I. The Role of the Opening Statement

A. The Opening Moment

Opening statement—the advocate's first opportunity to speak directly to the jury about the merits of the case—marks the beginning of the competition for the jury's imagination. This moment is crucial because the mental image that the jurors hold while hearing the evidence will directly influence the way they interpret it. The attorney who is successful in seizing the opening moment will have an advantage throughout the trial because the jury will tend to view all of the evidence through a lens that she has created.

The importance of access to the jury's imagination cannot be underestimated. We are accustomed to receiving most of our information through the sense of sight, but at trial the jurors will obtain most of their information through the sense of hearing—the oral testimony of witnesses. They will hear descriptions and recountsings of past events, but in almost all cases they will not actually see an enactment of the crucial occurrences. They will, however, envision the events as they believe them to have occurred. Each juror will summon her own mental images of the facts, objects, locations, and transactions that are described from the witness stand. The details and context of these images will, in turn, influence the juror's decision.

Consider, for example, the image that is brought to mind by the words "billiard parlor." Each person who hears that term is likely to think of a specific location that she once visited (or saw on television or in a movie) and use it as a reference in calling up a mental picture of a similar locale. Billiard parlors, in most people's experience, are probably formal, reserved, well-lighted, reasonably open, and fairly respectable. Thus, events occurring in a billiard parlor will have a certain cast to them. Jurors with this scene in mind will tend to fit the events into that image, that is, to view them in a "billiard parlor" sort of way.

On the other hand, consider the image evoked by the words "pool hall." Now many people would probably envision a place that is smoky, dark, perhaps slightly threatening, and probably a little seedy. Things happen differently in pool halls than
they do in billiard parlors. Visibility is better in a billiard parlor; things happen more furtively in a pool hall. A stranger might be questioned in a billiard parlor, but a confrontation is more likely in a pool hall. In other words, the initial mental image dictates, or at least suggests, a variety of assumptions about the nature, context, and likelihood of events.

These assumptions, of course, are not graven in stone. They can be altered, dispelled, or contradicted by the evidence. Still, the creation of an initial image can be a powerful tool. Recall how Professor Henry Hill in the classic musical comedy *The Music Man* convinced the citizens of River City to purchase the instruments for a boys' band. He described their “trouble with a capital T and that rhymes with P and that stands for pool.” The townsfolk listening to Professor Hill envisioned their children sinking en masse into depravity and delinquency because of the mental picture evoked by “Pool.” He would not have been a quarter so persuasive if he had preached that they had “trouble with a capital T and that rhymes with B and that stands for billiards.” The image just isn't that compelling.

Your task in an opening statement is to engage the jury's imagination—to help them begin to imagine the case your way. As we shall see below, this forensic task is complicated by the legal function that the opening statement plays in the conduct of the trial.

**B. Legal Function**

Opening statements exist to help the jury understand the evidence to be presented at trial. Of course, we hope that the evidence will be self-explanatory, but in even the best-organized cases evidence is often presented in a disjointed if not utterly discontinuous manner.

To reduce the possibility of jury confusion as a result of the manner in which evidence is introduced, the courts have developed the concept of the opening statement. At the very beginning of the trial jurors are presented with an overview of the case so that they will be better equipped to make sense of the evidence as it is actually presented. The institutional purpose of the opening statement, then, is to ease the jury's burden by making the trial more understandable; it is not intended to give the lawyers another crack at pleading the case.

Thus, we have the basis of the “nonargument” rule. The courts and commentators are virtually unanimous that opening statements may only be used to inform the jury of “what the evidence will show.” Counsel may not argue the case during opening and is restricted to offering a preview of the anticipated testimony, exhibits, and other evidence. This limitation results in a highly stylized set of rules for the presentation of opening statements, and it informs almost everything else that there is to be said on the subject.
C. Advocacy

As an advocate your governing principle in presenting an opening statement should be to use it as an opportunity to advance your theory of the case. This is not as easy, or as obvious, as it sounds. Many lawyers take the approach of simply listing the witnesses or describing the general tenor of the expected testimony and exhibits. In other words, they discuss only what the “evidence will be.” This is a serious mistake, as it squanders the potential benefits of the opening moment.

A far more useful, and equally permissible, approach is to discuss what the “evidence will show” rather than merely what it will be. The distinction is not semantic. Telling the jury “what the evidence will be” is a neutral formulation geared toward providing a simple synopsis of the trial to come. Explaining “what the evidence will show,” on the other hand, requires you to consider the relationship between the expected evidence and the conclusions and outcomes that you want the jury to reach. In our intersection case, for example, the projected evidence might be that a fire truck approached the intersection and that the defendant did not stop his car. From the plaintiff’s perspective, however, the evidence hopefully will show that the defendant had ample opportunity to observe the fire truck, which was flashing its lights and sounding its siren, but that he was so distracted that he did not notice it.

Counsel need not feel limited to a mundane listing of the evidence to come. Rather, explain to the jury what propositions will be proven and exactly how they will be proven. As long as you avoid lapsing into argumentative form, you may elaborate your theory of the case. While you may not urge the jury to reach certain conclusions, you may arrange your discussion of the facts so that the conclusions are inevitable. Many tools are available to accomplish this goal. In brief, a well-developed opening statement will take advantage of some or all of the following concepts:

Choice of facts. In every opening statement you must decide which facts to include and which to leave out. While you will obviously want to emphasize the facts that you find helpful, there is also considerable risk in telling an incomplete or illogical story.

Sequencing. The order of facts may be as important as the nature of the facts. Recall the question that resulted in the downfall of the Nixon administration: “What did the President know and when did he know it?”

Clarity of description. It is one thing to mention a fact, but it is better to describe it with sufficient detail and clarity as to engage the jury in your own mental portrait.

Common sense. Common sense is used both to judge and to predict outcomes. An opening statement cannot be successful if its story doesn’t jibe with everyday experience. On the other hand, a juror’s reflexive resort to common sense can be used to lead them to a desired conclusion. Consider an opening statement that begins this way: “The defendant woke up late; he had an important meeting to go to; the meeting was to be held far from his home; the defendant drove to the meeting.” Without saying more, common sense suggests that the defendant was in a hurry.
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Moral attraction. An opening statement can be made more attractive when it tells a story that people want to accept. The evidence can be described in a context of shared values or civic virtues so as to add moral force to your client's position. In the intersection case, for example, the plaintiff's evidence will be that she stopped for the fire truck. On the other hand, the evidence will show that the plaintiff knew that it was important not to get in the way of a fire engine, and so she stopped to let it pass.

In the final analysis the most successful opening statements are those that explain exactly how you intend to win your case.

D. The Story Arc

Every trial is a story, and every story is about change and resolution. The story begins; the characters encounter conflicts or challenges; and the story ends when the tensions have been resolved. Playwrights and screenwriters refer to the "story arc," or the sweep of change that takes the characters from one condition at the beginning of the story to a different condition at the end. The story arc proceeds in the form of a narrative in which events are selected and placed in a strategic sequence so as to evoke particular values and lead to a specific conclusion.¹

There are many potential story arcs in literature and film, often involving intricate characterizations, unexpected coincidences, and complex subplots. In litigation, however, there is one single arc that can be used to tell the story of every plaintiff or defendant. For our purposes, it might even be called the universal story arc.

The story arc of every trial can be summarized in the following three sentences: There was a time when everything was fine. Then, something terrible and disruptive happened. Now it is time to provide a remedy or restore order. In other words, every plaintiff's story begins at a time before there were any injuries. It continues through the events of the accident, or broken contract, or other disruption that has caused great harm. The story can only end when the jury (or judge) remedies the damage or rectifies the injustice. Every defendant's story (civil or criminal) begins the same way, with the terrible disruption occurring in the form of a false accusation or erroneous complaint. Once again, the story ends when the judge or jury resolves the conflict by dismissing the wrongful charges.

Opening statement is the perfect opportunity to introduce the story arc, because it allows the attorney to set out the case succinctly and persuasively. In our intersection case, for example, the plaintiff's attorney would point out that his client began her morning with great enthusiasm for the day ahead. The sun was shining, the air was clear, her health was good, and she was on her way to see a wonderful exhibit at the Art Institute. In other words, everything was fine. As she approached the intersection of Sheridan and Touhy, she saw a fire truck with its lights flashing and siren

¹. See Robert McKee, Story (1997).
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sounding, so of course she stopped her car. Then something terrible happened. The defendant failed to stop for the fire truck. Despite the lights and siren, he smashed his SUV into the rear of the plaintiff's car, sending it spinning into the intersection. Although she was wearing her seatbelt, the plaintiff's head snapped back and then forward into the steering wheel. In that moment, her life changed forever. The injuries to her back and neck were extreme and irreversible. She can no longer walk without pain or enjoy any of life's simple pleasures. She has been unable to work, and her expenses have been overwhelming. Although it will never be possible to make her whole, she has come to court for justice.

Of course, counsel will speak at much greater length about the details of the accident and the extent of the plaintiff's injuries, as well as the reasons that a jury verdict will provide restorative justice. All of those details—sequenced for maximum effect—will fit neatly into the story arc.

II. THE LAW OF OPENING STATEMENTS

A. The Rule Against Argument

As we noted above, the rule against argument is inherent in the very concept of the opening statement.

1. Defining the Rule

The rule against argument is easier to state than to define. Moreover, application of the rule will vary from jurisdiction to jurisdiction, and even from courtroom to courtroom. No matter how the rule is articulated, it is almost never hard and fast. Most judges recognize that "argument" is a relative concept and allow lawyers a reasonable amount of latitude.

As a general rule, opening statement ends and argument begins when counsel attempts to tell the jury how they should reach their decision. Difficulties arise when the advocate engages in interpretation or exhortation. You may not urge the jury to draw inferences from facts or to reach certain conclusions. You may not explain the importance of certain items of evidence or suggest how evidence should be weighed. It is improper to comment directly on the credibility of witnesses. Finally, an opening statement may not be used to appeal overtly to the jury's sense of mercy or justice.

For example, it would be proper to tell the following story to a jury during the opening statement in a personal injury case:

Just before the accident the plaintiff was sitting in a tavern. In less than an hour and a half he consumed at least four shots of whiskey. He bought a round for the house and then he left. He left in his car. The accident occurred within the next twenty minutes.

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It would be improper argument, however, to continue in this vein:

The plaintiff was obviously drunk. No person could drink four whiskies in that amount of time without feeling it. Only an alcoholic or a liar would even claim to have been sober under those circumstances.

