CIVIL TRIAL, PART II: THE OPENING

PUPILLAGE GROUP:

Chair:	Harry H. Kutner, Jr. (Master)
Panel:	Hon. Helen Voutsinas (Master)
	John H. Gionis (Master)
	Marjorie E. Bornes (Master)
	Kim D. Victor (Master)
	William P. Laino (Master)
	Ilene Barshay (Master)
Law students:	Michael Berger (Hofstra 2L)
	Aleksandra Gontaryuk (Hofstra 2L)
	Toni Kong (Touro 1L)
	Arthur Conte (Touro 1L)

Biographical sketches of each panelist are attached.

PROGRAM OUTLINE

I. INTRODUCTION — 5 mins.

II. Openings: purposes, the law, and the strategy

A. Michael Berger (Hofstra 2L) — 12 mins.

1. Purpose of a civil case opening
2. New York law (civil)
3. Comments
   a. New York law (criminal)
   b. federal (civil and criminal)

B. Toni Kong (Touro 1L) — 12 mins.

1. strategic considerations
   a. plaintiff's perspective
   b. defendant's perspective
   c. jury against non-jury
   d. practical
2. ethical bounds:
   a. plaintiff
   b. defendant
   c. Code of Professional Responsibility

C. Hon. Helen Voutsinas: Court's role — 5 mins.

III. Sample openings based on predicate fact pattern:

A. Aleksandra Gontaryuk (Hofstra 2L) - for plaintiff 10 mins.

B. Arthur Conte (Touro 1L) - for defendant 10 mins.

IV. Comments from audience: 20 mins.

errors, omissions, and missed opportunities ?!

V. Revised openings: learning from audience

A. William P. Laino (Master) - for plaintiff 7 mins.

B. Arthur Conte (Touro 1L) - for defendant 7 mins.

VI. Miscellany:

A. Poll of audience: from fact pattern, who thinks 5 mins.

- plaintiff should prevail?

- defendant should prevail?

Comments

B. In light of Court of Appeals holding in *Centro Empres. Compresa*, can a wealthy, shrewd, experienced, and intelligent investor be the victim of a fraud?

1. Donald Trump, Warren Buffet, etc.

2. our fact pattern: Radah set up Emerald (bottom paragraph on 1st page)

C. Blue Chip Emerald v. Alllied Partners, 299 A.D.2d 278 (1st Dept. 2002), abrogated by *Centro Empres. Compresa* v. *America Movil*, 17 N.Y.3d 269 (2011)

Program materials

Blue Chip Emerald v. Allied Partners, 299 A.D.2d 278 (1st Dept. 2002)

Centro Empres. Compresa v. America Movil, 17 N.Y.3d 269 (2011)

Purpose of opening

CPLR

CPL

FRCP

FRCr.P.

Trial - Theories, Tactics, Techniques - Chapter 7, Opening Statement by Roger Haydock and John Sonsteng

Rules of Counsel's Trial Conduct - courtesy of Hon. Arthur D. Spatt, U.S. District Judge

22 NYCRR Part 100: Rules Judicial Conduct §100.3

22 NYCRR Part 1200: Rules of Professional Conduct

Rule 1.16: Declining of terminating representation

Rule 3.3: Conduct before a tribunal

Rule 3.4: Fairness to opposing party and counsel

Rule 3.5: Maintaining and preserving the Inn partiality of tribunals and jurors

Rule 3.6: Trial publicity

HARRY H. KUTNER, JR., ESQ.

Iona College (B.A. Government 1969)
Fordham University Law (1972)

Practice in Mineola since 1974 in diverse areas, mostly involving litigation and noteworthy for its variety over a wide spectrum of legal issues, both civil and criminal, in federal and state courts. Reported cases involved personal injury (auto-construction), wrongful death, medical malpractice, civil rights, zoning and land use, class action frauds, criminal and estates, as well as commercial and real estate.

Member of Inn since 1993, and current member of Board.

BIOGRAPHY OF HELEN VOUTSINAS

Judge Helen Voutsinas assumed her position in the District Court on January 1, 2011.

Judge Voutsinas graduated from Our Lady of Mercy Academy and entered St. John's University full-time while she worked part time to help pay for her education. She graduated St. John's University with a Bachelor's in Accounting. She graduated from St. John's Law School with the CALI Excellence Award from the Elder Law Clinic.

Judge Voutsinas began her career at the law firm of Donohue, McGahan, Catalano & Belitsis handling various cases including, personal injury and commercial litigation from inception to trial.

In 2002, she served as Assistant Town Attorney and Counsel to the Board of Zoning and Appeals for the Town of North Hempstead handling all types of litigation. In January 2004, she left the Town of North Hempstead to serve as Deputy Majority Counsel to the Nassau County Legislature. There she drafted new legislation for Nassau County.

In 2005, she assumed her role as Principal Law Clerk to the Honorable Steven M. Jaeger. Although Judge Jaeger was elected to the County Criminal Court, he sat in Family Court for the first year and Supreme Court for six months thereafter. During that time, she conferenced cases and drafted over 500 Supreme Court decisions. In July 2006, she served in a criminal part handling criminal felony cases, including murders, robberies, burglaries and drug cases. Judge Voutsinas was an integral part in implementing the first Judicial Diversion Part in Nassau County, which is the felony drug part enacted after the recent changes to the Rockefeller Drug Laws. She also has served as a law secretary in other specialized parts including, the Domestic Violence Part, Post Release Supervision Part and Search Warrants. As counsel, she conferenced all cases, drafted decisions and prepared cases for trial and sentence.

Judge Voutsinas has also served as President to the Nassau County Women's Bar Association after she worked her way up the ranks of the Nassau County Women's Bar Association. She advocated for pay equity and work/life balance during her presidency. She also co-founded the Nassau Women's Foundation for the purpose of providing scholarships to woman who want to advance their careers by entering the legal profession. In 2002 she was the recipient of the Bessie Ray Geffner Award from the Nassau County Women's Bar Association.

She currently is a Delegate to the New York State Women's Bar Association and serves on the Nominations Committee to the state and local chapter. She has previously served as chair to the Nominations Committee to the NCWBA. She serves as President of the Nassau County Women's Foundation. She is an active member of the Nassau County Bar Association and served on the Bold Task Force (Bridge Over Language Divides), Women in the Courts and Strategic Planning Committee. She is a member of the Theodore Roosevelt Inns of Court, Criminal Courts Bar Association, Hellenic Bar Association, Hispanic Bar Association, Dominican Bar Association and Courthouse Kiwanis.

Marjorie Bornes, Esq.
A graduate of SUNY at Albany (B.S.) and Brooklyn Law School (J.D.), Marjorie is a solo practitioner who specializes litigation of insurance and personal injury actions, and landlord/tenant proceedings in state and federal trial and appellate courts. She also extensively litigates issues as to insurer's regulatory obligations with regard to evaluation and payment of automobile property losses under Insurance Department Regulation 64. Currently President Elect of the Theodore Roosevelt Inn of Court, Marjorie previously served as Recording Secretary of the Inn, is a past President of Yashar, the Lawyers and Judges Chapter of Hadassah, and a member of the Nassau County Bar and New York State Bar Association.

Kim D. Victor, Esq.

