arguments…the hinges, as it were, upon which a case turns" (Clark 72). Objectivist theories, in the legal context, may be found to be self-serving. Realists, who tell "what really happened" stories, arrange the facts to emphasize those favoring their clients while minimizing adverse elements. Kim Scheppele tells us that:

> The objectivist theory of truth holds that there is a single neutral description of each event which has a privileged position over all accounts. This single, neutral description is privileged because it is objective, and it is objective because it is not skewed at any particular point of view. Its very 'point-of-viewlessness' gives it its power. (Scheppele 11)

Narratives adhering to realist understandings tend to support the status quo and disadvantage those who are not so fortunate as to find themselves among the upper echelon of law-determiners.

Simonson, arguing to an academic audience, presents a theoretical work which allows for a broader interpretation of invention, contrasting the traditional view of invention with a expanded, more comprehensive definition. Simonson writes that one interpretation of this canon asserts that, "[Traditional] invention is conceived as a teachable art located in specific practices and issuing in discrete speeches or texts" (Simonson 300). This line of thought would be identified as the objectivist approach that prescribes for the use of just-the-facts argumentation.

In his more comprehensive definition, Simonson expounds upon invention, "[as] scattered across an array of activities, moods, and spatio-temporal openings that feed all manners of knowing, making, doing, and being in the world" (Simonson 300). Breaking from the contemporary trend of separating creating from discovering, this new definition unites them as Simonson characterizes invention as the "generation of rhetorical materials" (Simonson 300). Such generation may be borne out of the case facts, but it is not constrained by those facts, though the creation must be consistent with the facts for trial purposes. Our author expounds upon the scope of this concept, "Generation can occur through finding, creating, assembling, translating, recombining, channeling or giving form" (Simonson 313). This expanded definition of invention – one which extends the scope of rhetorical materials beyond what, for example, might be contained in the case facts – can be applied to the formulation of opening statements, as it can to any form of persuasion. Simonson's definition allows for the production of more comprehensive materials.

An example of Simonson's expanded definition may be found within an argument originating during the American Civil Rights era. This was not a traditional argument detailing the tenants of systemic injustice nor the constitutionality of such injustice; however, it was an argument consistent with Simonson's definition of invention as the "generation of rhetorical

materials" (Simonson 300). James Baldwin, novelist and social critic, appealed to experiential truth as he contributed to the argumentative body advocating against the institutions of racial discrimination in the United States. Through the use of critical writings of fiction, Baldwin successfully communicated the black experience and the injustices faced by America's most marginalized. Fictional works like "Sonny's Blues" and *If Beale Street Could Talk* both served as an embodiment of truth. They put forth creative arguments against systemic persecution. Baldwin's powerfully effective narratives, although predating Simonson's work, fit well with the frame of creative argumentation suggested by Simonson.

Such a frame falls within the post-modernist understanding of truth. This understanding holds truth not as a fixed point, but rather as a product of perception. In the legal context, during a trial about a car accident, that event can be depicted through witnesses who share individual accounts of it. Each witness's testimony is confined to the vacuum of what they perceived. Therein lies a critical limitation of an argument which relies on just the facts. Scheppele poses this question to the legal community, "How does one know truth when one finds it? Truth isn't a property of an event itself; truth is a property of an *account* of the event" (Scheppele 12). In short, the jury's only access to the event is through the prism of individual stories offered by each witness.

Given this reality, I submit that in order to achieve the fullest version of justice – one in which the broadest spectrum of realities and perspectives are offered to the jury – that attorneys rely upon invention as discovery and creation during any attempt at advocacy. The American legal structure is contingent upon the presence of an adversarial system in which both sides are equipped with the best means to pursue their case. Given the inherent limitations which reside in any attempt to convey the reality of an event to a jury, it stands to reason that a crucial

component to the pursuit of the fullest version of justice ought to be the inclusion of all available materials.

An observable instance of an attorney's employment of creation can be found in Abbe Smith's opening argument during her defense of a fourteen-year-old defendant accused of raping his neighbor.

> This story starts with a baby born to a poverty-stricken, drug-addicted mother who lives here and there. She is not sure who the father of her child is; she is not even sure what day it is. She soon hooks up with another drug addict who becomes her boyfriend. Together they spend their time getting high and assaulting the baby. One or both of them stub out cigarettes on the baby. One or both of them put objects in the baby's anus. The Department of Social Services finds the baby, age 2, in an abandoned apartment with scars all over his body in varying degrees of healing. There is no way of knowing exactly what had been done to the baby and by whom, since everything happened before he could talk. The baby is taken from the mother and placed in foster care where he continues to be sexually and physically abused. Meanwhile, his mother receives treatment in a drug rehabilitation program and comes out clean. The baby, now a child, is returned to his mother. Soon there is another boyfriend, more drugs, another child. This new boyfriend inflicts more abuse on the child. The mother endures abuse as well. Eventually someone discovers the situation. The child is again placed in foster care, as is his younger brother. The child is troubled: he seems both starved for love and angry when it is offered. He has never committed any acts of juvenile

> delinquency and has never been in any real trouble at the time he rapes his neighbor. He is 14 years old. (Smith 440-41)

This opening was not constrained to the relevant law nor the case facts which one could sufficiently ascertain by reading the prosecution's indictment. Rather, the defense attorney employed creation by bringing in outside material (i.e., the upbringing of the defendant) in order to argue on behalf of her client.

There exists a spectrum of instances in which defenses based upon creation have yielded successful results. Attorney Rikki Klieman, in her defense of a defendant accused of murder, explained how she "[painted] him as something different," when the evidence from the government showed him to be a dangerous man (Klieman). The charges held that her client, a West Coast native with the outward appearance of a rough-and-tumble biker, was visiting a South Boston neighborhood when he got into an ultimately-fatal altercation with a local resident. Klieman formulated an argument of self-defense: her client had received vocal threats from the victim that evening while passing through the neighborhood and he defended himself once the situation escalated by shooting the unarmed heckler. Knowing the jury would consist of Boston natives who would strongly identify with the victim, Klieman had to maneuver in order to provide a more favorable image of her client, one which existed outside the hard facts of the case. She depicted the defendant as being an outsider in a bad situation – not a thug looking for trouble. The story, one that was not inconsistent with the facts, described the defendant as "an outsider, in a strange neighborhood…bottles and crates were being thrown all around him" (Klieman 41-45). Such an argument illustrates the use of creation as a means for articulating a defense not immediately suggested by the facts.

Similarly, there exist clear examples of such strategies in the acquittals of Rod Blagojevich and Ethan Couch. The first defendant was the former governor of Illinois, who had been indicted on a litany of counts involving corruption. In Blagojevich's first trial, after the prosecution had presented an elaborate case theory involving charts and timelines of the former governor's alleged corruption, the defense team offered a simple defense – Rod Blagojevich was absolutely fooled into these actions by his advisors. The former governor had surrounded himself with cons and ill-willed advisors who led him astray. He possessed a terrible, terrible sense of judgment, but he was not guilty of a thing, said his attorney. Blagojevich's counsel argued that the defendant was solely culpable of possessing poor judgment and a naïve gullibility. The jury would return acquittals of Blagojevich on all counts except for perjury.

In another instance of legal defense born out of invention, the defense of Ethan Couch – a privileged youth who killed four people during an episode of drunk driving – relied upon the notion that Couch was fundamentally unable to grasp the wantonness of his actions. The basis for this disconnect was labeled "affluenza," an affliction of the mind which provided that Couch's extreme wealth and upbringing made him unable to link his actions to consequences. It was an affliction entirely constructed by creation of the defense team, and one that ultimately led to his freedom. We may evaluate from this example that McElhaney, perhaps, would have been interested in the action of the case – that the young man was intoxicated and subsequently drove his vehicle into a crowd of pedestrians. We see further, though, that the application of Simonson's new invention is consistent with searching for the origin of such action – the psyche of the defendant Ethan Couch – to be interrogated and brought forth as a defense.

Such cases often draw criticism of the use of creative methods, as they may merely be providing a means to let guilty or negligent people off the hook. Especially in a criminal sense,

where there exists a constitutional guarantee of effective assistance of counsel, one can argue that each person seeking the assistance of counsel is entitled to the same degree of advocacy. One legal scholar argues this point, as he emphasizes, "The United States Supreme Court reminds us: you must give your client 'fearless, vigorous and effective advocacy'" (Fine 33). This advocacy must be provided irrespective of any perceived valuation on the merits of a given client's case. The entire notion of retaining an attorney to represent one's case rests on the bedrock premise that they will advocate on the client's behalf more effectively than the client could do for themselves. Relinquishing one's right to self-representation relies on this principle.

Neither the subject nor any facet of the body of this paper concerns itself with the outcome of a trial. Although such outcome bears certain importance, its evaluation exists outside the scope of this work. There was no examination of the outcome for any one of the cases in which the opening statements examined were delivered. Even in terms of the means of persuasion, I submit that we ought to be solely concerned that there *is* a viable defense, one which may arise out the creative, expanded pool of arguments. In a criminal case, the government selects the subject of their prosecution. The defense must sort out the rest. They have to formulate an argument – one which might most effectively be conceived from an expanded pool of arguments, including creative ones. This broadened field of arguments, suggested by this work's suggested application of Simonson's new definition of invention, provides an expanded inventory from which an attorney may produce a viable defense. The current legal advice dictates that an attorney's arsenal may only be made up of certain limited munitions that may be considered to be "true and provable" (Lubet 416).

It is the contention of this paper that every tool of defense must be at the attorney's disposal in order to increase the propensity for effective argumentation and best advocacy. Even if such a tool may be used for ill, Aristotle explains the amorality of rhetoric:

> If it is urged that an abuse of the rhetorical faculty can work great mischief, the same charge can be brought against all good things (save virtue itself), and especially against the most useful things such as strength, health, wealth, and military skill. (Arist. *Rhet* I.1, 1355b2-7)

There may be cases, such as the defense of Ethan Couch, where the case facts simply do not permit a defense. My injection of Simonson's new invention to legal advocacy would allow for such arguments to be brought into the fray. A defense must be provided – such is the requirement of the adversarial system and such is also the assurance of an expanded pool of arguments. The complexity arises as the decision ultimately falls into the hands of the jury. Some may not agree with the jury's decision, but they must be relied upon as the existing determiners of legal results. Such is the system of American jurisprudence.

In the case of the younger Tsarnaev brother, responsible for the unconscionable act of bombing scores of innocent people during the Boston Marathon, we see that creative argumentation is a tool which itself is limited to the checks of our justice system. It was imperative that a defense be provided. Our justice system requires as much. Ultimately though, the jury landed on a decision of life in prison. They remain the executors of judgment, and such a status is not disrupted by the introduction of creative argumentation.

It matters that attorneys implement the use of invention – combining creation and discovery – because doing so will provide the most effective counsel to their client. Further, such means represent the more just methodology as it allows for the most comprehensive truth to be

heard by the jury. Baron describes the law within the realist context as "[seeming] anything but objective and neutral to those who are silenced by legal assumptions that bear little connection to the reality in which they live" (Baron 67). Realist understandings purport to contain the only set of facts, ignoring the presence of other perceptions and, ironically, other realities. The bringing-in of outside material allows attorneys to supplement and make more whole the rigid just-the-facts arguments, thus providing a picture of justice which more closely resembles our own reality.

When framing the question of whether justice is better served by the bringing in of outside materials (i.e., the use of all available arguments, creation, etc.), one may draw upon a scenario presented by Plato's *The Statesman* and analyzed by later scholars (Dorter 201-202). In his analysis of the statesman, the ancient Greek philosopher describes the process of carding and weaving wool. The initial carding of the wool – separating it out to see what is useful and removing impurities – would be the process of discovery. Attorneys comb through the hard facts laid bare within the case. But what is also critical to successful clothesmaking is weaving the wool into something new. Here, the craftsman combines the raw materials back together, often including the spinning and weaving of supplemental materials in order to achieve a completed product of the highest utility. Creation in the legal context serves the same purpose.

Our justice system operates at its highest capacity when all perspectives are allowed into the courtroom venue. By not only allowing but also promoting the use of rhetorical creation by attorneys, the justice system can avoid being a structure which "participates in a process of suppressing and silencing by selecting among conflicting accounts," as it so often does in our current system. It is traditionally the disempowered, who find themselves having been charged by the state with crimes or perhaps otherwise seeking justice through civil means, who must rely

upon information not immediately suggested by the facts of the case. The use of creation in legal settings will permit for those persons seeking justice to explain a fuller picture of reality, one which extends beyond the narrow vacuum contained within the case facts.

Based on the theoretical foundation already presented, I will conduct an analysis of 21 opening statements in both criminal and civil cases. The criteria for such analysis will be based on two rubrics which I created – with one rooted in Simonson's new definition of invention as creation, and the other reflecting industry-standard literature on how an attorney ought to deliver an opening statement (i.e., "just the facts"). Each opening statement will have a brief description before an evaluation is administered with respect to that opening's adherence to the rubrics.