The second paragraph violates the argument rule not only because it draws the conclusion that the plaintiff was drunk, but also because it tells the jury how to evaluate the plaintiff's anticipated testimony: "Only an alcoholic or a liar would claim to have been sober."

2. Guidelines

A number of guidelines or rules of thumb have been developed for determining when an opening statement has drifted into argument.

The witness test. One possible test is to question whether a witness will actually testify to the "facts" contained in the opening statement. If so, the opening is proper. If not, it has become argument. In the tavern example above, for instance, witnesses will be able to testify to the plaintiff's presence in the bar and his consumption of liquor; therefore, the initial paragraph is appropriate. No such witness, however, would be allowed to testify to the conclusion that the plaintiff is a liar or an alcoholic. Accordingly, the second paragraph is impermissible.

The verification test. An alternative measure is to determine whether the content of the opening statement can be verified, the theory being that facts are verifiable while argumentative conclusions are not. Note that this analysis can be more flexible than the witness test since the comment that the plaintiff was drunk is subject to verification. On the other hand, the "alcoholic or liar" comment continues to fail under this test as well.

The "link" test. A final approach is to consider whether the opening statement contains facts with independent evidentiary value or whether the attorney has had to provide a rhetorical link in the probative chain. Again we see that the first paragraph above is just fine; it consists entirely of classic evidence. The second paragraph, however, is pure rhetoric. It becomes probative only when counsel supplies the explanation, or link, that "no person could drink that amount of whiskey without showing it."

Each of these tests is more holistic than legalistic. There are no case holdings or rules of court that detail how a particular jurisdiction will apply the rule against argument. Even a seasoned trial judge may not be able to explain exactly why an objection was sustained to some portion of an opening statement. As a practical matter it may be best to keep in mind the principle that "argument" occurs when counsel seeks to tell the jury how they should go about reaching their decision.
3. Other Considerations

In addition to the words spoken and the evidence marshaled by counsel, a variety of other considerations may lead a judge to conclude that an opening statement has crossed the line into argument. Some of these are detailed below.

Tone of voice. Words that appear neutral on the printed page may become argumentative by virtue of the tone in which they are delivered. Sneering, sarcasm, volume, or vocal caricature can all transform an acceptable opening into an impermissible one.

Rhetorical questions. Rhetorical questions are inherently argumentative. Such questions can be used to suggest disbelief: “What could she possibly have been thinking of?” Alternatively, they can be used as a statement of incontrovertible certainty: “What other answer could there be?” In either case they strongly signal argument when used in an opening statement.

Repetition. Although an excellent persuasive device when used elsewhere in a trial, repetition can lead an opening statement into forbidden territory. In the tavern scenario above, for example, imagine that the first paragraph of the plaintiff’s opening statement was embellished this way:

Just before the accident the plaintiff was sitting in a tavern. In less than an hour and a half he consumed at least four shots of whiskey. Not two or three, but four. He bought a round for the house, and then he left. He left in his car. That’s right, he drove away from the tavern. He opened the car door, got behind the wheel, put the key in the ignition, started the engine, shifted into first gear, and proceeded to drive down the road. There will be two witnesses who will testify to plaintiff’s consumption of alcohol. And three different witnesses will testify that they saw the plaintiff drive away from the bar in his own car.

Although each of the facts in this extended paragraph could stand as nonargumentative, some judges would no doubt consider the extreme repetition as going too far.

B. Comments on the Law

Closely related to the rule against argument is the general proscription against discussing law during opening statements. The rationale is the same. Opening statements are allowed so that evidence can be organized and previewed for the jury. Not until the end of the case will the court instruct the jurors on the law. The instructions presumably will be comprehensive and therefore will not require a preview. Indeed, it is usually impossible to predict all of the jury instructions until all of the evidence has been admitted. In any event, to the extent that the jury requires advance information about the law, this can come from the judge in the form of a preliminary instruction.
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Nonetheless, it is virtually impossible for counsel to avoid some discussion of the law during any but the simplest opening statement. It is the law, after all, that determines the relevance and importance of the facts being previewed. Without some explanation of the legal issues, a jury will have no way to tell whether certain facts are significant or merely window dressing. Most judges attempt to steer a middle course when it comes to discussion of the law during opening statements. It is almost always permissible to frame the legal issues for the jury. A sentence or two devoted to an explanation of the legal significance of the evidence will also usually be allowed. Once the discussion of the law becomes intricate, lengthy, or controversial, however, an objection will usually be sustained.  

C. Persuasion

While argument is prohibited during opening statements, persuasion is not. As long as counsel refrains from suggesting conclusions to be drawn from the facts it is permissible to arrange those facts in an order that maximizes their favorable impact. Furthermore, persuasive ordering of the facts by both counsel will typically assist the jury in understanding the case because the jurors will then be able to see just how the parties' stories diverge.

Counsel can persuasively order the facts either through incremental development or through contrast. Incremental development involves the successive ordering of a series of discrete facts, each building upon the last, until the desired conclusion becomes obvious. Although the facts will be related, they need not be presented in chronological order. The following example demonstrates how the plaintiff might use incremental development in our fire engine case:

The defendant awoke at 7:00 a.m. He had an important meeting scheduled with a potential new client for 8:30 that morning. The client had not yet decided whether to hire the defendant, but the account would have been worth a lot of money. The meeting was to be held downtown, which was sixteen miles from the defendant's home. The defendant showered, shaved, dressed, and ate a quick breakfast. He went to his car, which was parked about a block away. All of this took approximately fifty minutes. By the time the defendant got to his car it was 8:00 a.m. He had thirty minutes left before the new client was scheduled to arrive at his office.

Note that the example begins when the defendant woke up, it next skips ahead to the information about the scheduled meeting, and it then goes back to describe the rest of the defendant's morning routine. Other facts, of course, could be added to show how seriously late the defendant was and therefore how likely he was to drive carelessly or too fast. The point is that the individual events build upon each

2. It should go without saying that an incorrect statement of the law is objectionable, even if made only in passing or for the purpose of framing the issues for the jury.
other to explain, without saying so, why the defendant would have been driving negligently.

Contrast is the juxtaposition of contradictory facts, most often used in an opening statement to demonstrate the implausibility of some aspect of the opposing case. The defendant in the fire engine case might use contrast this way:

The plaintiff in this case is seeking damages for pain and suffering and lost income. She claims a permanent disability. You will see medical bills offered into evidence that start with the date of the accident and continue right through to last December 10. You will also see a receipt for the purchase of a new backpack and camp stove, purchased by the plaintiff last August 17. She went to the doctor on August 15, she bought her backpack on August 17, and she went camping at Eagle River Falls on August 31. She returned to town on September 3. Her next visit to the doctor was not until October 19.

Without resort to argument, the simple contrast between the medical bills and the camping trip casts doubt on the plaintiff’s allegation of permanent injury.

The line between persuasive ordering and argument is crossed when counsel attempts to inject judgments, conclusions, or other means of reaching a decision into the opening statement. It is fair game to present facts showing, say, that the plaintiff requires a large judgment to be fully compensated:

Each morning when the plaintiff wakes up, he needs help to get out of bed. He cannot walk to the bathroom himself. He cannot bathe or clean himself. He cannot fix his own breakfast. If he wants to read a newspaper or a book, someone must get it for him. Each day, for twenty-four hours, he must pay a nurse or housekeeper to do all of the things that other people are able to do for themselves.

It is not fair game, however, to continue in this vein: “The plaintiff could just as easily be your own neighbor or relative; he deserves your generosity.”

III. Structure and Elements

If a trial is a persuasive story, the opening statement is the attorney’s first opportunity to tell the whole story without distraction or interruption. Not until final argument will counsel again be able to speak directly to the jury. All other communication will be filtered through the awkward, and often opaque, process of witness examination. If your theory is to be presented in its entirety, opening statement is the time to do it. Because of the conventions that control the content and form of the opening statement, it is particularly important to pay careful attention to its structure and elements.
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A. Communicate Your Theory

The single most important rule for opening statements is to present a coherent theory of the case. You will, of course, have developed such a theory in your pretrial preparation since no case can be won without one. The challenge now is to communicate it clearly, succinctly, and persuasively.

Recall that a trial theory is the adaptation of a factual story to the legal issues in the case. Your theory must contain a simple, logical, provable account of facts which, when viewed in light of the controlling law, will lead to the conclusion that your client should win. In short, you will want to use the opening statement to explain to the jury why the verdict should be in your favor.

A successful theory will be built around a persuasive story. Ideally, such a story will be told about people who have reasons for the way they act; it will explain all of the known or undeniable facts; it will be told by credible witnesses; it will be supported by details; and it will accord with common sense. Thus, your opening statement should, at some point and in some manner, address all of the following elements.

What happened? The crucial events in your story will be the ones that speak to the legal elements of your claim or defense. If you represent the plaintiff in a tort case, your opening statement should contain sufficient facts from which a conclusion can be drawn that the defendant was negligent. The defendant’s opening, on the other hand, should emphasize facts pointing toward his own caution or the plaintiff’s fault.

Why did it happen? It is not sufficient to list the facts. A story is most persuasive when it explains why events occurred as they did. It is particularly important to explain why individuals acted as they did, since a compelling reason for an action will tend to rule out or negate alternative possibilities. For example, you may explain that the defendant in a collision case was driving slowly and carefully just before the accident. This story will be more persuasive if it can be supported with a reason. Perhaps she was returning from an antique auction, carrying an expensive and fragile chandelier in her back seat. Obviously, then, she would be inclined to be more than normally cautious. Her reason for driving slowly not only supports her version of events, but it also makes less likely a claim by the plaintiff that she careened around a corner at high speed.

Which witnesses should be believed? Trials almost always revolve around conflicting testimony, with one set of witnesses supporting the plaintiff’s theory and another supporting the defendant’s. It is improper to argue the credibility of witnesses in your opening statement, but you may, and should, provide the jury with facts that bolster your own witnesses and detract from the opposition’s. While too much background can easily clutter your opening statement and distract the jury, positive information—such as education, community ties, and family responsibility—should
be provided to humanize your key witnesses. Bias, motive, prejudice, and interest in the outcome of the case are always relevant to a witness's believability. Explain the facts that demonstrate your own witnesses' lack of bias; include as well the facts that demonstrate the motive or interest of the opposition.

