Chapter 4

OPENING STATEMENT

§ 4.01 INTRODUCTION

After the jury has been selected, the parties give their opening statements. The opening statements introduce the jurors to the parties' competing theories of the case. Opening statements generally are fairly short, and focused on the key facts you will present. They are told in chronological order, as much like a story as possible. Opening statements help jurors understand the nature of the dispute, focus on the key evidence, and place witnesses and exhibits in their proper context.

There are four main purposes to be accomplished in opening statements:

- Present a clear picture of the case — its major events, participants, instrumentalities, disputes and contentions.
- Arouse the interest of the jurors in your case and general theory so that they want to hear your evidence. If jurors become bored (or worse, if they become antagonistic), they may be inattentive while you present your witnesses.
- Build rapport with the jurors, speaking to them as intelligent people and communicating your sincere belief in your cause. This continues the process of establishing bonds with jurors that was begun in the voir dire.
- For the defense, the opening statement presents the opportunity to alert jurors that there will be two sides to the case so they do not make up their minds too soon.

Many trial practitioners assert that the opening statement is the most underrated and overlooked part of the case. While you may have been able to begin to talk about your case in voir dire, this is your first opportunity to present it as a cohesive whole. While you cannot expect jurors to reach a decision in your favor based solely on your opening remarks, you can make effective use of the principle of primacy to begin this persuasion process. Too often, lawyers squander this opportunity to present their theory and highlight the pivotal evidence. Instead, they choose to read the pleadings, bury the important facts in a boring mass of trivial details, sacrifice coherence to plod through a witness-by-witness summary, ignore the facts in favor of broad generalizations, or waive opening altogether.

Proper opening statements are not arguments, although you occasionally will hear them referred to as such. Opening statements are supposed to be limited to informing the jury of the facts you intend to prove. The temptation to argue — to discuss legal standards, debate the respective credibility of witnesses, make inferences, and speak in broad terms about justice and truth — may be almost irresistible at times. Not only is succumbing to temptation objectionable; it may not be wise. After all, it was the evidence that convinced

you to go to trial, and it will be evidence that carries the jury. This is your opportunity not to tell the jurors that you have the evidence on your side, but to show them. As Lloyd Stryker, one of the great trial lawyers put it, "Evidence itself is eloquence, and the facts, if properly arranged . . . will shout louder than you possibly could."[1]

The most common problem seems to be that lawyers cannot resist overstating the evidence. Over 100 years ago, the first treatise on trial practice warned:

> [Never] overstate the evidence. Clearly right as this rule is, few are more often violated. Advocates very frequently exaggerate, and the result is generally disastrous, for jurors are quick to resent what they conceive to be an attempt to deceive them. Not only this, but they are very apt to think that all that is stated must be proved or else no case can be made out, and when the proof falls short of the statement they are quite likely to conclude that the advocate has no case. There is yet another reason supporting this rule, and that is this: where the evidence is stronger than the statement, the advocate secures credit for modesty and candor, and these are great virtues in the eyes of the jurors. It is never to be forgotten in stating the facts that keen and hostile eyes are watching, and that an unrelenting enemy is on the alert ready and eager to expose the least misstatement or mistake. It may be that the Roman priests were . . . able to deceive Jupiter by chalking over the dark spots of the sacrificial bull; but, if they were, he was not so keen-eyed as an opposing counsel is likely to be, for chalking dark spots in a statement of facts will not deceive him. Fictions will not supply the place of facts.[2]

NOTE

How important is the opening statement? In Charles Becton and Terri Stein, *Opening Statement,* 20 TRIAL LAW. Q. 10, 10 (1990), appears the following statement: "Empirical studies conclude that after hearing opening statements, 65 to 80 percent of jurors not only make up their minds about the case, but in addition, in the course of the trial, they do not change their minds." This oft-repeated assertion is false. *See* William L. Burke, Ronald L. Poulson, and Michael J. Brondino, *Fact or Fiction: the Effect of the Opening Statement*, 18 J. CONTEMP. L. 195 (1992). Jurors do not make up their minds during opening statements (before they have heard any evidence). This piece of misinformation is usually attributed to the research of the University of Chicago Jury Project, but no actual source is ever cited, and all that the Chicago Jury Project found was that "the real decision is often made before the deliberation begins." Most jurors reach a tentative decision at the *end* of the trial, after closing arguments, and most verdicts reflect the majority's tentative decision. HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 488–89 (1966). According to the late Hans Zeisel, no data were ever collected

[1] LLOYD PAUL STRYKER, THE ART OF ADVOCACY 53 (1954).

[2] BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, THE WORK OF THE ADVOCATE 206–07 (1888).

that could support a conclusion that jurors make a decision after opening statements.

§ 4.02 EXAMPLE OF AN OPENING STATEMENT

It is difficult to provide you with a representative opening statement, because their length and detail vary widely with the complexity of the case. The more complicated the case, the longer and more detailed your opening will need to be. However, the following example,[3] presents the issues discussed in this chapter, and should give you a feeling for the scope and organization of a typical opening statement.

> May it please the Court, and you, Ladies and Gentlemen of the Jury: Our defense is that the witnesses for the State who have attempted to identify Anthony Zirille are mistaken. This man, Anthony Zirille, was nowhere near the scene of this hold-up when it occurred. As a matter of fact, he was more than 35 miles away. Like many a mystery, this one is a case of mistaken identity.
>
> Anthony Zirille is a hard-working young man from Niles. He lives with his mother and younger sister while he works two jobs to try to save money for college. He wants to become the first member of his family to attend college. All that is threatened now, because he finds himself accused of a robbery. But accusations are not evidence, and the judge will instruct you that the state must prove his guilt beyond a reasonable doubt with evidence.
>
> What will the evidence show? It will show that the crime was committed by two men who arrived and fled in a sport utility vehicle. Anthony Zirille owns no S.U.V.
>
> It will show that the hold-up men were armed. Anthony Zirille owns no gun, and no gun was ever found that can be connected to him.
>
> It will show that the crime happened way down here [pointing to location on a map] south of the city on Western Avenue, about midnight. At midnight, Mr. Zirille was at his second job at a tavern and restaurant on Deerfield Road in the town of Niles [pointing to location on a map]. That is about 30 miles northwest of the scene of the crime. Anthony Zirille's working hours at the restaurant were from 6 p.m. to midnight. The testimony of the restaurant owner and two other witnesses who were patrons of the place will be that on the night in question, March 13, Anthony worked steadily from 6 o'clock in the afternoon until midnight. At midnight, when the robbery was taking place, Mr. Zirille was walking to the parking lot toward his car. He drove home. He lives here [pointing to map] with his widowed mother and sister at Orleans Street, on what is known as the near north side, about 7 miles away from where this hold-up occurred. Mr. Zirille arrived home about 12:30. His mother was sitting up for him and will testify he arrived home at that time. His sister, who was 14 years old,

[3] Portions of this example are adapted from FRANCIS X. BUSCH, LAW AND TACTICS IN JURY TRIALS, vol. 2: 840–41 (1959).

was asleep. She is not allowed to stay up that late, so she did not see him until the next day at noon, when she got home from school.

Anthony Zirille will take the stand, and face you and the prosecutor, and tell his story. He knows nothing of this hold-up and will swear to you that he had nothing to do with it. He has been brought up and has always lived on the near north side. He had no business and no friends or acquaintances on the south side, and has never had occasion to be and never has been in the neighborhood of 115th Street and Western Avenue where this hold-up occurred. The witnesses who claim they can identify him based on a fleeting glimpse of a robber in the dark of night are mistaken. Based on this evidence I shall ask and expect you to return a verdict of not guilty.

NOTE

Other examples. Many other examples of opening statements can be found in LEONARD DECOF, ART OF ADVOCACY — OPENING STATEMENT (2001), ALFRED S. JULIEN, OPENING STATEMENTS (1980); RICHARD J. CRAWFORD, THE PERSUASION EDGE 118–37 (1989); JAMES W. JEANS, LITIGATION §§ 9.30–9.31 (2d ed. 1992); and FRED LANE, LANE'S GOLDSTEIN TRIAL TECHNIQUE §§ 10.73–10.76 (3d ed. 1984).

§ 4.03 OPENING STATEMENT LAW AND PROCEDURE

[A] RIGHT TO MAKE OPENING STATEMENTS

The giving of an opening statement is so well established as part of the adversary system, that it probably rises to the level of a right. In *United States v. Stanfield*,[4] the court stated:

> The practice of permitting attorneys to make opening statements is a practice long accepted as established and traditional in jury trials. It has the practical purpose of directing the attention of the jurors to the nuances of the proposed evidence in such a way as to make the usual piecemeal presentation of testimony more understandable as it is received. . . . We strongly believe that the well established and practical custom of permitting opening statements by counsel at jury trials in criminal cases should be continued in the district courts of this circuit.

In most cases in which an opening statement is requested but denied (at least in jury trials), the courts have held that an important part of the right to be heard has been withheld that warrants reversal in all but the strongest cases.[5]

The right to make an opening statement is not a constitutional one, however. Unlike closing argument, it is not among the traditions of the

[4] 521 F.2d 1122 (9th Cir. 1975).

[5] *E.g.*, *McGowen v. State,* 25 S.W.3d 741, 744–45 (Ct. App. Tex. 2000).

adversary fact-finding process deemed necessary to a fair trial. Consider *United States v. Salovitz*:[6]

> Some States provided by statute that [a criminal] defendant might open after the prosecution had completed its case. Others provided that the defendant's opening might be made immediately following the prosecution's. Other States gave the defendant the option of opening either before or after the prosecution's proof. Some States permitted the defendant to exercise the option of reserving his opening statement until the close of the State's case only if the defendant was going to present evidence. Still other States, of which Connecticut is one, permit the trial court to decide in its discretion whether a defendant may open at all. . . . We have held in a civil case that "opening is merely a privilege to be granted or withheld depending on the circumstances of the individual case."
>
> [In criminal cases,] the Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected. . . . We believe that an opening statement by the defendant is not such a guaranteed right, and that the making and timing of opening statements can be left constitutionally to the informed discretion of the trial judge.