CHAPTER 2

The population examined during my rhetorical analysis consisted of 21 opening statements. Four of them – two prosecution and two defense – fall within the same criminal realm. The other seventeen were delivered during civil cases on a variety of issues including professional negligence by a banking institution, asbestos liability, and workers' compensation. While the vast majority of these speeches were delivered to juries, one opening transcript is sourced to a National Labor Relations Board hearing. The bulk of my material consisted of speeches from both counsel tables in a given trial, allowing for a robust sample by which to evaluate how attorneys create and shift their argumentation in light of opposing counsel's approach to presenting the case. These opening statements were assessed through a rhetorical analysis relying upon two rubrics.

Both rubrics were generated out of an evaluation of relevant literature. In McElhaney's *Trial Notebook*, a publication syndicated by the American Bar Association, we find the text widely accepted by legal practitioners. Given the crux of this work's suggested strategy for trial lawyers – that they ought to utilize Simonson's description of discovery *and* creation, particularly during opening statements – the second rubric draws from Simonson's "Reinventing Invention, Again," where he offers a new definition of invention. By using the two rubrics, I was able to ascertain the tangible implementation of the standard legal educational instructions on opening statements, in addition to observing how Simonson's version of creation has been woven into some of the more effective arguments offered by attorneys in their opening statements.

CASE SUMMARIES

Opening 1: Commonwealth v. White. Prosecution. Counsel Bryant. Criminal case involving robbery and murder. Opening statement begins with a reading of the indictment, before transitioning into a lengthy description of family history (low relevance to case). The prosecution contends that the murders of three elderly victims were committed in the process of a robbery. However, it takes 66 pages of an opening statement to convey this.

Opening 2: Commonwealth v. White. Defense. Counsel Charters. Defense counsel gives an anthology of emotional history and familial experiences which explain how such an individual may have fallen into a pattern of delinquent conduct.

*Opening 3: Commonwealth v. Bowling***.** Prosecution. Counsel Rose. Criminal case of murder, robbery. Again, the prosecution reads the indictment aloud to the jury. The attorney describes the victims of the attack before moving on to the defendants and their actions, providing a clear narrative of how the robbery came to occur.

Opening 4: Commonwealth v. Bowling. Defense. Counsel Page. Right out of the gate, the attorney contends that the jury will hear "nothing from this defense but the facts." The other defendants in the case will not walk out free, but this client (Bowling) should. This defendant was the most reluctant one of the bunch – he did not want to do it.

Opening 5: Thompson v. Forcht Bank, et al. Plaintiff. Counsel Conway for Thompson. Civil Case. Breach of Duty. Slander of Title. November 2013. Magnolia bank furnished the money and made the loan to the plaintiff. Forcht brokered the loan. Wells Fargo received a check from New Age Title to pay the plaintiff's loan in full. However, that check never cleared. New Age Title was fraudulent. Your Community Bank, the bank of New Age Title, gave notice to Wells Fargo that the check was being returned because of an order to stop payment.

Opening 6: Thompson v. Forcht Bank, et al. Defense. Counsel Riddle for Forcht Bank. Attorney shifts blame fully on the entity of New Age Title, which is not present. Riddle asserts Forcht's role as a middleperson, with "no way for [them] to know" that something had gone wrong in this transaction. Counsel explains that Forcht really wanted to help the plaintiffs, but their hands were tied.

Opening 7: Thompson v. Forcht Bank, et al. Defense. Counsel Halliday for Magnolia Bank. This defendant's stance is that they were brought into this case when the plaintiff cast too wide of a net when filing suit. They played no role in the wrongful transaction which ultimately harmed the plaintiffs. The two actors who should really be in question are the criminal who stole the money and Wells Fargo, which released it mistakenly.

Opening 8: *Thompson v. Forcht Bank, et al*. Defense. Counsel Terry for Wells Fargo. The opening statement attempts to provide a clear depiction of the "true villain" of the case, as the attorney shows the jury an image of the man who was convicted for the fraud which occurred. Wells Fargo's role in allowing for the foul play to occur is downplayed as a clerical error.

Opening 9: Thompson v. Forcht Bank, et al. Defense. Counsel Payne for Mour. The argument here paints the defendant as someone whose trust was violated by this bad man who had committed the foul act in this case. Defendant Mour had no control over that person's actions. The person who took the money – an action which the defendant was powerless to stop – has already been apprehended, so there is no need for further action.

Opening 10: Zapp v. CSX Transportation. Defense. CSX Transportation. This case involves the central question of whether a workplace was reasonably safe for a locomotive

engineer who later developed carpal tunnel syndrome. Counsel takes much care in framing the legal issue of what constitutes "reasonably safe."

Opening 11: Sirbaugh v. CSX Transportation. Plaintiff. Counsel Ezra. A case had been brought regarding potentially hazardous materials in the workplace. A battle of the expert witnesses seems to be at hand. Plaintiff counsel focuses on the credibility of the local doctor's testimony versus the university expert's outside evaluation of the patient.

Opening 12: Sirbaugh v. CSX Transportation. Defense. Counsel Lafferre. Unlike plaintiff counsel, the defense attorney refers to the hazardous material directly as asbestos, without trying to step around the issue. We again see the centrality of expert testimony in this case, as the language of credibility takes center stage.

Opening 13: Clayton v. CSX Transportation. Plaintiff. Counsel Guerry. Lung disease from workplace environment. "Mr. Claxon is a good guy, and you are going to like him." Much of the opening serves to paint the plaintiff as a simple, good man who has been exposed to asbestos in his workplace by a company who committed large-scale injustices to its workers.

Opening 14: Claxton v. CSX Transportation. Defense. Counsel Lafferre. Attorney establishes timeline in which the plaintiff sought counsel from an attorney before ever seeing a doctor, insinuating that the proper sequence of events would be the reverse. "This case is backwards."

Opening 15: Foutz v. Norfolk & Western Railway Company. Plaintiff. Counsel Cranwell. Attorney gives a civics lesson on branches of government, dating back to the Magna Carta and Richard Lionheart in the 13th century. The case itself is about hearing loss, though you would never guess that from the first half of the opening.

Opening 16: Foutz v. Norfolk & Western Railway Company. Defense. Counsel Hickton. Defense attorney starts the timeline at the plaintiff's time of joining the military as a tank operator in Vietnam. He explains that tank service, active hunting life, etc. could very well have been the cause of hearing loss, instead of it being a workplace issue.

Opening 17: Koger v. Norfolk Southern Railway Company. Plaintiff. Counsel Farina. The case is one of liability in the face off train conductor signaling. Attorney begins plainly by placing the jury's mind at 10:55 on the morning of the incident.

*Opening 18: Koger v. Norfolk Southern Railway Company***.** Defense. Counsel Bird. There must be a determination of whether Mr. Koger was also responsible, as all others in this case have already had responsibility assigned to them

*Opening 19: Sloas v. CSX Transportation***.** Plaintiff. Counsel Kvas. Back pain lawsuit where the railroad company allegedly forced him to do heavy labor despite his old age.

Opening 20: Sloas v. CSX Transportation. Defense. Counsel Bird. The defense plans to provide contrasting testimony to the plaintiff, while also stating that he has the opportunity to see other work (via CSX's college/vocational programs).

Opening 21: NLRB Hearing. Respondent. Counsel Dailey. Vehicular accident in which the driver is purported to have driven recklessly, despite presenting himself as a well-qualified driver. Attorney draws upon "personal" experience as a law school classmate had been killed due to similar negligence as the one shown today.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Audience is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of their client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION	"That could have happened to me." Discuss the facts so that the audience identifies with the client.	While there was no language which separates the audience out from the client, there exists minimal language which draws them into the perspective of that client.	A totally unrelatable case – one in which the audience finds itself unable to relate to the client – is presented.
SUPPORT	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

MCELHANEY CRITERIA

Each of this author's key components of an opening statement have been listed below and elaborated upon, so that we may see the array of traits whose presence, or lack thereof, which we will be examining in each speech.

Comprehension. By the content of the opening statement alone, the jury should be able to understand what the case is about and why they have been brought to deliberate on it. The presentation of a totally incomprehensible case by an attorney drastically reduces the chance of persuading a jury to find in favor of that party. The use of demonstrative aids can help tremendously in conveying a clear, cogent explanation of the case. Risk of confusion ought to be a prevalent concern in the mind of any attorney delivering an opening statement.

Credibility. An indication that the attorney (1) knows what they are talking about and (2) has an investment in the merits of the case are vital to establishing credibility with the jury. Such a foundation serves as a necessity for opening statements as all information offered must pass the test of credibility to the jury. Humanization of the client, a personal connection to the case, and a tangible zeal for the advancement of their cause are all potential vehicles to convey a credible presentation of the case.

Identification. Despite the classic admonition implicit within "the Golden Rule" – that attorneys may not ask the jury to place themselves into the shoes of their client – there must be a sympathetic connection established between the jury and the client. There is no driving force more powerful in the deliberative mind of a juror than the thought, "That could have happened to me" (McElhaney 177). Although direct appeals to emotion are prohibited, our courtroom advocates can rely upon familiar aspects of human experience in order to relate the events of the

trial to the jurors. The bonds of identification are most effectively formed through tethering common values and understandings to relevant case facts.

Support. This component of an opening provides the jury with reasons to be pulling for a given client after the attorney delivers their opening. The effective establishment of a sense of injustice may draw the jurors into hoping that the evidence supports that side. Our guiding legal authority tells us that, "Jurors naturally want to right a wrong," so a good advocate will provide them with ample reason to do so in favor of their client (McElhaney 179). This is a double-edged sword, though. The appeal may also work in the inverse as opposing counsel explains why *they* have been the actors of injustice and must be punished. Whether the support is manifested in restorative or punitive forces, its presence acts as a crucial foundation for receiving a favorable verdict.

Impact. The jury must be left with lucid images or taglines from the opening which they can draw upon throughout the trial. A powerful, incisive theme – especially one which can "emphasize responsibility" – may serve as the perfect tool to guide the jury through their deliberations (McElhaney 179).

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of a mere recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts.	Only displays a surface-level purview of the case events. No effort made at arranging, explaining or interpreting such events.
FRAMING	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists a fraction of the opening, rather than the lens through which the case should be viewed.	No attempt made to frame the facts of the case into a particular, specific thematic structure.
RELEVANCE	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the bulk of the facts offered probe into the issue at hand, some material offered has little to ability to either persuade the audience or probe into the case.	Much of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

SIMONSON CRITERIA

Again, we look towards the specifications set forth by this author to be evaluated in each of the opening statements in our sample population. Simonson is writing for an academic audience, rather than communicating a message tailored for use by attorneys. The criteria below reflect my own application of Simonson's work into opening statements.

Discovery. The degree to which the opening statement relies upon facts strictly within the scope of the case, as collected during the process of discovery. Modern trial scholars express the importance of providing sufficient facts borne out of the case itself. For plaintiffs' openings, "their opening statement should contain sufficient facts from which a conclusion can be drawn" (Lubet). Conversely, the defense ought to make a similar case. Entering the facts is instrumental to formulating a persuasive argument, as it lays the foundation upon which that argument may be constructed.

Creation. This implies the presence of invention used as "the generation of rhetorical materials" (Simonson). The bringing-in of material (analogies, context, family history, etc.) that, although technically outside of the scope of the event which led to the court proceeding, are relevant in forming a persuasive argument.

Framing. This criterion will evaluate the "sensemaking" nature of how each attorney frames their opening statement (Fairhurst). Framing is the attorney's opportunity to shape the juror's perception of the case. By employing the use of framing as a rhetorical device, attorneys may tailor the scope of an issue to aid their case. This carries robust importance for opening statements in particular as the framing of various issues in that speech will be relevant through the rest of the trial.

Relevance. There will be a qualitative analysis of whether – and how frequently – the attorney strays from the narrative which affects the case at hand. Examples may include long diatribes pontificating on the origins of the jury system, excessive non-probative background on the client, etc. The metric for this criterion lies within a given talking point's ability to either provide factual information to the jury, contribute to a persuasive narrative via means of creation, or any content which otherwise contributes to the finding of all available arguments. "The provision of reasons, biases, or details, no matter how compelling they are to [the attorney's] way of thinking, will accomplish nothing if the jurors cannot place them into a context that they understand and accept" (Lubet). On this basis, it can be determined that relevancy may be examined thorough the lens of the jury's perspective.

Each completed rubric for all 21 opening statements can be found in the appendix of this work. Now having laid the foundation for how each of the opening statements were analyzed, we may look towards the findings that may be drawn from this study.

CHAPTER 3

Having read and evaluated 21 openings statements, along with supplemental authorities in relevant literature, I have identifies three potential conduits for the use of creative arguments or more conventional argumentation. These foundational elements are (1) framing, (2) storytelling, and (3) credibility. Each of these elements, it must be noted, are not uniquely my own. While the conventional legal texts examined thus far provide some basis for each of these building blocks, my original contribution asserts that creative argumentation can be used through each of these three practices. In doing so, attorneys have an expanded pool from which to draw frames, stories, and points of credibility.