How can we be sure? As should be apparent from the examples above, the persuasiveness of an opening statement—indeed the persuasiveness of virtually any aspect of a trial—is often established through details. Broad assertions can stoke out territory and raise issues, but it is most often the details upon which the truth will be determined. An essential element of an opening statement, then, is the judicious use of details in support of the accuracy, dependability, or believability of your facts.

Does it all make sense? Finally, the theory you present in opening, or at any other point in the trial, must make sense when it is measured against the everyday experiences of the jurors. The provision of reasons, biases, or details, no matter how compelling they are to your way of thinking, will accomplish nothing if the jurors cannot place them into a context that they understand and accept. It is meaningless to suggest that a witness should be believed because she received an "A" on her contracts exam in law school. Although that detail may make her praiseworthy in some eyes, it is not a common-sense indicator of honesty.

B. Communicate Your Theme

Your trial theme, as distinct from your theory, should be expressed in a single sentence that captures the moral force of your case. A theme communicates to the jury the reason that your client deserves to win. Thus, introducing a theme in opening is particularly effective as a persuasive matter since it can focus the jury's attention on a cognitive image that you will return to throughout the trial.

Nonetheless, using a theme in your opening statement presents some difficulty. Unlike a trial theory, a theme is intended to reflect on or interpret the evidence rather than simply describe or outline it. Overuse or constant repetition of your theme may bring you perilously close to argument. Most judges, however, will allow the statement of a theme at both the beginning and the end of an opening statement, especially when it is phrased in terms of fact as opposed to opinion or characterization.

C. Utilize Primacy

The principle of primacy posits that in all aspects of a trial a jury will remember best those things that they hear first. The opening statement therefore provides a double opportunity to exploit primacy. The first few minutes of your opening statement constitute the "beginning of the beginning" and therefore have the potential to be among the most memorable moments of the trial. Put them to good use.
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It is essential not to waste your opening moments on trivia or platitudes. Get right to the point. State your theme. Explain the most important part of your theory. Lay the groundwork for a crucial direct or cross-examination. Foreshadow your closing argument. Above all, do not spend your most precious minutes meandering through a civics-class exposition on the virtues of the American jury system.

In the fire engine case, the plaintiff might want to open something like this:

This is a case about a defendant who was too busy to be careful. Because he failed to stop for a fire truck, he smashed his car right into the back of the plaintiff’s automobile. The fire truck was flashing its lights and sounding its siren. All of the other drivers noticed the fire truck and stopped. Except the defendant. He had his mind on an important meeting, so he kept on driving until it was too late. Now the plaintiff will never take another step without feeling pain. Let me tell you exactly what happened.

The above opening is direct and to the point. It states theory and theme right at the outset and launches immediately into the facts that support the plaintiff’s case. The three central points that the plaintiff will make are all mentioned: (1) the fire truck was clearly visible, (2) all of the other traffic stopped, and (3) the defendant was preoccupied and caused the accident.

Two principles can guide your selection of material for the beginning of the opening statement: impact and relationship.

Impact. Your opening statement should begin with the information that you hope will have the greatest impact on the jury. What facts most support a verdict in your favor? What issues will be most hotly contested? Which witness will you rely on the most? Choose the point that you most hope the jury will take with them when they retire to deliberate.

Relationship. There will be many important evidentiary facts in most trials. Since you will want the jury to remember them all, it may be difficult to decide just which ones to begin with. This decision can be made easier if, in addition to impact, you consider the relationship of the information to some other aspect of the trial. Will the testimony of your key witness be attacked? Will you need to undermine or impeach the testimony of an opposition witness? Will your closing argument rely on certain inferences or conclusions? You can use the first moments of your opening statement to begin developing the points to which you intend to return.

D. Utilize Issues

Your case can be only as persuasive as the theory behind it, and your theory can only be persuasive if it ties the evidence to the legal issues. Your opening statement, then, must address the legal issues in your case. Ultimately, the jury will not be
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asked to conclude whether a particular witness is a good person or whether events occurred in a certain order. Such decisions may be reached along the way, but they are only important to the extent that they affect the actual verdict in the case. Defense counsel may do a stunning job of convincing the jury that the plaintiff is foolish or forgetful, but she will lose her case unless she also persuades them that the defendant was not negligent.

It is imperative, therefore, that your opening statement explain to the jury why your facts are important to their decision. Although a statement of importance may seem to approach argument, recall that the opening statement's purpose is to help the jury understand the evidence. A serial presentation of facts, no matter how beautifully organized or well delivered, cannot be understood clearly without some mention of the purpose for which the evidence will be offered. Accordingly, it would be unusual for a judge to disallow a reasonable explanation of the issues toward which the evidence is directed.

Assuming that the fire engine case is being tried in a comparative negligence jurisdiction, the defense may want to show that the plaintiff was partially at fault for the accident. In her opening statement counsel could simply list a set of facts that comprise the plaintiff's contribution to the accident and hope that the jury draws the right conclusion: the plaintiff didn't pull over; the plaintiff's brake lights were not working; and, although she claims otherwise, the plaintiff may not have been wearing her glasses. It will be more persuasive, however, and truly more helpful to the jury, if the opening first explains the import of the evidence:

One issue in this case is whether the plaintiff herself contributed to the accident. You see, even if the defendant was negligent in some way, the law still asks whether the plaintiff was partially at fault as well. And if she was at fault, then any damages would have to be reduced. The evidence will definitely show that the plaintiff was at fault. When she saw the fire truck she slammed on her brakes right in the middle of the road. She didn't pull over to the side. She didn't leave a clear lane for the car that was immediately behind her. That made it impossible for the following driver, my client, to avoid the accident. Furthermore, her brake lights weren't working on the day of the accident. She knew they weren't working, but she hadn't gotten around to getting them fixed. So when she slammed on her brakes, my client had no way of knowing that she was going to make a sudden stop instead of pulling over into the parking lane.

The statement of the law is an acceptable part of this opening statement because it is correct, neutral, and closely related to the facts that follow. It is helpful because it focuses attention on the import of the facts concerning the plaintiff's driving. The evidence is going to be offered not to show that the plaintiff was generally a poor driver, but rather to show exactly how she contributed to the accident in this case.
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E. Use the Evidence, Don’t Just Display It

There is a world of difference between using evidence and merely displaying it. Displaying evidence is a vice most common to unprepared or disorganized lawyers, and it is frequently the result of insufficient attention to theory and analysis. While no diligent attorney would intentionally use the opening statement to list a series of facts in a purely random order, many lawyers are attracted to the allure of some seemingly natural organization. Use of the evidence, however, involves the purposeful ordering of the facts, as we have discussed above, in the manner that best supports counsel’s theory of the case.

1. Avoid Witness Summaries

The “witness-by-witness” approach, in particular, is to be avoided. It is a mystery why many lawyers think that they can help the jury understand the case by naming all of the witnesses and outlining the expected testimony of each. Recall that the very purpose of the opening statement, indeed its underlying justification, is to overcome the disjointed fashion in which the witnesses will produce evidence at trial. Witness-by-witness rendition of the facts is unlikely to produce a coherent story when the witnesses take the stand and testify for themselves. This method of organization becomes no more helpful simply because a lawyer has substituted a summary of the testimony for the actual direct and cross-examinations.

2. Be Wary of Chronology

Chronology is an obvious, natural, and often useful organizing technique for opening statements. All events in the real world, after all, occur in chronological order. Moreover, we are all used to thinking of life in chronological terms. It is for this very reason, in fact, that opening statements have become part of the trial: to allow lawyers to take individual witness accounts and mold them into a single chronological narrative.

Still it is all too easy, and sometimes counterproductive, automatically to allow chronology to establish the organization of an opening statement. Simply because events occurred in a certain order is not a sufficient reason to present them that way to a jury. This is especially the case when your story involves simultaneous, or nearly simultaneous, events that took place in different locations.

a. The Drawbacks of Chronology

In the fire truck case, for instance, a strict chronology might begin with the time that the plaintiff left her home. The defendant probably left his home shortly thereafter, and the fire engine left the station last of all. None of this ordering should matter to either party’s story, however, since the only important fact is their concurrent arrival at the fateful intersection. While it may not undermine either opening statement to detail the order in which the vehicles departed, it will certainly clutter the stories with useless, and perhaps confusing, details.
Chronology can also interfere with the logical exposition of your theory. The plaintiff’s theory in the fire truck case is that she stopped for the fire engine, as required by law, but the defendant did not. The defendant was at fault because he was preoccupied and failed to keep a proper lookout. Perhaps he was speeding, and perhaps his brakes performed inadequately due to poor maintenance. The various elements of this theory both precede and follow the accident itself. For example, the defendant woke up late before the collision, but he grabbed his phone to cancel his meeting after the collision. Both of these facts directly support the theory that the defendant was in a hurry that morning. Even though they occurred at different times, they can have more impact if they are presented together.

Similarly, consider the importance of the defendant’s failure to have his brakes repaired. If the opening statement were presented in strict chronology, that fact would be introduced to the jury before they had any way to measure its importance. Of course, no matter when the jury hears it, it sounds bad for the defendant to have ignored a warning about his brakes. But a chronological recitation will separate this fact from the moment of the accident, thus requiring the jury to reach back in their memories in order to recall its importance.

The brake story is most persuasive when it is added to the events of the accident, not when it precedes them. Presented first, the brake story, at best, will evoke curiosity: “I wonder why that will turn out to be important?” Presented after the account of the accident the brake story should result in understanding: “Oh, so that is why he didn’t stop in time.” As an advocate you should almost always prefer to have the jury understand your theory rather than wonder about it.

* The Usefulness of Chronology*

Despite the drawbacks mentioned above, the judicious use of chronology is an essential part of every opening statement.

Chronological development should always be used to explain independent events. Every trial can be understood as a series of subevents, which fit together to comprise the entire story. The order of addressing these subevents is always open to determination by counsel. The subevents themselves, however, have their own internal logic, which generally can be understood only when explained chronologically.

