



# Chapter 5

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## Opening Statement

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As stated in the previous chapter, defense strategy may involve the use of misinformation and misinterpretation of the facts and the law at every stage of the trial. During his opening statement, defense counsel will reinforce his already stated belief that the case should not have been brought, that the First Amendment protects his client, that community standards tolerate such businesses, that the issue involves "privacy" — what people do at home alone, and that the law is vague, unenforceable, etc. Therefore, you must tell the jurors during your opening statement (in simple terms) what they need to know to bring back a verdict on behalf of the prosecution in your case.

There are three things that you must communicate during your opening statement: (1) during the course of the trial you will present to the members of the jury a serious community problem which warrants their careful attention and concern; (2) in judging the obscenity of the material at issue in the trial, the jury will be required to apply a three-part test of obscenity; and (3) application of the test of obscenity will not be difficult for them since it requires only a consideration of local "community standards," which is an application of their common sense and experience.

During your opening statement, you should describe in some detail the community problem that the jurors are there to consider. The businesses that are involved are "public" businesses that are pandering obscene material to the community. These businesses are located on public streets, usually with brightly painted buildings, and feature exterior signs advertising entertainment as "XXX-rated" and "Live Nudes." You will want to visually place the jurors inside the bookstore. Tell them what they will see, what they will feel, what they will smell, and what they will experience as the law enforcement officers describe it to them during their direct examination. If the trial involves an organized conspiracy or unknown or unproduced out-of-state interests, you may be able to make all of these facts known to the jury. You may not be able to tell the jury in so many words that "organized crime" is involved in this case, but you may be able to show that there is a conspiracy through your evidence and through the types of exhibits and pictures you introduce into evidence. Your goal during opening statement and your case in chief is to show the jury a community problem — to take the material and put it back into its environment. On the other hand, the defense attorney will attempt to place the magazine, film, or book into a vacuum for the jury's examination.

If you are prosecuting a so-called "Mom and Pop" videocassette store, you may wish to emphasize that the entire videocassette industry is not on trial. The jury should be concerned with only those

specific videotapes before the jury. Stress that it is only those videotapes which are legally obscene that are of concern to law enforcement authorities. The law proscribes only those hardcore tapes which are obscene; only those specific videocassettes which they will view have crossed the "line" called obscenity. Remember —if the jurors believe that *all* "adult" videocassettes are on trial, they may have difficulty convicting. From a strategy standpoint, you need to state that only those ("adult" or "hardcore") tapes which are legally obscene as those in the immediate trial — are against the law.

If the defense attorney has raised a "privacy" argument, remind the jury there was nothing private about the filming, production, duplication or retail sale of the materials. If you can, tell the jury that the U.S. Supreme Court has held (*Paris Adult Theatre Iv. Slaton*) that merely because obscene films are distributed to "consenting adults" does not excuse the violation of commercial obscenity laws, any more than it does for drugs, stolen goods, or prostitution.

Briefly discuss the fact that in determining obscenity, the jury will apply a three-part test. Very simply, the jurors will have to find that the material appeals to a prurient interest, that it features patently offensive depictions of sexual activity, and that it lacks serious literary, artistic, political, or scientific value. You should conclude your opening statement by impressing upon the jury that the law involved is a community law, to be applied by the jury as "representatives" of the community, and will involve an application of their experience and their common sense as members of this community. If the jurors listen closely to the evidence and to the instructions as the court gives them, they should have no trouble in bringing back a verdict in favor of the state.

To summarize, begin during opening statement to make it easy for the jury to rule in your favor. It must only determine during its deliberation that there is a community problem (which will be shown by your evidence) because the material contains patently offensive depictions of sexual activity, appeals to a prurient interest, and lacks serious literary, artistic, political, or scientific value. The proper tone for your case and for the trial must be set no later than your opening statement — you must make it easy and simple for the jury to rule in your favor. If you involve yourself before the jury in arguing over the intricacies of obscenity law, you will be playing right into the hand of the defense. If you believe that the law is vague" and "too hard," you can be certain that the jury will agree with you by its verdict.