Framing, storytelling, and credibility are forms of argumentation which may be generated inside and/or outside the case facts. An expanded definition of invention, which includes creation *and* discovery, permits for the use of such tools. An expanded pool of argumentation provides an avenue for parties, especially those disadvantaged by conventional rules around providing "just the facts," to have access to more effective advocacy. The examples used through the drafting of this work are evidence that some attorneys employ one or all of these strategies. However, the guiding texts of legal education remain largely opposed to the inclusion of creative arguments. The advice from these texts remains focused on arrangement of facts, rather than the *bringing in* of information or modes of understanding (i.e., frames, stories, analogies) outside the case facts.

Framing

In Frank Baum's original *The Wonderful Wizard of Oz,* published in 1900, the focal narrative location rests in the idyllic Emerald City, whose brightness and glory shine throughout the land. A close reading of the original text, though, reveals that the city is no more green than any other. Inhabitants and visitors alike are forced to wear green-tinted glasses upon entering the city, under the guise that such glasses are being provided for optical protection against the brilliance of the city itself. Of course, the intended effect by the Wizard of Oz, a master trickster, is that each person will be tricked into visualizing the city in the most majestic light possible. The Wizard has created a frame, figuratively and literally, through which spectators would view his kingdom. As attorneys bring some facts in sharper relief than others, they too act as framers of the case to the jury, shining light on facts more favorable to their case while prescribing a set of emerald-colored glasses to the jury to improve the appearance of less favorable facts.

The suggestion here is not that attorneys act in the role of the wizard. Deceit is not an acceptable practice for the courtroom. Rather, framing reflects the inclusion of a perspective and such an inclusion lies at the heart of one's ability to advocate. The other side will have *every* opportunity to provide its frame for the case facts, so it stands to reason that each party ought to construct their own frame in the time allotted to them. Effective attorneys act in the role of rhetorical optometrists in their ability to provide the jury with a lens more favorable to their client. Ultimately, the test for the lens of best fit is determined by the jury. They remain the triers of fact who decide which version of events – or in other words, which pair of glasses – provides the most sensible explanation for what has happened in a given case. But the lenses must be offered to them in order for the jury to make that determination, or else they will attempt to

create their own, and so it is pivotal to legal advocacy that litigators construct frames to be used at trial.

An endorsement of such framing can be found within accepted canons of trial practice. While attorneys are discouraged from inventing facts, they are given free rein with how they arrange such facts in their presentation of the case during trial.

> Obviously you don't create the facts. You can't invent evidence. But you do select which facts to present and which to omit. And it is your role as master storyteller to arrange the events to suit the story that needs to be told… A breach of contract is a story of broken promise… so the story of trust and reliance becomes almost a psychological necessity to a persuasive presentation. (McElhaney 185)

The arrangement of such facts into a frame persists as a basic element of any effective opening statement. Even in the process of selecting which material will be emphasized in the opening, attorneys are already constructing a framework. Some, though, take it a step further. One example from my evaluated population showed an instance where an attorney framed the legal issue of the case, so as to confine the jury into thinking that the only possible decision is one which rests within the scope of the frame provided.

Defense counsel for CSX Transportation, a railroad company fighting a lawsuit which alleged unsafe working conditions, established an early frame through which he wanted the jury to evaluate the evidence offered. His carefully framed explanation of a "reasonably safe workplace" fits an extraordinarily wide range of realities, one in which his client's workplace would fit quite comfortably:

> On one end of the spectrum, picture a workplace that is perfectly safe: A workplace where no one is ever injured, even in the slightest; where there are no dangers, no safety

> risks. I would give you an example, but there is not such workplace – though CSX tries to be. On the opposite end of the spectrum, picture a workplace that is completely unsafe: A workplace where there are no safety rules or where safety rules are simply ignored; a workplace where there is no requirement to report safety concerns or no system for reporting them; a workplace where there are dangers everywhere – dangers that could be avoided if only somebody cared; a workplace where there is no commitment to safety whatsoever. Sweatshops, for instance… Somewhere between a perfectly safe workplace and a completely unsafe workplace is a reasonably safe workplace. At a reasonably safe workplace, there are dangers due to the nature of the work and, as a result, there is always some risk of injury. But the employer takes an active role to minimize those dangers and, in turn, injuries. The employer promotes safety not just through words but through actions…That is CSX. (Opening 10)

Here, the defense counsel has constructed a frame in order to depict the legal issue – whether his client's workplace was reasonably safe – in the most favorable light possible. The attorney only needs to land his client between those two pillars in order to win. By providing two extreme goalposts, one reflecting an impossibly idyllic reality and the other invoking an absolutely abysmal image of a workplace, the attorney creates an advantageous legal footing in which the jury can have adequate justification in finding a verdict in favor of the defense. He then makes the rhetorical move to place his client *somewhere* between those two goalposts. By broadening the scope of what can be considered reasonably safe, the language of this opening gives the jurors a means to test the forthcoming evidence for whether such proof places the railroad company in negligent "sweatshop"-like working conditions or whether the defendant ought to land in the extremely broad "reasonably safe" category.

Academic scholars and rhetoricians find common ground with practicing attorneys and the professional legal texts on this subject, maintaining that framing exists as an effective form of communication.

> To frame is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation. (Entman 52)

The cohesion of the facts offered to the jury – how they fit together, significance to the case at large, what it ought to mean to the jury as they deliberate on the case – remains one of the most essential factors in communicating a legal argument. It is critical that such a framework is presented early during opening statements, as such timing allows for the jurors to don those emerald glasses before processing the ensuing information throughout the trial. Scholars and practitioners agree on the efficacy of framework; however, a close evaluation of our population sample reveals to us that framing is rarely utilized when a case is presented to a jury.

Storytelling

On a Sunday afternoon in the small town of Watford, England, thousands of spectators bore witness to an event characterized by unbridled passion and corporal turmoil. In other words, a football match was played. The hometown club, Watford FC, would be playing against Leicester City as the Premier League hopefuls would compete to advance into a final playoff match – the winner being promoted to participate in the top competitive division next year. The team played with a buccaneering style, whose charisma and appeal had won the hearts of those fateful fans who sang their team to victory at Vicarage Road Stadium each Sunday. That stadium – which the club was only able to finance through a benefit concert held by boyhood fan Elton

John – would be the venue as little Watford competed for the chance at Premier League glory next season. As the final whistled approached, the aggregate scoreline remained level at 2-2. That was until Leicester player Anthony Knockaert made a last-minute dive into the penalty area, embellishing the slightest contact from a Watford defender as he appealed for a penalty. The referee obliged – pointing to the penalty spot in a move that surely spelled doom for Watford's playoff hopes.

The air of injustice was palpable as anguished Watford fans waited for Knockaert to drive the final dagger home. It would be impossible to imagine a neutral who claimed to not have a sympathetic connection to Watford in that moment. But, in an act which could be described as no less than pure heroism, the home goalkeeper reversed the narrative as he saved the otherwise fatal penalty shot. The script was flipped. "And here come Watford," exclaimed the announcer, whose commentary of the game remains etched in the annals of English football history. After a gallant charge to the other end of the pitch, the ball ultimately fell to the feet of striker Troy Deeney, a player who earlier that season had just been released from prison. Deeney to this day claims the transformative effects of having the club put their faith in him when he rejoined the outside world. He felt indebted to the club that allowed his footballing story to continue. That debt was repaid in full as he scored the winning goal, prompting hundreds of fans to storm the field in a flurry of shocked jubilation. The events of that May afternoon served as a miraculous culmination of a circumstance and narrative background – the kind of background which lays the foundation for emotional investment in a competitive outcome, like the wins and losses present within a soccer match or, for our purposes, a jury trial.

The fans who stormed that field did so because they were *moved* to do so. Stories, whether they be Troy Deeney's personal story of redemption or the town's collective story or a

legal client's story, compel us into an emotional response. Each trial is predicated upon the basic narrative structure that an injustice has been done and a determination must be made. Attorneys must present a story which portrays this conflict in such a way that the jury can organize the facts into a cohesive, believable structure through which to determine their verdict. Further, it must be a story which provides the kind of support described by McElhaney – one which beckons the jury into hoping, *cheering* that the evidence will come out in favor of that attorney's client.

Coherence and cultural consistency are essential to the presentation of an effective story at trial. Law professor Thomas Mauet, in his text containing practical legal advice, characterizes the nature of a trial as being "essentially a contest to see which side's version of a disputed event or transaction the jury will ultimately accept as true" (Mauet 64). Writing from the perspective of evaluating narrative structures in capital punishment cases, Sara Cobb agrees, offering that the courtroom is "a place for 'story-battles' where each narrative works to disqualify the other and legitimize itself" (Cobb 296). The defense's narrative in a capital case, once guilt has been established and sentencing is the only issue at hand, would revolve around an explanation of the violence at issue. Mitigating efforts from the defense attorney will often manifest themselves in the form of contextualization of the defendant's actions, bolstering the perceived effects of exterior forces. Cobb goes as far as to assert that, "The outcome of the penalty phase of a capital trial may be understood as a function of features of the narratives that seek to construct and contain the meaning of violence" (Cobb 298). Narrative practice in this way is the heart of advocacy. The zealous presentation of the client's case may even include story-driven interpretation of what constitutes violence and how we ought to judge it.

Legal publications agree: "This 'story-framing' allows fact finders to place the evidence at trial into an existing story and test it for 'fit'" (McPeake 39). In order for the jury to perform a

test for fit, the story must be presented to them early in the trial, before the evidence. Opening statements represent the best venue for the delivery of a story. Academics studying jury decisions agree on the necessity of the story's early arrival in trial:

> [The story model] underscores the importance of establishing a story – the sooner the better – and opening remarks represent the first and best opportunity to do so in most trials. It is difficult to think of a trial where it would not be advantageous to provide an overview of one's case before the jurors start hearing the evidence… Anything that makes it easier for jurors to compose a narrative framework should be done. (Devine 228)

Ideally, starting with their opening statements, both sides participate in a narrative battle in which the jury serves as the ultimate decision-maker on what makes sense and, ultimately, which story prevails.

An authority in the realm of communication points to the functionality of narration as being a means through which the jury can evaluate rationality. Narration, Fisher asserts, "can be interpreted and assessed as [a mode] of expressing good reasons, as [a rhetorical form] inducing conclusions about people, community, and the world" (Fisher 55). This form can be aptly applied to trial practice for use by jurors in their process of deliberation. Juries form judgments which are published in the form of verdicts. Those judgments are the results of conclusions formed about the parties in trial, and we can see that attorneys with a greater command of storytelling will yield a higher power of persuasion as they advocate for their client's case.

One potential element of storytelling is establishing the locus of control. In assigning agency, or lack thereof, to a given party's actions, the attorney maintains the ability to assert responsibility or the absence of it. Establishing a locus of control, in terms of internal and

external forces which caused the central actions of the case, is pivotal in communicating fault to the jury. The story serves as the ideal delivery system for such a locus. As attorneys attempt to convey responsibility, Devine dictates,

> Given jurors' predilection for narrative explanation, it seems likely that good opening statements will mimic good stories… (Devine 194). Jurors also likely prefer stories that explain human actions in terms of dispositional tendencies. Considerable research on the fundamental attribution error shows that we tend to attribute the behavior of others to stable, internal motives (although paradoxically we are more likely to acknowledge the effects of situational influences on our own behavior). Particularly when the allegations against the defendant involve violence, a desire to see consistency and purpose in the behavior of others may lead jurors to innately favor stories where the defendant is viewed as a "bad" or "evil" person who is fundamentally different from other people." (Devine 200)

Given that jurors seek explanation for actions by the parties in question, it ought to be the case that counsel are eager to provide such rationale to them.

The provision of an external locus of control, one which emphasizes the effects of external forces, serves as an apt strategy when arguing against claims of negligence. For example, a case of professional wrongdoing had been brought against a collection of banks, all of which were alleged to have sat idly by while the plaintiff was defrauded by a third-party actor. One defense attorney, Benjamin Riddle on behalf of Forcht Bank, took tremendous care in his opening statement to articulate his client's wholesale inability to help the plaintiff as they were being victimized by a fraudulent mortgage closing agency.

> In January of 2011, two months after the closing occurred, unfortunately, Forcht Bank has no ability to control anything that happens after the closing… It's not that we didn't want to help the Thompsons out. It's not that we did not want to undo what New Age Title did. It's that we can't. We have no ability to. (Opening 6)

The story here transitions from the tale of a big, bad bank which crossed its arms at the plaintiff's woes, to a narrative centered around a willing champion hampered by bureaucratic constraints. The locus of control has been established around the external forces which blocked the attorney's client from acting.