The fire engine case provides an excellent illustration of this principle. The plaintiff’s case consists of at least the following four subevents: (1) the collision itself; (2) the defendant’s hurried morning; (3) the defendant’s failure to repair his brakes; and (4) the fire department’s policy of always sounding the siren on a vehicle that is responding to a call. These four elements—and of course there may be others—can be arranged in a variety of ways to make the case more persuasive. Once you have determined the overall structure, however, it will make the most sense, as you reach each individual component, to detail it chronologically. Suppose that plaintiff’s counsel has decided to organize her opening statement in the same order that
the subevents are given above. After going through the facts of the accident in the same sequence in which they occurred, she would proceed to develop the secondary components by relying upon the chronology of each one:

Why didn't the defendant stop when all of the other traffic did? We know that he woke up late that morning and that he had an important meeting to attend downtown, which was scheduled to begin only an hour and a half later. By the time he washed and shaved and went to the garage where his car was parked, he had only about thirty minutes left to get to his meeting. It was sixteen miles from his home to his office. As he headed south on Sheridan Road, every delay made him that much later for his meeting.

By the time he got to the corner of Sheridan and Touhy, he only had twelve minutes or so before his meeting was to start, yet he still had seven miles to go. We know that the fire truck was already at that corner, flashing its lights and sounding its siren. There is no evidence that the defendant intentionally ignored the fire truck, but he obviously didn't respond to it in time. Although at some point he hit his brakes, he still went crashing into the back of my client's car.

Was there something wrong with the defendant's brakes? Could he have stopped in time if they had been working better? We know that just a week before the accident he had his car in for servicing. The mechanic advised him to have his brakes relined, but the defendant decided not to take the time to have the repair work done. He left the garage without having his brakes fixed.

We also know that the fire truck gave the defendant plenty of warning. It was flashing its lights and sounding its siren. We know this because it has always been strict fire department policy to use these warning signals whenever an engine is responding to a call. And so it was that day. Engine Number 9 was responding to a call, so, as one of the firefighters will tell you herself, the lights and siren were being used with full force.

Note, by the way, the reference to the testimony of the firefighter in the paragraph about the fire truck's lights and siren. Even though the story is not being presented in a witness-by-witness fashion, it will often be helpful to refer to the source of certain evidence, particularly when you know that it will be disputed.

Although the subevents as units are presented out of chronological order, internally each one is detailed basically as it occurred. The result of this approach is that the jury will be able to understand the context of the entire story as well as the precise nature of the individual occurrences that comprise the story.
3. Use Details Persuasively

As we have seen, the use of evidence in an opening statement depends on the persuasive arrangement of major propositions and supporting details. While the application of this approach will vary tremendously from case to case, the following few generalizations should prove helpful.

a. Big Ideas, Then Details

As a general rule, an opening statement should be organized as a series of big ideas, each of which is immediately supported by persuasive details.

As we have discussed above, jurors will tend to resolve a case on the basis of certain turning points or crucial issues. Details can be marshaled to make your version of these turning points more persuasive. For example, one major issue in the fire truck case will be whether the engine was sounding its siren just before the accident. If the jury decides that there was a siren, it will be more likely to bring back a plaintiff’s verdict; if it decides there was no siren, then the defendant has a better chance of prevailing. Thus, the use of the siren could be a turning point in the trial. The plaintiff’s position on this issue can be made more likely by adding details: the fire truck was responding to a call; there is a departmental policy to use the siren whenever responding to a call; the driver of the truck was an experienced firefighter, well aware of the policy; other motorists stopped their cars.\(^3\)

The details, however, have little meaning when offered on their own. They become important only in light of the turning point on which they are offered. The fact that the fire truck was responding to a call doesn’t tell us anything about the way the accident happened, but it does tell us that the truck was almost certainly using its siren. In the same vein, the jurors will have no reason to care about the experience level of the fire truck driver until they are first informed that the use of the siren is an issue in the case. It is for this reason that details are best used to follow up or support the initial explication of a bigger idea.

b. Weave in the Witnesses

While the witness-by-witness approach is unlikely to result in an effective opening statement, this does not mean that individual witnesses should not be mentioned in the course of your opening. To the contrary, it is often quite important to inform the jury of the source of a specific fact or the precise nature of some anticipated testimony. The key is to weave the information about the witnesses into the narrative so that the witness references arise in the context of your theory of the case.

As we have been discussing, the use of the siren is likely to be a turning point in our fire truck case. The plaintiff says there was a siren, and the defendant says there

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\(^3\) In the absence of details, the “siren question” would simply be a matter of the plaintiff’s word against the defendant’s. Note, then, that one value of the details is that they add persuasive force to the plaintiff’s theory without relying upon her own credibility. This, in turn, makes the plaintiff all the more credible, since her version of events is supported by objective facts.
was not. The plaintiff’s opening statement can bolster her position by weaving in
witness information when her narrative reaches the siren issue:

Just as she reached the intersection, the plaintiff saw and heard an
approaching fire truck. It was sounding its siren and flashing its lights.
We know that the siren was operating because Lieutenant Sarah
Tigre, the driver of the fire truck, will testify that she always sounds
the siren when she is answering a call. That is fire department policy,
and Lieutenant Tigre is a decorated firefighter who has been with the
department for over ten years. Perhaps, for whatever reason, the defen-
dant didn’t hear the siren, but Lieutenant Tigre will testify that she is
certain that she was doing her official duty—that is, using her audio
and visual alarms—on the day when the accident occurred.

Used in this manner, the information about Lieutenant Tigre corroborates and
strengthens the plaintiff’s theory of the case. It neither stands alone as an isolated
description of the witness, nor does it interfere with the flow of the narrative. Rather,
it adds unapologetic support to the plaintiff’s theory at the precise moment when
support is likely to be most readily understood.

<table>
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<th>Opening Statement Preparation Checklist</th>
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| Did you refrain from arguing?          | Are you interpreting the evidence or urging the fact
|                                        | finder to draw inferences? Are you explaining the
|                                        | importance of evidence or suggesting the weight it
|                                        | should be given? Are you appealing overtly to the
|                                        | fact finder’s sense of mercy or justice? If so, you are
|                                        | arguing and you should revise your opening
|                                        | statement. |
| Did you refrain from commenting on the | Are you going beyond straightforward explanations
| law?                                   | of the legal issues in the case? If so, save the
|                                        | further
|                                        | discussion for closing argument. |
| Did you weave your theory and theme  | Are you beginning with a clear statement of your
| into your trial story?                 | theory and theme, and then giving the supporting
|                                        | facts in narrative form? If not, rework your opening
|                                        | statement to make it more persuasive. |
| Did you order and contrast the facts   | Did you use incremental development of the facts to
| of your case persuasively?             | support your theory and theme? Did you use contrast
|                                        | to point out the opposing party’s factual weaknesses?
|                                        | If not, rework your opening statement to make it more
|                                        | persuasive. |

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Opening Statements

IV. CONTENT

The range of triable subjects being virtually limitless, is it possible to define what goes into a good opening statement? Of course every good opening statement, no matter what the case, contains enough information to help you win the trial, but not so much as to distract the jury or risk exploitation by the other side. The following considerations should be helpful in most trials.

A. True and Provable

Every fact that you include in your opening statement must be true and provable. We have already seen that the law limits opening statements to a preview of the evidence that will be presented once the trial begins. It is not enough, however, that some witness may be willing to make a certain statement. The ethics of our profession require that we never knowingly be involved in presenting false evidence. This squire applies not only to offering testimony, but also to outlining the case during the opening statement.

As we discussed earlier, the concept of truth takes a very specific form in the context of the adversary system. Since the jury, or judge, is assigned the role of deciding the truth of facts, counsel is generally obligated only to present one competing version of events. An attorney does not need to subject potential witnesses to a polygraph examination or be convinced of a witness's truthfulness beyond a reasonable doubt. The attorney may not, however, present evidence known to be fraudulent. Stated conversely, while you needn't be persuaded to a moral certainty, you must have some reasonable basis for believing a fact to be true before you can offer it from the witness stand or use it during your opening statement. It does not matter how good it makes the story, it does not matter how well it fits your theory of the case, it does not matter how incontrovertible your position might be—no fact may be used in an opening statement unless it meets the test of validity.

Conversely, even assuredly true facts should not be used in an opening statement until they have been subjected to the test of provability. While there may occasionally be reasons to depart from this principle, you should, as a general rule, omit from your opening statement any fact that you are not certain you will be able to prove at trial.

An opening statement is in many ways a promise to the jury. By making a definitive statement about the future evidence, you have committed yourself to produce that evidence. If your witnesses turn out to be less conclusive than your opening statement, you may seem at best to have overstated your case. At worst, you may seem to have deliberately misled the jury. The same thing can happen when promised evidence fails to materialize, either because the court declines to admit it or because it turns out to be unavailable. Even if the jury doesn't immediately realize that there has been a gap between your opening and your proof, you can be certain that opposing counsel will point it out during final argument.
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Your strongest evidence should generally be at the heart of your opening statement. The central evidence will be a combination of: (1) the facts most essential to your case, and (2) the facts least likely to be disputed.

In the fire truck case it is central to the plaintiff’s position to prove that she did indeed stop for a fire engine. The opening statement, if it does nothing else, must firmly establish in the jury’s mind the presence of the truck and its use of its warning signals. Even if these facts will be disputed, they must be developed in the opening statement because the plaintiff cannot win without them.

Additionally, the plaintiff’s opening statement should make liberal use of undisputed evidence even if it is not absolutely necessary to the case. The plaintiff can win the fire truck case without proving that the defendant was in a hurry. On the other hand, many of the specifics of the defendant’s rushed morning cannot be controverted, which obviously makes them all the more persuasive. Thus, the plaintiff should be sure to include facts such as the time and importance of the defendant’s business meeting that morning, the distance from his home to his office, the route he had to drive, his parking arrangements, and his telephone call to the office immediately after the collision.

B. The Operative Facts

The most important part of any opening statement is its treatment of the operative facts. Facts win lawsuits. Everything else—organization, presentation, theme development—must be seen as an aid to communication of the facts of the case.

It goes without saying that there can be no recipe for presenting the facts of a case. Each trial is unique. Some call for delicate innuendo; others may benefit from a frontal assault. Some cases rest heavily on the credibility of witnesses, while others depend on the timing of events. Often, however, the operative facts of a case will include some or all of the following.

1. Action and Key Events

Many cases revolve around one or more actions or key events. Most cases involving personal injury, crimes, medical malpractice, or property damage, to name only a few, require the description of a series of physical occurrences. An earlier section discussed the importance of using chronology to detail a single discrete event, as well as its frequent misuse as a device to outline an entire case. This section addresses other aspects of presenting an account of the key events.