Kim D. Victor is the Managing Attorney of Thaler & Gertler LLP's Litigation Department. With over sixteen years of experience, her practice focuses on representing business entities in complex commercial litigation matters including commercial and partnership disputes, real estate development and construction actions as well as fraud and negligence claims at the federal, state and appellate court levels. She has considerable experience representing financial and lending institutions in matters involving breaches of commercial loan documents, including letters of credit, promissory notes, guarantees, and financing and factoring agreements. Ms. Victor also regularly litigates commercial issues in bankruptcy cases, prosecuting on behalf of creditors, creditors' committees, debtors and trustees in actions involving preference actions, adversary proceedings, fraudulent transfers, reclamation proceedings, declaratory relief, and the determination of discharge from claims.

Prior to joining Thaler & Gertler LLP, Ms. Victor was a senior associate at Moritt Hock & Hamroff LLP in Garden City and Hahn & Hessen LLP in Manhattan. She is a graduate of Stony Brook University and New York Law School. She is a member of the Nassau County Bar Association, the New York State Bar Association and the Theodore Roosevelt Inns of Court. Ms. Victor is also a mentor for law students through the Theodore Roosevelt Inns of Court. She clerked for two years in the litigation department at the prestigious law firm of Paul, Weiss, Rifkind, Wharton & Garrison in Manhattan. Ms. Victor is admitted to the practice of law in the State of New York and the State of New Jersey and in the United States District Courts of the Eastern and Southern Districts of New York and the United States District Court for the District of New Jersey.

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Martindale-Hubbell®
from LexisNexis®

WILLIAM P. LAINO

Practice Areas

Commercial Litigation

William Laino is a Partner with Moritt Hock & Hamroff, practicing in complex commercial litigation including shareholder and partnership disputes, contract claims, and construction law. He also has experience in sophisticated financing transactions including aircraft sales and leases.

Education

St. John's University School of Law, J.D. 1973 *with distinction*
Board of Editors, St. John's Law Review
Dartmouth College, B.A. 1966

Admissions

Mr. Laino is admitted to practice in New York. He is also admitted to the United States District Court for the Southern and Eastern Districts and the U.S. Court of Appeals for the Second Circuit.

Affiliations

Mr. Laino is an active member of the New York State and Nassau County Bar Associations, as well as the Theodore Roosevelt American Inn of Court. Mr. Laino is qualified as a New York State Court Fiduciary to serve as a court appointed referee and counsel to receivers and as a receiver. He also serves an arbitrator for FINRA.

In addition, Mr. Laino served as a Senior Grade Lieutenant in the U.S. Navy from 1966-1970.

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Ilene H. Barshay, Professor Legal Process

B.S. Long Island University; M. Ed. Hofstra University; J.D. Touro College School of Law, Touro Law Review Editorial Staff; L.L.M. New York University School of Law.

Admitted to the bar of New York, the United States District Courts for the Southern and Eastern Districts of New York, the District of Columbia, and the United States Supreme Court.

Before attending law school, Professor Barshay worked as a teacher, magazine editor and principal of a speakers bureau. Dedicated to public interest law and teaching, she has served as chair of the Nassau-Suffolk Law Services Advisory Council; president of Nassau County Coalition Against Domestic Violence; chair of the Bar Association of Nassau County's Arts and Letters Competition, member of the Community Relations, Family Law, and We Care Committees of the Nassau County Bar Association and participant in the Association's Lawyer in the Classroom program. She is a member of the Law Guardian Advisory Committee, Supreme Court, Appellate Division, Second Judicial Department which appoints Law Guardians and sets standards for lawyers who represent children involved in Family Court proceedings. She is also Touro's liaison to the Theodore Roosevelt Chapter of the American Inn of Courts and a member of its executive committee, chair of Touro's Jewish Programs Committee and member of the law school's Academic Policy Committee. Professor Barshay was the recipient of the Paul Marks Public Interest Award in 1996 and 2004 and is the author of "The Implications of the Constitution's Religion Clauses on New York Family Law" which was published by the Howard Law Journal.

Michael Berger is currently a 2L at Hofstra University School of Law. He is a member of the Journal of International Business and Law. This semester he is interning at Cheriff & Fink, P.C. after splitting his time last summer interning for the Honorable Joseph A. Zayas in the Supreme Court of the State of New York in Queens County and Lewis Johs Avallone Aviles, LLP in Melville. He attended the University of Pittsburgh where he majored in History and Business with a minor in Economics.

Aleksandra Gontaryuk

A 2L at Hofstra Law School specializing in Civil Litigation and ADR. Graduated from Pennsylvania State University with a Bachelor in International Politics. Competitor in the 2012 Nassau Academy of Law Moot Court Competition. Vice President of the Unemployment Action Center. Previously worked as a law clerk at in house counsel for Nationwide, Epstein, Frankini & Grammatico, from June to November of 2011. Two years of personal injury experience as a paralegal at Vlasac & Shmaruk, LLC. Has done writing and research for personal injury, contract and medical malpractice summary judgment motions, motions to dismiss, motions in limine and other such motions. Negotiated settlements, assisted in trial prep, performed client intakes, client prep for depositions and trials. Represented clients seeking unemployment benefits in proceedings before administrative law judges. Fluent in Spanish, Russian and Ukrainian.

299 A.D.2d 278, 750 N.Y.S.2d
291, 2002 N.Y. Slip Op. 08798

Blue Chip Emerald LLC et al., Appellants,
v.
Allied Partners Inc. et al., Respondents.

Supreme Court, Appellate Division,
First Department, New York
(November 26, 2002)

CITE TITLE AS: Blue Chip
Emerald v Allied Partners

Order, Supreme Court, New York County (Herman Cahn, J.), entered October 10, 2001, which granted defendants' motions to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5) and (7), unanimously reversed, on the law, with costs, the motions denied, and the complaint reinstated to the extent not previously withdrawn by stipulation.

Plaintiff Blue Chip Emerald LLC, which is owned by the three other plaintiffs bringing this action (collectively BCE), held an interest of approximately 50% in a joint venture known as Ceppeto Enterprises LLC (the Venture). The remainder of the Venture was owned by its managing member, defendant Ceppeto Holding Enterprises LLC, the principals of which are defendants Eric Hadar and Richard Hadar (collectively with the other defendants controlled by the Hadars, the Hadar defendants). The Venture's sole substantial asset was the commercial building located at One East 57th Street in Manhattan (the Property). Eight months after the formation of the Venture and its purchase of the Property, BCE sold its interest therein to the Hadar defendants for a price based on an $80 million valuation of the Property. Two weeks later, the Hadar defendants entered into a contract to sell the Property to a third party (LVMH) for $200 million.

BCE's complaint, after giving effect to a stipulation withdrawing other claims, asserts causes of action for fraud and breach of fiduciary duty against the Hadar defendants, among others, seeking to recover the additional $60 million of profit BCE allegedly would have realized if it still had held its one-half interest in the Venture when the Property was sold. BCE alleges that it was induced to sell its interest in the Venture for an unfairly low price by the Hadar defendants' misrepresentations and omissions concerning the discussions they were then conducting with third parties for the purpose of bringing about a sale or lease of the Property. Most significantly, the Hadar defendants allegedly failed to disclose and misrepresented to BCE both the true price range in which they were negotiating with LVMH for a sale of the Property and the alleged existence, as of the date BCE sold its interest, of LVMH's oral agreement to purchase the Property for $200 million. The Hadar defendants also allegedly made other misrepresentations concerning the need for renovations that led BCE to seek a quick exit from the Venture.