Effective storytelling at trial often manifests itself in the narrative expression of a very simple human tendency. A trial regarding an injured train conductor and his inability to see a train signal provides the perfect view for a night-and-day contrast between how two advocates may present their case. The plaintiff's attorney gave a lengthy explanation of the specifics of whether a train conductor could have conceivably seen the signal. Essentially, the conductor was in a double-bind, unable to see the signal for himself, but required to verify that signal. He relayed the signal without having seen it for himself (Opening 17). Instead of embarking upon such an explanation, perhaps the attorney would have been better served to explain the overarching principle, before communicating the particular action. Miring the opening in detail only detracts from the central principle with drives the attorney's case. The more creative argument would have been to more clearly establish the principle of being put into a catch-22 by your employer and getting into a harmful situation because of that.

The defense counsel in that same case succeeded where the plaintiff had failed. The defendant's case rested on the principle that it was important for this employee to act as a stage of verification, not as a conduit for information without ensuring that the communicated signal

was correct. Because he relayed a signal that he had not seen for himself, the injurious accident was his own fault, claimed the railroad company. Defense counsel primed this central message even in introducing themselves as being "very proud to represent Norfolk Southern in this case… on behalf of their employees who have taken responsibility for what happened in this case," with an eye towards the fact that there is one ex-employee here who will not do that (Opening 18). The attorney then expounds:

> [The plaintiff], as the conductor, was responsible under the rules for looking ahead, for watching the signal, for vigilantly observing the signal, for calling the signal and repeating the signal, for calling the signal on the radio, and immediately before passing that signal for calling it again. He did none of those things. (Opening 18)

The story cut through the actual, confusing dynamics of how the train was positioned and what the signals themselves meant. A narrative of irresponsibility, especially in the face of other employees who would be brought by the defense to confess their responsibility in the accident, was one which could clearly resonate with the jury at a basic level.

Some literature indicates that evidence, in the narrative sense, must serve to explain the actions of the story characters. Jurors will balk at delivering a judgment if the evidence is not manifested and, subsequently, the central story does not hold up. In the instance of a criminal case, we may see that:

> If the prosecution offers no rationale for the defendant's behavior, jurors may be unable to formulate a convincing story and thus be reluctant to convict even though the legal criteria have been met…Scope is thus not concerned with the degree to which the evidence satisfies the legal criteria for finding the defendant culpable, but rather the

> degree to which the emerging story can answer the questions that jurors naturally have about the case. (Devine 194-195)

It must be noted that openings are the venue for priming the jury with a narrative mold into which the facts can be poured. Opening statements are not the place to outright provide an unabridged fact pattern under the guise of a story. Shorter, simpler messages are often more effective. The jury can readily call upon that story as they evaluate the evidence presented to them during the remainder of the trial. In a foreword by William S. Bailey, a professor and director of trial advocacy at the University of Washington School of Law, we read that:

> There is a fundamental underlying symbiotic relationship between legal and social judgment… While jurors are given instructions as to what the law is before retiring to reach a verdict, the outcome of a case depends almost entirely on human judgment, which is based on how well the legal definitions fit into stories told by the prosecution and the defense. (Bennett & Feldman ix)

In distilling a collection of actions into one central thesis (e.g. that the defendant is a person who refuses to take responsibility), the attorney successfully ties a set of facts into a narrative that resonates with the experience-driven, judgment-centered consciousness of the jurors.

Much like currency in the economic sense, persuasive language loses its value as more is produced. An oversaturation of details and arguments will yield a fatigued jury left without a concise understanding of how the pieces are going to all fit together. Spending time on information regarding the attorney, the civic structures of why the jury systems exists, what an opening statement is, etc. is a waste of currency. An absolutely abysmal performance in this sense can be found in an opening delivered by another plaintiff counsel, where the attorney launched into a digression, stating, “The reason you [the jury] are here today is back in the year

1292…" which preceded a lengthy history lesson detailing Richard Lionheart and the Magna Carta (Opening 15).

We can see an ineffective use of storytelling, because it does not probe at any issue in the case. The defense attorney did not commit this same mistake, though, as he hammered home an early narrative that the plaintiff "began his noisy experience in Vietnam in the tank service and in tank school, he had a hearing loss," followed by years of hunting and other experiences outside the workplace that contributed to the alleged hearing loss (Opening 16). Here, we see an effective use of storytelling as the narrative timeline begins early, with a probative jab against the work-related hearing loss claim made by the opposing party.

Credibility

The trial of the century – *People of the State of California v. Orenthal James Simpson* – featured an explosive volume of trial maneuvers and over-the-top dramatics. From the very beginning, though, the opening statement from Johnnie Cochran represented an early volley of shots aimed at the credibility of the government's case. The tactic was to undercut the opposition's credibility rather than bolster his own. After all, the burden in such a criminal case rested entirely upon the prosecution's counsel table. Cochran asserted:

> Detective Mark Fuhrman will play an integral part in this case for a number of reasons. It's very interesting that the prosecution never once mentioned his name yesterday. It's like they want to hide him, but they can't hide him. He's very much a part of this case. And we ask ourselves, 'Why didn't they mention him?' I think that answer will become very clear to you as the case progresses… We expect the evidence will show that this evidence that was collected at these various locations that you've just seen was

> contaminated, compromised and ultimately corrupted. Now, briefly last week I spoke to you about a detective named Mark Fuhrman. Mr. Fuhrman and his partner, Mr. Phillips, worked West Los Angeles homicide… and they were the first ones to arrive at the scene. (LA Times Archive)

In retrospect, we see now that it was extraordinarily prescient of Cochran to lay such an early foundation regarding Mark Fuhrman's credibility, or lack thereof, especially in light of the racist remarks that would later be brought center stage as the infamous Fuhrman tapes were revealed.

The credibility of any attorney or witness must always be understood as a loan granted by the jury. The loan is at first given in good faith, one scholar tells us, as "factual assertions will be incorporated into jurors' mental representations unless there is good reason to do otherwise" (Devine 195). In the instant the Fuhrman tape recordings bounced off the walls of the Los Angeles County Superior Court and into the ears of twelve fateful listeners, the jury rescinded that loan. The prosecution team found themselves in a state of jurisprudential bankruptcy and they ultimately failed to secure a conviction.

In the description provided by McElhaney, credibility for an attorney may manifest itself in the establishment of a personal investment in the case. Anna Dailey, in her opening statement delivered before the National Labor Review Board, does well to bolster her own credibility through creative means:

> It's really hard for me personally, since I lost a law school classmate and friend because the driver of a car reached for an ice cream cone that they had dropped on the passenger side floor, and the result was a head-on collision that killed the driver of the oncoming car – my friend. It was reckless driving to be more concerned with the ice cream than paying attention to one's driving. (Opening 21)

Further examples of positive establishment of credibility can be found within an opening provided by a criminal defense attorney, who sought to provide a necessary sympathetic connection to his client, while also insisting that there will be no antics launched from his counsel table:

> I want to thank the Judge now for letting me represent this young man. I have been in this thirty years and I do believe in this system. This is one case where we will make our proof and I guarantee you there will be no tricks, no courtroom dramatics and nothing from this defense but the facts. (Opening 4)

Such an early admonition bodes well for the defense, as an authority in the field of psychology indicates to us that primacy and recency bear much weight, not only in the retention of information, but also in how subsequent information is processed:

> The recency effect is an order of presentation effect that occurs when more recent information is better remembered and receives greater weight in forming a judgment than does earlier-presented information… The opposite of a recency effect is a primacy effect, when early information has a disproportionate influence on subsequent impressions compared to more recent information. (Vohs 699)

Credibility, given that its presence or absence bears much weight in whether the jury accepts or rejects the proof offered, must be offered with respect to the principles of primacy and recency.

Of the opening statements available within our population sample, we may find that one delivered by Luke Lafferre, defense counsel for CSX Transportation, provides a close synthesis of the concepts of framing, storytelling, and credibility. Lafferre's opening followed a lengthy account from the plaintiff's attorney about how the railroad industry, on a massive scale, had committed gross injustice through nondisclosure of harmful asbestos in the workplace. This

affected countless employees, plaintiff counsel said, as he made an appeal for the jury to find in favor of his client by applying the whole to the part. Rebutting this, Lafferre begins his opening with a sense of immediacy, stating that, "What you will see from the facts in this, really, what is really a small case, is that [the plaintiff] does not have any kind of asbestos disease" (Opening 14). Already, a frame is being constructed. The phrase "what is really a small case" is not insignificant. The defense frames the case as being a small case – not one which would result in the sort of landmark verdict that the plaintiff had suggested. While the industry-wide practices may have been wrong, they are not at issue in the frame that Lafferre provides to the jury. The issue, as he frames it, rests on whether such an injustice happened to this one worker in one small case.

The defense attorney continues to frame through use of storytelling, as he asserts that "this case is totally backwards," before proceeding to describe a narrative involving a claimant who sought counsel *before* the discovery of any injury (Opening 14). Such a framework shines a spotlight on how the case came to be. The story constructed by the defense attorney was one of a litigious retiree looking to cash in on a railroad company. The sequence of events involved an initial visit to an attorney's office, and only then did the plaintiff seek subsequent medical care from a lawyer-suggested doctor, whose prognosis serves as the basis for the plaintiff's claim. Here, Lafferre provides the jury with a narrative framework to review the plaintiff's case with the perspective of a backwards process – one in which the plaintiff met with an attorney *then* saw a doctor.

Having now explored methods for implementing creative argument, through (1) framing, (2) storytelling, (3) credibility, or a synthesis of them, we are able to evaluate how the use of such practices might lend us a more comprehensively just system of the law.

CHAPTER 4

At the heart of legal advocacy lies the fundamental understanding that one is arguing on behalf of a client for whom the best representation is through counsel, and not *pro se*. Those clients rely on attorneys to argue their case using best practices in the hopes that their perceived injustice will be corrected. Having set forth three rhetorical devices which characterize the best approach for formulating opening statements, we must now evaluate *why* such a question of best practices matters and why the execution of such strategies may bolster legal advocacy.

Jury decisions, and subsequent appeals ranging all the way up to the Supreme Court of the United States, matter. Their lasting impact on our nation's landscape of liberty can be found in several clear, identifiable decisions. A number of landmark cases involving law enforcement – perhaps our government's closest and most involved presence to the people – illustrate this concept. For example, proper collection of evidence and our modern Miranda rights were two concepts born out of creative arguments before the Supreme Court. In the 1928 Supreme Court case *Olmstead v. United States*, the validity of a bootlegger's conviction, in light of an invasive and improper collection of evidence by law enforcement, was at issue. The government put forth the simple argument that, because Roy Olmstead committed the crime of which he had been accused, he ought to be found guilty and imprisoned regardless of how the evidence necessary for such a conviction had been collected. The petitioner disagreed, naturally, but the majority court decided that Olmstead's guilt stood on its own. It was in this case that Justice Louis Brandeis set forth early language on the consequences of improper police practice. Writing in dissent, Brandeis asserted:

> Contempt for the law breeds contempt for the law…If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that, in the administration of the criminal law, the end justifies the means -- to declare that the Government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. (*Olmstead v. United States*)

This is an argument generated outside of the case facts. An appeal to the threat of tyranny – not the case facts nor the explicit legal precedent surrounding the case – serves as a creative argument in support of Olmstead's exoneration. Brandeis recognized the importance of this trial, and the libertarian consequences that it represented for the American people as persons subject to police presence.

The arguments of Justice Brandeis and John Paul Frank, counsel for the petitioner in the famous *Miranda v. Arizona* case in which Frank successfully argued that the Supreme Court ought to ignore precedent and establish new liberties now enunciated in the Miranda Rights, are essentially creative and critically important in equal measure. These advocates worked to shift our national landscape on police power structures. Without such argumentation, we may very well live within an America where law enforcement are free to disregard the laws set before them. Civil liberties may have continued to fall by the wayside in favor of traditionally held power dynamics. If attorneys who have been given the charge to argue in such critical case were to stick to just the facts, then those who had determined the relevant facts would remain in disproportionate power. The government's dominating fact in *Olmstead* was that this man had committed a crime. Brandeis' dissent tells us that we must bring in the relevant information on *how* that fact pattern came to be (i.e., illegal law enforcement practices). Brandeis acknowledges

a higher power scheme which, if sustained, would perpetuate a tyrannical system in which the government is permitted to ignore its own laws.

Creative argumentation broadens and enhances the persuasive abilities of those advocating for parties disadvantaged by the patriarchal power structures who have determined legal standards or evidentiary relevance. Speaking with regard to the legal battles on reforming the rhetoric of consent during the dawn of sexual harassment statutes in the 1960s, one author describes to us, "The 'objective' approach is not inherently better or more fair. Rather, it is accepted because it embodies the sense of the stronger party, who centuries ago found himself in a position to dictate what permission meant" (Delgado 3-4). Our notions of sexual consent, and subsequent prosecution of those who violate our reformed modern understanding, are the brainchildren of creative legal argumentation.