Whether representing the plaintiff or the defendant, it is important to use the opening statement to begin to paint a picture of the events in a way that helps the jury visualize the case from your client’s point of view. To do this effectively you must first have created your own mental image, which will, of course, be consistent with

4. See section III(E).
the testimony to be given later by your own witnesses. The importance of preparation cannot be overemphasized. You must know precisely how, and in what terms, your witnesses will relate each incident. You must be familiar with all of the physical evidence, and you must, if possible, have visited the site of the events. Competent counsel should never risk the possibility of dissonance between the events portrayed in the opening statement and those that emerge from the witnesses’ testimony.

In depicting events, nouns and verbs can be much more helpful than adjectives and adverbs. This may not be immediately obvious since we commonly think of modifiers as adding descriptive depth. Consider, however, which of the following accounts is more evocative of the crime. First, a short paragraph that makes maximum use of adverbs and adjectives:

It was a heinous, horrible crime. The defendant’s actions were inhuman and awful. He brutally grabbed at the victim’s gold chain, fiercely yanking it away. He left an ugly, ugly bruise on the victim’s neck. Unsatisfied with the proceeds of the armed robbery, the defendant then coldly and wantonly stabbed the victim twice, leaving his jacket lying in a bloody heap. It was indeed a cowardly act, taken against a defenseless victim.

Now consider a paragraph with virtually no modifiers at all:

The defendant placed his knife against the victim’s body. Without waiting, he grabbed the gold chain from the victim’s neck and wrenched it until it snapped, leaving bruises on the victim’s neck that didn’t heal for weeks. Although he had already taken what he wanted, he twisted the knife into the victim’s shoulder, turning it as he pushed, and watched as the blood welled to the surface. Then he stabbed the victim again, until blood soaked the jacket all the way through.

The second paragraph is more vivid, not only because of its slightly greater length, but primarily because it describes the deeds as they occurred. In contrast, the first paragraph actually short-circuits the action by substituting value-laden modifiers for an account of the events themselves.

Of course, it would be foolish, if not impossible, to attempt to deliver an opening statement free of modifiers. Adjectives and adverbs are useful precisely because they convey compact meanings. Often they are indispensable. It is impossible to describe a red rubber ball without using the word “red.”

Counsel must bear in mind, however, that modifiers frequently stand for judgments rather than for descriptions. Words like heinous, brutal, and awful or lovely, wonderful, and grand may convey the lawyer’s opinion about something, but they do not depict a vision of the events themselves.

5. It inevitably takes more words to write without adjectives and adverbs since one of the functions of a modifier is to compress concepts into a single word.
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2. The Physical Scene

The meaning and legal significance of events often depends on their location. Actions that are lawful or innocuous in one locale may become the basis of liability if they occur somewhere else. It is negligent to drive an automobile on the wrong side of the road. It may be an unfair labor practice for management to approach potential union members in their homes. It may violate a zoning ordinance to operate a law practice in a residential neighborhood. Similarly, the physical details of a particular setting may affect issues such as probability, credibility, or visibility.

It is important, therefore, to use your opening statement to set the scene for major events. While virtually all commentators agree that the scene should be set apart from a description of the action itself, there is divided opinion about the sequence in which a scene should be described. Many lawyers suggest putting all of the details in place before going on to portray the action. In this way, the jury will already be aware of the physical details as the events unfold. Alternatively, you may describe the action first, and then go back to fill in the specifics of the setting. The theory behind this approach is that the importance of the events should be obvious, but the importance of the details will require some context to become apparent. There is no reason to care about the location of a stop sign until we know that there was a collision in the middle of the intersection.

Setting a scene involves describing a potentially unlimited number of details. Your opening statement should dwell on those details that are significant to your case while avoiding those that are merely clutter. In the fire truck case, for example, it is important for the plaintiff to note that the pavement was dry, since that would affect the defendant's stopping distance. The height of the curb, however, would be extraneous under virtually any theory of the case.

3. Transactions and Agreements

Most business cases involve written and oral communications far more than they do physical occurrences. In many ways these nonphysical events may be more difficult to describe during an opening statement since there is little or no activity to depict. Nonetheless, when a case turns on the interpretation of a document or the meaning of a series of telephone calls, counsel must search for a way to bring the transaction to life.

The surest way not to bring a business transaction to life is to parse it out in minute chronological detail. It is generally far better to begin at the end. Explain the gist of the agreement and then go back to fill in only those details that are necessary to support your interpretation. There is no need, for example, to recount every telephone conversation that went into the negotiation of a purchase order. It will usually be sufficient to delineate the terms of the order itself, supported by an account of one or two crucial conversations.
It is not enough, however, simply to recite the terms of an agreement and then to point out that it was either kept or broken. While such an approach may, in the driest sense, convey your theory, it will not add moral weight to your case. Recall that your trial theme is intended to provide the jury with a reason for wanting to rule in your favor. This can only be done if you are able to explain the “rightness” of your interpretation of the contract. Why were the particular terms so important? Why was your client’s reliance on the other party justified? Why will the other party’s interpretation lead to chaos and disaster for the entire republic?

4. Business Context

Business context can be crucial to an appreciation of many agreements and transactions. Words may have specialized meanings, or unspoken expectations may be understood by all of the parties. Detailing the business context of a contract or other transaction may be the equivalent of setting the scene for an automobile accident.

Business context can include information on industry practice, course of dealings, production standards, insurability, cost of credit, lines of authority, agency, normal business hours, grievance procedures, and a host of other factors that may form the backdrop for even the simplest transaction.

5. Relationship of the Parties

As much as any physical detail, the past relationship of the parties can speak volumes about the merits of a case. It will add a whole new dimension to a contracts case if it is revealed that there had been a history of misunderstandings between the buyer and the seller. Past animus can be used to show motive or malice. A tradition of reliability, on the other hand, can be used to establish the reasonableness of a party’s actions.

6. Motives and Motivations

As we have consistently seen, stories are more persuasive when they are told about people who have reasons for the way they act. An opening statement, therefore, should always attempt to stress the motivations for the parties’ actions. The activity that you describe will be far more plausible if, at the same time, you are also able to explain why the people involved acted as they did.

It must be stressed, however, that the opening statement is not the time to speculate about a person’s secret motives. The opening statement must develop motive in the same way that it treats everything else—through the preview of evidentiary facts. The rule against argument applies with full force, and probably then some, to the discussion of motive.
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Thus, motivation must be carefully established through the use of discrete, incremental facts. You cannot say that the plaintiff is greedy. You can point out five previous occasions on which the plaintiff sued for breach of contract, each one based upon an imperceptible flaw in the goods delivered.

7. Amount of Damages

There are two schools of thought regarding the treatment of damages during the plaintiff's opening statement. One approach is to make the discussion of damages a significant part of the opening, explaining the nature of the injury and the amount being sought. The theory here is to acclimate the jury to the fact that the plaintiff will be requesting substantial monetary compensation. Where the amount sought is extremely large, many lawyers believe that it will take some time for the jury to become used to thinking about such big numbers. Thus, they like the process to begin as soon as possible.

Other lawyers believe that damage amounts will have little meaning until the jury actually has heard the evidence. It will be difficult for them to think in terms of awards until they have at least begun to make up their minds about liability. This is thought to be particularly true about big numbers, as it may make the lawyer and client seem greedy to begin talking about large verdicts before any evidence has been introduced. Lawyers who hold this view generally discuss the facts that support damages, but do not mention a specific figure. Note, however, that there is little reason not to state a precise figure for damages in, for example, a commercial case where the amount is liquidated.

Finally, a majority of defense counsel refrain from discussing damages during the opening statement. Even where the plaintiff's damage figure is inflated or unrealistic, many defense lawyers fear that they will appear to concede liability if they seem to quibble about the amount of damages right at the outset of the case. Some lawyers choose to make only a passing reference to the plaintiff's request, stating something to the effect that, "Even if the defendant was at fault, the evidence will show that the plaintiff's number is far more than would be necessary for fair compensation." Others do not even go this far. Of course, where the defendant has admitted or stipulated to liability, the case will be tried only on the question of damages. Since the amount of compensation is the only issue, the defendant obviously must address it during the opening statement.

C. The Opposition's Case

It is always difficult to decide how much attention to give to the opposition's case. Plaintiff's counsel must determine whether to anticipate and respond to the expected defenses. Defendant's counsel has to consider whether and how much to react to the plaintiff's opening.
1. Plaintiff’s Opening

Unlike final arguments, there is no rebuttal in opening statements. The plaintiff gets to address the jury only once and without the advantage of knowing what the defendant’s opening will be. No matter what defense counsel says, plaintiff’s attorney will not be able to respond directly until the end of the trial. This can be especially troublesome in cases where the defendant presents an affirmative defense. Since an affirmative defense, by definition, raises issues that go beyond the plaintiff’s own case, the plaintiff faces a delicate problem in dealing with them during the opening statement. Should the plaintiff ignore the affirmative defense, thereby foregoing the opportunity to reply to it at the outset of the trial? Or should the plaintiff respond to the defense in advance, in essence forecasting the defendant’s case?

One solution to this problem is to construct the discussion of the plaintiff’s own case in such a way as to blunt any rejoinders that the defendant might raise. In a simple automobile accident case, for example, plaintiff’s counsel can build up the plaintiff’s level of care and skill while driving, without ever mentioning the defense of contributory negligence.

Unfortunately, not all defenses are equally amenable to this approach. Assume, for instance, that you represent the plaintiff in a sales transaction. Your client contracted to sell industrial machinery to the defendant. Your client contends that the goods were shipped, but no payment was received. There are at least three possible defenses: (1) the goods were never received due to some fault of the plaintiff; (2) they were received, but they were defective; or (3) payment was made.

To negate fully any of these claims, the plaintiff, at a minimum, must refer to the defense itself. Consider the defense of defective products. To be sure, a general statement that the goods conformed to the contract will be sufficient to stake out the plaintiff’s position. But a truly persuasive story will require the plaintiff to confront and refute each of the shortcomings asserted by the defense. In the absence of this discussion in the plaintiff’s opening, the jury will hear only about what was wrong with the shipment. It is conceivable that plaintiff’s counsel might run through every single specification, explaining that the goods conformed across the board, but this itemization could go on forever without informing the jury of the precise issue in dispute. It would make far more sense for the plaintiff to focus her opening statement on exactly the defects claimed by the defendant.