Defendants moved to dismiss the complaint as barred by certain representations and disclaimers BCE made in the ***279** agreement governing the sale of its interest in the Venture (the buy-out agreement). BCE acknowledged that it was entering into the buy-out agreement without having received any "representations or warranties" from the Hadar defendants as to, inter alia, "the actual or projected value of the Property for sale or leasing or to any other matter affecting or related to the Property," with the sole exception of the disclosure that, as of the date of the agreement, the Hadar defendants had discussed the possible "operation, leasing, sale and/or valuation of the Property" with 16 third parties named on "Exhibit B" to the agreement, among whom LVMH, the ultimate purchaser, was included. BCE acknowledged that it had been "afforded an opportunity to conduct its own due diligence" with respect to the third parties listed on Exhibit B, and was "satisfied" with the information made available to it in conducting such due diligence. Further, BCE expressly disclaimed (1) all interest in any profit realized by the Hadar defendants on a future sale of the Property to any of the disclosed third parties, and (2) "any claim for fraud, breach of loyalty or fiduciary duty" arising out of their participation in the Venture, with the sole exception of a claim that the Hadar defendants sold or leased the Property to a third party not listed on Exhibit B to the extent such transaction arose from discussions held on or before the date of the buy-out agreement. The IAS court concluded that, in light of these contractual representations and disclaimers, it was required to dismiss the complaint in its entirety. We disagree.

The key fact overlooked by the IAS court is that the Hadar defendants, as coventurers and, in particular, as managing coventurers (*see Birnbaum v Birnbaum*, 73 NY2d 461, 465, citing *Meinhard v Salmon*, 249 NY 458, 468), were fiduciaries of BCE in matters relating to the Venture until the moment the buy-out transaction closed, and therefore "owe[d] [BCE] a duty of undivided and undiluted loyalty ..." (*Birnbaum v Birnbaum*, 73 NY2d at 466, citing *Matter of Rothko*, 43 NY2d 305, 319, and *Meinhard v Salmon*, 249 NY at 463-464). Consistent with

this stringent standard of conduct, which the courts have enforced with "[u]ncompromising rigidity" (*Meinhard v Salmon*, 249 NY at 464), it is well established that, when a fiduciary, in furtherance of its individual interests, deals with the beneficiary of the duty in a matter relating to the fiduciary relationship, the fiduciary is strictly obligated to make "full disclosure" of all material facts (*Birnbaum v Birnbaum, supra*). Stated otherwise, the fiduciary is obligated in negotiating such a transaction "to disclose any information that could reasonably bear on [the beneficiary's] consideration of [the fiduciary's] offer" (*Dubbs v Stribling & Assoc.*, 96 NY2d 337, 341). Absent such ***280** full disclosure, the transaction is voidable (*see Matter of Birnbaum v Birnbaum*, 117 AD2d 409, 416).

It follows from the foregoing principles that, in negotiating the buy-out agreement, the Hadar defendants had no right to keep to themselves or misrepresent material facts concerning their efforts to sell or lease the Venture's Property, such as, for example, the prices prospective purchasers were offering to pay. If the Hadar defendants kept silent about such matters, or misrepresented them, as alleged in the complaint, the contractual disclaimers the IAS court invoked as grounds for dismissing this action would be voidable as the fruit of the fiduciary's breach of its obligation to make full disclosure. Defendants have not brought to our attention any authority, from either New York or Delaware (the state under whose law the Venture was organized), that would give effect to a waiver of a fiduciary's duty of full disclosure that the fiduciary obtained by means of its breach of that very duty, even where the party that gave the waiver was, like BCE, commercially sophisticated and advised by its own counsel. Thus, even if the disclaimers of the buy-out agreement would have negated any allegation of reliance on the Hadar defendants by a party to whom they owed no fiduciary duty (*see e.g. Citibank v Plapinger*, 66 NY2d 90, 94-95; *Danann Realty Corp. v Harris*, 5 NY2d 317, 323), such disclaimers must be deemed ineffective, on this motion addressed to the pleadings, as against BCE, to whom the Hadar defendants did owe such a duty. Similarly ineffective to bar this action at the pleading stage is the general release BCE executed in favor of the Hadar defendants and their attorneys, among others, pursuant to the buy-out agreement. In sum, a fiduciary cannot by contract relieve itself of the fiduciary obligation of full disclosure by withholding the very information the beneficiary needs in order to make a reasoned judgment whether to agree to the proposed contract.

In declining to give effect to BCE's statements in the buy-out agreement that it had been afforded an opportunity to conduct its own "due diligence" investigation into the disclosed potential purchasers of the Property, and that it was "satisfied" with the information it had obtained, we note that it cannot be said as a matter of law that BCE had at its disposal ready and efficient means for obtaining or verifying the relevant information on its own (*cf. e.g. CFJ Assoc. of N.Y. v Hanson Indus.*, 274 AD2d 892, 895 [buyer had access to real property to make its own estimate of environmental clean-up costs]; *Stuart Lipsky, P.C. v Price*, 215 AD2d 102, 103 [buyer could have reviewed financial statements to determine true condition of business]). ***281** For example, there is no reason to believe that BCE could have learned the substance of the Hadar defendants' discussions with potential purchasers from public sources or from some easily located private source, such as the Venture's financial records. Indeed, such offers might well not have been documented at all (as the complaint alleges that the Hadar defendants specifically requested in its discussions with one company interested in leasing substantial space in the Property), or might have been reflected only in letters, e-mail, or notes that could be discovered only through a full-blown, litigation-style review of the Hadar defendants' files. Moreover, in view of the competitive nature of business and the natural presumption that BCE should look to its own partner for information about the Venture, it cannot be assumed, as the Hadar defendants suggest, that BCE had only to make phone calls to the potential purchasers identified in the buy-out agreement to learn what they were offering for the Property. The allegations of the complaint offer no basis on which to believe that the potential purchasers would have been any more forthcoming with this information than the Hadar defendants allegedly were.

BCE is also suing in this action the Hadar defendants' attorneys, the law firm of Olshan Grundman Frome Rosenzweig & Wolosky LLP and one of its partners (collectively, the Olshan defendants). Besides representing the Hadar defendants in the formation of the Venture and the negotiation of the buy-out agreement, the Olshan defendants represented the Venture in its dealings with third parties, such as the purchase of the Property and subsequent efforts to find a buyer and tenants. In substance, BCE alleges that the Olshan Defendants participated in, and aided and abetted, the Hadar defendants' alleged fraud and breach of fiduciary duty, as described above. Since the Olshan defendants make substantially the same arguments as do the Hadar defendants for affirming the dismissal of such causes of action, we reinstate the complaint against them to that extent for the reasons already discussed. BCE also asserts an eighth cause of action for legal malpractice against the Olshan defendants

alone, based on the contention that, by virtue of their representation of the Venture, the Olshan defendants also had an attorney-client relationship with BCE. We reinstate this cause of action as well. On this motion addressed to the pleadings, it cannot be said as a matter of law that BCE will not be able to prove that it reasonably believed the Olshan defendants to have been acting as BCE's counsel and advisor in discussing the Venture's business with BCE, at least during the time period after the formation of the Venture and prior to ***282** the commencement of the negotiation of the buy-out agreement.

Concur--Tom, J.P., Andrias, Rubin, Friedman and Marlow, JJ.

17 N.Y.3d 269
Court of Appeals of New York.

CENTRO EMPRESARIAL
CEMPRESA S.A. et al., Appellants,
v.
AMÉRICA MÓVIL, S.A.B.
DE C.V., et al., Respondents.