The American justice system invites both sides to employ the best, most effective tactics possible in the courtroom. The two-sided courtroom arena provides implicit checks and balances to prevent egregious abuse:

> The adversary system provides its own checks on advocate abuses during opening statement, without regard to the externally imposed limit of the rule against argument… By force of necessity, lawyers must use caution or risk losing their credibility before the jury. (Perrin 163)

Certainly, one's invention remains anchored to the case facts or reasonable inferences from such. In addition to the principle that one may not simply conjure fictitious stories or misleading connections, there also exists the practical check against gratuitous invention. The risk of coming across a probative, questioning jury will work to disincentivize attorneys from putting forth

products of fabrication. Ultimately, the jury will hear the evidence. Lying about or misrepresenting the evidence in opening statements will work to the detriment of counsel.

One excellent example of material offered to the jury outside the case facts can be found in one of the opening statements examined in this work. A criminal defendant had been charged with participation in a brutal string of murders. Defense counsel, through opening statement, made the case that the accused, Karu Gene White, should not be held fully responsible for his actions because of the contextual circumstances which deprived him of proper moral agency. This was not a story made out of whole cloth. It was one consistent with the case facts, as it provided an external locus of control in order to mitigate the defendant's culpability. These were real experiences which impacted the defendant's psyche. The attorney argued:

> Testimony will show that upon revelation that they did in fact participate in this crime, [defense counsel] dropped any tendency we may have to be gentlemen, and started saying to the defendants and to the members of the family, let's cut the bill and sit down here and tell us what's going on, what makes this kid tick… And we heard it. We will bring to you a series of witnesses who will tell in great detail that [the defendant] was the product of incestuous rape of some twenty-one years ago, that he is the son of [his father's] fourteen-year-old step daughter… that situation has torn that boy's emotions and mind and heart apart… But that's not enough. That's happened to other people. They haven't ended up killing. So what else did we find? We will bring you evidence that at the age of two, he watched a smaller brother walk into a pool of water and drown. That he was visibly moved and shaken by that. That two and a half years later, then when he was four and a half, that he sat on a bed in the bedroom of [his grandmother's] house and watched as [her] brother brutally beat and murdered his father… That murder consisted of

> shooting, beating, stabbing with a broomstick which was shaved to a point. That the actual murder and death took over a period of four hours, in which he was too frightened and not physically able to leave, and he witnessed that. (Opening 2).

This background is not included in the case facts, yet it is absolutely relevant in assigning the weight of responsibility to the defendant at hand. The attorney here relies upon our previously mentioned notion of the locus of control. This serves as an immediately relevant example of how introduction of material outside the case facts may serve to provide a more complete version of events – including those events outside the case facts which occurred many years before the crime itself. According to the defense, those nascent experiences were the true origin of the crime. The defendant's story did not begin when he and the co-defendants arrived at the gas station where the brutal murders occurred. According to the case offered in his defense, Karu Gene White's story began in the moment of his first childhood trauma, and it ultimately coalesced into a narrative of murder and depravity.

I believe that this form of creative argumentation – the sort that we see offered in the defense of a man who ostensibly carried heinous responsibility in the murders of multiple victims – provides a far more complete version of advocacy, one in which the defendant's full story and scope of responsibility has been laid bare for the jury's eyes. The jury will ultimately decide the defendant's fate. In fact, the defense counsel asks that they exercise that right: "We will ask you take into consideration the nature of the crime and then we will ask you at that time as to how responsible you will hold this young man" (Opening 4). The creative argument's utility, as seen in this case, manifests itself within the expanded pool of information upon which the jury may draw while making a judgment. This field includes *all* of the facts, not just those contained within the case's indictment.

We see that our current system of competitive legal advocacy "relies heavily on the zealousness of counsel to present the best case for their clients, thus helping to ensure that the factfinder possesses all information needed to make an informed decision" (Perrin 113). The best presentation of a client's case, for those whose full story and scope of action exist outside of the explicit case facts, often manifests itself in the form of a creative argument. Jurors must make their determination based off of the statements given by counsel, and if such counsel are prohibited from including creative arguments, then the client will be disadvantaged.

In the best-case scenario for the client, their professional advocate will have entered the courtroom equipped with the best means of argumentation possible, and this paper submits the idea that such practices are born out of dedication to heightened advocacy. Clients ought to have their expectation for effective advocacy met. It is the position of this work that attorneys must have all available arguments at their disposal as they advance their client's case. The new definition of invention offered by Simonson, which asserts that invention should include both discovery and creation, presents an important vehicle for providing that advocacy. This convention, therefore, should be implemented into contemporary legal practice and education so that creative arguments are not only permitted but encouraged for the betterment of our system of advocacy.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **<u>Score</u> – 2** Counsel begins by reading the indictment, thereby listing the accusations with which the defendant is charged. However, a confusing of the issues arises as heaps of superfluous information is given to the jury (family tree, exact location of the crime scene, etc.).	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **<u>Score</u> – 3** In relying upon the official indictment to relay the case to the jury, the prosecutor attains credibility through explaining the charges as though they are facts.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **<u>Score</u> – 1** No sense of injustice is communicated to the jury on behalf of the victims. The voracity of the crime	"That could have happened to me." Discusses the facts so that the audience	While there was no language which separates the audience from the client, there exists	A totally unrelatable case – one in which the audience finds itself unable to relate

itself is lost in the sea of irrelevant details provided.	identifies with the client.	minimal language which draws them into the perspective of that client.	to the client – is presented.
SUPPORT **<u>Score</u> – 2** An overabundance of minute details surrounding the crime is given to the jury. Very few of those details actually lend themselves to the creation of favorable conditions for the jury to arrive at a verdict of guilty.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 1** There is no narrative structuring which would allow for the jury to become engaged in the story of the case. The opening is mired in unnecessary detail about family relations, street locations, weather, etc.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** A tremendous trove of material is unloaded onto the jury. There seems to be an endless number of available facts and arguments upon which the prosecution may establish its case. There is fault in the attorney's failure to actually pick one line of argument and stick with it.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 1** No creative effort is evident in this opening, as counsel merely regurgitates all available facts, making no effort to connect or synthesize them. He places that burden upon the jury: "There's been a tremendous amount of material to cover in such a short time. As this evidence develops and unfolds, I'm sure you will understand the significance of each little bit of evidence that we have	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.

marshalled, more so than you do at this point."			
FRAMING **<u>Score</u> – 1** No narrative framework is offered into which the jury might attempt to fit the facts offered. An overabundance of detail is provided, yet no frame exists into which those points may be organized cohesively.	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than the lens through which the case should be viewed.	No attempt made to frame the facts of the case into a particular, specific thematic structure.
RELEVANCE **<u>Score</u> – 2** The opening is flooded with information that is irrelevant, or at least not effectively tied, to the central action (i.e. a very serious crime).	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **<u>Score</u> – 3** Counsel provides a litany of explanations around why the defendant in question would commit a brutal crime (childhood trauma, etc.). The effort to mitigate the sentencing is clear and understandable, even in light of accepting guilt of the client.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **<u>Score</u> – 3** The speech begins with an explanation of how the attorney became involved in the case, and how the defense team's investigation into the matter has panned out. A clear investment in the case is demonstrated.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **<u>Score</u> – 3** Through expository language on the defendant's troubled past, the jury is	"That could have happened to me." Discusses the facts so that the audience	While there was no language which separates the audience from the	A totally unrelatable case – one in which the audience finds itself unable to relate

forced to examine how any person might be negatively affected by childhood trauma, and how it might serve as an explanation for what happened in this case. Some measure of identification may have been yielded out of defense's explanation for why the troubled defendant did this.	identifies with the client.	client, there exists minimal language which draws them into the perspective of that client.	to the client – is presented.
SUPPORT **<u>Score</u> – 3** The proposed testimony from the psychologist about the defendant in question gives support to the attorney's claims that the crime was born out of a troubled past.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 2** The introduction that, "The discussion at this time will be considerable more brief than the Commonwealth's Attorney's statement" surely must have won some points with the jury. However, muddled statements about how the attorney was retained, what the voir dire	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

process means, etc. only served to dampen the early impact of the speech.			

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** Facts regarding the defendant's past, which extend far outside the scope of the crime in question, are offered in order to provide justification for the actions of the accused. This argument is in furtherance of the case to mitigate the sentencing of the defendant.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 3** The defense presents a creative argument which probes at the defendant's soundness of mind, or lack thereof, during the action of the crime.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.
FRAMING **<u>Score</u> – 3** After having heard about the deaths of three innocents from the Commonwealth, the jury now hears from defense counsel	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a	No attempt made to frame the facts of the case into a particular, specific thematic structure.

that "we're considering the possible execution of another member of the human race." Counsel thereby imparts upon the jury a frame of severity about their decision, should they vote for a verdict of guilty.		fraction of the opening, rather than the lens through which the case should be viewed.	
RELEVANCE **<u>Score</u> – 2** The early portion of this counsel's opening, including the language about the Court of Appeals process, case history, etc. bears little relevance to the case.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **Score – 3** The indictment is read to the jury and the attorney provides reasoning for why the defendants may have committed the crime. The prosecution asserts that the defendants started out as masked robbers in need of money, but became murderers once their identities had been revealed.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **Score – 2** Counsel struggles to navigate an explanation as to why one of the actors in the crime has received full immunity and will be testifying against the others.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **Score – 3** The audience is made to identify with the victims of the crime through the sheer wickedness of the	"That could have happened to me." Discusses the facts so that the audience	While there was no language which separates the audience from the client, there exists	A totally unrelatable case – one in which the audience finds itself unable to relate

crime committed. The victims were brutally beaten and the store ransacked – the jury needs to decide "who done it?"	identifies with the client.	minimal language which draws them into the perspective of that client.	to the client – is presented.
SUPPORT **<u>Score</u> – 3** The claims of the indictment are supported by the comprehensive story woven by the prosecutor as he describes the events leading up to and during the attack.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 2** Much of the impact is effective through the prosecutor's description of the crime and its brutality. However,, the opening concludes poorly with language about the prosecutorial immunity granted to an upcoming witness: "Whether or not that decision was proper will be revealed to you at a later time, and it was a necessity. Thank you."	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook.* American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** Outside material is provided to explain the actions of the defendants to the jury. Familial relationships are provided in order to advance prosecution argument that this was a heinous crime.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 3** Language about the victims – that they were hard workers who put everything they had into the store where they were robbed and murdered – is delivered to bolster the prosecution's case.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.
FRAMING **<u>Score</u> – 3** The early reading of the indictment, and the ensuing story provided quickly thereafter, frames the information provided by the Commonwealth as being presumed factual.	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than the lens through	No attempt made to frame the facts of the case into a particular, specific thematic structure.

		which the case should be viewed.	
RELEVANCE **<u>Score</u> – 3** Each statement offered during the opening is done with clear lines of connection to the case at hand.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **Score – 3** The defense clearly lays out the issue at hand – how much responsibility does this defendant have for the crimes committed? He has already pled guilty, and the jury is here to decide his fate.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **Score – 3** The opening begins: "I want to thank the Judge now for letting me represent this young man. I have been in this thirty years and I do believe in this system." The attorney goes on to explain that there will be no tricks or courtroom dramatics from his counsel table.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **Score – 3** Counsel asserts through the opening that his client was bullied into	"That could have happened to me." Discusses the facts so that the audience	While there was no language which separates the audience from the	A totally unrelatable case – one in which the audience finds itself unable to relate

committing this crime by the real actors who are responsible for what happened in the case.	identifies with the client.	client, there exists minimal language which draws them into the perspective of that client.	to the client – is presented.
SUPPORT **<u>Score</u> – 3** Counsel supports his claim that his client had the minimum amount of participation in the crime through the fact that the client was the only one to arrive at the scene without a weapon, along with other signs of reluctance.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 3** The opening statement is delivered in relatively short order. The jury was primed with an appeal to counsel's own credibility, while the speech concludes with a indirect jab at one of the Commonwealth's witnesses.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** The attorney maintains that he will confine himself to nothing but the facts, yet he expounds upon his client's mindset during the time of the attack.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 2** Counsel sticks with the information explicit within the case facts. His client's reluctance to commit the crime are manifested through his actions during the course of the crime itself, and nothing is offered outside of that scope.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.
FRAMING **<u>Score</u> – 3** The defendant is framed as being "the most reluctant" of them all, as all incriminating actions are framed as having been pushed by other	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the	No attempt made to frame the facts of the case into a particular, specific thematic structure.

parties. The "major participants in the crime" can be found elsewhere.		opening, rather than the lens through which the case should be viewed.	
RELEVANCE **<u>Score</u> – 3** The opening statement remains closely tailored to the scope of the case as a clear, cogent defense is offered.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **<u>Score</u> – 1** The attorney struggles to navigate through a muddied narrative about a mortgage broker procedure gone wrong. Essentially, the actions of the banks had left his clients vulnerable to fraud; however, the content offered to the jury would give no clear indication of that. No clear chronology or identification of each party is offered.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **<u>Score</u> – 1** Much of the flow of the opening statement is mired in objections from opposing counsel, many of which were sustained as the attorney was noticeably forced to reconfigure the organization of his speech. Any sense of credibility was shot down by the scenes of the attorney making open accusations followed by objections that	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.

were immediately sustained by the bench.			
IDENTIFICATION **<u>Score</u> – 3** Right out of the gate, the attorney is describing his clients as folks who live right at home in Jeffersontown, and one is a police officer.	"That could have happened to me." Discusses the facts so that the audience identifies with the client.	While there was no language which separates the audience from the client, there exists minimal language which draws them into the perspective of that client.	A totally unrelatable case – one in which the audience finds itself unable to relate to the client – is presented.
SUPPORT **<u>Score</u> – 3** Attorney offers factual support as to why his clients had been wronged by the banks, who had inadvertently released plaintiff's money to culprit.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.