In some cases, then, the plaintiff has little choice but to anticipate the defendant’s opening statement. Here are some guidelines:

Your case first. Give primary attention to the strongest aspects of your own case. The opening statement is your opportunity to begin to capture the jury’s imagination. Don’t get them started imagining the things that might be wrong with your case. Accentuate the positive. To the extent possible, defenses should be treated as technicalities or annoyances.
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_Be certain._ The process of discovery should allow you to know with some certainty exactly which defenses will be raised. There is no reason to survey all of the holes that the defendant might try to punch in your case. Concentrate on the principal defenses.

_No apologies, no sneers._ When it comes time to discuss the opposition's case, your tone should be firm, unapologetic, and straightforward. If you seem overly concerned or worried about a defense, it will suggest that there are indeed problems with your case. By the same token, you shouldn't sneer or be entirely dismissive; after all, you are the one who is introducing the issue. Moreover, you can't expect the jury to share your disdain for the defendant's position when they haven't even had a chance to hear it yet.

_Minimize witness references._ There is an inherent difficulty in predicting what the other side's witnesses are going to say. Opening statements are allowed, after all, for you to assist the jury by previewing your own evidence. Not having prepared or organized the other side's case, you would be hard put to explain how you can help the jury by guessing at what it might be.

In this vein, it has even been suggested that it is improper for counsel to preview testimony from opposition witnesses. The theory behind this position is that you may only use your opening statement to explain what you expect the evidence to show and that you cannot be certain what the opposition evidence will be. Given the reality of deposition practice and pretrial orders, however, it is obvious that in most cases you will have a good idea of just how the opposing witnesses will testify. Even if a witness ends up not being called, in most jurisdictions you will have the opportunity to call the witness yourself.

Nonetheless, it is a good idea to refer to the other side's case in summary only and to avoid direct quotations from their witnesses. There is something discordant about a lawyer predicting how opposing witnesses will testify. Additionally, there is a tremendous chance that, following such an opening, the other side's witnesses will testify differently, if only to spite you. Finally, recall that the purpose of anticipating the defendant's opening statement is to allow you to build up your own case, not to expound on the details of theirs.

There are situations where explicit quotations may be helpful. It can be devastating to read from a document that the defendant produced or to quote directly from the defendant's own deposition. The key to this approach is to be sure (1) that the quotations are accurate, (2) that they are meaningful standing alone and do not require extensive context, and (3) that you have an independent evidentiary basis for introducing them yourself.

Finally, it must be noted that the Fifth Amendment prohibits prosecutors from so much as suggesting that the defendant will testify. The Fifth Amendment does not,
however, prevent the prosecutor from reading from a confession or prior statement of the defendant as long as the statement itself has not been ruled inadmissible.

2. Defendant’s Opening

Many lawyers believe that thorough preparation includes planning every word of the opening statement in advance. This is true only to a point. While plaintiffs and prosecutors have the luxury of knowing exactly how they will open their cases, defense lawyers must be more flexible. It is a tremendous advantage to deliver the second opening statement, and defense counsel can only take advantage of this opportunity by being ready to respond to at least some aspects of the plaintiff’s opening. No matter how well you have prepared your case, it is a mistake to be tied to a scripted opening statement. Responses or rejoinders to the plaintiff’s opening can be fruitful in the following situations:

**Denials.** The civil plaintiff’s opening statement, and even more so the criminal prosecutor’s, is essentially an accusation. Its entire thrust is to tell a story that accuses the defendant of negligence, breach of contract, criminal acts, or some other negative conduct. After hearing such an extended charge against the defendant, the jury’s first inclination will be to ask the question, “Well, is it true?” The defendant, then, absolutely must respond with a denial. Anything short of a denial is likely to be regarded as evasion, equivocation, or worse, an admission of fault.

While defense counsel can plan to deny the plaintiff’s allegations, it can be a mistake to plan exactly how to deny them. Generic denials tend to sound exactly like generic denials; they lack force because they do not meet the opposing party head-on. It can be much more effective and persuasive to pick up on the plaintiff’s opening and to deny their claims using some of the same language in which they were made.

Care must be taken not to echo the insinuations of the plaintiff’s charge. There is no reason to repeat all of the nasty evidence that the plaintiff claims to be able to produce. On the other hand, it is necessary to recognize that the plaintiff has made specific charges and to explain specifically how they will be rebutted.

The following is a poor example of a denial in a defendant’s opening statement because it is too general to carry any weight:

The defendant denies any and all negligence on his part. He denies that he was anything less than a careful driver, and he denies that he caused the plaintiff any harm.

Here is a worse example, because it gives too much credence to the plaintiff’s case:

The plaintiff has claimed that my client was preoccupied with an important business meeting on the morning of the accident. It is their
position that he was thinking about how to attract a lucrative new client instead of paying attention to the road. This is all untrue. We will prove that the accident was the plaintiff’s own fault.

Here is a better example; it responds directly to the plaintiff’s central claim, but it does so by building up the defendant’s own case, not by reiterating the plaintiff’s:

Contrary to the plaintiff’s claim, my client was anything but “too busy to be careful.” We will prove that he was driving well within the legal speed limit and that he was keeping a proper and careful lookout. He had plenty of time to get to his office that morning, but the plaintiff herself stopped her car in the middle of the street rather than pulling over to the right as the traffic laws require.

Controverted evidence. It is also important to respond directly to the plaintiff’s version of significant controverted evidence. Simply telling your own independent story is not sufficient—doing so will not allow you to explain why the facts in support of your version are superior. It is also risky to expect the jury to keep the plaintiff’s opening in mind and then to appreciate the implications of the contrary facts as you reveal them. Instead, you should make it apparent that you are contradicting the plaintiff’s factual claims:

Plaintiff’s counsel claimed that my client neglected to have his brakes repaired. The facts are that he took his car in for a tune-up, and the mechanic said only that he should have his brakes “looked at” within the next 10,000 miles. The evidence will show that the defendant took care of all scheduled maintenance completely in accordance with the manufacturer’s timetable and that he had no reason to think that his brakes were not functioning properly.

If defense counsel simply began talking about brakes the jury might take it as a concession that defendant’s brakes were a problem. The defense case is therefore made much stronger by pointing out how the defendant’s facts contradict the plaintiff’s claim.

Omissions. The absence of evidence can be as telling as the evidence itself. Defense counsel should therefore be ready to respond not only to what was said in plaintiff’s opening but also to what was not said. While it would be argumentative to accuse opposing counsel of concealing information, it is perfectly proper to point out evidentiary gaps in the plaintiff’s opening statement. Assume, for example, that liability has been stipulated in the fire engine case and that it is being tried solely on the issue of damages:

Plaintiff’s counsel spoke at some length about the plaintiff’s injuries. She did not, however, give you all of the facts about the plaintiff’s current physical condition. The evidence will show, for example, that the plaintiff spent a weekend last summer camping at Eagle River Falls.
She carried a backpack, she slept on the ground, and she hiked every day. Plaintiff's counsel did not tell you that the trip was planned for a long weekend, and she stayed the full time. It was not necessary for her to leave early. After the long weekend of roughing it, she simply went home. She didn't go to a hospital, or even to her family doctor. On the other hand, there will be absolutely no evidence in this case that the plaintiff lost any income as a result of her injuries.

### The Basics

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<th>Opening Statement Content Checklist</th>
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<tr>
<td>Did you include only provable facts?</td>
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<td>Did you include all the necessary facts?</td>
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<tr>
<td>Did you include a reference to the other side's case (or are you prepared to do so at trial)?</td>
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### D. Bad Facts and Disclaimers

Should your opening statement ever mention negative information that is likely to come out about one of your own witnesses? There is divided opinion on this issue. The traditional view is that you will appear to be hiding any bad facts that you do not mention and that you can defuse the impact of such facts by bringing them out yourself. Thus, most lawyers favor making at least a casual reference to such matters as felony convictions, admissible "bad acts," and other provable misconduct.

More recently, however, it has been suggested that jurors do not expect lawyers to say anything negative about their own witnesses and that by doing so you actually call greater attention to the damaging information. There will be time enough to respond to charges after they have actually been made; there is no need to lead the bandwagon yourself.
Whether to introduce damaging information about your own witnesses remains a matter of judgment, and no doubt the answer will differ with the context of the case. A prudent approach, however, is always to keep bad information, or even the suggestion of bad information, to an absolute minimum. You will want to exhibit the highest possible level of confidence and belief in your own witnesses. Thus, negative information should not be mentioned until you have laid out all of the positive facts about the witness. If you believe that you must defuse a ticking bomb, do it quickly and without fanfare.

Defense counsel, of course, does not need to wonder if any of her witnesses will be attacked during the plaintiff’s opening statement. She has the advantage of going second. Thus, for defense counsel there will seldom, if ever, be a situation where it is necessary to raise damaging facts in order to head off the opposition. If the jury didn’t get the bad news when the plaintiff opened, there should be scant reason to deliver it during the defendant’s opening statement.  

F. Legal Issues

As was noted above, it is frequently important to use the opening statement to introduce the legal issues to the jury. A statement of legal issues will put the significance of the facts into clear perspective. Explanations of the law should be brief and to the point. It is far better to weave them into the context of the story as opposed to “string-citing” all of the legal issues at once.

F. Introductions

At some point in the opening statement it will be necessary to introduce yourself, your client, and any cocounsel. Even if the judge has already introduced all of you, it is a common courtesy to do it again yourself. While there is a natural inclination to begin with introductions, they are not really important enough to warrant the use of your opening moment. It is usually better to start with a strong statement of your theory and theme and then proceed to the introductions at a natural breaking point.

G. Request for Verdict

Your opening statement should almost always conclude with a request for, or explanation of, the verdict that you will seek at the end of the trial. This request should

6. It is possible, of course, that the plaintiff will introduce negative information into evidence notwithstanding the fact that it was not mentioned during the opening statement. Defense counsel should nonetheless be wary of advance disclosure during her opening. First, the plaintiff may decide not to offer the damaging evidence, or if offered, it may not be admitted. Second, much unpleasant information can be developed only on cross-examination, in which case there will be time enough to defuse it (if that is your choice) during the witness’s direct. Finally, the bad facts might be introduced during plaintiff’s case-in-chief, in which case cross-examination will be immediately available to the defendant, and it is unlikely to appear that the defendant was trying to conceal the material.

7. See section II(B).
be made in general terms: "At the end of the case we will ask you to return a verdict that the defendant was not guilty of negligence." The opening statement is not the time for a lengthy discussion of verdict forms or special interrogatories.