Because the right to open is not constitutional, it is subject to time limits[7] and other restrictions, and courts have said it can even be refused in nonjury trials or simple cases.[8] Where openings are permitted, a party generally has the right to make his opening statement without interference from or adverse comments by the judge.[9]

[B] PROCEDURE

Opening statements customarily are given after the jury has been selected and sworn and before any evidence is produced. The party with the burden of proof — usually the plaintiff or prosecutor — gives the first opening statement, followed by the defense. The defense customarily has the option of postponing (reserving) the opening statement until the beginning of its presentation of evidence. In most jurisdictions, statutes or court rules determine the order and timing of opening statements. Michigan Court Rule 2.507 is typical:

> ***Opening statements.*** Before the introduction of evidence, the attorney for the party who is to commence the evidence must make a full and fair statement of that party's case and the facts the party intends to prove. Immediately thereafter, or immediately before the introduction of evidence by the adverse party, the attorney for the adverse

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[6] 701 F.2d 17 (2d Cir. 1982).

[7] *E.g.*, *United States v. Gray,* 105 F.3d 956, 962–63 (5th Cir. 1997) (3 minutes each for three co-defendants upheld in simple case); *Glenn v. Cessna Aircraft Co.,* 32 F.3d 1462, 1464 (10th Cir. 1994) (10-minute limit upheld).

[8] *United States v. Five Cases, More or Less, Containing "Figlia Mia Brand,"* 179 F.2d 519 (2d Cir. 1950).

[9] *See, e.g.*, *United States v. Frazier,* 580 F.2d 229 (6th Cir. 1978).

party must make a like statement. Opening statements may be waived with the consent of the court and the opposing attorney.

Even when a statute seems to set a specific order for opening statements, the trial judge has discretion to change the order of opening remarks in unusual circumstances.[10]

One such unusual situation is a multi-party lawsuit. Where several attorneys represent multiple plaintiffs or defendants, or the case involves a third-party complaint, the order of statements customarily is resolved among the parties at pretrial conference. If the parties are unable to set the order themselves, the trial judge will do so. The party with the most to gain will usually go first for plaintiffs, and the party with the primary liability or the largest financial exposure will usually go first among defendants. Attorneys representing multiple defendants might be allowed the customary option of reserving their openings until the start of their own cases, but this can result in unfairness if one defendant opens immediately following plaintiff, and another waits until the start of the defense case. For that reason, most judges will require that multiple parties arrayed on one side make their opening statements all at one time.[11]

Jurisdictions differ on whether a party may waive its opening statement altogether. Some states *require* the party with the burden of going forward (the plaintiff in most cases) to give an opening statement;[12] others permit the plaintiff to waive it. Almost all states permit a defendant who does not have a burden of proof to waive opening remarks, although a few require statements from both sides even in criminal cases.

In some jurisdictions, each party with a burden of going forward with evidence is required to make a complete opening statement demonstrating that it has enough evidence for a legally sufficient case. Such opening statements must include enough facts to make out a prima facie case on all essential elements of the claim or defense.[13] Failure to state a case may result in dismissal, nonsuit, or a judgment as a matter of law against that party before any evidence is introduced. Such a drastic resolution of the case threatens to deprive a party of its basic due process rights to be heard and to present evidence, so a judgment as a matter of law will be granted only if it appears that counsel has stated all of his or her evidence and has been given the opportunity to supplement the statement with additional facts to satisfy this requirement.[14] Courts exercise this power sparingly, and the law prefers that the case be tried on the merits.[15] The courts are split on the

[10] *See, e.g.*, Cal. Civ. Proc. Code § 607 (the trial must proceed in normal order "unless the court, for special reasons otherwise directs"); *State v. Guffey,* 468 P.2d 254 (Kan. 1970) (court has inherent discretion to vary order seemingly required by statute).

[11] *See Commonwealth v. Weitkamp,* 386 A.2d 1014 (Pa. Super. 1978) (codefendants being tried together must all open at the same time).

[12] *See, e.g.*, Rev. Stat. Mo. § 546.070(1).

[13] *E.g.*, *People v. Kurtz,* 414 N.E.2d 699 (N.Y. 1980).

[14] *See Commonwealth v. Lowder,* 731 N.E.2d 510, 518 (Mass. 2000).

[15] *See Giles v. Amer. Family Life Ins. Co.,* 987 S.W.2d 490, 492 (Mo. Ct. App. 1999) (procedure is highly unusual and rarely justified).

propriety of such a drastic procedure, and many do not approve of summary disposition based only on opening statement.[16]

[C] THE CONTENT OF OPENING STATEMENT

The purpose of an opening statement is to inform the jurors in a general way of the nature of your case so that they will be better prepared to understand the evidence. You are supposed to limit yourself to a discussion of the anticipated evidence and what the main issues are.[17] You may not argue about how to resolve conflicts in the evidence, nor discuss how to apply the law to the facts, nor attempt to arouse the emotions of the jurors. How strictly these limits are enforced, however, is a matter usually left to the discretion of the trial judge. Some judges permit the attorneys wide latitude to discuss their cases; others will more strictly enforce the general rules concerning what one may and may not say during the statement.

[1] The Prohibition Against Argument

The most basic rule of opening statements is that "argument" is prohibited.[18] The rule is easy to state, but it is hard to define argument precisely. With respect to statements of fact, there are two rules of thumb:

- If it is something you intend to prove, it is not argument. If you make a statement that is not susceptible of proof, it is argument.[19]
- Whenever you make a statement, if a witness could take the stand and make the same statement, it is not argument. However, if the rules of evidence would prevent such testimony, or if no such witness exists, the remarks are argumentative.[20]

Neither of these statements is complete. Many jurisdictions also allow an attorney to state his or her legal claim or defense, at least in basic terms,[21] and to describe the nature of the case and summarize the issues, at least in complicated matters.[22] Some jurisdictions also permit the attorneys to draw reasonable inferences from the anticipated evidence, and thereby tell the jury in more conclusory fashion the gist of the evidence.[23]

The prohibition against argument must be understood in light of the reasons for giving opening statements. As long as opening remarks will assist the jury in understanding the evidence, they are permissible. However, when they turn distinctly partisan—asking the jury to resolve disputes, make inferences, or

[16] *See Cherny v. Fuentes,* 649 N.E.2d 519 (App. Ct. Ill. 1995). *Cf. Galanek v. Wismar,* 81 Cal. Rptr.2d 236 (Ct. App. Cal. 1999) ("clearly"disfavored practice).

[17] See *State v. Smith,* 988 S.W.2d 71, 75 (Mo. Ct. App. 1999).

[18] *See, e.g.*, *State v. Thompson,* 68 S.W.3d 393 (Mo. 2002).

[19] LEONARD DECOF, ART OF ADVOCACY — OPENING STATEMENT § 1.06[1] (2001).

[20] *See* JAMES JEANS, TRIAL ADVOCACY 316–17 (2d ed. 1993).

[21] *See People v. Frazier,* 738 N.Y.S.2d 16 (App. Div. 2002).

[22] *See Lamar v. State,* 68 S.W.2d 294 (Ark. 2002).

[23] *See, e.g.*, *Commonwealth v. Williams,* 761 N.E.2d 1005, 1009 (Mass. App. 2002) (victim retracted part of her accusation to protect boyfriend/defendant).

interpret facts favorably to the speaker—the remarks are argumentative.[24] Common examples of argumentation include:

- Asking the jury to resolve disputes in your favor. For example, you cannot refer to your witnesses as "good and truthful," and therefore more worthy of belief than your opponent's witnesses,[25] nor discuss how your evidence satisfied a legal standard.
- Making negative judgments about your adversary or referring to the other party in scurrilous terms. You cannot, for example, call the defendant a "big cow."[26]
- Using colorful labels that characterizes facts in a way distinctly favorably to your side. For example, the prosecutor cannot characterize a crime as a "rampage of terror"[27] or "unspeakable evil."[28]

[2] Discussing the Law

Local rules vary widely on the extent to which you may talk about law in your opening remarks. Most jurisdictions do not permit the law to be discussed in any detail in opening statement.[29] However, most will permit you to state briefly the main legal issues on which the case depends. For example:

> In an opening statement to the jury the plaintiff's counsel briefly outlined his claim with regard to the law of negligence. The gist of the statement in this regard was that negligence is a shortage of duty; but some expressions were used which deviated from an accurate definition of negligence. Counsel expressly disclaimed that such statement was made in correct legal form, and at the outset reminded the jury that they were to take the law from the court. There was nothing of an inflammatory character in the statement, and what was said about the law was put forward in a way that suggested to the jury that the claim of the defendants would differ from that of the plaintiff. An exception was taken to the opening statement, but it avails nothing. In so holding there is no intention on the part of the court of giving countenance to the idea that counsel may argue the law to the jury, or read law to the jury, or treat as open questions of law upon which the court has ruled, or in any way seek to have the jury understand that they can do otherwise than to take the law from the court.[30]

When a cause of action is based on a statute, you usually will be permitted to read the statute or an approved jury instruction, but you will not be allowed to go further and argue how the law is supposed to be interpreted.[31]

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[24] *See People v. Green,* 702 N.Y.S.2d 317, 318 (App. Div. 2000) (defense attacked reliability of identification and accused police of planting evidence to bolster case).