IMPACT **<u>Score</u> – 1** Immediately, the impact of the opening is dampened by statements like "I'm going to give you an outline of what you will hear from the witness stand and the facts you're going to hear." These are statements uttered right after the judge already explained opening statements to the jury. The impact of the speech is also muted by the comprehensive lack of clarity in counsel's description of what injustice had befallen the plaintiff.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook.* American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 2** Little outside material is used to create a sense of narrative.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.

	consideration for arguments outside those suggested within the case facts.		
CREATION **<u>Score</u> – 1** A confusing examination of the events leading to the inadvertent mortgage release is offered, with little opportunity for the jury to connect these events to a coherent case theory.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.
FRAMING **<u>Score</u> – 2** The only initial framing is that which depicts the plaintiff in a sympathetic light; however, there is no priming offered before the counsel launches into the details of the case.	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than the lens through which the case should be viewed.	No attempt made to frame the facts of the case into a particular, specific thematic structure.

RELEVANCE **<u>Score</u> – 2** Some elements of the opening were outside the scope of the claims filed by the plaintiff. Accordingly, they were objected to and omitted from the trial.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **Score – 3** Attorney clearly identifies the parties and their roles in what happened. A visual aid is offered to diagram the relationship between the parties involved in the case.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **Score – 3** While counsel focuses on the wrongdoing of the fraudulent party, who has already been found ultimately responsible, he does not attempt to mitigate the hand that the other defendants may have had in this case. He tells the jury he is only asking them to decide on *his* client's culpability, not anyone else's.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **Score – 2** There is very little that can be done to draw the jury into the mind of a banking institution. While	"That could have happened to me." Discusses the facts so that the audience	While there was no language which separates the audience from the client, there exists	A totally unrelatable case – one in which the audience finds itself unable to relate

counsel does well to explain their position, he does not offer statements which would allow for the jury to identify with the client.	identifies with the client.	minimal language which draws them into the perspective of that client.	to the client – is presented.
SUPPORT **<u>Score</u> – 3** "Forcht Bank had no power to [undo] anything that New Age Title or any other party did at that point." Support offered through client's inability to act to the aid of the plaintiffs.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 3** Counsel takes a very early opportunity to shift blame fully and explicitly to New Age Title, describing their position as the thieves who stole the money.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **Score – 3** Reasonable efforts to pursue valid arguments are shown as the attorney mounts a defense focused on his client's inability to know of the ill-intentions of another party.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **Score – 3** Counsel flips the argument made by the plaintiff, suggesting that, from his client's perspective, "this case ends on November 10th, 2010." That was the day that responsibility fell out of his client's hands.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.
FRAMING **Score – 3** The attorney frames his client's actions as being those of an actor incapable of helping. "It's not that we didn't want to help the Thompsons	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than	No attempt made to frame the facts of the case into a particular, specific thematic structure.

out... It's that we can't."		the lens through which the case should be viewed.	
RELEVANCE **<u>Score</u> – 3** Each segment of the opening statements remains on-task and probative to the matter at hand.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **Score – 3** Through the shortest opening given in this case of many parties, counsel explains through clear narrative what occurred and why his client had no hand in this banking transaction gone wrong.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **Score – 3** The attorney begins by advertising the undisputed nature of the information he offers.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **Score – 3** The client is depicted as having been roped into this big case during the chaos of what happened in this case. Statements made by counsel would lead one to believe that this defendant is here by association, and not	"That could have happened to me." Discusses the facts so that the audience identifies with the client.	While there was no language which separates the audience from the client, there exists minimal language which draws them into the perspective of that client.	A totally unrelatable case – one in which the audience finds itself unable to relate to the client – is presented.

out of any genuine issue of liability.			
SUPPORT **<u>Score</u> – 3** Evidence is offered of others' hand in the matters which brought these parties to trial. The omission of the attorney's client from that narrative gives support to the notion that they had no responsibility for the injustice which occurred in the case.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 3** The brevity and precision with which the attorney argues their side of the case is a gift to the jurors. The opening weighed in at a trim 91 lines, versus the other speeches with lengths of 335 lines at a minimum.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 2** Little respect given to facts existing outside of the case, as the sole focus is on the narrative driven by the plaintiffs and the other banks.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 3** The wholesale removal of this defendant from the narrative offers the argument that they are merely here because the plaintiff filed a claim against one too many defendants.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.
FRAMING **<u>Score</u> – 3** The story of the case is framed in a way which excludes the client from the action of the case.	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than the lens through	No attempt made to frame the facts of the case into a particular, specific thematic structure.

		which the case should be viewed.	
RELEVANCE **<u>Score</u> – 3** Counsel remains tightly within the scope of relevance in this brief opening statement.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **<u>Score</u> – 3** Counsel gives the simplest explanation of the case events of all attorneys: "The Thompsons had a mortgage with Wells Fargo… they decided to get a new mortgage and refinanced. And when they refinanced, this man – you've heart his name a bunch – Ivan DeLeon, he stole the money that was supposed to go to Wells Fargo."	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **<u>Score</u> – 3** Attorney effectively creates a sense of injustice for the bank, whose employees were "strung along" for months being deceived by the villain who stole the money.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **<u>Score</u> – 3**			

The opening statement strives to bring the jurors into the perspective of a bank that has been slighted by a criminal fraud into losing a quarter-million dollars.	"That could have happened to me." Discusses the facts so that the audience identifies with the client.	While there was no language which separates the audience from the client, there exists minimal language which draws them into the perspective of that client.	A totally unrelatable case – one in which the audience finds itself unable to relate to the client – is presented.
SUPPORT **<u>Score</u> – 3** The facts of the case involve a perpetrator who acted with intent to steal the money from Wells Fargo and the plaintiffs. The audience is given reasons to root against this antagonist and thus in favor the bank from which he stole.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 2** The initial apologies to the jury the long, confusing, boring, etc. nature of the case does little to provide an impactful basis for the rest of the speech.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** Counsel's cause is rendered more sympathetic as her client is depicted as one that merely committed a "clerical error" which opened the window for an evil-doer to steal the money at issue in the case. Such an explanation existed outside the given case facts.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 3** The man who stole the money is not a party in this case, yet he is brought explicitly into center-stage by counsel as she drags blame away from her client's table.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.

FRAMING **<u>Score</u> – 3** Early in the speech, the client is depicted as having been the true sufferer of damages in this case, as the plaintiffs' credit score had "rebounded to where they were, essentially." Effective use of creative arguments is employed through the formulation of a villainous narrative around the "bad guy, Ivan Deleon."	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than the lens through which the case should be viewed.	No attempt made to frame the facts of the case into a particular, specific thematic structure.
RELEVANCE **<u>Score</u> – 3** Arguments offered by counsel fit within the scope of the issue at hand.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **Score – 3** Counsel describes his client's role in the case, making clear this defendant's relationship to the narrative which had been laid out by plaintiff's counsel and the attorneys for the other defendant.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **Score – 3** A clear identification and introduction to his client is provided. The attorney states that he, like all other attorneys in the room, wants "what's best for their clients."	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **Score – 3** Once more in this case, we see the depiction of the client as someone who fell victim to a two-faced villain that stole the plaintiff's money. The defendants were victims of deception too.	"That could have happened to me." Discusses the facts so that the audience identifies with the client.	While there was no language which separates the audience from the client, there exists minimal language which draws them into the perspective of that client.	A totally unrelatable case – one in which the audience finds itself unable to relate to the client – is presented.

SUPPORT **<u>Score</u> – 3** The attorney describes a "big, giant paper trail" which supports the fact that his client was not involved in some conspiracy to defraud the plaintiffs.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 3** The attorney speaks plainly, "[The thief] did not steal [$248,000] from the Thompsons… He stole $248,000 that the Thompsons owed Wells Fargo. So, the only party who has lost money…is Wells Fargo."	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** Rather than arriving at the plaintiff's playing field that the banks acted carelessly when they released the mortgage to the criminal, the attorney tells of a money trail that proves there was never a conspiracy between the bank and the criminal. No such accusation was ever offered by the plaintiff, yet its mention undercuts the legitimacy of their claim.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 3** Counsel spins the argument of the plaintiff – making it appear to be one of conspiracy and conjecture aimed at making big banks look bad. Distracts from the facts of the case.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.

FRAMING **<u>Score</u> – 3** Counsel begins by asking the question, "Who took the money," and then quickly frames the issue, stating that "Ivan DeLeon took the money. There he is."	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than the lens through which the case should be viewed.	No attempt made to frame the facts of the case into a particular, specific thematic structure.
RELEVANCE **<u>Score</u> – 3** Each pocket of the opening goes towards the ultimate issue of whether his client acted in complicity with the criminal who stole the money.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **<u>Score</u> – 3** Counsel provides a description of the plaintiff's medical timeline, which reflects the fact that his condition had begun to develop approximately two years before he began working for the defendant. The use of video aid to show the type of work done by the plaintiff is effective.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **<u>Score</u> – 2** While the attorney works to qualify the company as one which cares about safety, there is little attempt to establish credibility of defense witnesses or of the counsel team.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **<u>Score</u> – 3** A long description of "reasonably safe workplace" is given, but counsel goes	"That could have happened to me." Discusses the facts so that the audience	While there was no language which separates the audience from the	A totally unrelatable case – one in which the audience finds itself unable to relate

further to say this includes *caring* about their employees and putting safety first. "That is CSX."	identifies with the client.	client, there exists minimal language which draws them into the perspective of that client.	to the client – is presented.
SUPPORT **<u>Score</u> – 3** An sharp contrast is shown between the plaintiff's claim – that the work was so grueling and unsafe – and the video portrayal low amount of exertion required for the type of job he was doing. The narrative of an unjust claim against this company quickly forms.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 3** The attorney immediately identifies the fact that a minimal amount of the plaintiff's working career (1.5 years out of 41 years) was spent at their client's jobsite. For a long-standing ailment like the plaintiff's carpal tunnel syndrome, this effectively diffuses much of the plaintiff's claim.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook.* American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** A clear survey of the facts of the case, the background of the defendant company, the nature of the work at that company, and the underlying legal issue is provided.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 3** Rather than confining their evaluation of the case to the plaintiff's individual experience on the job, counsel broadens the picture as they depict another person performing that same job under no stress whatsoever, thus reinforcing the idea that the carpal tunnel syndrome must have arisen before he took this job.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.

FRAMING **<u>Score</u> – 3** Before applying the rule to his client, the attorney defines a reasonably safe workplace as being "somewhere between a perfectly safe workplace and a completely unsafe workplace," which gives a rather generous range for his client's responsibility in the matter.	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than the lens through which the case should be viewed.	No attempt made to frame the facts of the case into a particular, specific thematic structure.
RELEVANCE **<u>Score</u> – 3** The key points of the case (medical timeline, reasonably safe workplace, nature of the job, etc.) remained in focus throughout the opening.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **Score – 3** The attorney ties in the expert testimony of his client's medical issues with a description of how the railroad knew about this dangerous substance to which its employees were exposed. The central issue of the case is clearly conveyed.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **Score – 3** An immediate introduction of all counsel is provided to the jury, along with a gleaming qualification of their lead expert witness.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **Score – 3** The plaintiff is sympathetically depicted as an individual who simply did not know the danger of what he was being exposed to, and it's the railroad who should pay for it.	"That could have happened to me." Discusses the facts so that the audience identifies with the client.	While there was no language which separates the audience from the client, there exists minimal language which draws them into the perspective of that client.	A totally unrelatable case – one in which the audience finds itself unable to relate to the client – is presented.

SUPPORT **<u>Score</u> – 3** The client requesting money for damages is depicted as "a shell of a man he used to be." Further, the credentials and input of the expert offered by the defense team is discounted by this attorney.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 2** Counsel's speech is initially undercut by the ceremonious declaration, "What I am indicating to you is not evidence." The end of the opening statement shows a lack of organization, and the impact suffers as a result. The key phrase, asbestos, is not uttered until the very end.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** Outside facts on industry-wide trends in safety, or lack thereof, is brought out in addition to the case-specific information about the plaintiff's story of working for the railroad and being worse for wear.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 3** The portrayal of this case goes outside the scope of the railroad's injustice upon one individual and expands to the larger picture of the railroad's wholesale negligence in informing its workers about workplace hazards. The narrative became about the railroad injury at large, more than seeking compensation for this sole claimant.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.