H. Bromides and Platitudes

There are a number of opening statement bromides and platitudes that have become venerated traditions among some members of the bar. While certain of these clichés have fallen from general use in recent years, others have taken on a life of their own, being repeated by generation after generation even though they have little, if any, intrinsic meaning. A few of the conventions have their limited uses. Here follows a short list of topics, phrases, and slogans that are usually best omitted from your opening statements.

The civics lesson. Some lawyers begin their opening statements with a paeon to the American jury system. This invocation is unlikely to help your case since it has absolutely no persuasive value one way or the other. It may convince the jury that you are a patriotic lawyer, but it is just as likely to convince them that you have very little to say on the merits. There is a time to thank the jury for their service and to indicate your respect for the job that they are doing, but it is not at the beginning of your opening statement. The civics lesson, by the way, should be distinguished from a discussion in criminal cases of the concept of proof beyond a reasonable doubt. Reasonable doubt, unlike a generalized discourse on the jury system, is virtually always an essential element of the defendant's case that must be addressed during opening statements.

The neutral simile. It is not uncommon for a lawyer to begin an opening statement with an extended simile that is intended to explain the function of the opening. An opening statement, the jury might be told, is like the picture on the cover of a jigsaw puzzle box. Or it might be like a road map, or like the directions for programming a DVR. None of these similes is really worthwhile. They communicate absolutely nothing about your case, but they are damaging in the sense that they waste your opening moment. If your opening statement is good, the simile will be unnecessary. If your opening statement is disorganized or vague, no simile or metaphor will save it.

"Not evidence." Perhaps the hoariest opening line in the history of opening statements is the caution to the jury that "What I am about to say to you is not evidence; the evidence will be presented in the form of witness testimony, documents, and exhibits." Although this introduction is now heard less and less, it was once considered de rigueur for opening statements. Because it still survives in some quarters, the reasons for abandoning this line bear repeating. Telling the jury that your opening statement is not evidence is the rough equivalent of telling them to ignore what you are about to say. No one has ever claimed that opening statements are evidence, so there is no reason to disclaim the idea. You want the jury to pay attention to your
opening; you should therefore say nothing that will tend to diminish its importance. There is one situation in which there may be some value to reminding a jury that an opening statement is not evidence. In criminal cases the prosecution often presents a very comprehensive and compelling opening statement. Since the defense may not wish to commit themselves to putting on a case, they are often left with very little to say in response. Moreover, the defense will frequently rely most heavily on cross-examination as opposed to the development of an affirmative case. In these circumstances it can be helpful to use the opening statement to explain that the prosecution opening, no matter how powerful it seemed, simply was not evidence. Note that in these circumstances the “not evidence” disclaimer is raised about the opposition opening, not your own.

"The evidence will show" "Opening statements are limited to a description of “what the evidence will show.” This rule has led some lawyers to conclude that every fact mentioned in the opening statement must be preceded with an introductory phrase such as, “We expect the evidence to show that the fire engine was flashing its lights,” or “we intend to prove that the defendant had not repaired his brakes,” or “there will be evidence that the defendant was already late for an important business meeting at the time of the collision.” There is no harm at all in occasionally reminding the judge and jury that you are indeed forecasting evidence that is yet to come. It is hopelessly distracting, however, to use such a phrase as a preface to every item of evidence. It is entirely possible to deliver a complete opening statement without ever once saying, “the evidence will show . . . .” At most, the line should be used at wide intervals simply as an acknowledgment that the opening is a preview.

V. DELIVERY AND TECHNIQUE

It would be very easy to overemphasize the significance of presentational skills in delivering an opening statement. While the popular misconception may be that polished style can win trials, the truth is that well-developed facts almost always triumph over dramatics. Only once you have generated your theory of the case and organized your opening statement to present it most effectively should you turn your attention to delivery techniques. This does not mean that delivery is irrelevant, but only that the substance of the case must come first.

Recognizing the secondary importance of technique, here are some useful guidelines.

A. Do Not Read

Do not read your opening statement from a prepared text. Only the most skilled professional actors can deliver a scripted speech and still appear to be spontaneous and sincere. Everyone else will seem to be stilted or labored. Your goal during the opening should be to communicate directly to the jury, not to lecture to them from a manuscript. You will want to make eye contact, you will want to pick up on the
jury's reactions, and you will want to respond to objections and rulings by the court. Defense counsel, moreover, will want to reply to challenges, weaknesses, and omissions in the plaintiff's opening statement. A written opening statement will prevent you from doing any of these things effectively.

Much the same can be said of attempting to memorize your opening statement. While exceptional memorization is better than reading, you will still run the risk of forgetting a line (or more), of losing your place, or of being thrown off track by an objection. Very experienced lawyers may be able to deliver opening statements from memory. Novices should be wary of trying.

The best approach is to deliver the opening statement from an outline. It should be possible to list all of your major points, as well as the most important supporting details, on one or two sheets of paper. An outline will allow you to organize the material as well as ensure that you don't leave anything out—all while avoiding the perils of reading or memorization. Although some lawyers believe that any use of notes is distracting to the jury, it is far more likely that jurors understand the need to use some notes whenever you are speaking at length. The key, of course, is for your notes to be unobtrusive—hence, an outline as opposed to text.

B. Use Simple Language and Straightforward Presentation

The opening statement should be reasonably straightforward and direct. It is a time to allow your facts to speak for themselves and not a time for emotional pleas or impassioned argument. In any event, the court will not allow you to make elaborate use of metaphors, literary allusions, biblical quotations, or any of the other rhetorical devices that can be so helpful during final argument.

While you should never talk down to a jury, simple language is generally the best. There is no word so eloquent that it is worth risking the understanding of a single juror. Your opening statement can be perfectly sophisticated without relying upon language that you won't hear on the evening news. There is no reason to say that the defendant in the fire truck case "procrastinated" in having his brakes repaired; say instead that he "put off having his brakes fixed." Most of all, do not use legalese. It isn't impressive even to lawyers, and it will tend to confuse, bore, and aggravate the jury.

C. Use Movement for Emphasis and Transition

To the extent that it is allowed by the judge, you can add considerable force to your opening statement simply by moving about in the courtroom. 8 Movement

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8. Readers have no doubt observed that this book does not shy away from big words. Nor should it; our language is rich, and it is made richer by the use of interesting and precise words. But writing for an audience of law students is one thing, and trying cases is another.

9. In some jurisdictions counsel is required always to remain at the lectern. In a few jurisdictions the attorneys must conduct the entire trial while seated at counsel table. Most judges, however, allow lawyers to move somewhat freely about the courtroom, especially during opening statements and closing
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can be used most effectively to make the transition from one topic to another or to emphasize a particular point.

Movement for transition. Whenever you want to highlight a change of subjects during your opening statement, take a step or two to one side or the other. If you are standing at the lectern, your movement could be as slight as a shift to its side. By using your body in this manner, you signal to the jury that one subject has ended and another is about to begin. This motion, in turn, will have the effect of reinitiating primacy. The jury's attention will refocus, and you will then have a new "opening moment" in which to take advantage of the jury's heightened concentration and retention.

Movement for emphasis. Deliberate body movement always concentrates the jury's attention. Movement toward the jury will concentrate it even more. Whenever you reach a particularly important point in your opening statement, you can emphasize it by taking a step or two in the jury's direction. As your movement becomes faster and more purposeful, you will increasingly emphasize the point. Two caveats regarding the use of this technique should be fairly obvious: don't run and don't hover over the jury. The invasion of their space can be seen as overbearing or even threatening. Note also that your important point should not be made while you are walking since the jury might be paying more attention to your motion than to your words. Instead, use a transition sentence while you are moving toward the jury, then stop, pause a moment, and deliver your crucial point while standing perfectly still. The contrast will emphasize the issue even more.

Pacing. Pacing is bad. It distracts the jury. Far worse, it also deprives you of the ability to use movement for emphasis. If you are constantly walking back and forth in the courtroom, you cannot use a few well-chosen steps to underscore the significance of a critical detail. This can be especially crippling in an opening statement since the rule against argument otherwise severely limits your ability to accent issues for the jury.

Lectern. Most, although not all, courtrooms are equipped with a lectern. Many experienced attorneys move the lectern aside during opening statements so that nothing will stand between themselves and the jury. They either speak without using notes, or they use a few small index cards. This is an excellent approach if you are able to use it. Most lawyers, however, need more notes and are more comfortable using a lectern as home base. There is nothing wrong with speaking from a lectern, and you will not lose your case if you take a note pad with you when you deliver your opening statement. The key is to use the lectern without being chained to it. Feel free to move out to the side of the lectern, or even across the courtroom, returning to your staging ground when you have finished emphasizing a point or when you need to refer to your notes.

arguments. If you are not familiar with a particular judge's practice, make a point of finding out before the trial begins.
D. Visuals and Exhibits

Your opening statement need not be confined to your words alone. Visual aids and exhibits can enormously enhance the value of your presentation.

Exhibits. Since the purpose of the opening statement is to explain what the evidence will show, you are entitled to read from or display documents and other exhibits that you expect to be admitted into evidence. If the case involves a contract, quote from the central clause. If you plan to offer a key letter into evidence, have it enlarged and show it to the jury during your opening statement. Use a pointer so that the jury can read along with you as you recite the opposing party’s damming admission. During your opening statement you may be able to show the jury photographs, models, maps, and charts, as well as other tangible exhibits such as weapons, machinery, or even prosthetics. There is some risk, of course, in displaying an exhibit that may not ultimately be admitted. Under modern practice, however, this problem can usually be alleviated by obtaining a pretrial ruling on admissibility.

Visual aids. In addition to displaying actual exhibits, you may also use visual aids during your opening statement. The general rule is that any visual aid must be likely to help the jury to understand the eventual trial evidence. Thus, lawyers have been allowed to show time lines to the jury or to draw freehand diagrams that will not later be offered into evidence. There are limitations, of course. The visual aids must fairly summarize the evidence, they cannot be misleading, and they cannot be argumentative. You could not, for example, produce a chart captioned “Three Reasons Not to Believe the Plaintiff.” Visual aids should be shown to opposing counsel before your opening statement begins. You should also show visuals to the court and obtain advance permission to use them.

Other evidence. Not all exhibits are visual. It is permissible to play audio recordings during opening statements—such as legally recorded telephone conversations or 911 emergency calls—if they will later be offered into evidence. It is conceivable that creative counsel might even make use of olfactory or tactile evidence, although this possibility seems remote.