[25] *Murray v. Taylor,* 782 A.2d 702, 714 (Conn. App. 2001).

[26] *Turner v. Commonwealth,* 240 S.W.2d 80 (Ky. 1951).

[27] *State v. Valdivia,* 24 P.3d 661, 677 (Haw. 2001).

[28] *State v. Runningeagle,* 859 P.2d 169, 173–74 (Az. 1993).

[29] *United States v. Ziele,* 734 F.2d 1447, 1455 (11th Cir. 1984); *Lam v. Lam,* 212 Va. 758, 188 S.E.2d 89 (1972).

[30] *Lewes v. John Crane & Sons,* 62 A. 60, 61 (Vt. 1905). *Contra Williams v. Goodman,* 29 Cal. Rptr. 877 (Cal. App. 1963); *State v. Kendall,* 203 N.W. 806 (Iowa 1925).

[31] *E. g.*, *Northern Trust Co. v. St. Francis Hosp.,* 522 N.E.2d 699 (Ill. App. 1988).

[3] Reference to Pleadings

Courts are split over whether it is permissible to read from or describe the pleadings during opening statement. The majority allow you to refer to the pleadings if doing so will explain the procedural posture of the case, clarify the factual contentions, or help identify which issues are contested and which have been admitted. This is a matter usually left to the discretion of the presiding judge.[32]

An exception to the general rule allowing you to refer to pleadings is the prohibition against telling the jury the specific dollar amount asked for in a complaint for damages. Most jurisdictions will not permit reference to the *ad damnum* clause, since the amount claimed — often in the millions of dollars — bears no necessary relationship to the damages actually sustained and provable.[33] However, damages may be mentioned if they are liquidated or capable of precise calculation, and present no intangible issues such as pain and suffering or the value of property.

[4] Discussion of Facts

Opening statements are supposed to be limited to summaries of the basic facts you intend to prove. Three rules follow from this: 1) you may not misstate or exaggerate the evidence, 2) you may not refer to inadmissible evidence, and 3) you may not discuss evidence you expect your opponent to introduce that will not be part of your own case.[34]

The most basic rule is that you may not misstate or exaggerate your evidence. You cannot promise evidence you cannot deliver. To do so is obviously error.[35] Exaggeration is also improper. For example, if you believe your witness will testify that the defendant's car was traveling 60 miles an hour, you may be tempted to tell the jury that you will prove the defendant was driving "much too fast." If this is your characterization it is improper, but if it is the witness's own opinion, it is permissible.

Enforcement of this rule is problematic, of course. At the time an objection is made, the trial judge obviously has not yet heard any evidence, is not a mind-reader, and cannot know what will be proved. The best the judge can do at the time is instruct the jury that what the lawyers say is not evidence, and they must disregard any statements that are inconsistent with the testimony of witnesses. The judge will have to overrule the objection. This does not mean that your opponent can get away with misstating the evidence, however. If the evidence introduced on a significant factual dispute does not deliver what was promised in opening statement, you may move for a mistrial at the conclusion of the case.[36]

The second basic rule is that you may not refer in opening statement to evidence that would be inadmissible at trial. If you do, your opponent may

[32] *See, e.g.*, *Henderson v. Henderson,* 172 A.2d 956, 568 N.Y.S.2d 664 (1991).

[33] *E.g.*, *Botta v. Brunner,*138 A.2d 713 (N.J. 1958).

[34] *E.g.*, *State v. Jaynes*, 549 S.E.2d 179, 197-98 (N.C. 2001).

[35] *See People v. Smith,* 565 N.E.2d 900 (Ill. 1990).

[36] *See White v. Consol. Freightways Corp.,* 766 So.2d 1228, 1231 (Ct. App. Fla. 2000).

object, and the judge probably will instruct the jury to disregard the remark.[37] If the reference to inadmissible evidence is damaging enough, it may constitute grounds for a mistrial.[38] If the judge has excluded the evidence on a motion in limine,[39] then he or she will obviously sustain an objection to a discussion of it. Otherwise, however, judges will rarely sustain this objection unless the evidence is clearly inadmissible. If evidence is of borderline admissibility or depends for its admissibility on the laying of a proper foundation, the courts apply the "good-faith-basis" test. Under this standard, an attorney may refer to any evidence that he or she has reasonable grounds to believe is admissible and intends to offer.[40]

What does this mean in practical terms? The judge probably will sustain an objection that an attorney is discussing inadmissible evidence under the following circumstances:

- The evidence was excluded in a pretrial motion.
- The evidence could only come from a person who is not on the witness list.
- The evidence is privileged.
- The evidence violates one of the specific relevance exclusionary rules:

  Rule 407. Subsequent remedial measures

  Rule 408. Offers to compromise

  Rule 409. Payment of medical expenses

  Rule 410. Plea discussions

  Rule 411. Liability insurance

  Rule 412. A rape victim's past behavior

However, objections on the following grounds are difficult for the judge to sustain:

- The evidence is irrelevant or prejudicial. Relevancy and prejudicial effect can only be determined in the context of the trial.

  Rule 402. Relevancy

  Rule 403. Prejudicial effect

- Evidence will be inadmissible because the proponent will not be able to lay a foundation. The judge is not a mind reader and cannot know whether the attempt to lay a foundation will or will not be successful. If the evidence is significant enough, a mistrial motion may be made if it is excluded at trial.[41]

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[37] *In re Minnis,* 29 P.3d 462, 464-65 (Kan. App. 2001).

[38] *See People v. Terry,* 728 N.E.2d 669, 677 (Ill. App. 2000).

[39] Motions in limine are discussed in Chapter 2.

[40] *E.g.*, *State v. Torres,* 744 S.2d 699 (N.J. Super. 2000); *Lillard v. State,* 994 S.W.2d 747, 750–51 (Tex. Ct. App. 1999).

[41] *Compare People v. Wolverton,* 574 N.W.2d 703 (Ct. App. Mich. 1998) (court should have granted mistrial after significant evidence discussed in opening statement was ruled inadmissible at trial for failure of foundation), *with People v. Kliner,* 705 N.E.2d 850 (Ill. 1999) (no mistrial required where evidence did not concern a main issue and did not substantially prejudice the defendant).

Rule 404(b). Specific acts of bad character

Rule 406. Habit

Rule 601. Competency to testify

Rule 602. Personal knowledge

Rules 607–610. Impeachment

Rule 701. Lay opinions

Rules 702–705. Expert testimony and scientific evidence

Rules 801–804. Hearsay and its exceptions

Rules 901–902. Authentication of exhibits

The third basic rule is that you may not anticipate your opponent's defenses nor talk about the facts your opponent intends to prove and how you will rebut them.[42] Unless you plan to offer the evidence yourself, you lack a good-faith basis that your statements will be supported by testimony, since you have no control over whether your opponent will call a particular witness or elicit testimony on a particular defense.[43] However, once your opponent has promised to deliver certain evidence in the pleadings, voir dire, or opening statement, then you may refer to it in a nonargumentative way.

[5] Exhibits

In most jurisdictions, you are permitted to use exhibits during opening statement. Exhibits that you reasonably believe will be introduced during the trial logically are evidence just like witness testimony, and you should be allowed to disclose them to the jury. Certainly the court should permit the use of accurate diagrams, charts and models that will help the jury understand the case, and most judges allow them.[44] Other kinds of exhibits that will be offered during trial, such as weapons, autopsy photographs, and bloody clothing, may be permitted at the court's discretion.[45] It is the custom in many courts to obtain the advance approval of the judge or a stipulation from the opposing attorney before using exhibits, especially potentially prejudicial ones.

[6] Other Improper Matters

It is improper to include remarks in your opening statement that have nothing to do with the facts and issues of the case, especially if they tend to divert the jury's attention from the merits. Thus, you should avoid the following:

- Making emotional appeals for sympathy for your own client, or antipathy toward the adverse party. Although you can discuss facts that have emotional content, such as the extent of a plaintiff's

[42] *E.g.*, *State v. Perez,* 946 P.2d 724 (Utah 1997).

[43] *See, e.g.*, *United States v. Hall,* 165 F.3d 1095, 1115 (7th Cir. 1999) (inappropriate for prosecution to comment on anticipated defense alibi witnesses even when the defense filed a notice of alibi).

[44] *E.g.*, *McGee v. State,* 529 S.E.2d 366, 368 (Ga. 2000) (diagram of crime scene); *Grimming v. Alton & So. Ry.,* 562 N.E.2d 1086 (Ill. App. 1990) (chart of damages).

[45] *E.g.*, *Wapplehorst v. Kinmett,* 282 N.E.2d 53 (Ohio App. 1972).

injuries, you cannot go outside the relevant evidence. For example, a plaintiff's attorney in a personal injury case may discuss how the plaintiff has suffered because there is a claim for compensation for pain and suffering. The attorney may not discuss how hard it has been on the plaintiff's family.[46]

- Appealing to racial, ethnic or other cultural prejudices. This is usually done by linking one of the parties to a disfavored group, e.g., suggesting that the defendant is a gang member,[47] or making extensive references to the war on drugs.[48]
- Discussing wealth, poverty, insurance, or anything else connected to a party's ability to pay damages, *e.g.,* that the defendant was not a large corporation, but a small family-owned business.[49]
- Personal attacks on the opposing attorney, e.g., that defense counsel would try to confuse the jury.[50]
- Referring to other similar cases or your own experience, e.g., informing the jury that the defendant had previously lost a similar product liability case.[51]

NOTES

1. *Objections to opening remarks.* If your opponent includes improper matter in opening statement, you should object immediately and move to strike the offending remarks, and move for a mistrial. Such an objection might sound like this:

a) I object to counsel discussing the victim's family. Appeals to emotions are improper in opening statement.

b) I object to counsel referring to the Geneva Convention. It is improper in opening statement to go outside the facts and law of the present case.