FRAMING **<u>Score</u> – 3** A comprehensive and effective primer – one which is favorable to his own witnesses and damaging to the other's – for hearing expert testimony is delivered.	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than the lens through which the case should be viewed.	No attempt made to frame the facts of the case into a particular, specific thematic structure.
RELEVANCE **<u>Score</u> – 2** The inclusion of an early description about what an opening statement is has no bearing on the case at hand. The judge already explained it to the jury and further explanation has no probative or persuasive value.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **<u>Score</u> – 3** The discrepancies between the two sides' medical experts are laid bare by the attorney, as he offers the defense theory of the plaintiff's lack of medical damages.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **<u>Score</u> – 3** The defense focuses on the lack of evidence of asbestos in this specific instance, thereby making the lack of credibility to the railroad as a whole (as laid out in plaintiff's opening) irrelevant.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **<u>Score</u> – 3** The attorney normalizes the actions of the railroad in using asbestos in the time period put forth by the plaintiff. Other places ("schools, hospitals, churches") used it	"That could have happened to me." Discusses the facts so that the audience identifies with the client.	While there was no language which separates the audience from the client, there exists minimal language which draws them into the perspective of that client.	A totally unrelatable case – one in which the audience finds itself unable to relate to the client – is presented.

knowing the potential risk, "because asbestos is there doesn't mean it's a hazard."			
SUPPORT **<u>Score</u> – 3** By pointing out other medical conditions, including the plaintiff's weight issues and pre-existing back pain, the opening undermines the validity of the claim that the railroad is to blame for the medical woes.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 3** The first words out of the defense attorney's mouth were, "Clyde Sirbaugh does not have any asbestos-related disease of any kind." This sharp introduction offers substantial impact in refuting the claims which had just been discussed by plaintiff counsel.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook.* American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** Attorney conveys a necessary understanding of the medical information and its application to the plaintiff.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 3** The argument offered by defense counsel supersedes the issue of whether the railroad caused his lung-related ailment. The opening instead reflects the defense's stance that the claimant has no such injury in the first place.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.
FRAMING **<u>Score</u> – 3** In the first sentence of the opening, counsel lays out the frame that the plaintiff "does not have any asbestos-related disease of any	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the	No attempt made to frame the facts of the case into a particular, specific thematic structure.

kind." The focus being on that issue provides a much more favorable battleground for the defense.		opening, rather than the lens through which the case should be viewed.	
RELEVANCE **<u>Score</u> – 3** From the beginning, the opening remains closely tied to the issue.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **<u>Score</u> – 3** A clear, necessary distinction is drawn between damage from asbestosis and consequences from smoking. Attorney gives a lucid description of asbestos.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **<u>Score</u> – 3** A sympathetic connection to the case is exhibited as the attorney describes the character and passions (hunting, outdoorsmanship, etc.) of the plaintiff, conjoined with how his ability to do this things has been crippled by the railroad's negligence.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **<u>Score</u> – 3** Much of the identification in this case stems from the villainization of the railroad company, as counsel shows document after document to the jury	"That could have happened to me." Discusses the facts so that the audience identifies with the client.	While there was no language which separates the audience from the client, there exists minimal language which draws them	A totally unrelatable case – one in which the audience finds itself unable to relate to the client – is presented.

detailing their knowledge of the issue without implementing sufficient safety measures.		into the perspective of that client.	
SUPPORT **<u>Score</u> – 3** Counsel includes a document which reflects the railroad's knowledge of harm from asbestos and furthermore the company's outward concern about "defending lawsuits rather than protecting people."	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 3** Bringing in documents from the 1930s to show that the railroad has known for a long time about this.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** Counsel makes use of all available arguments by taking clear steps to evaluate those he presumed would be offered by opposing counsel. His arguments were tailored to anticipate the ensuing rebuttal.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 2** Aside from likening the railroad to a drunk driver, who knew or should have known of their negligence, there is little creative content introduced to the jury. There is a careful examination of the issues; however, it is done within the confines of existing argumentation.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.

FRAMING **<u>Score</u> – 3** In a case which would ultimately boil down to the jury's decision between conflicting experts, counsel does well to frame the content of the expert testimony, discounting any evidence about smoking (i.e. that which is damaging to his case. He emphasizes the legal language which dictates that asbestos does not have to be the "sole contributing case… It simply has to be a cause in part."	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than the lens through which the case should be viewed.	No attempt made to frame the facts of the case into a particular, specific thematic structure.
RELEVANCE **<u>Score</u> – 3** Each argument offered by counsel is tethered to the foundational issues of the plaintiff's damages and the railroad's negligence in causing them.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **Score – 2** The actual theses of the attorney are lost as the opening is mired in detail.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **Score – 2** The attorney takes until the middle of the 40-minute opening to introduce himself and his associates. The issue of credibility appears to be an afterthought.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **Score – 3** Rather than identifying the jurors with the railroad, the attorney works to rally the jury against the plaintiff. This reverse-identification may be effective to the jury.	"That could have happened to me." Discusses the facts so that the audience identifies with the client.	While there was no language which separates the audience from the client, there exists minimal language which draws them into the perspective of that client.	A totally unrelatable case – one in which the audience finds itself unable to relate to the client – is presented.
SUPPORT **Score – 3** The idea that a false claim may have been	The attorney provides the audience with	Limited attempts to compel a sense of	There exists no attempt to establish a

borne out of the plaintiff's visit with an attorney will certainly provide the audience with a reason to hope against the plaintiff's case.	reasons for the audience to hope that the evidence supports their client.	sympathy to the client or to create a sense of injustice.	sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 2** The opening is detail saturated, with many different lines of argument pursued. A more focused take on the case would have been more effective.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** The presented arguments indicated that an exhaustive process of discovery and reasonable inferences from the facts had taken place.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 3** Argument centers around the chronology of the case, rather than the explicit events within it. The attorney's contention is that a claim must be spurious if the plaintiff visited a lawyer before visiting a doctor. The reasoning here, although lacking in logical basis, may resonate with the jury.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.

FRAMING **<u>Score</u> –** The attorney's designation of the case as being "a small case" serves to undercut the preceding attorney's argument that the whole (i.e. railroad industry's negligence) ought to be applied to the part in the form of this client's claim.	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than the lens through which the case should be viewed.	No attempt made to frame the facts of the case into a particular, specific thematic structure.
RELEVANCE **<u>Score</u> – 3** Despite some disorganization, all of the content presented is relevant to the decision that the jurors are asked to make.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **Score – 2** While the statement ultimately arrives at the central issue in the case, the attorney takes a considerable amount of time to get there. A tangential story about the Magna Carta and jury trials distracts focus away from the case.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **Score – 3** A clear condemnation of the railroad companies is asserted, as the attorney shows personal disgust for the wanton negligence of the defendant.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **Score – 3** The attorney works to ally the audience with the client, as an individual who was wronged by a big company that knew of their wrongdoing.	"That could have happened to me." Discusses the facts so that the audience identifies with the client.	While there was no language which separates the audience from the client, there exists minimal language which draws them into the perspective of that client.	A totally unrelatable case – one in which the audience finds itself unable to relate to the client – is presented.
SUPPORT			

Score – 3 Sufficient motivation is provided for the audience, comprised of common jury members, to hope for favorable testimony on behalf of the plaintiff.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **Score – 1** The speech eventually finds its way to the main point of the case; however, any opportunity to impact the jury had be nullified by the long, fundamentally irrelevant opening portion of the statement.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** Outside material of the railroad industry's knowledge of hearing loss damage is brought in as a means to connect the part to the whole. The case itself does not suggest an industry's wholesale malpractice, but it helps to make the plaintiff's case.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of a recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 3** The case theory requires that jurors look at the whole picture of the railroad industry's handling of hearing loss, which extends far outside the scope of the one defendant company implicated in the case. The creative argument allows for the jurors to apply fundamental wrongdoing to the facts of this specific instance.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.

FRAMING **<u>Score</u> – 3** The attorney framed the case in such a way that a verdict against his opponent was a verdict against a big evil industry.	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than the lens through which the case should be viewed.	No attempt made to frame the facts of the case into a particular, specific thematic structure.
RELEVANCE **<u>Score</u> – 2** While an oral history of jury trials cannot be considered relevant to a specific case, the attorney succeeds in making relevant arguments once that unnecessary foundation had finally been laid.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **Score – 3** The opening retains a sense of simplicity as it details the timeline and alternative causes of the plaintiff's hearing loss.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **Score – 2** Attorney makes clear distinction that his responsibility is to this railroad company, not to the industry. However, investment in the case is not made explicit.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **Score – 1** No discernable effort to adjust the view/position of the jury to that of the client.	"That could have happened to me." Discusses the facts so that the audience identifies with the client.	While there was no language which separates the audience from the client, there exists minimal language which draws them into the perspective of that client.	A totally unrelatable case – one in which the audience finds itself unable to relate to the client – is presented.
SUPPORT **Score – 3**			

The attorney points out the nature of the plaintiff's initial hearing test as being for the purpose of getting a payout from the company at the suggestion of counsel.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 3** A clear directive is given to the jury to evaluate what alternatively could have caused the hearing loss. This is strongly supplemented by a lucid narrative of "noisy" military service.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** The bringing-in of information pertinent to the hearing loss from outside the case facts (previous military service, gamesmanship, etc.) clearly constitutes discovery.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 2** Counsel succeeds in crafting an argument based on external information; however, it does not fully take the shape as an exceedingly unique argument. Rather, it is one of blame-shifting suggested by existing evidence.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.

FRAMING **<u>Score</u> – 3** Attorney begins by framing the timeline, showing a tactical decision in choosing plaintiff's enlistment in military as starting point. This frames the ensuing discussion on why the plaintiff has hearing loss.	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than the lens through which the case should be viewed.	No attempt made to frame the facts of the case into a particular, specific thematic structure.
RELEVANCE **<u>Score</u> – 2** While much of the testimony is tied to the central issue of cause of hearing loss, the attorney diverges off course and explores technical language in how hearing loss is measured, quantified, etc. The only relevant information on hearing loss testing is that which shows this was loss attributed to things other than work.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **<u>Score</u> – 2** The description of the accident was difficult to explain and ultimately unclear; however, the statement of the client's injury and damages were plainly clear.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **<u>Score</u> – 3** Attorney provides a sympathetic image of client's actions immediately after the incident. He did not claim injury straightaway, dispelling the notion that this claim is a mercenary one.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **<u>Score</u> – 2** The client is depicted as a plain worker who was put into a difficult, unmaneuverable position by his employer.	"That could have happened to me." Discusses the facts so that the audience identifies with the client.	While there was no language which separates the audience from the client, there exists minimal language which draws them into the perspective of that client.	A totally unrelatable case – one in which the audience finds itself unable to relate to the client – is presented.

SUPPORT **<u>Score</u> – 3** Ample description of the event is provided in such a way that the audience is meant to root for the individual placed into a catch-22.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 3** By beginning the opening with placing the jury's mind on the morning of the incident, counsel immerses the jury in the story.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** The arguments offered in advocacy of the client's case are reflective of the full scope and causation of what happened during the incident. Inclusion of outside influences on what impacted the employee's ability to act rightfully is present.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 3** Acknowledges the actions of the client such a way that suggests client was constrained by the railroad to act wrongly. The argument did not center around whether the employee broke the regulation, but rather what other body placed him in a position of having to do so.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.
FRAMING **<u>Score</u> – 3** The situation of the train conductor is	Effectively lays the contextual foundation	Some attempt to provide context is	No attempt made to frame the facts of the

framed as one in which that employee is placed into a bind, a catch-22 which originated outside of his locus of control.	upon which the case narrative and arguments may be constructed.	present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than the lens through which the case should be viewed.	case into a particular, specific thematic structure.
RELEVANCE **Score** – 3 Each talking point remained within the scope of relevant information.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **<u>Score</u> – 2** The lack of visual aids to depict railroad signals or the dynamics of a train derailment most likely led to confusion by the jury, who were forced to imagine it on their own.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **<u>Score</u> – 3** The opening begins with an introduction that plays heavily upon the attorney's ties to the local community. She also depicts her client's employees as honest and accepting of responsibility.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **<u>Score</u> – 3** Her client is plainly identified as willing to accept responsibility, while the plaintiff has gone through every channel to avoid such an acceptance.	"That could have happened to me." Discusses the facts so that the audience identifies with the client.	While there was no language which separates the audience from the client, there exists minimal language which draws them	A totally unrelatable case – one in which the audience finds itself unable to relate to the client – is presented.

		into the perspective of that client.	
SUPPORT **<u>Score</u> – 3** Counsel describes the conductor as the "manager," one who should have known that the signal relayed to him was impossible.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 2** Much of the central action which caused the incident is still unclear, and yet is at the heart of the legal action. Rather than burying a key point about the impossibility of such a signal in the middle of the opening, the attorney should have emphasized it more strongly.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook.* American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** While the organization of the material may have been less than clear, all necessary arguments were present within the opening.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 2** An analogy between train conductors and baseball managers surfaces during the opening; however, the events of the accident, not just the roles of the involved parties, necessitated a creative depiction.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.
FRAMING **<u>Score</u> – 3** The attorney frames the issue of the case so that the central question is one of accepting responsibility. She proceeds to depict the other side as an individual who is unwilling to do that.	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than the lens through	No attempt made to frame the facts of the case into a particular, specific thematic structure.

		which the case should be viewed.	
RELEVANCE **<u>Score</u> – 3** The opening is both concise and thorough in its depiction of the case.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **<u>Score</u> – 3** A lucid explanation of how the injury occurred, and the railroad's role in not providing proper equipment for a safe workplace, is relayed to the jury.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **<u>Score</u> – 3** The attorney is adamant that the client *wanted* to continue working for the defendant company, but he just could not get through the pain. This portrays the plaintiff as being hard-working and not in search of an easy cash grab.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **<u>Score</u> – 3** Sufficient evidence is provided that the plaintiff is a working person whose preference is to continue working; however, the railroad deprived him of that.	"That could have happened to me." Discusses the facts so that the audience identifies with the client.	While there was no language which separates the audience from the client, there exists minimal language which draws them into the perspective of that client.	A totally unrelatable case – one in which the audience finds itself unable to relate to the client – is presented.