June 7, 2011.

Synopsis

Background: Former holders of indirect minority interest in Ecuadorian mobile telephone company brought action against owner of majority interest in company and its affiliates, alleging they were fraudulently induced to sell their ownership interests in company and to release defendants from claims arising out of that ownership. The Supreme Court, New York County, Richard B. Lowe, III, J., denied defendants' motion to dismiss, and they appealed. The Supreme Court, Appellate Division, 76 A.D.3d 310, 901 N.Y.S.2d 618, reversed. Plaintiffs appealed as of right.

Holdings: The Court of Appeals, Ciparick, J., held that:
[1] parties' release agreement encompassed unknown fraud claims;
[2] parties' release agreement barred sellers' fraud claims; and
[3] a sophisticated principal is able to release its fiduciary from claims where the fiduciary relationship is no longer one of unquestioning trust so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into, abrogating *Littman v. Magee*, 54 A.D.3d 14, 860 N.Y.S.2d 24, *Blue Chip Emerald v. Allied Partners, Inc.*, 299 A.D.2d 278, 750 N.Y.S.2d 291, *Collections v. Kolber*, 256 A.D.2d 240, 682 N.Y.S.2d 189.

Affirmed.

West Headnotes (12)

[1] **Release**
Operation and effect in general

Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release.

4 Cases that cite this headnote

[2] **Release**
Operation and effect in general

If the language of a release is clear and unambiguous, the signing of a release is a "jural act" binding on the parties.

1 Cases that cite this headnote

[3] **Release**
Mistake

Release
Fraud and Misrepresentation

Release
Duress

Release
Legality of consideration

Release may be invalidated for any of the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake.

2 Cases that cite this headnote

[4] **Release**
Presumptions and burden of proof

Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release shifts the burden of going forward to the plaintiff to show that there has been fraud, duress or some other fact which will be sufficient to void the release.

3 Cases that cite this headnote

[5] **Release**
Fraud and Misrepresentation

Plaintiff seeking to invalidate a release due to fraudulent inducement must establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury.

5 Cases that cite this headnote

[6] **Release**

Scope and extent in general

Release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is fairly and knowingly made.

6 Cases that cite this headnote

[7] **Release**

Release of specific indebtedness or liability in general

Release agreement granted in connection with buy-out transaction, covering "all manner of actions" whether "future" or "contingent," encompassed unknown fraud claims.

1 Cases that cite this headnote

[8] **Release**

Indebtedness or liability in general

Shareholders who sold their minority interest in parent company to majority shareholders failed to show that release granted in connection with buyout was induced by fraud separate from fraud alleged in complaint, and thus minority shareholders' fraud claims, alleging they were fraudulently induced to sell their ownership interest in company, were barred by parties' release agreement, since fraud claims alleged in complaint fell squarely within scope of release.

1 Cases that cite this headnote

[9] **Release**

Reality of assent in general

Broad release of any and all claims, "whether past, present or future, actual or contingent," granted in connection with majority shareholders' purchase of minority shareholders' ownership interest in parent company, was enforceable against minority shareholders, despite existence of fiduciary relationship between majority and minority shareholders, since minority shareholders were sophisticated parties advised by counsel, fiduciary relationship between parties was no longer one of unquestioning trust, and minority shareholders knowingly entered into release and understood that majority shareholders were acting in their own interests.

4 Cases that cite this headnote

[10] **Release**

Reality of assent in general

A sophisticated principal is able to release its fiduciary from claims where the fiduciary relationship is no longer one of unquestioning trust so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into; abrogating *Littman v. Magee*, 54 A.D.3d 14, 860 N.Y.S.2d 24, *Blue Chip Emerald v. Allied Partners, Inc.*, 299 A.D.2d 278, 750 N.Y.S.2d 291, *Collections v. Kolber*, 256 A.D.2d 240, 682 N.Y.S.2d 189.

4 Cases that cite this headnote

[11] **Release**

Indebtedness or liability in general

Shareholders who sold their minority interest in parent company to majority shareholders failed to allege they justifiably relied on majority shareholders' allegedly fraudulent statements in executing release granted in connection with buy-out, as required to render release unenforceable in action alleging minority shareholders were fraudulently induced to sell their ownership interests in company.

[12] **Fraud**

Duty to Investigate

When the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it; it cannot reasonably rely on such representations without making the additional inquiry to determine their accuracy.

1 Cases that cite this headnote

Attorneys and Law Firms

***5 Fox Boron & Camerini LLP, New York City (Kathleen M. Kundar, JooYun Kim and Jennifer A. Fischer of counsel), for appellants.

Mayer Brown LLP (Donald M. Falk of the California bar, admitted pro hac vice, of counsel), Mayer Brown LLP, New York City (Philip Allen Lacovara and Scott A. Chesin of counsel), Mayer Brown LLP, Houston, Texas (Steven R. Selsberg of counsel), and Mayer Brown LLP, Chicago, Illinois (Timothy S. Bishop and Joshua D. Yount of counsel), for respondents.

Opinion

***272 **997 OPINION OF THE COURT**

CIPARICK, J.

Plaintiffs claim they were fraudulently induced to sell their ownership interests in a company they co-owned with one of the defendants, and to release defendants from claims arising out of that ownership. We affirm the Appellate Division's determination that this action is barred by the release.

Plaintiffs Centro Empresarial Cempresa S.A. (Centro) and Conecel Holding Limited (CHL) allege they once owned substantial shares of an Ecuadorian telecommunications company, defendant Consorcio Ecuatoriano de Telecomunicaciones S.A. Conecel (Conecel). The complaint alleges that, in 1999, they approached defendant Carlos Slim Helú (Slim), the "moving force behind" defendant Teléfonos de México, S.A. de C.V. (Telmex Mexico), which owned defendant AMX Ecuador LLC, then known as Telmex Wireless LLC (Telmex), about the possibility of Telmex investing in Conecel.

Through a "Master Agreement" executed in March 2000, Telmex obtained a 60% indirect interest in Conecel, while plaintiffs each retained a minority interest, all held through a new entity, defendant Telmex Wireless Ecuador LLC (TWE). In exchange for its interest, Telmex contributed $150 million to TWE and paid CHL $35 million to cancel Conecel debts. The parties simultaneously entered into various other agreements. Under the "Limited Liability Company Agreement," the members of TWE agreed that Telmex would manage accounting, tax, and record-keeping for TWE, and that TWE would provide quarterly financial statements to all its members. In the ***273** "Agreement Among Members," the members of TWE agreed that if Telmex ever consolidated —or "rolled up"—its Latin American telecommunications interests into a single entity "for purposes of selling the equity securities of such entity in international capital markets" at a time when plaintiffs owned 5% or more of TWE, plaintiffs could "negotiate in good faith (for a period not to ****998 ***6** exceed 20 days)" to exchange their TWE units for equity shares in the new company "at a mutually satisfactory rate of exchange." The Agreement also stated that, prior to any roll-up, Telmex and TWE would provide "financial, accounting and legal information with respect to Conecel and [TWE] as may reasonably be requested." A fourth agreement, the "Put Agreement," gave plaintiffs the right to require Telmex to purchase plaintiffs' TWE units at a set "floor price" during three separate 180–day periods between March 2002 and March 2006. Plaintiffs could exercise these put options for up to 50% of their units during the 2002 period; up to 75% during the 2004 period; and up to 95% during the 2006 period.

