

# “Why Should You Win Your Trial?”

## 4 CRITICAL QUESTIONS YOU MUST ANSWER BEFORE BEGINNING TO WRITE YOUR OPENING STATEMENT

By Elliott Wilcox

Whenever an attorney asks me to help them with their opening statement, I usually ask them a series of questions to help assess the true value of their case:

### Question #1:

**“What do you like about your case?”**

It sounds like a silly question, but it's actually quite important. The more time you invest in your case, the more weaknesses you start seeing in your case. That's an invaluable asset for realistically evaluating your case, but unfortunately, it often leads to tunnel vision. Some lawyers become so fixated on their case weaknesses that eventually, that's all they see. They magnify those weaknesses out of proportion until they start feeling overwhelmed. Before long, these lawyers can actually start believing that their case is unwinnable.

Obviously, that's not true. All that's happened is that they've lost sight of their case strengths. If it ever happens to you, take a clue from the time when Apollo Creed took Rocky to the inner city gym in *Rocky III*. All you need to do is get back to basics and remember your inner strengths. Answer these questions and you'll remember why your case is winnable:

### ♦ “Why did you initially decide to take this case?”

When the case first came into your office, what did you like about it? Was it the client? The opposing party? The legal issues? What was it that made you think, “This is a good case, and I can win it”?

### ♦ “How did you feel the first time you heard the case details?”

Did you feel an emotional tug on your heartstrings? Did you get angry? What was your emotional response when you learned about the case?

### ♦ “What did you say to your spouse / best friend / trial partner the first time you told them about the case?”

How did you sum up the case for them? What facts did they fixate upon? What grabbed their attention? What did they like most? How did they respond?

By getting back to basics, you'll tap into the memories of what first attracted you to the case. By the end of your opening statement, if the jurors feel like you did when you first learned about the case, the battle is half-won.

### Question #2:

**“What do you hate about your case?”**

Your case isn't perfect. If it was, you wouldn't be writing an opening statement, because your opponent would have made an incredible offer and the case would already be settled.

Nope, your case isn't perfect, so if you're going to present a persuasive opening statement, you not only need to focus the jury's attention on the strongest elements of your case, but you'll also need to prepare them to handle the weaknesses in your case. You can't ignore your case



*How strong is your case? Why do you deserve to win?*

“To be effective, you need to create an all-encompassing opening statement that successfully incorporates your case weaknesses into a persuasive storyline.”

weaknesses during opening statement, because if you don't address them, your opponent will exaggerate them and make it look like you're hiding things from the jury. To be effective, you'll need to create an all-encompassing opening statement that successfully incorporates your case weaknesses into a persuasive storyline. So, what's wrong with your case? What are the weaknesses and the difficulties you'll need to overcome? Here are some of the problems you might experience:

**Bad facts?** Sometimes a single fact can be a case-killer. What is the worst fact in your case? What is the best fact in your opponent's case?

**Credibility issues?** Do any of your witnesses have criminal histories? Reputations for dishonesty? Have they previously made statements that conflict with what they're expected to say during trial?

**Conflicts in the evidence?** Do your witness statements agree with the physical evidence? Do the witness's statements agree with what other witnesses have said about the case?

**Lack of proof?** Are there any gaps in the evidence? Do you have two forms of proof for every essential element, in case one form of proof falls apart or becomes inadmissible?

**Legal hurdles?** Are there any legal technicalities affecting the admissibility of your evidence? Will the evidence be partially admissible? Will you need to survive a *Frye* type hearing before your witness may testify?

**Financial hurdles?** Can you afford to hire experts? The best ones? (Or at least more persuasive than your opponent's experts?) Will financial issues force to use a recorded deposition rather than a live witness, or limit your use of demonstrative aids?

**Witness difficulties?** Is your witness incomprehensible? Does he need an interpreter? Is he a sanctimonious jerk? Does he have any character traits that will prevent the jury from listening to his story?

**Societal expectations?** Just because a landlord is *legally* entitled to evict a family on Christmas Eve doesn't mean the jury is going to approve of his actions. There may not

be any duty to be a Good Samaritan, but will your jury understand? Even if your case is legally viable, does it fly in the face of societal expectations? Will you need to overcome jurors' negative emotional feelings?

**Question #3:**

***"What scares you the most about your case?"***

What is the biggest problem with your case? Where is your Achilles heel? As you look through the list of things you hate about the case, is there a recurring theme? Is one of the problems more insurmountable than the others? If your opponents have even *half* a brain, they're going to focus all of their attention on that single issue. You'll need to be prepared to address it during opening statement, so on a fresh sheet of paper, answer this question: "The thing that scares me the most about my case is..."

**Question #4:**

***"Why do you still deserve to win?"***

If your case is like most cases heading to trial, you probably wrote down an extensive list of problems, and didn't have any difficulty identifying the thing that scares you the most about your case. Now you need to show the jury why you **still** deserve to win this case, despite all of these problems. (If you can't do that, you might want to start thinking about settling the case immediately.) For each issue (focusing especially on the issue that scares you most about your case), write out an answer to this question: "Despite [negative fact], we **still** deserve to win because..." It might take creative thinking and late nights, but develop a response for each potential issue before you advance to the next step of preparing your opening statement. ■

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