A prompt objection that states specific grounds is essential if you wish to preserve the matter for appeal. *Butler v. State*, 541 S.E.2d 653, 658 (Ga. 2001). Unless the remarks were extremely prejudicial, the court's granting of the motion and instructing the jury to disregard the objectionable statement will obviate the error. *See Harding v. Deiss*, 3 P.3d 1286 (Mont. 2000).

2. *Evidentiary admissions.* Factual admissions made during opening statement may constitute binding judicial admissions which preclude the party from later contesting that fact. Clear and unequivocal admissions by the defense may relieve the plaintiff of the burden of proving a fact. Clear statements that a party intends to rely on only one of several grounds asserted in the pleadings may estop that party from asserting the alternative grounds. If

[46] *E.g.*, *Lance, Inc. v. Ramanauskas,* 731 So.2d 1204, 1215 (Ala. 1999) (impact of child's death on family); *Nevels v. State,* 351 So. 2d 762 (Fla. App. 1977) (the suffering of a crime victim's family).

[47] *People v. Terry,* 728 N.E.2d 669, 677 (Ill. App. 2000).

[48] *E.g., Billings v. State,* 558 S.E.2d 10, 11-12 (Ga. App. 2001).

[49] *Horton v. Continental Volkswagen,* 382 So.2d 551 (Ala. 1980).

[50] *People v. Carney,* 636 N.Y.E.2d 524, 525 (App. Div. 1995).

[51] *E.g.*, *Kawamata Farms, Inc. v. United Agri. Products,* 948 P.2d 1055, 1088 (Haw. 1997).

there is any ambiguity in the statement, it is presumed that the attorney is not making an admission. *See Giles v. American Family Life Ins. Co.*, 987 S.W.2d 490 (Mo. Ct. App. 1999); *Lystarczyk v. Smits*, 435 N.E.2d 1011 (Ind. App. 1982). Not all states follow this rule. *See Cherny v. Fuestes*, 649 N.E.2d 519, 525 (App. Ct. Ill. 1995) (opening statements not admission of facts).

3. *Opening the door.* If an attorney mentions inadmissible evidence in opening statement, it may open the door to a response in kind from the other side. For example, in *Mutual Savings Life Ins. Co. v. Smith*, 765 So.2d 652 (Ct. Civ. App. Ala. 1999), the attorney for the life insurance company told the jury that the company was a small, employee-owned business. As a general rule, evidence concerning the wealth, poverty or resources of a litigant is not admissible. Nevertheless, the court held that the opening statement opened the door to plaintiff to prove that the company made $3 million the previous year. *See also State v. Eugenio*, 565 N.W.2d 798 (Ct. App. Wisc. 1997) (discussing character in opening statement opened door to otherwise inadmissible character evidence). *But see Bynum v. Commonwealth*, 506 S.E.2d 30, 34 (Ct. App. Va. 1998) (in Virginia, statements made in opening do not open door to evidence).

§ 4.04 ETHICAL CONSIDERATIONS

The Model Rules of Professional Conduct do not specifically discuss opening statements. However, several general provisions of the Model Rules are relevant:

- Rule 3.3: A lawyer "shall not knowingly make a false statement of material fact."
- Rule 3.4 (e) (1): A lawyer may not "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." It is not enough that the lawyer *hopes* evidence will be admitted, or believes there is a slim chance. The lawyer's belief must be objectively reasonable.
- Rule 3.4 (e) (2): A lawyer shall not "assert personal knowledge of facts in issue."
- Rule 3.4 (e) (3): A lawyer may not "state a personal opinion as to the justness of the cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of the accused."

Rule 3.4 also prohibits a lawyer from "knowingly disobey[ing] an obligation under the rules of a tribunal." Although the wording is vague, this provision makes it unethical to intentionally include in opening statement anything you know to violate the legal guidelines.[52] It is therefore unethical to try to get away with:

- Argument

[52] *See* RICHARD H. UNDERWOOD AND WILLIAM H. FORTUNE, TRIAL ETHICS 309–16. The superseded ABA CODE OF PROFESSIONAL RESPONSIBILITY was more explicit; DR 7-106(C)(7) provided that a lawyer was forbidden to "intentionally . . .violate any established rule of procedure or of evidence."

- Appeals to sympathy or prejudice
- Discussions of the law
- Exaggerated evidence or statements of facts and issues outside the scope of the pleadings
- Attacks or negative comments on your opponent's case.

Consider the following case, in which an attorney was held in contempt for his opening statement:

HAWK v. SUPERIOR COURT

42 Cal. App. 3d 108, 116 Cal. Rptr. 713 (1974)

Contempt No. 5: [I]n his opening statement for defendant, contemnor did state "I would expect the county doctor to testify that Juan Corona suffered two heart attacks as the result of his arrest and incarceration."

The court found that contemnor's reference to the heart attacks was an effort to create sympathy in the minds of the jury for defendant and to create a prejudice against the prosecution, and that the reference constituted an improper and prejudicial attempt to influence the jurors at the trial of the action. In his opening statement a lawyer should confine his remarks to a brief statement of the issues in the case and evidence he intends to offer which he believes in good faith will be available and admissible. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence.

Contempt No. 6: [W]hile making the defendant's opening statement to the jury, contemnor referred to his client as "Juan" [despite a court order not to use first names] and engaged in the following colloquy:

> MR. HAWK: Okay. Let me tell you about the man that I smuggled cupcakes into his cell up in Yuba City on his birthday in February of 1971 contrary to the Sheriff's office regulations about bringing in foodstuffs, which I did anyway. THE COURT: Mark the record for me, please, Mr. Reporter. MR. HAWK: Let me tell you about Juan, the Christian. . . .

The court found that contemnor's continual references to his friendship and affection for the defendant constituted improper and prejudicial attempts to influence the jurors, a violation of the professional ethics of contemnor as an attorney at law, and an improper interference with the administration of justice in the trial of the case. As an officer of the court the lawyer should support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses and jurors.

A court has authority to control courtroom conduct of an attorney that is in flagrant disregard of elementary standards of proper conduct and to temper his speech in order "to insure that courts of law accomplish that for which they were created — dispensing justice in a reasonable, efficient and fair manner." The record discloses that petitioner stubbornly defied the court's order to refrain from calling his client by his first name and from making

reference to his friendship for his client. Petitioner's conduct, following numerous warnings, constituted a contempt of the authority of the court.

Contempt No. 7: [I]n his opening statement on behalf of defendant, contemnor made the following statement:

> "Under oath it was alleged by one of the officers of the Sutter County Sheriff's Office, on which search warrants were had, and information which was passed out to the press, where Mr. Corona was stripped of his presumption of innocence by the press with the help of the Sheriff's Office."

The court found the references to be improper and prejudicial attempts to influence jurors, a violation of the professional ethics of contemnor as an attorney at law, and an improper interference with the administration of justice and the trial of the case. As we have noted, it is unprofessional conduct for a lawyer knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to make impermissible comments in the presence of the judge or jury.

NOTE

"Bending" the rules. In ALFRED JULIEN, OPENING STATEMENTS § 5.01 (1980), appears the following statement: "I am dissatisfied with any opening statement which does not at least draw from the district attorney the complaint that 'counsel is summing up.' There is no impropriety [in doing this]". What do you think of Mr. Julien's advice? At least two distinguished commentators on ethics agree with him. RICHARD UNDERWOOD AND WILLIAM FORTUNE, TRIAL ETHICS 315 (1988) assert that "it is not unethical to [argue] unless argument violates a standing order of the tribunal. Because it is rarely clear when a statement of the facts becomes argument, attorneys may legitimately press onward until halted by the court." The more common ethical advice is that if you intentionally argue to see if you can get away with it, you are acting unethically whether or not the opponent objects.

§ 4.05 PREPARATION AND PLANNING

[A] LENGTH

How long should your opening statement be? It is difficult to provide a definitive answer; obviously, the length will vary according to the complexity of the case and the amount of evidence. It is hard to state even general guidelines because trial practitioners hold widely varying opinions. Some advocate short openings: the minimal statement necessary to summarize the facts in a general way and pique the jurors' interest. This method has the advantage of minimizing the danger that you will promise to prove particular details to which witnesses later do not testify and maximizing the likelihood that you can hold the attention of the jury. This is probably the approach used by most trial lawyers today. However, some lawyers still prefer to give a long, detailed opening statement, organizing and presenting all of the witnesses and all of the anticipated testimony. They argue that longer openings give

the jurors a better understanding of the favorable evidence, and the sheer quantity of supporting evidence can make a persuasive argument early in the trial.

As a general rule, you probably should try to keep your opening statement short. Shorter statements are less boring and do not drown the important facts in a sea of details. Remember that the jurors know nothing about your case yet. The opening statement should give them the basic framework, not the entire case. A short opening statement that emphasizes your five or six main facts is more likely to be remembered by the jury and be helpful to them than a long, detailed one. Remember that the jurors will only *hear* your opening; they will not read it.

[B] THE CONTENTS OF AN OPENING STATEMENT

Opening statements can be divided into five stages: (1) the introductory remarks; (2) the introduction of the witnesses, places, and instrumentalities involved in the case; (3) the identification of the major issues or contentions; (4) telling the story; and (5) the conclusion and request for a verdict. The following paragraphs provide suggestions on planning what to include in each segment.