In September 2000, Telmex Mexico formed defendant América Móvil, S.A.B. de C.V. (América Móvil), which became the holding company for several entities, including TWE. Plaintiffs allege that, under the Agreement Among Members, this triggered their right to negotiate an exchange of their TWE units for shares in América Móvil. They allege that in March 2001 they asked defendant Daniel Hajj Aboumrad (Hajj), Slim's son-in-law and CEO of América Móvil, for financial information about Conecel and TWE for use in the contemplated negotiations. Plaintiffs assert that they never received the information, despite repeated requests. They also allege that throughout 2001 Hajj falsely represented that Conecel was financially weak and had not generated any profits to distribute to TWE.

At this point, the complaint states, plaintiffs were "wary of the threat that Defendants would never negotiate in good faith and would never distribute the Conecel profits ... as agreed." Thus left with "no practical alternative," plaintiffs exercised the first put option in March 2002 and sold Telmex 50% of their TWE units, the maximum number allowed in the first 180–day period, for which the put agreement entitled them to over $66 million. Over the next year, plaintiffs allege that they repeatedly attempted to open exchange negotiations, but defendants refused to negotiate. In 2003, defendants provided Conecel's balance sheet, which indicated that the company was not doing well, and made further representations to that effect.

***274** In 2003, Telmex offered to purchase plaintiffs' remaining units at the floor price, and plaintiffs—allegedly

relying on the false financial information—agreed, entitling them to additional substantial consideration. In July 2003, plaintiffs entered a Purchase Agreement with América Móvil, AM Wireless, LLC (formerly Telmex), and Wireless Ecuador LLC (formerly TWE). The parties executed various releases in connection with the sale. In the "Release for Agreement Among Members" (Members Release), the sellers released Telmex and its affiliates, shareholders, and agents from

> "all manner of actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands, liability, whatsoever, in law or equity, whether past, present or future, actual or contingent, arising under or in connection with the Agreement Among Members and/or arising out of, based upon, attributable to or resulting from the ownership of membership interests in [TWE] or having taken or failed to take any action in any capacity on behalf of [TWE] or in connection with the business of [TWE]."

A second release, the "Release for Master Agreement" (Master Release), employed nearly identical language, but added a proviso. ****999 ***7** It released the Telmex-related parties from claims,

> "relating to (A) the ownership by the Telmex Released Parties of the [TWE] Units, or (B) any matter arising under or in connection with the Master Agreement, or any other document, agreement, instrument related thereto or executed in connection therewith ... provided that the foregoing release shall not release any claims involving fraud."

In June 2008, plaintiffs commenced this action against Telmex Mexico and several of its affiliates: América Móvil, AMX Ecuador (formerly Telmex), Wireless Ecuador LLC (formerly TWE), Conecel, Slim, and Hajj. The complaint asserts 12 causes of action for, among other things, breach of contract, breach of fiduciary duty, fraud, and unjust enrichment. The crux of plaintiffs' claim is that defendants failed to provide them with accurate tax and financial statements for Conecel and were unwilling to negotiate in good faith for a share exchange. ***275** Plaintiffs allege that they only discovered that defendants supplied them with fraudulent information in 2008, after the Ecuadorian government audited Conecel and released the results. They seek a minimum of $900,000,000 in damages—the amount they claim they would have made if a good faith share exchange had been accomplished under the terms of the Members Agreement—plus interest.

Defendants moved to dismiss the complaint on several grounds, including that a defense is founded on documentary evidence (*see* CPLR 3211[a][1]) and the action is barred by a release (*see* CPLR 3211[a][5]). Supreme Court, ruling from the bench, denied the motion.

The Appellate Division reversed and granted the motion to dismiss, holding that plaintiffs' claims, "are barred by the general release they granted defendants in connection with the sale of their interest" (*Centro Empresarial Cempresa S.A. v. América Móvil,* S.A.B. de C.V., 76 A.D.3d 310, 311, 901 N.Y.S.2d 618 [1st Dept.2010]). After finding that the release "includes any claim possibly to be discovered in the future that defendants had misrepresented the value of Conecel" (*id.* at 317, 901 N.Y.S.2d 618), the court concluded that the release was not fraudulently induced, since plaintiffs failed to allege any fraud "separate and distinct" from that contemplated by the release (*id.* at 317–318, 901 N.Y.S.2d 618). That Telmex, as the majority shareholder, owed plaintiffs a fiduciary duty did not alter the court's analysis. Further, the court noted, plaintiffs were allegedly aware that they lacked a full picture of Conecel's internal finances and that the relationship between the parties had become adversarial, yet they failed to condition the release on the truth of the information supplied by defendants, obtain representations or warranties to that effect, or insist on viewing additional information.

Two justices dissented on the ground that the release was fraudulently induced, since plaintiffs did not realize the depths of the alleged fraud and a fiduciary cannot be released from liability unless it has fully disclosed its tortious conduct (*see id.* at 329, 901 N.Y.S.2d 618 [Catterson, J., dissenting]). The dissent emphasized that the complaint does not allege that plaintiffs had knowledge of defendants' fraud, and plaintiffs were "reasonably justified in their expectations that the defendants," as fiduciaries, "would disclose any information in their possession that might affect plaintiffs' decision on their best course of action" (*id.* at 330, 901 N.Y.S.2d 618). Moreover, in the dissent's view, the release

did not "mention[ ] or contemplate [ ]" fraud claims (*id.* at 331, 901 N.Y.S.2d 618). ****1000** *****8** Plaintiffs appealed as of right pursuant to CPLR 5601(a).

***276** Plaintiffs argue that, as the Appellate Division dissent found, the Members Release was not intended to reach fraud claims. They further contend that the release itself was fraudulently induced, particularly in light of the parties' fiduciary relationship, and that their reliance on defendants' financial disclosures was justified.

[1] [2] [3] Generally, "a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93, 98, 824 N.Y.S.2d 210 [1st Dept.2006]). If "the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties" (*Booth v. 3669 Delaware*, 92 N.Y.2d 934, 935, 680 N.Y.S.2d 899, 703 N.E.2d 757 [1998], quoting *Mangini v. McClurg*, 24 N.Y.2d 556, 563, 301 N.Y.S.2d 508, 249 N.E.2d 386 [1969]). A release "should never be converted into a starting point for ... litigation except under circumstances and under rules which would render any other result a grave injustice" (*Mangini*, 24 N.Y.2d at 563, 301 N.Y.S.2d 508, 249 N.E.2d 386). A release may be invalidated, however, for any of "the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake" (*id.*).

[4] [5] Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release "shifts the burden of going forward ... to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release" (*Fleming v. Ponziani*, 24 N.Y.2d 105, 111, 247 N.E.2d 114 [1969]). A plaintiff seeking to invalidate a release due to fraudulent inducement must "establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury" (*Global Mins.*, 35 A.D.3d at 98, 824 N.Y.S.2d 210).

[6] Notably, a release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is "fairly and knowingly made" (*Mangini*, 24 N.Y.2d at 566–567, 301 N.Y.S.2d 508, 249 N.E.2d 386; *Alleghany Corp. v. Kirby*, 333 F.2d 327, 333 [2d Cir.1964]). As the Appellate Division majority explained below (*Centro*, 76 A.D.3d at 318, 901 N.Y.S.2d 618), a party that releases a fraud claim may later challenge that release as fraudulently induced only if it can identify a separate fraud from the subject of the release (*see Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 527–528 [2d Cir.1985]). Were this not the case, no party could ever settle a fraud claim with any finality.