SUPPORT **<u>Score</u> – 3** The railroad told the plaintiff to do a job while also failing to provide necessary equipment for him to do it. The plaintiff was injured as a result. Such a story is conducive to a sympathetic jury.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 3** The attorney describes how "the purchase of a $1.50 saw blade would have prevented this accident from occurring." Much impact is generated from contrasting a measly cost to a huge amount of damages to the plaintiff.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** The opening shows that a successful search for the available arguments has been carried out by the attorney.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 2** The overall argument, while effective, is not creative. This is a cut-and-dry case about a lack of provided equipment.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.
FRAMING **<u>Score</u> – 3** The early description of the plaintiff is one which lays a perfect contextual foundation for damages. "When he came to work [that day], he had all the security that anyone could hope for. He had a good job. He	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than the lens through	No attempt made to frame the facts of the case into a particular, specific thematic structure.

had his heatlh and he had his family. And that changed at 7:15 p.m. that evening.		which the case should be viewed.	
RELEVANCE **<u>Score</u> – 3** Each pocket of the opening statement is anchored to the central issues of the railroad's negligence and the plaintiff's subsequent damages.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **Score – 3** Counsel uses a demonstrative aid in order to show the repairs that the plaintiff on which was working. The timeline presented is clear and followable.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **Score – 3** The opening is deliberate in introducing all members of the defense team, while also tying them geographically to the local area.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **Score – 3** Much language is provided surrounding the idea that the defendant's employees all verified that the repair efforts were safe and routine. "He was told not to overexert himself with brute force."	"That could have happened to me." Discusses the facts so that the audience identifies with the client.	While there was no language which separates the audience from the client, there exists minimal language which draws them into the perspective of that client.	A totally unrelatable case – one in which the audience finds itself unable to relate to the client – is presented.

SUPPORT **<u>Score</u> – 3** The attorney gives a litany of eyewitnesses which will all indicate that the repair procedure was nothing out of the ordinary, and that the plaintiff opted to use the wrench – the use of which was in no way wrong or abnormal.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 2** Counsel delivers a statement of facts along with expected corroboration from witnesses; however, a strong impression has not been made on the jury as to the responsible actions of the company in this case.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** The available arguments against the plaintiff – that the job was reasonably safe and that he did not initially want to use the missing tool – were discovered and conveyed to the jury.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 2** The opening from the defense does well to rebut the facts presented by the plaintiff; however, the arguments are constrained to a rebuttal of opposite facts, rather than creation of new arguments.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.
FRAMING **<u>Score</u> – 3** The argument begins from a review of the regular operations of the locomotive repair facility. The attorney then connects this image to the repair in question, which the defense asserts to be	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than the lens through	No attempt made to frame the facts of the case into a particular, specific thematic structure.

within the bounds of regular safety procedure.		which the case should be viewed.	
RELEVANCE **<u>Score</u> – 3** The macro- and micro-details of the incident – both in the general functions of the facility and in this specific instance – offered by the attorney are relevant to the case being presented.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

OPENING STATEMENT ANALYSIS RUBRIC

Based on McElhaney's Trial Notebook

Trait	3 (best)	2	1 (worst)
COMPREHENSION **<u>Score</u> – 3** Counsel provides clear distinction that the termination of the complainant was the result of reckless driving, while providing a lucid example of such conduct.	The jury should understand what the case is about. Requires good organization, simple words.	Some uncertainty present about the facts and events of the case, in addition to lack of clarity on the burden.	Reader is confused as to the subject matter of the case. Theme is trite. Focus of the opening may intermittently shift in focus or specificity.
CREDIBILITY **<u>Score</u> – 3** Attorney establishes a sympathetic connection to the case as she communicates a personal example where a friend had been killed by recklessness similar to that of the opposing party.	Language of the litigator demonstrates an investment in the case. Shows a belief in the merits of the client's case.	Meager efforts to establish sympathetic connection to case.	Illustrates a disconnect between the attorney and the client's case.
IDENTIFICATION **<u>Score</u> – 3** The client is depicted as having done a diligent task in terminating an employee who carried much risk in his dangerous driving habits.	"That could have happened to me." Discusses the facts so that the audience identifies with the client.	While there was no language which separates the audience from the client, there exists minimal language which draws them into the perspective of that client.	A totally unrelatable case – one in which the audience finds itself unable to relate to the client – is presented.

SUPPORT **<u>Score</u> – 3** The jury is given ample reason to cheer *against* the complainant, given the scathing indictment of his conduct and character leveled by counsel in this opening.	The attorney provides the audience with reasons for the audience to hope that the evidence supports their client.	Limited attempts to compel a sense of sympathy to the client or to create a sense of injustice.	There exists no attempt to establish a sense of injustice on behalf of the client. Provides a "just the facts" case with sterile argumentation.
IMPACT **<u>Score</u> – 3** A visceral impact may have certainly been caused by the attorney's personal account of a law school classmate being killed by conduct similar to that of the complainant.	Provides a strong impression to influence the audience with vivid images or a sense of crisis/suffering.	Initially, the opening fails to capture the audience's attention, although the crux of the case is eventually addressed.	Statements lack pertinence to the central conflict of the case.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

OPENING STATEMENT ANALYSIS RUBRIC

Based on Simonson's New Definition of Invention

Trait	3 (best)	2	1 (worst)
DISCOVERY **<u>Score</u> – 3** An argument outside the case facts is offered as counsel expounds upon potential harm that *could have* been done by the opposing party, in addition to the damage he did cause.	"Excogitation of valid or seemingly valid arguments to render one's cause plausible" (Simonson 6). Displays a consideration for arguments outside those suggested within the case facts.	Implements already existing knowledge with some implementation of outside material.	Consists of recitation of case facts, with no supplementary information, narrative or connectivity.
CREATION **<u>Score</u> – 3** Highly relevant to the case is the notion that the employee in question was rightfully fired, not only for the actual damage he did to company property, but for further potential harm which exists outside the case facts.	Arguments not already existing within the case materials, yet are relevant to the case, are offered. A novel case theory, one not immediately inferred from the case facts, is presented.	There is some presence of ideas not suggested immediately by the materials; however, the arguments ultimately rely upon pre-existing facts or reasonable inferences.	Only displays a surface-level purview of the case events. No effort made at explaining or interpreting such events.
FRAMING **<u>Score</u> – 3** Counsel effectively frames her version of events by explaining, "Like all things in life, there are two sides to every story. We have a very different story." What	Effectively lays the contextual foundation upon which the case narrative and arguments may be constructed.	Some attempt to provide context is present in the organization of the facts of the case. The frame exists as a fraction of the opening, rather than	No attempt made to frame the facts of the case into a particular, specific thematic structure.

follows is a narrative regarding the complainant's reckless driving, amid claims of experience and ample qualification.		the lens through which the case should be viewed.	
RELEVANCE **<u>Score</u> – 3** Each pocket of the opening works to address the central rationale – one favorable to the attorney's client – for why this truck driver was terminated, along with how such termination was justified.	Arguments offered by counsel have a strong tendency to make the case facts in contention more or less likely (Fed. Rule 401).	While the majority of the facts offered probe into the issue at hand, some material offered has little ability to either persuade the audience or probe into the case.	Many of the statements offered by the attorney have little bearing on the events of the case or on the legal decision.

Simonson, Peter. "Reinventing Invention, Again." Rhetoric Society Quarterly, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

WORKS CITED

Aristotle, and Lane Cooper. *The Rhetoric of Aristotle: an Expanded Translation with Supplementary Examples for Students of Composition and Public Speaking.* Prentice-Hall, 1988.

Baron, Jane B. "Storytelling and Legal Legitimacy." *College Literature*, vol. 25, no. 1, 1998, pp. 63–76. JSTOR.

Bennett, Lance W. and Martha S. Feldman. *Reconstructing Reality in the Courtroom*. Quid Pro Books. New Orleans, Louisiana. 1981.

Blume, John H.; Johnson, Sheri L.; and Paavola, Emily C. "Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense." *Cornell Law Faculty Publications*. 65. 2007.

Clark, Donald L. *Rhetoric in Greco-Roman Education*. Columbia University Press. New York, NY. 1957.

Cobb, Sara. "Stabilizing Violence: Structural Complexity and Moral Transparency in Penalty Phase Narratives." *Narrative Inquiry*, vol. 20, no. 2, p. 296 – 324, Jan 2010.

Delgado, Richard. "Shadowboxing: An Essay on Power." *Cornell Law Review*, vol. 77, no. 4, 1992.

Devine, D.J. *Jury Decision Making: The State of the Science*. New York University Press. New York, NY.

Dombroff, Mark A. *Dombroff on Unfair Tactics*. Wiley Law Publications. New York, NY. 1988.

Dorter, Kenneth. *Form and Good in Plato's Eleatic Dialogues: The Parmenides, Theatetus, Sophist, and Statesman.* Berkeley: University of California Press, c1994.

Entman, Robert M. "Framing: Toward Clarification of a Fractured Paradigm." *Journal of Communication* 43 (4): 51-8. 1993.

Fairhurst, Gail Theus. *The Power of Framing: Creating the Language of Leadership*. Jossey-Bass, 2011.

Fine, Ralph. *The How to Win Trial Manual: 5th Edition*. Juris Publishing Inc. Huntington, NY. 2011.

Fisher, Walter R. "Clarifying the Narrative Paradigm." *Communication Monographs,* 56:1, 55 -58. 1989.

Howard, Maureen. Revisiting Trial Basics Every Time: A Ritual for Courtroom Success. *American Journal of Trial Advocacy, 34,* 335.

Klieman, Rikki J. "How to Dliver a Convincing Opening in a Criminal Defense Case." Public Affairs & Education Committee of the American Trial Lawyers Assocation. Boston, MA. 1978.

Lopez, David T. "Getting the Best Results from Opening Statements." American Bar Association. Trial Practice, Vol. 25, 3. 2011.

Lubet, Steven. *Modern Trial Advocacy: Analysis and Practice*. National Institute for Trial Advocacy. Boulder, Co. 2010.

Lundquist, Weyman I. "Advocacy in Opening Statements." *Litigation,* vol. 8, no. 3, 1982, pp. 23–64. JSTOR.

Mauet, Thomas A. *Trial Techniques*. Aspen Publishers. 2010.

McElhaney, James W. *McElhaney's Trial Notebook*. American Bar Association. 2005.

McPeake, Robert. "The Art of Storytelling." *The Lawyer*. Inns of Court School of Law. 10 September 2007.

Menkel-Meadow, Carrie. “The Trouble With the Adversary System in a Postmodern, Multicultural World.” Georgetown University Law Center. 1996.

Miller, Katherine. *Communication Theories: Perspectives, Processes, and Contexts*. McGraw Hill. New York. 2005

Mumby, Dennis. *Organizational Communication: A Critical Approach*. Sage Publications, Inc. 2012.

Olmstead v. United States, 277 U. S. 438 (1928).

Perrin, Timothy L. “From O.J. to McVeigh: The Use of Argument in the Opening Statement.” *Emory Law Journal*, Winter 1999, 48, pp. 107-167.

Scheppele, Kim Lane. "Legal Storytelling: Foreword: Telling Stories.” Michigan Law Review, 87, 2073 August 1989. Accessed November 25, 2018.

Simonson, Peter. “Reinventing Invention, Again.” *Rhetoric Society Quarterly*, 44:4 (2014), 299-322, DOI: 10.1080/02773945.2014.938862.

Sloane, Thomas O. “Reinventing Inventio. ” *College English* 51.5 (1987): 461–473. Print. Washington, DC: Catholic University of America, 1997. Print.

Smith, Abbe. “Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer.” 21 N.Y.U. Rev. L. & Soc. Change 433. 1993.

“The O.J. Simpson Murder Trial: Excerpts of Opening Statements by Simpson Defense.” *The Associated Press*, Los Angeles Times Archives, 26 Jan. 1995.

Vohs, Kathleen D., et al. *Encyclopedia of Social Psychology*. SAGE Publications, Inc, 2007.