[1] Introductory Remarks

To some extent, the introduction will depend on what happened during jury selection. You may have already "met" the jury and introduced yourself and your client. The judge may have explained to the jury the purpose of opening statements and the normal procedure of the trial. If so, there is no reason to repeat these preliminary remarks in opening statement. But if these preliminary matters have not yet been covered, most attorneys would probably begin their opening statements by introducing themselves and their clients, explaining the procedural order of the trial, and conveying the purpose of the opening statement. They frequently use an analogy to explain what an opening statement is, such as, "An opening statement is like the cover of a jigsaw puzzle box that previews what the finished puzzle will look like." They also commonly include the disclaimer that what is said in opening statement is not evidence. The typical introduction sounds like this:

> May it please the Court, and you, ladies and gentlemen of the jury: My name is Paul Overhauser, and I represent the plaintiff, Chris McGuigan. Now that you have been accepted and sworn as jurors to try this case, it becomes the privilege of the lawyers on both sides to make opening statements of what they intend to prove. The plaintiff — that's me — makes such a statement first, and ordinarily the defendant's lawyer, Ms. Scott, follows with a statement in which she tells you what her defense is going to be. These statements are not evidence, but only a preview of the evidence — a road map, if you will, to help you find your way and understand where the trial is going. The evidence will come from the witnesses who take the stand and from exhibits. We will call witnesses first, and I will examine them and then the defendant will cross-examine. After I am done, Ms. Scott

> will call witnesses, she will ask them questions, and I will cross-examine. When we have called all the witnesses, both Ms. Scott and I will have the opportunity for closing arguments. When the lawyers are all finished, the judge will instruct you on the law and then the case will be in your hands to reach a verdict.[53]

This kind of opening has long been the standard for a number of reasons. The primary one is that making similar introductory remarks in all cases may help you overcome initial nervousness. Your familiarity with this generic introduction enables you to sound professional and confident, and the explanatory content may be helpful to the jurors, all of which helps you make a good first impression. The analogies and explanations about the trial process will make the trial less bewildering to the first-time jurors — always a good idea.

But what happened to our basic strategy of taking advantage of primacy by starting each phase of the trial by emphasizing some important aspect of the case? Obviously, it is an opportunity lost if you adopt this approach. Most of the better trial practitioners therefore recommend a more aggressive approach to your introduction. They agree that the first few minutes of opening statement, when jurors are most likely to be paying attention, are crucial in making a good impression, but argue that you should give them a good impression of your *case,* not of your*self.* You are not likely to fool the jurors into thinking you are nonpartisan by such a mock display of humility and fairness, and the jurors may detect your insincerity.

There are other problems with this type of traditional opening. Cliches about road maps may have the effect of irritating the jury, rather than making a good impression.. A juror does not want "to sit there and be told by some young pup what an opening statement is."[54] Analogizing your statement to a road map or the cover of a jigsaw puzzle box may suggest to the jury that your case is complicated and your entitlement to a verdict uncertain. Stating that what you say is not evidence may encourage the jurors to ignore your remarks as unimportant.

Instead, in the initial moments of opening statement, you should convince the jurors that justice is on your side. The modern trend is to begin directly with remarks that summarize the nature of the case, state your theme, and arouse the interest of the jury. Consider the following two examples:

> a) On January 23, 2001, Chris McGuigan walked into Riverside Hospital through the front door to have a minor operation to remove a growth on her arm. One week later, on January 30, she was carried out of the back door — dead. What happened in that short week to turn a routine operation into a life and death struggle, and why it never should have happened, is what this case is all about.[55]

> b) On November 8, 2001, a boy named Jim Posey was killed at an amusement park through the carelessness of an untrained, substitute ferris wheel operator. The defendant, who owns and

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[53] *See* FRANCIS X. BUSCH, LAW AND TACTICS IN JURY TRIALS 825 (1960).

[54] MARK R. MCGARRY, *McGarry's Illustrated Forms of Jury Trial for Beginners*, LITIGATION, Fall 1982, at 38, 39.

[55] *See* L. Decof, *supra* note 19, at § A.01(e).

> operates the ferris wheel was not there to supervise this new kid, who didn't know what to do when a warning light came on. This case is an attempt to answer the question "Where was Waldo?" when this tragedy occurred.[56]

If you still feel the need to introduce yourself, explain trial procedures to the jury, and tell them what opening statements are, you should do it someplace other than first.

[2] Introduction of Actors, Places and Instrumentalities

At the beginning of an opening statement you should introduce your client and other important witnesses and set the scene, unless these matters were adequately covered during jury selection. By giving this background information first, you do not have to interrupt the summary of events to explain who certain people are or to describe a location or instrumentality.

In most cases, the introduction of your client (or the victim if you are a prosecutor) is probably the most important thing you will do in opening statement. Whether the jury is inclined to return a verdict in your favor, and whether that verdict is large or small, will depend in large part on their feelings about the two battling clients and whom they like better. Jurors will be more receptive to testimony from a person if they have been introduced and are convinced the client is normal. For that reason, you must devote considerable thought to what you will say about your client that personalizes and humanizes him or her, and makes the client sympathetic. Imagine that you are trying to convince the jurors to go out on a blind date with your client.

You also should consider whether the jury should be introduced to any other important actors, and if so, what to say about them. This is not a recitation of your witness list. The purpose of opening statement is to describe *the incident,* not to describe the upcoming trial. Therefore, you should introduce the jury to the people who actually played out the crime or other event, not the witnesses who will later describe it. In doing so, bear in mind that the *role* they played is important to the jury's understanding who they are. Compare the following two examples:

> a) Another important witness will be Stan Johnson. Mr. Johnson is married, lives here in Bayshore, and works at Lennie's Pizza. He will describe what happened at the scene of the accident.
>
> b) Another important person is Stan Johnson. Mr. Johnson was driving the Lennie's pizza truck that smashed into Denise Kelly.

The first tells the jury nothing that is important about the case; the second introduces them to one of the critical people involved — the man who caused the wreck.

Jurors also will be better able to understand the events if they know the goals and motives of the participants,[57] and any obvious factors affecting

[56] *See* ALFRED S. JULIEN, OPENING STATEMENTS § 1.12 (1980).

[57] *See* Daniel Linz and Steven Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 LAW & PSYCHOLOGY REV. 1, 3–7 (1984).

credibility. You should add any of this additional information only if you can do so briefly. For example:

> Another important person is Stan Johnson. Mr. Johnson was driving the Lennie's pizza truck, trying to beat the 30-minute delivery guarantee, when he smashed into Denise Kelly.

Finally, you should familiarize the jury with the important locations, times, and instrumentalities involved. The same kinds of considerations apply. Your goal should be not just to mention them, but to make them real to the jury. Locations can be pictured from the perspective of the client or eyewitness; instrumentalities and machines can be made to appear as complicated devices, difficult to control, or as simple extensions of the will of the operator; and times can be related in terms of rememberable events such as holidays or mealtimes. For example:

> Let me set the scene for you: It's 12:15 on Sunday afternoon. People are driving home from church services. Don Levenhagen gets into this truck [holding up a photo] and drives to the Bond Street intersection [displaying diagram]. This is where the accident happened.

[3] Identification of Disputes

Trial practitioners emphasize that it is helpful to describe the main *factual* disputes between the parties in opening statement. It is usually acceptable to mention the points of contention in order to help the jury focus on the real disputes, but not to start arguing about how they should be resolved. Tell the jury in plain, ordinary language what is claimed in the complaint and how the complaint was answered, stating the general nature of the disputes they must resolve. You must be careful, however, not to begin attacking your opponent's case at this point. For example:

> (a) The prosecution has charged Greg Schiller with murder. They say he intentionally killed the deceased, planned it in advance, and knew what he was doing. We have a straight-forward defense. We do not deny that Greg caused the death of the deceased. Our defense is that at the time the deceased was killed, Greg Schiller did not know what he was doing or that what he was doing was wrong. He had been driven crazy with fear of the deceased. Our evidence will therefore concentrate on the issue of Greg's mental condition.[58]
>
> (b) We are claiming that Linda Bridgewater's injuries were caused by the negligence of the defendant. We will offer evidence to show that the defendant was careless when he was driving, causing a wreck that seriously injured Linda and sent her to the hospital. In the papers filed before trial, the defendant asserted that he was driving safely and is therefore not legally responsible for Linda's injuries. Thus, you will have to decide one central question — was the defendant driving carelessly? That's the issue we will be focusing on.

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[58] *See* F. Lee Bailey & Henry Rothblatt, Successful Techniques for Criminal Trials 123–24 (1971).

[4] Telling the Story

The body of your opening statement is your story of what happened — a narrative of the facts from your client's point of view. Bear in mind that this is an introduction. It must be simple rather than complicated, and focus on the important facts rather than the peripheral details. Bear in mind also that you are recreating an event that happened a couple of years ago. Your focus is on the past event — who did what to whom, what were their reasons, and what was the consequence. Your focus is not on the trial to come. It does not matter *how* you will prove the facts, but on the facts themselves. Thus:

Good: The ice storm struck on March 21, turning local roads into a treacherous mess. At around 3:00, Michael Bonnell was driving a bright orange Schneider truck on Highway 446, when he hit a patch of ice. The truck jack-knifed and flipped over, crushing the Toyota in which Bonnie Forrest was riding.

Bad: We will call Gino Brogdon as a witness. He will testify that he lives on Highway 446 and was at home on March 21 when the ice storm struck. After he saw two cars slide off the road in front of his house, he went in and got his camcorder so he could videotape what was happening. He will say that he went back to his front porch and waited. Around 3:00, he saw a bright orange Schneider truck he thought was going too fast and headed right for the patch of ice. He started filming, and was still filming when the truck hit the ice, jack-knifed and flipped over, crushing the Toyota in which Bonnie Forrest was riding. We will show you that videotape.