[7] ***277** As a preliminary matter, the parties here debate whether the Members Release encompasses unknown fraud claims. We find that it does. The broad language of the release reaches "all manner of actions ... whatsoever ... whether past, present or future, actual or contingent, arising under or in connection with the Agreement Among Members and/or arising out of ... the ownership of membership interests in [TWE]." The phrase "all manner of actions," in conjunction with the reference to "future" and "contingent" actions, indicates an intent to release defendants from fraud claims, like this one, unknown at the time of contract (*see Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1312 [5th Cir.1983]; *Consorcio Prodipe, S.A. de C.V. v. Vinci, S.A.*, 544 F.Supp.2d 178, 192 [S.D.N.Y.2008]).

*****9** ****1001** Plaintiffs note that the Master Release, executed at the same time as the Members Release, is substantially similar but expressly excludes fraud claims. They argue—apparently for the first time in their briefs before us—that the fraud exception in the Master Release should be read into the Members Release. Even assuming we can reach this argument (*see Matter of SoHo Alliance v. New York City Bd. of Stds. & Appeals*, 95 N.Y.2d 437, 442, 718 N.Y.S.2d 261, 741 N.E.2d 106 [2000]), "courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" (*Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 72, 412 N.Y.S.2d 827, 385 N.E.2d 566 [1978]). We see no reason to import the Master Release's express statement into the Members Release. If anything, the explicit exclusion of fraud claims from the Master Release suggests that the Members Release is not so limited. Plaintiffs' claims are either brought under the Agreement Among Members, under which Telmex agreed to negotiate in good faith and provide Conecel and TWE's financial information, or otherwise "aris[e] out of" their "ownership of membership interests in [TWE]." They therefore fall under the Members Release.

[8] Having executed this release, plaintiffs cannot now claim that defendants fraudulently misled them regarding the value of their ownership interests in TWE unless the release was itself induced by a separate fraud. The fraud described in the complaint, however, falls squarely within the scope of the release: plaintiffs allege that defendants supplied them with false financial information regarding the value of Conecel and

TWE, and that, based on this false information, plaintiffs sold their interests in TWE and released defendants from claims in connection with that sale. Thus, as the Appellate Division ***278** observed: "plaintiffs seek to convert the 2003 release into a starting point for new ... litigation, essentially asking to be relieved of the release on the ground that they did not realize the true value of the claims they were giving up" (*Centro*, 76 A.D.3d at 317, 901 N.Y.S.2d 618).

[9] That the parties had a fiduciary relationship does not alter our conclusion. It is true that Telmex, as a majority shareholder in a closely held corporation, owed a fiduciary duty to plaintiffs, minority shareholders (*see Fender v. Prescott*, 64 N.Y.2d 1077, 1079, 489 N.Y.S.2d 880, 479 N.E.2d 225 [1985]). Telmex was therefore required to "disclose any information that could reasonably bear on plaintiffs' consideration of [its purchase] offer" (*Dubbs v. Stribling & Assoc.*, 96 N.Y.2d 337, 341, 728 N.Y.S.2d 413, 752 N.E.2d 850 [2001]).

[10] A sophisticated principal is able to release its fiduciary from claims—at least where, as here, the fiduciary relationship is no longer one of unquestioning trust—so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into (*see Alleghany Corp.*, 333 F.2d at 333 ["There is no prerequisite to the settlement of a fraud case that the (fiduciary) defendant must come forward and confess to all his wrongful acts in connection with the subject matter"]; *Consorcio Prodipe, S.A. de C.V.*, 544 F.Supp.2d at 191). To the extent that Appellate Division decisions such as *Littman v. Magee*, 54 A.D.3d 14, 17, 860 N.Y.S.2d 24 (1st Dept.2008), *Blue Chip Emerald v. Allied Partners*, 299 A.D.2d 278, 279–280, 750 N.Y.S.2d 291 (1st Dept.2002) and *H.W. Collections v. Kolber*, 256 A.D.2d 240, 241, 682 N.Y.S.2d 189 (1st Dept.1998) suggest otherwise, they misapprehend our case law. Plaintiffs here are large corporations engaged in complex ****1002** *****10** transactions in which they were advised by counsel. As sophisticated entities, they negotiated and executed an extraordinarily broad release with their eyes wide open. They cannot now invalidate that release by claiming ignorance of the depth of their fiduciary's misconduct.

[11] In addition to failing to allege that the release was induced by a separate fraud, plaintiffs have failed to allege that they justifiably relied on defendants' fraudulent statements in executing the release. As we recently reiterated:

> "[I]f the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he ***279** must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations" (*DDJ Mgt., LLC v. Rhone Group L.L.C.*, 15 N.Y.3d 147, 154, 905 N.Y.S.2d 118, 931 N.E.2d 87 [2010], quoting *Schumaker v. Mather*, 133 N.Y. 590, 596, 30 N.E. 755 [1892]).

Here, according to the facts alleged in the complaint, plaintiffs knew that defendants had not supplied them with the financial information necessary to properly value the TWE units, and that they were entitled to that information. Yet they chose to cash out their interests and release defendants from fraud claims without demanding either access to the information or assurances as to its accuracy in the form of representations and warranties. In short, this is an instance where plaintiffs "have been so lax in protecting themselves that they cannot fairly ask for the law's protection" (*id.* at 154, 905 N.Y.S.2d 118, 931 N.E.2d 87).

[12] In certain circumstances, a fiduciary's disclosure obligations might effectively operate like a written representation that no material facts are undisclosed, and this might satisfy a principal's obligation to investigate further (see *id.* at 154–155, 905 N.Y.S.2d 118, 931 N.E.2d 87). Where a principal and fiduciary are sophisticated parties engaged in negotiations to terminate their relationship, however, the principal cannot blindly trust the fiduciary's assertions. This is particularly true where, as alleged here, the principal has actual knowledge that its fiduciary is not being entirely forthright: "[W]hen the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it. It cannot reasonably rely on such representations without making additional inquiry to determine their accuracy" (*Global Mins.*, 35 A.D.3d at 100, 824 N.Y.S.2d 210 [citations omitted]; *see also Littman*, 54 A.D.3d at 17, 860 N.Y.S.2d 24 [if the fiduciary is "aware of information that rendered (its) reliance unreasonable, or if (it) had enough information to create a duty to investigate further, the requisite reliance cannot be established"]).

Plaintiffs repeatedly and unsuccessfully attempted to hold defendants to their disclosure obligations for years before negotiating and executing the sale of their shares and the accompanying releases. Moreover, the complaint alleges that plaintiffs were driven to sell because they were "wary of the threat that Defendants would never negotiate in good faith and would never distribute the Conecel profits." Plaintiffs therefore cannot be said to have reasonably relied

on defendants' assertions regarding Conecel's performance in executing the releases.

***280** In sum, the 2003 Members Release was intended to bar the very claims that plaintiffs now bring, and plaintiffs fail to allege that the release was induced by any fraud beyond that contemplated by the ****1003** *****11** release. In any event, the fraudulent statements plaintiffs point to cannot support a conclusion that the release was fraudulently induced, since plaintiffs allege that they released defendants from claims relating to the sale of their TWE units without conducting even minimal diligence to determine the true value of what they were selling. The Appellate Division majority was therefore correct in concluding that, fully crediting plaintiffs' allegations, they would not be able to prevail as a matter of law.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge LIPPMAN and Judges GRAFFEO, READ, SMITH, PIGOTT and JONES concur.

