

# “Are You Promising Too Much During Opening Statement?”

WHY PROMISING TOO MUCH DURING OPENINGS CAN COST YOU THE CASE

By Elliott Wilcox

*“Your closest exit may not be the one in front of you.”*

*“Your seat is a flotation device.”*

*“If we start hurtling to our deaths, oxygen masks will descend from the ceiling...”*

If you’ve flown more than once, you’ve probably ignored this exact same message, haven’t you? It’s the standard safety video they play before your plane taxis down the runway. All of these videos sound pretty much the same, and I’d heard the instructions hundreds of times. But, much to my surprise, this time I was actually paying attention to the video.

I wasn’t paying attention because I needed a refresher in safety instruction. With as many miles as I’ve flown, I can probably recite those safety instructions word-for-word. No, I was watching it for a different reason. But before I tell you why I was paying attention to the video, let me give you a little background history...

This was my fourth flight in less than three days. Out of my four flights, every single plane had been late. The couple sitting in front of me hadn’t had a single plane depart or arrive on time, either. The guy sitting next to me? He’d been on four planes in two days, every one of his flights had been late, and his last flight had been completely cancelled. They’d given him two options: wait until the next day to fly home, or fly to an airport 140 miles away from home and drive back.

Collectively, our flying experiences had been miserable.

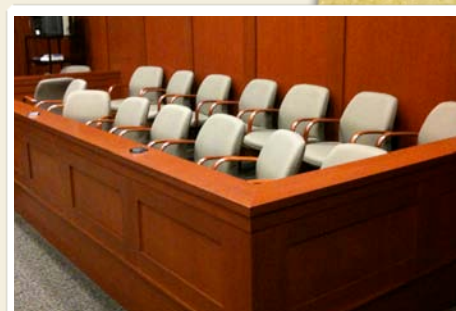
This final flight was no exception.

We’d boarded the plane like cattle, squeezing ourselves into seats designed to comfortably accommodate pygmies or small children. Our flight was booked solid, so the overhead bins were jammed to overflowing. Although I was seated in row 11, my bag was halfway to the back of the plane. We’d been scheduled to leave at 9:35 PM, but here we were, over an hour later, still sitting on the tarmac and waiting to depart.

Which brings me to the reason why I was paying attention to their safety video.

In addition to telling us the safety instructions, the video was basically serving as a promotional piece to tell us how wonderful the airline was. The video was filled with smiling faces, and every passenger depicted in the video seemed to have plenty of legroom. They showed a plane with enough space in the overhead bins to place all of your carryon luggage and a spare briefcase or two. Finally, they showed a quick view of their departure board, where every plane seemed scheduled to leave on time.

I turned to a woman seated to my left and commented, “What airline are they flying



*Promise too much and they'll be disappointed*

“Don’t fall into the trap of overselling your case during opening statements. What happens when your case doesn’t live up to the image that you created?”

on? Lots of legroom, plenty of overhead space, and the planes leave on time... Can I switch to that airline?!?" (In all fairness, I won't mention the name of the airline that I was traveling with, but here's a clue: The majority of their flights are in U.S. Air space...)

The problem was that my experience didn't measure up to their advertised experience. It wasn't even close. (Which isn't uncommon... When was the last time you had a fast food burger that looked like the one in the advertisement?)

Don't make the same mistake with your jury.

In your opening statement, you're presenting them an image of what they should expect to experience during your trial. But many lawyers seem tempted to oversell their cases during opening statements. They talk about evidence that will "probably" get admitted, about statements they're "pretty sure" will be admissible, and develop theories of their cases that will "likely" come to fruition.

Don't fall into the trap of overselling your case during opening statement. What happens when your case doesn't live up to the image you created? Even though you present a legally sufficient and persuasive case, when you hold yourself up to a higher standard, that's what the jury will expect. If you don't attain that standard, they won't come back with a verdict in your favor, even if that standard is higher than what the law requires.

For example, imagine a criminal trial where the defense attorney promises to prove his client is "innocent." Why

do that? He doesn't need to prove the guy's innocent, he just needs to show why the government is unable to prove their case beyond a reasonable doubt. When he assumes the extra burden of proving that his client is innocent, the jury will hold him and his case to that higher standard. If he can't prove the defendant is innocent (even if he proves that there's a reasonable doubt in the case) his jury may vote "guilty" because they think he's failed to prove his case.

Don't make it harder to prove your case than it needs to be. You're better off underselling your opening statement and letting the jury discover your case is actually stronger than they thought it would be during opening statement. Unlike the airline message, where the actual experience didn't live up to the hype, you can't afford to present an image you can't live up to or make promises that you can't keep during trial. Present a strong opening statement, but then overdeliver on your promises during your case in chief. When your jurors discover that your case has exceeded their expectations, they'll return with the only possible verdict — the verdict that favors your client.

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