It also does not matter that facts will be disputed at trial or that witnesses will be cross-examined and have their credibility challenged. Closing argument will look back on the trial itself, assessing its strengths and weaknesses, and reviewing whether the parties have proved the cases they described way back at the beginning. The purpose of opening statement is to tell the jury what you believe actually happened, based on your investigation and the evidence you will present.

Good: At around 3:00, Michael Bonnell was driving a bright orange Schneider truck on Highway 446, coming down a small hill. The speed limit is 55, and he was going about 60 despite the bad weather. At the bottom of the hill, he hit a patch of ice, lost control of the truck, and jack-knifed.

Bad: At around 3:00, Michael Bonnell was driving a bright orange Schneider truck on Highway 446, coming down a small hill. The speed limit is 55. We will call State Police Sergeant Marissa Ford who will testify that based on skidmarks and the position of the truck, she estimates his speed at around 60. The defense will undoubtedly suggest that skidmarks are hard to compute accurately when roads are icy, but Sgt. Ford will explain the methods she uses to compensate for poor road conditions. We will also call Gino Brogdon, an eyewitness, who will testify he saw the truck come down the hill and will give his opinion that the truck was going at least 60. It will come out that Brogdon had been drinking, but

> he will tell you that did not hurt his ability to estimate the truck's speed.

A straightforward, chronological order is the safest, easiest, and most natural way to tell a story, and is used by most experienced trial attorneys. The jurors can follow it easily, and you can prepare and deliver it with only a minimal chance that you will leave out something important. A chronological organization is especially imperative in cases involving many separate incidents spread over a period of time.

A chronology is not just a recitation of facts. Your main task is to paint a vivid mental picture of what happened. The words you use and images you create should be chosen not only for their technical accuracy, but also for the effect they will have on the minds of the jurors. If you can create effective images that the jury will understand and remember; they will bring the story to life. This is especially important for conveying an accurate picture of emotions, pain, or a complex series of events difficult to describe in simple words. Certain words can trigger jurors' personal memories about the pain of a toe stubbed in the darkness or the anxiety of a dentist's waiting room. Different images are created by referring to an arm as hurt, injured, mangled, or shredded to the bone. Some words or phrases will spontaneously set off a whole string of images, emotions, and associations in the minds of the jurors, *e.g.,* September 11, Monica Lewinski, or Enron.

Another way to communicate a clear picture of places or events that are hard to describe is to use visual aids. Selective use of charts, diagrams, and exhibits can give the jury a more accurate impression of the case than words alone. Exhibits used at this early point may even have more impact than they would if introduced later. Diagrams of the scene and charts that clarify your main points will create images that remain more easily in the jurors' minds than words alone. If the facts on a given point are especially complex, they may need to be visually reinforced for the jury to understand them in the first place.[59] Visual aids should not be used indiscriminately, however, or they can detract from the clarity of your opening statement by interrupting your story and diverting the jurors' attention.

The most common mistake in an opening statement is overstatement:

> An advocate can make no greater mistake in an opening statement than deliberately or carelessly to overstate his case. The deliberate inclusion of matters which cannot be established by admissible evidence may, as has been indicated, constitute reversible error. The more usual situation arises where an advocate, through overzealousness, makes an exaggerated statement of his proposed proof, or states as proposed proof matters [which he is later unable to prove because the evidence] is excluded as incompetent or irrelevant. In either event, the consequence may be fatal. An alert opponent will be quick to argue that [if] the opposing side had been able to prove what they solemnly told the jury they expected to prove, a different case might be presented; but as it has turned out, there has been a clear failure to prove

[59] *See* Linz & Penrod, *supra* note 56, at 7–8 (complex facts need to be written on an exhibit to be remembered).

the case. Such an argument is often persuasive, even though what has been proved is sufficient to make a case.[60]

There is empirical verification of this assumption. In controlled experiments with mock juries, when an attorney promised more than the evidence proved, and the overstatement was pointed out by the opponent, the overstatement had a negative effect on the verdict — the attorney was actually worse off than if he or she had given a more cautious opening statement.[61]

Overstatement takes several common forms:

- ***Discussing your opponent's case.*** In opening statement, you are supposed to discuss your own evidence. You lack a good faith basis for even *knowing* what your opponent is going to do; for all you know, the other side may rest without calling any witnesses! In any event, why would you want to emphasize the other side of the case? Other than a brief statement of the competing contentions of the two sides, you almost always are making a mistake to spend valuable time doing your adversary's job.
- ***Discussing evidence of doubtful admissibility.*** Obviously, you should include in your opening statement only evidence you think will be admitted, and not mention clearly inadmissible evidence. But what about evidence of doubtful admissibility, which might either be allowed or excluded? There is a great temptation to discuss it, especially if it makes your case appear stronger. But of course, that is committing the sin of overstatement. You probably should not refer to dubious evidence, to avoid the risk of promising evidence you cannot deliver. One possible solution to this dilemma is to try to resolve the question of admissibility before trial, by stipulation or motion in limine.[62]
- ***Discussing the testimony of uncertain witnesses.*** A closely related question is what to do about evidence from an uncertain witness. You may have doubts about exactly what a witness will say, or even if the witness will show up at all. Again, if you are uncertain what the witness will say, it is better not to mention the witness than to promise evidence you cannot deliver. Remember that a good opening statement describes what happened, not who will testify, so there will be nothing suspicious about your failure to mention the witness in opening statement if he or she eventually does testify. If a shaky witness is also a material actor, you will have to say something about the person, but should try to avoid specific details.

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[60] F. Busch, *supra* note 3, at 796–97. *See also* Linz & Penrod, *supra* note 56, at 34–35 (psychological experiments show that overstatement lowers jurors' opinions of your expertise and credibility).

[61] Tom Pyszczynski et al., *Opening Statements in a Jury Trial: the Effect of Promising More Than the Evidence Can Show*, 11 J. Applied Social Psychology 434, 440–41 (1981).

[62] Stipulations and motions in limine are discussed in Chapter 2.

[5] Weaknesses

Every case you take to trial will have some inherent weaknesses — gaps in your evidence, witnesses who lack credibility, the absence of corroboration on an important issue, unavailable witnesses, and so forth. Trial practitioners and psychologists unanimously agree that weaknesses in your case should be disclosed in the opening statement. By bringing them out yourself in as positive a manner as possible, you take some of the sting out of them, appear honest, and lessen the negative impact when your opponent points them out.[63]

This does not mean you should tell the jury about every piece of conflicting evidence, every possible line of impeachment, or anticipate disputes your adversary may raise. These are not weaknesses in *your own* case. Rather, you must bring out and explain away those weaknesses that will emerge from your own presentation of evidence or that inhere in your theory of the case, regardless of what your opponent does. For example, suppose that your client is accused of being at fault in an accident, and had just left a restaurant where he had consumed a couple of beers. This is a major problem that you must deal with but not overemphasize.

- At 9:00, Jim McCutcheon left the steak house, and got into his car to head home. The car was in good condition, and Jim was alert, sober and not at all tired. He had drunk two beers with his dinner, but was still in full control of his faculties. He would not have driven if he had been feeling any effects from the beer. Jim won't even drive with a cell phone on.

Or, if you anticipate that one of your key witnesses cannot attend, you might say:

- Dr. Darla Brown, who assisted at the operation, has moved to Chicago. If her busy surgical schedule permits her to travel here, she will testify in person. If she cannot get away — if her patients cannot wait — we will still be able to show you her observations that were recorded in the official hospital record.[64]

[6] Damages

One of the most difficult problems of opening statements in civil cases is how to deal with damages. Opinions differ greatly among trial lawyers. One school of thought is that damages, especially in catastrophic injury cases, should be treated only in very general terms, letting the facts speak for themselves. Those who favor this approach fear reaching a climax — the magnitude of the injuries and the enormous amount it will take to compensate the plaintiff — too early. Another school of thought opts for a detailed treatment of damages, because it helps the jury understand the case or because damages may be the stronger part of your case and may predispose the jury to want to find liability. The best advice we can give is to let your theory of the case dictate the amount of emphasis you put on damages in opening statement.

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[63] *See* Linz & Penrod, *supra* note 56, at 13–14.

[64] *See* James Jeans, *supra* note 20 at 309.

Intangible damages, such as pain and suffering, are the hardest to deal with. They are subjective and not susceptible to exact computation. Lawyers are split on the wisdom of naming a specific amount. Asking for a specific amount creates a frame of reference for the jurors, satisfies their curiosity, and communicates the seriousness of the case. On the other hand, it may appear too forceful too early. It may distract the jurors from focusing on the facts and reaching their own conclusions about the seriousness of the case. By committing yourself to a specific amount, you are gambling that the jurors eventually will accept your estimate of the value of pain and suffering and not decide you were overstating the case. Among lawyers who do discuss damages in detail, there are different approaches. Some list them on a chalkboard and add them up; others give only a general total figure at the end when asking for a verdict. For the novice, however, it is difficult to attach a dollar amount to intangible damages without being argumentative, so the best approach may be to discuss the facts underlying these damages, give the jury some idea of their dimensions, and leave the details for closing argument.

[7] Conclusion and Request for Verdict

Every good story must have an ending, and the opening statement is no exception. Your conclusion should summarize the theme of your case and ask the jury for a specific verdict, but it cannot be argumentative. This is a difficult line to draw. It usually is permissible to suggest that the evidence adds up to a favorable verdict, as long as this is done simply and not at great length. For example:

Good. The bottom line is that the evidence will show that the defendant knew what he was doing when he killed Boyd Farnam. He killed Boyd for revenge — an eye for an eye — because he blamed Boyd for the death of his daughter. The people of this state will therefore ask you at the close of the evidence to find him guilty of murder.