Order affirmed, with costs.

Parallel Citations

17 N.Y.3d 269, 952 N.E.2d 995, 929 N.Y.S.2d 3, 2011 N.Y. Slip Op. 04720

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1. Purpose of the Opening
    a. The purpose of an opening statement is to permit the parties to advance their client's theory of recovery or defense before the jury. (Miller v. Owen)
    b. Outline what expect to prove. Tell you about each party's claims so that you will have a better understanding of the evidence as it is introduced. What is said in such opening statements is not evidence. (Pattern Jury Instructions 1:3).
    c. 2 Purposes (Gianna: Opening Statements § 6:17)
        i. Have listeners see the evidence from your side, to bias the listener to view the evidence from your point of view. In other words, to make the jurors care enough to abandon logical thinking in your favor. To engage that *pre-decisional bias* and start the process of confirmational bias that slants evidence in your favor.
        ii. Help the audience visualize what happened to your client from your point of view. The opening must preview your reality, must make your reality real right away and motivate the jurors first, to care, and then, to "see" what happened from your perspective.
    d. An opening statement also advises the jury of the case in order to prevent the jury from being confused and it prevents the opposing party from being surprised. (Lane Goldstein Trial Techniques § 10:5)

2. Requirements for an Opening Statement
    a. New York
        i. Civil
            1. An attorney for each plaintiff having a separate right, and an attorney for each defendant having a separate right, may make an opening statement. (CPLR 4016)
            2. What is said in such opening statements is not evidence. Plaintiff makes an opening statement first, and is followed by defendant. The party having the burden of proof is entitled to open first (usually the plaintiff). While defense counsel may move to dismiss at the close of plaintiff's opening, such motions should rarely be granted. When an opening statement has been challenged as inadequate, counsel should be offered the opportunity to correct or enhance the opening statement by making an offer of proof. (PJI 1:3)
            3. The right to open and close belongs to the party who holds the affirmative on the issues in the case and the test of who has this important privilege is whether the party can prevail without giving any evidence. If he cannot so prevail and must offer some proof, he has the right to open and close. (Flaherty v. Wunsch)
            4. "[c]ontrary to popular misconception, a party is not rigidly bound by his opening[s]." DeVito v. Katsch

ii. Criminal

1. The people must deliver an opening address to the jury. The defendant may deliver an opening address to the jury. CPL § 260.30
2. Defense counsel's opening statement attacked the reliability of the complainant's identification of the defendant and suggested that the police planted evidence on the defendant to bolster a weak case. The remarks exceeded the bounds of an appropriate opening statement. People v. Green
3. The court properly exercised its discretion in precluding defense counsel from turning his opening statement into a summation, and the court's admonition to defense counsel to limit his opening statement to "any proof that you intend to produce here in the courtroom" did not shift the burden of proof, particularly where the court amply charged the jury that the defense did not have to make an opening statement and that the burden of proof remained with the People. People v. Orr.
4. When, in his opening statement, defense counsel expressed doubt about the memory of the arresting officer, the court interjected, "Is that what you are going to prove?" Also during his statement, when defense counsel referred to "the facts that will be shown," the court again interrupted, saying, "No, tell us what you are going to prove." Later, the court said: "Opening statement is what you are going to prove". The court later cut short the defense's opening statement. People v. Robinson
5. The People's opening should provide sufficient allegations so that the jury can "intelligently understand the nature of the case they have been chosen to decide" People v. Carter
6. Courts have recognized that a prosecutor's opening statement should set forth the nature of the charges against the defendant and briefly state the facts the prosecution intends to prove and the evidence which will be introduced in support thereof. People v. Brown

b. Federal

i. Civil

1. Plaintiff next argues that defense witnesses misrepresented facts during the trial and defense counsel improperly prejudiced plaintiff during opening and closing arguments. A new trial may be granted when prejudicial remarks by counsel during trial have made it "reasonably probable that the verdict was influenced by prejudicial statements. Bolt v. Hickok
2. The court is of the opinion that plaintiff has not had a fair trial due to the objectionable trial strategy of defendant's counsel. In substance, those tactics consisted of knowingly making prejudicial insinuations in his opening statement which were not substantiated by evidence. a

new trial will not be required merely because of reference by counsel, in a civil case at least, in his opening statement to matters which he subsequently makes no attempt to prove. *The rule is different, however, where it is clear that prejudice resulted to the opposing side from the remarks of counsel in his opening statement, which was not cured by the action of the court.* Kiefel v. Las Vegas Hacienda

3. With respect to the statements made by Costello's attorney in his opening statement, the district court agreed that it was improper for the attorney to have brought attention to the discovery defects, but decided that the misconduct was not prejudicial. Soltys v. Costello
4. A "pattern of misconduct from opening statement through final argument" that proves "beyond any doubt" the "reasonable probability that the jury's findings were influenced by counsel's highly improper conduct," which effectively nullifies any instructions to cure unfair prejudice, justifies a new trial. Genzyme Corp. v. Atrium Medical Corp.

ii. Criminal

1. Ordinarily, the prosecutor has the advantage of making the first opening address to the jury. The defendant must therefore be prepared with a strong and persuasive statement to dislodge any unfavorable ideas which the prosecutor may have placed in the minds of the judge or jury. In most jurisdictions, the prosecutor must make an opening statement. Bailey Criminal Trial Techniques
2. The defense in a criminal action has a constitutional right to make an opening statement. Comparing and contrasting evidence is not necessarily impermissible argument during opening statement. Crim. Prac. Manual
3. Prosecutor's opening statement "overstepped the parameters of an opening statement" in the manner in which it characterized Helbling. Prosecutor's remarks were over the line, and arguably even out of line. Case law punishes the government by granting a new trial in such a situation only if the defendant was prejudiced by the remarks in question. Here, we conclude that a new trial is not warranted because Helbling was not in fact prejudiced. US v. Helbling
4. As long as the opening statement avoids references to matters that cannot be proved or would be inadmissible, there can be no error, much less prejudicial error. The use of a chart to preview the government's case certainly did not "poison the jury's mind" against the defendants, nor did it allude to "items of highly questionable evidence." US v. De Peri
5. First, the government should not have mentioned appellants' prior offenses in its opening statement. Such mention irretrievably puts before a jury the fact that a defendant has been involved in prior

criminal activity. If later government efforts to introduce evidence of the prior offenses prove unavailing, the jury is still left aware of these offenses and, even with a cautionary instruction, the chances of prejudice are still significant. US v. Bailey