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<th>THE BASICS</th>
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<tr>
<td><strong>Opening Statement Organization</strong></td>
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<tr>
<td>- Begin with your theory and theme</td>
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<tr>
<td>- Introduce yourself and your client (if applicable)</td>
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<tr>
<td>- Tell the full story (avoiding a rigid witness-by-witness or chronological approach)</td>
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<tr>
<td>- Highlight the legal issues</td>
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<td>- Request a verdict</td>
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VI. ADDITIONAL CONSIDERATIONS

A. MOTIONS AND OBJECTIONS

Objections are fairly unusual during opening statements. It may seem rude to interrupt when the other lawyer is speaking directly to the jury, and a general convention has developed that most attorneys will try to avoid objecting during opposing counsel's opening. There are times, however, when objections are called for and should be made.

1. Common Objections

The most common objection during an opening statement is to improper argument. Most judges will sustain this objection only when the argument is extended or over the top. An argumentative sentence or two will be unlikely to draw an objection and even more unlikely to see one sustained. Drawn-out argument, however, should be objected to. There is no convention that allows opposing counsel to transform the opening statement into a final argument. Be particularly alert to extended argument on the credibility of witnesses.

It is also objectionable to discuss or explain the law during opening statements. Again, some brief mention of the applicable law is permissible and, in fact, unavoidable. Lengthy discourse on the law, and especially misstatement of the law, should draw an objection.

It is both objectionable and unethical for counsel to express a personal opinion during the opening statement or to assert personal knowledge of the facts of the case. The purpose of this rule is to prevent attorneys from offering "facts" that will not be in evidence as well as to prevent the trial from becoming a referendum on the believability of the lawyers. This rule is intended to prevent lawyers from saying things like, "Believe me, I know what happened, and I wouldn't lie to you." It is not intended to preclude the occasional use of phrases such as "I think" or "I'm sure." An objection on this ground is most likely to be sustained when opposing counsel discusses her own investigation of the case or makes reference to her own credibility.

While opening statements are required to preview only the evidence that will ultimately come before the jury, objections usually will not be sustained on the ground that counsel is discussing inadmissible evidence. A lawyer is entitled to take a chance that her evidence will be admitted, and most judges will not rule on evidentiary objections during the opening statements. If you truly believe that evidence should be excluded, then your proper course of action is to make a motion in limine before the trial, not to raise an objection during opposing counsel's opening statement. On the other hand, it is possible that the opposition might take you completely by

10. In fact, it is unethical for counsel to express a personal opinion or assert personal knowledge of the facts at any point during the trial. See Model Rules of Prof'l Conduct R. 3.4(e).
surprise by trying to slip some outrageously inadmissible and prejudicial tidbit into their opening statement. If that is the case, by all means object. It is unethical for an attorney to “allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.”

It is objectionable to refer to evidence that has been excluded via motion in limine or other pretrial ruling.

Finally, it is worth noting that there is no such objection as: “That is not what the evidence will be.” Opposing counsel presents her case, and you present yours. You will naturally disagree about what the evidence will show. If counsel ultimately fails to live up to the commitments given during her opening statement, then you can pound that point home during your final argument. For the same reason there is also no such objection as: “Mischaracterizing the evidence.” If a characterization amounts to argument, object to it. Otherwise, opposing counsel is free to put whatever spin she can on the evidence.

2. Responding to Objections

An objection during your opening statement can be distracting. Lengthy argument, however, can be even more disruptive. Any time you spend speaking to the court is time you are not speaking to the jury. In all but exceptional circumstances, then, it is best to wait for the judge to rule on an objection and then proceed.

If the objection is overruled, you may thank the court and pick up where you left off. If the objection is sustained, you must adapt your opening to the court’s ruling. For example, if your theme has been declared argumentative, you must figure out a way to recast or truncate it so that you can continue to use it without objection.

Consider the “too busy to be careful” theme that we have posited for the fire truck case. Although it is unlikely, imagine that the court has sustained an objection to the use of that phrase during your opening statement for the plaintiff. Don’t ask for reconsideration or try to explain why you weren’t being argumentative. A small adjustment to your opening should be sufficient:

The evidence will show that the defendant was extremely busy on the morning of the accident. The evidence will also show that the defendant was not careful. He was busy because he had an important meeting scheduled with a new client. He was running late for the meeting, and he wanted to get there on time. We know that he wasn’t careful because he kept on driving when all of the other traffic stopped for a fire truck. The truck was flashing its lights and sounding its siren, but the defendant didn’t notice it until it was too late.

11. MODEL RULES OF PROF’L CONDUCT R. 3.4(e).

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Finally, many judges are adept at avoiding rulings on objections during opening statements. The following scenario is not uncommon:

Counsel: Objection, Your Honor. Counsel is engaging in improper argument.

Court: Argument is not permitted during opening statements. Proceed.

The judge has neither sustained nor overruled the objection. What should you do? The best approach is usually to modify your opening statement slightly as an indication to the court that you understand the need to avoid argument. The judge, in effect, has cautioned you, and you should not take that as license to binge on argument.

3. Motions and Curative Instructions

Once an objection is sustained the opening statement is allowed to continue. Occasionally the offending portion of the opening statement is so damaging that the objecting lawyer must request a curative instruction from the court. This should be done primarily when opposing counsel has engaged in lengthy argument or has referred to evidence that has already been excluded.

Counsel can obtain a curative instruction by asking the court to “instruct the jury to disregard counsel's comments.” Some judges then instruct the jury in rather perfunctory terms, while others actually make some effort to ensure that the jury will not consider the improper comments. In either case, the decision to request a curative instruction is a touchy one since the instruction itself might serve to emphasize exactly the point that you want the jury to disregard.

Nonetheless, in many jurisdictions you cannot appeal on the ground of improper comments during opening unless you first objected and then requested a curative instruction. Paradoxically, it is not uncommon for appellate courts then to hold that the instruction rectified any harm.

In extreme cases a motion for a mistrial can be made on the basis of improper comments during the opening statement. To warrant a mistrial, opposing counsel's improper statement must have been so prejudicial and damaging as to have destroyed irrevocably the possibility of a fair trial.

B. Bench Trials

A judge, unlike a jury, is obviously familiar with the manner in which evidence is produced at trial. Does a judge ever require help in understanding the evidence? Is there a place for opening statements in bench trials?

In all but very complex cases, judges often prefer to eliminate or severely truncate opening statements. It may be conceit, but judges tend to believe that they can
follow the evidence without the benefit of a preview. Counsel, however, should be reluctant to give up opening statements. It is just as important and valuable to capture the judge’s imagination as it is to begin creating a mental picture for a jury. Indeed, it may be more important to impress your image of the case upon the judge since the court eventually will render its verdict without the benefit of deliberations. Even in the absence of opening statements, a jury will be composed of at least six people, all of whom will enter the jury room with different predispositions and experiences. A judge will have only her own background to rely on, and the opening statement may be your best opportunity to begin to persuade the court to see the case your way.

Nonetheless, in most jurisdictions the court has the right to forgo opening statements in bench trials. The surest way to be certain that opening statements will be allowed is not to abuse the privilege when it is granted. Your opening statement to the court should be particularly short, well-focused, and to the point. Many of the conventions and techniques that are aimed at juries should be eliminated when trying a case to the bench.

Judges hate long opening statements. You must do everything you can to shorten your presentation. For example, while repetition is effective in making a point to a jury, it can be deadly when opening to the court. There is seldom a need to repeat points, or to drive them home through a series of incremental steps, when your audience is a single judge. Do not omit significant details, but do not build them up in the same way that you would before a jury.

Similarly, there is certainly never any reason to go through a list of witnesses for the court. This technique has limited value in a jury trial, but it has absolutely no function in a bench trial. The judge will be able to understand who the witnesses are as they appear.

On the other hand, chronology and the ordering of facts continue to be important in bench trials. A clear picture of the occurrences will always help the judge’s understanding. This applies not only to the sequence of events, but also to relationships among the various facts. If certain facts cast doubt on the credibility of a witness, tell that to the court. If a certain document will bolster or contradict a witness’s testimony, tell that to the court.

Perhaps the most important consideration in opening to the court is to stress the legal issues. You should have much greater latitude in discussing legal issues in a bench trial. Tell the court what the claims and defenses are. Explain exactly how the principal facts and supporting details relate to the legal issues in the case. The judge will eventually arrive at a verdict by applying the applicable law to the proven facts. Your opening statement can be most effective if it presages this process.
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C. Timing

1. When to Open

The plaintiff always opens at the very beginning of the case. The defendant, at least as a technical matter, usually has the option of either opening immediately after the plaintiff or waiting until the plaintiff has rested and the defense case is about to begin.

The overwhelming consensus view is that the defense should never delay opening. The plaintiff’s (or prosecutor’s) opening will portray her case in its strongest possible form. The defense can undermine that portrayal, as well as create some discontinuity between the plaintiff’s opening and the beginning of their evidence, by presenting their opening statement immediately after the plaintiff’s. Delaying the defense opening will give the impression that the plaintiff’s claims have gone unrebutted. On the other hand, opening at the outset of the trial will allow the jury to consider the defense position even while listening to the plaintiff’s evidence. It will also create a context for defense counsel’s cross-examinations.

There are only a few possible justifications for delaying the defense opening until after the plaintiff has rested. It is remotely conceivable that you might have some surprise up your sleeve that you don’t want to reveal before the plaintiff has concluded its case. Alternatively, criminal defense counsel sometimes prefer to evaluate the strength of the prosecution witnesses before deciding whether to present a defense. In these situations there may be some theoretical benefit to delaying the opening statement, although the same advantage can often be obtained by structuring an initial opening to achieve the same goals.

2. Multiple Parties

In cases with more than one plaintiff or defendant, the court will determine the order of opening statements. The plaintiff with the most at stake will typically be allowed to open first, followed by the others in descending order of potential recovery. Similarly, the defendant with the greatest exposure will usually be afforded the first opening statement. Other factors may also be considered, and the parties are customarily free to stipulate to some other order.

In a case with multiple defendants, it may be possible for one to open immediately after the plaintiff and for another to reserve opening until the beginning of the defense case. This approach provides the best of both worlds, although it obviously requires a fair level of cooperation among defendants. The court has discretion to grant or deny such a request.