Bad. The bottom line is that the evidence will show that the defendant knew what he was doing when he killed Boyd Farnam. He had a motive — revenge. He blamed Boyd for the death of his daughter. He hated Boyd for years, which constitutes malice aforethought. He planned the killing for two weeks, which constitutes premeditation. He had no justification, and Boyd did not threaten him, so there's no self-defense. And Boyd's wife heard him say, "Now we're even, you son of a bitch," as he stood over the body, which shows the killing was intentional. This was a cold-blooded intentional killing by a man who knew what he was doing, and it constitutes murder. The people of this state will therefore ask you at the close of the evidence to find him guilty of murder.

[C] SHOULD YOU WAIVE OR RESERVE OPENING STATEMENT?

Except in those jurisdictions that require the party with the burden of proof to make a prima facie opening, both sides have the option of giving or waiving their opening remarks. Should you ever do so? Trial practitioners unanimously agree that you should not. Because first impressions are so important, you should rarely, if ever, waive your opening remarks.

In many jurisdictions, a defendant has another option — reserving the opening until the beginning of the defense case-in-chief. Should you ever do so? The answer this time is occasionally, but not often. In the overwhelming majority of cases, it will be better to present your opening immediately. If jurors hear only one side of the case, they will have difficulty suspending their judgment. They will tend to form opinions based on the early evidence presented by the plaintiff. The only way that you can effectively combat the problem of early opinion formation is through "forewarning." Research by psychologists shows that if you forewarn jurors that the plaintiff will attempt to persuade them, and provide them with a summary of your facts, jurors will be able to resist their tendency to commit themselves prematurely to plaintiff's position.[65]

However, plausible grounds for deferring your opening statement have been suggested. If the plaintiff's or prosecutor's case could take a number of different paths and you have alternative defenses depending on the strength and course of their case, you should consider reserving the opening. If you will have to concede or admit matters that your opponent might otherwise be unable to prove, such as the fact that your client was indeed at the scene of the crime, you may choose to reserve opening until after you have made a motion for a judgment as a matter of law at the close of the state's case. Also, if plaintiff's case will take several weeks, you may want to reserve your opening; otherwise the jurors will have forgotten your side of the case by the time you get to present it.

[D] SHOULD YOU WRITE OUT YOUR OPENING STATEMENT?

The danger or writing out an opening statement word for word is that you will be tempted to read it word for word to the jury. This is not likely to produce a sincere, spontaneous opening. If your opening statement sounds like a prepared speech, it will result in less effective communication than if it sounds spontaneous. For these reasons, you may want to consider preparing your opening in outline form, and then reducing it to a key word outline before trial. With practice, you will quickly learn that if you know the facts well, you can give an effective opening statement without notes.

You may find it helpful to first write it out completely exactly as you intend to present it, before reducing it to an outline. This technique has two advantages. First, a written opening can be checked carefully in advance for overstatements, exaggerations, while extemporaneous statements based only on outlines are more susceptible to exaggeration. Second, you can check a written statement for objectionable comments and eliminate them. Third, you might know the points you want to make, but not realize how difficult they are to articulate until you try to turn a thought into a sentence. Choosing the best words and phrases to effectively present your thoughts and concepts will require time and effort spent in preparation.

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[65] *See* SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 104 (1988).

[E] PRACTICE

The final stage of preparation is to practice your opening statement — in front of an audience if possible, in front of a mirror otherwise. This serves two functions. First, it will help you become more comfortable with your delivery, especially if you record your opening statement on video or audio tape. This gives you an opportunity to listen to yourself and correct delivery problems. Second, it may be useful in finding out whether your opening is adequate.

> Whether counsel has properly prepared her opening statement can be tested by "trying it out" on a spouse or lay friend. Most people have an interest in trials, so it will be a simple matter to induce one or more of them to listen to the opening statement. . . . If at the end of this test opening statement, the friend has too many questions about matters that he didn't quite understand, that opening statement should not be delivered. Such "testing" should become a matter of routine.[66]

A more sophisticated version of this "test run" is to use what is called a focus group. Social science consulting firms can supply attorneys with focus groups drawn from the community at large that will reflect the demographics of a real jury, so the attorneys can test-market their products.

NOTES

1. ***Allocation of time.*** It is difficult to generalize concerning how much time you should devote to each of the various sections of your opening statement. In a case that turns on the credibility of the victim versus the defendant, such as a date rape in which the defendant claims consent, you may end up devoting most of your opening statement to the introduction of the two main actors. In a breach of contract case for shipping non-conforming goods, you may spend all your time explaining how a camshaft works. Nevertheless, in a typical case in which there are a variety of factual and legal disputes involving several witnesses, you might start from the following suggested range:

> Introductory remarks: 1 minute
>
> Introduction of actors, scene, instrumentalities: 2 minutes
>
> Identification of disputes: 1 minute
>
> Summary of facts: 5–10 minutes
>
> Conclusion: 1 minute

2. ***Two different models of a chronology.*** There are two different ways to organize a chronology. The more common is to following your client chronologically through the event. *E.g.*:

> Ellyn Rosen left her house at 3:15 to drive to the supermarket. She put on her seatbelt and drove east on Second Street. As she passed Walcutt Elementary School on her right, she slowed down. She was watching the road in front and the schoolyard on her right, when she

[66] FRED LANE, LANE'S GOLDSTEIN TRIAL TECHNIQUE § 10.63 (3d ed. 1984).

> heard a sudden screeching of tires and was smashed into by the defendant coming out of a driveway on her left.

The other is to use a time line, in which the movements of several people are charted minute by minute, but there is no protagonist. For example:

> It's 3:15. Ellyn Rosen is leaving her house to go to the supermarket. The defendant is finishing his fourth beer in his apartment on Second Street. Guy Tully is sitting in his fifth grade classroom at Walcutt Elementary School. At 3:16, Ms. Rosen gets in her car and fastens her seatbelt. The defendant goes to the refrigerator for another beer, but the cupboard is bare. Guy looks anxiously at the clock. From 3:16 to 3:20, Ms. Rosen drives east on Second Street. The defendant decides to go out for more beer, puts on his coat, and walks down to his car. Guy counts the minutes to the end of the school day. At 3:20, Ms. Rosen is approaching Walcutt School. The defendant guns his car down the driveway. The bell finally rings and Guy races out of the schoolhouse. At 3:21, these three people come together. Guy runs across the schoolyard. Ms. Rosen looks to her right to make sure he's not going to run into the street. The defendant flies into Second Street without stopping and smashes into Ms. Rosen's car.

See JAMES W. JEANS, LITIGATION, vol. 2: 595–99 (2d ed. 1992).

3. ***Non-Chronological organization.*** The most common alternative to the standard chronological order is a witness-by-witness method, in which you discuss the testimony of each witness independently. Most experienced trial practitioners do not use this approach. Since witnesses inevitably will testify slightly differently than you anticipate, it is embarrassing (and potentially reversible error) to promise that a particular witness will testify to a fact and then discover that he or she testifies otherwise. Especially in cases involving numerous witnesses, jurors are more likely to remember a sequence of events, than a sequence of witness's names and narratives. On the other hand, there are rare occasions when a witness-by-witness method might be more effective — when your case hinges on the testimony of one or two principal witnesses, and you must build a case around their personal credibility.

In severe personal injury cases in which the amount of damages is the primary issue, lawyers sometimes employ a flashback technique. The plaintiff's current lifestyle is described in categories — health, work, sports, personal life, family life, and so on — and each one is contrasted with the plaintiff's lifestyle before the accident. This method will work best if liability is conceded.

4. ***Withholding weaknesses and gambling on your opponent's ignorance.*** It was once popular to base decisions about what weaknesses to disclose during opening statement on what you thought your opponent knew, telling the jury about a weakness only if you think your opponent is likely to bring it out. *See* RALPH MCCULLOUGH & JAMES UNDERWOOD, CIVIL TRIAL MANUAL 583 (2 d ed. 1980). Most practitioners now think this approach unwise. You may misjudge your opponent's knowledge and pass up the opportunity to present favorable evidence or to put a weakness in a favorable light. With modern discovery, it is unlikely you can surprise your opponent by keeping

some evidence hidden. The only persons you are likely to surprise are the jurors — not a very good tactic. Most lawyers recommend that you err on the side of safety, disclosing important weaknesses and giving the jury all the facts, and that you not concentrate on trying to outsmart your opponent. *See* LEONARD DECOF, ART OF ADVOCACY — OPENING STATEMENT § 1.18[3] (2001).

5. *Overuse of phrase "we expect to prove."* Many trial lawyers think that qualifying phrases such as "we expect to prove" or "the evidence will show" are overused. Many trial lawyers think that the repetitious use of these qualifiers before every sentence is unwise. Many trial lawyers think that constantly repeating a phrase like "the evidence will show" breaks up the flow of the story and communicates that you are unsure of the evidence. Many trial lawyers think that it will be sufficient to state clearly at the beginning that the facts you will be summarizing are facts you expect the evidence to prove. *E.g.*, FRED LANE, LANE'S GOLDSTEIN TRIAL TECHNIQUE § 10.46 (3d ed. 1984). What do you think?

§ 4.06 PRESENTING YOUR OPENING STATEMENT

[A] LAST-MINUTE CHANGES

It is likely that jurors will be more receptive to people with characteristics that are similar to their own.[67] During jury selection, you found out things about the jurors — occupation, what kinds of families they have, their backgrounds, and what organizations they belong to. If your client or a key witness shares the characteristics of particular jurors, you should consider mentioning it. For example, suppose your client is college educated, divorced, has two teenaged children, and has worked as an administrator at the state university for twenty years. If the jury is predominantly blue-collar people with large families, you might introduce your client as "John Bridges, a man who has worked hard for twenty years to support his children." Obviously, this part of your opening statement cannot be prepared in advance, because you do not know who your jurors will be.

[B] BEGINNING YOUR OPENING STATEMENT

When the judge asks for opening statements, or looks at you expectantly, you have to begin. For some reason, these first few moments often seem to be the most awkward. The classic advice to the novice is this:

1. Ask to proceed, remembering that this is a trial, not an appellate argument:
   - ***Okay.*** May it please the court.
   - ***Better.*** May I begin my opening statement?
2. Wait until the judge acknowledges you, which may be either explicit ("Go right ahead, counsel") or implicit (nodding in your direction).
3. Unless the judge requires you to use a fixed lectern,[68] walk to a position between counsel table and the front of the jury box. The exact position you select will depend on several factors:

[67] *See* JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY 166–67 (1987).

[68] This is the practice in many federal courts.

- You want to be in an open space that allows you to move around freely.
- You should still be near enough to your own table that you can take a couple of steps and glance at your notes or retrieve an exhibit easily.
- Generally speaking you want to be close enough to the jury that you can speak in an ordinary voice, but not so close that you invade their space and make them (or you) uncomfortable. If your style tends to be informal and conversational, you should consider standing six to eight feet away from the jury at a slight angle.[69] If your style tends to be more formal or oratorical, empirical research suggests you should stand farther back — approximately twelve feet from the jury — for the most effective presentation.[70]

[C] DELIVERY

Delivery is largely a matter of personal style. Trial practitioners agree that you should be sincere, friendly, conversational, and above all, natural. They do not, however, tell you how you can suddenly become all these things if you are not a naturally gifted public speaker. The answer is not to worry about it. Any one of us can sit down with a friend over a glass of wine or cup of coffee and talk about the events of the day. If you can carry on a social conversation, you can make an opening statement. Talk to the jury as you would talk to a friend. If you naturally pace back and forth, gesture with your hands, and rant and rave when you talk, don't try to change your style and become a country lawyer because you happen to like *Matlock.* If you tend to be shy, speak quietly, and feel uncomfortable raising your voice, you should stick to that style and not try to run around the courtroom pounding on tables just because you've seen lawyers do that on *Ally McBeal*.

Within the confines of your own style, there are a number of standard suggestions about how to deliver an opening statement:

- Use as few notes as possible. Whatever you do, don't read a prepared opening statement word for word.
- Maintain eye contact with the jurors, looking from one to another. If looking directly at an individual juror makes you nervous, look between two jurors.
- Use simple words and plain English. Avoid "legalese."
- Don't get too dramatic. Impassioned oratory, emotional outpourings, and bombastic ranting are rarely appropriate during the opening. This is the introduction to your case, not the climax. Too dramatic an opening can disconcert the jurors because it is out of place and it sets a fever pitch too early that cannot be maintained.

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[69] Carol Lassen, *Effect of Proximity on Anxiety and Communication in the Initial Psychiatric Interview*, 81 J. ABNORMAL PSYCHOLOGY 226–29 (1973) (four to eight feet and oblique angle best distance for informal conversation).

[70] Stuart Albert and James M. Dabbs, *Physical Distance and Persuasion*, 15 J. PERSONALITY & SOC. PSYCHOLOGY 265 (1970) (twelve feet best distance for more formal, one-way persuasion).

- Vary your pace, pitch and loudness. A monotonous, droning speaking voice will put jurors to sleep. You can vary the loudness of your voice as appropriate to the subject under discussion, starting softly, raising your voice when talking about car wrecks, or lowering it when discussing your client's intimate family relationships. Let your voice rise in pitch when talking about exciting events and lower when talking about nonexciting events.
- Keep up the pace of your speech, without letting it get so fast the jury cannot follow you. You may have heard the common advice that you should speak slowly and distinctly when you want to deliver a forceful message. That's usually bad advice — slow speech is boring, and jurors will start to daydream. Obviously if you talk too fast, you may sound nervous or be difficult to follow, but communication experts generally believe that fast speech is more effective than slow. Beware, too, of uneven pace — halting sentences containing pauses or the repetitive use of sounds like "um," "er," and "y'know."[71]
- Use good posture. Despite what you see on television, the slouching country lawyer approach is not very effective. Most jurors see poor posture and leaning on courtroom furniture as inappropriate. They expect attorneys to be poised and confident professionals. Good posture (with your hands out of your pockets) can project an image of competence.[72]
- Move around occasionally.
- If you use a lectern, do not become wedded to it. Use it as a place of sanctuary or a place for your notes, but get out from behind it to talk to the jury. Empirical research on communication shows that jurors are more likely to believe you if they can see you.[73]

[D] RESPONDING TO THE UNEXPECTED

[1] Improper Opening by Opponent

If your opponent violates the legal or ethical guidelines in opening statement, you may object and move to strike the offending remarks. Such an objection would look like this:

> DEFENDANT: . . . and we will show that plaintiff's medical bills have already been paid by her own insurance company, so there were no actual damages.
>
> PLAINTIFF [Stands up]: I object your honor. Evidence about whether anyone has paid part of Ms. Butler's hospital bills is barred by the collateral source rule, and it is improper to mention inadmissible evidence in opening statement.

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[71] *See* John Conley, William O'Barr, and E. Allen Lind, *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L. J. 1375 (jurors find this kind of "powerless" speech less persuasive).

[72] *See* RALPH MCCULLOUGH AND JAMES UNDERWOOD, CIVIL TRIAL MANUAL 583 (2d ed. 1980).

[73] JURGEN RUESCH & WELDON KEES, NONVERBAL COMMUNICATION 128 (1972).

Should you object? Most trial practitioners recommend that objections be made sparingly in opening statement, and only if you are sure of your ground and reasonably certain you will be sustained. The full tactical considerations of when to make objections will be discussed in the next chapter. However, as a starting point, consider the following suggestions:

When to object

- If your opponent talks about the credibility of witnesses, object as argumentative.
- If your opponent discusses how the jurors should resolve disputes, object as argumentative.
- If your opponent explains how the facts should be applied to the law, and whether elements of a cause of action have been satisfied, object as argumentative.
- If your opponent mentions evidence that you are absolutely certain is inadmissible, you should object.
- If your opponent mentions his or her personal opinion, object that it is improper to do so.
- If your opponent disparages you or your client, object that it is improper and argumentative.

When not to object

- If your opponent mentions evidence that you think is irrelevant or hearsay. The judge cannot rule in advance of trial on these objections.
- If your opponent is stating facts he or she will not be able to prove, you should forgo objection, because the judge cannot resolve this difference until the evidence is presented.
- If your opponent states the law correctly, an objection is pointless, even if it is a technical violation against discussing law.

You may want to consider tactics other than objections to handle improper opening statements, especially misstatements and overstatements of the evidence. You can take careful notes (or obtain a transcript) of the remarks, and point out to the jury during closing argument how your opponent failed to fulfill his or her promises. If you represent the defendant, and speak second, you can immediately highlight the plaintiff's overstatements as factual issues, asking the jury to listen for the actual testimony. You can remind the jury that what your opponent says is not evidence; that it is easy to say something is a fact, but the law requires it to be proved by evidence.

[2] Responding to Objections

Objections also may be made by your opponent, of course. If there are objections, how should you respond? It probably is unwise to argue with the court or your opponent at this early stage. This is not the time to encourage the jurors to take sides. You are striving to give the jurors a comprehensive picture of your case, and lengthy interruptions detract from this purpose. If you must respond, a simple one is probably best. For example:

- I am only stating what I expect the evidence to show.

If the objection is sustained, apologize and move on. If overruled, you should repeat what you were saying (if there is any chance the jurors may have been distracted by the interruption) and continue.

[3] Should the Defense Change Its Opening Because of What Plaintiff Does?

As the defendant going second, you may find that much of what you wanted to say has been covered by the plaintiff in his or her opening. You may also find that Plaintiff's opening is totally unexpected, involves some bizarre theory of the case you had not anticipated, or completely ignores the main issues. Should you change what you were going to do? Our general advice is to go ahead and give the opening statement you had planned. You are supposed to be talking only about your own case and evidence that does not depend on what your opponent does. Your prepared opening will probably be better than a totally improvised one anyway.

NOTES

1. *Dramatic beginnings.* If you want to see an effective opening statement ploy, watch the opening statement by prosecuting attorney Charlie Stella (Joe Mantegna) in the movie *Suspect* (1987). He walks half way to the jury box, and then leans down to tie his shoe. Every juror's eyes are on him, as he slowly rises and begins his opening statement.

2. *Primacy effect.* Social psychologists Daniel Linz and Steven Penrod argue that the data on the relative effect of primacy and recency effects are ambiguous. It may not be bad for the defendant to defer opening — at least if you have had the opportunity to forewarn jurors in voir dire. There is evidence that the primacy effect favors the plaintiff when opening statements are delivered seriatim. If a second message is delayed, however, there are data suggesting a slight recency effect that would favor the defendant. Daniel Linz and Steven Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 LAW & PSYCHOLOGY REV. 1, 15–16 (1984).

3. *Objecting to your opponent discussing the law.* Contrary to the advice given in the main text, Mark Dombroff advises you to object when your opponent presumes to "instruct the jury on the law." If you do not, your opponent gains the high ground and becomes the "expert," and your status is reduced. DOMBROFF ON UNFAIR TACTICS 345–46 (2d ed. 1988). This is not just a matter of ego. The jury in close cases may tend to defer to the attorney who appears to hold the higher status. Before you do, however, you should find out whether the judge holds the same view you do about the propriety of discussing the law in opening. If you object, as Dombroff suggests, but are overruled by the judge, it will widen the expertise gap between your opponent and you, rather than narrowing it.