3. Strategies
    a. Plaintiff
        i. If you are a plaintiff, you must engage the mind and move the heart—but you must also foreshadow and counter jury thinking that will hurt your client. Defense theories of the case and defense themes very often attempt to direct jurors toward the theme of "personal responsibility." Most lawyers, in fact, intuitively, use this theme in defense. Gianna § 9:11
        ii. Jury science tells us that the ease with which a juror can undo a negative event with a counterfactual affects the amount of blame the juror attributes to a party. The more jurors create counterfactual thinking, the stronger their opinions of blame on the party they feel could have changed the outcome of the event. Counterfactual thinking is most often effective against a defendant. Gianna § 9:13
        iii. The jury, relying on the lawyer's exaggerated opening statement, waits for evidence which will prove such overstatements. When such "proof" relates to a sufficiently important subject and is not presented, not only may opposing counsel point out that the record does not support such representations, but an unfavorable verdict is likely to result as well.[5] Consider the opening statement to be a promise that you must keep. Be sure to make the judgment of opposing counsel's broken promise. Lane Goldstein § 10:63
    b. Defendant
        i. Begin with a short, simple opening remark or approach, then follow with a brief and simple description of the facts of your defense, explaining all technical and legal terms. Take special care to explain the significance of the prosecution's burden. Bailey § 42:6
        ii. Emphasize, in simple language, the legal theory underlying your defense. Show them how your evidence will support this defense. Make the jury aware that there are two sides to every story. Show the manner in which your defense is contrary to the version of the facts given by the prosecutor. Explain to the jury that people are human and will view the same occurrence differently. Certain witnesses' testimony will allow for multiple conclusions. It is far easier to mold an open mind than to change one that has already formed an opinion. Bailey § 42:8
        iii. An essential function of the opening statement is the anticipation of the strong points to be presented by the prosecutor and, conversely, the weaknesses of the defense case. It is always desirable in planning your trial strategy to anticipate disclosures by the prosecution of highly unfavorable and damaging evidence against the accused. Carefully consider in advance whether to disclose

such weaknesses in your opening address in an effort to lessen their effect and dispel the devastating impact such evidence may have upon the jury if it is first advanced by the prosecution. If the defendant is not going to testify, it is best for you to address this fact in your opening statement. You should inform the jury that your client is under no obligation to take the stand and, therefore, the jury should not hold the defendant's choice not to take the stand against him or her. Of course, defense counsel must be careful not to disclose anything which the prosecution may not already have in its hand. Bailey § 42:11

iv. Remember that you want to arouse sympathy for your client. It is much easier for a jury to sympathize with a person than with an abstract "defendant." When you refer to your client for the first time, refer to him as "the accused Joe Smith." Thereafter, call him "Joe" or "Joe Smith." Do not call him or her "the defendant." On the other hand, you want the prosecution's witnesses to be impersonal. Refer to the "complainant," Bailey § 42:17

v. Help the jury. A trial lawyer must work with the jury to find the facts which will let the jury make the right decision. Do not state as fact something about which there will be no evidence. Educate the jury. Explain your case fully in the opening. Reinforce this explanation by presenting evidence skillfully. Then tie it together with an argument that reinforces your view of the evidence. Keep it simple. Do not unnecessarily embellish or over-develop any aspect of your case. Expose weak points. Do not wait for opposing counsel to be the first to bring up a weak point in your case. Emphasize jurors' participation. Stress that you are asking jurors for help in reaching a fair result for both sides. Be persuasive. Do not read your opening statement. Outline the significant parts of your opening statement but try not to even refer to your outline during your opening. Stress the jury's role. Ask the jury not to reach a decision until it has heard all of the evidence and has been instructed on the law by the judge. Bailey § 42:19

vi. if the plaintiff had a real choice, a viable choice, and then consciously made the wrong choice, jurors tend to feel that the plaintiff is personally responsible, at least in some part, for the consequences of that choice. Jury scientists call this "attribution theory."[1] Attribution theory tells us that when a person chooses to do something, that person is then seen as responsible for the consequences of that choice, the results of that choice, whatever the results may be. The defense must argue and prove that the choice was the plaintiff's, and the plaintiff's alone and the defendant did nothing to influence the path chosen by the plaintiff. Everyone knows that certain consequences follow from certain choices. Gianna § 9:12

vii. Simply telling a judge or a jury "we are not guilty," "we are not liable," does not work in the modern courtroom. The jury expects to hear the defense story and the defense theme no matter how weak the plaintiff's case appears to the defense lawyer. The defense opening statement should always, at least implicitly, tell the trier-of-fact that there is something else here, some evidence

that has been hidden by the opposition. never think that the defense has to prove nothing to win; never assume that attacking the opposition's case will suffice and must never reserve the defense "good stuff" to the end of the defense case. Drop the jury into the defense story as soon as possible, set the theme, create appropriate labels, and set the anchors in the beginning. Gianna § 11:1

viii. In a criminal case, a defendant who relies upon the "burden of proof" and the "cloak of innocence," is a guilty defendant. In a civil case, if the defense relies on the plaintiff's burden of proof, in other words, putting the plaintiff's case to the preponderance of the evidence test, the plaintiff wins! If for one moment you think that the defense lawyer does not have a higher burden of proof, you have failed to put yourself in the shoes of the jurors. Jurors come to the courtroom believing that both sides have to prove their case. Gianna § 11:4

ix. Defense counsel should go through the outline, contradicting, modifying or supplementing plaintiff's presentation. Also, she should reemphasize those facts that support her defense. Goldstein 10:15

CHAPTER 7
OPENING STATEMENT

REFLECTING ON ADVOCACY

The best way to win an argument is to begin by being right. . . .

—Jill Ruckelshaus

Judge:

Mr. O'Connor, you may proceed with the plaintiff's opening statement.

Plaintiff's Attorney:

My name is F. Melvin O'Connor, III. As you know, I am the attorney representing the plaintiff, Martin Sikorski, in this case. As the judge has advised you, this part of the trial is known as the opening statement. It is the opportunity that the attorneys in this case have to explain to you the evidence that will be presented. You need to realize that what we lawyers say in these opening statements is not evidence and is not to be considered by you as evidence.

It may help you to think of this opening statement as if it were like a table of contents of a book you are about to read. During this opening I will tell you what happened, when it happened, and how it happened. I will tell you who the witnesses will be, what they will testify to, and what the evidence will show. So this opening will give you an overview of the evidence in this case, just like a table of contents of a book tells you what is in the book.

In this case, my client entered into a written insurance agreement with the defendant, Vulcan Insurance Company, to insure his building against any loss incurred by the fire that destroyed the insured's building. He signed this contract on February 2, 1987 and paid the full premium. Then a fire, caused by accidental circumstances, caused the building to burn down more than six months later on August 17. A claim was filed to collect the value of the building from the insurance company, and that claim was denied. That is why we are in court today. Let me now tell you the details of what happened. . . .

Juror:

[I'm not sure what to expect. Why is this attorney beginning this way? We already know who he is, and the judge told us a little

REFLECTING ON ADVOCACY

Minds are like parachutes. They only function when they are open.

—Thomas Robert Dewar

bit about these opening statements. I feel like I'm in my sixth grade civics class. Why is he telling us that what he is about to say is not that important? I didn't think that a trial was like a book, but maybe it is. Doesn't he want us to listen carefully or be persuaded by him? Ok, now he is starting to tell us about the facts. Except he sounds too much like a lawyer. I know he's a lawyer because I don't understand what he's talking about. You would think he would be a better speaker. His eye contact is poor, he sounds a little unsure of himself. His story should seem more interesting. Maybe it's his choice of words. This is not what I expected. I'm getting bored already.]

By the Court:

Ms. McGillis, you may now proceed with the defendant's opening statement.

Defendant's Attorney:

This case is about the burning down of a factory. About the intentional and willful destruction of a factory building. About arson committed by the plaintiff Martin Sikorski.

The plaintiff had severe financial problems and burned his building down to solve those problems. Martin Sikorski, on August 17, 1987, started a fire in the boiler room of his factory at around 1:30 in the morning. The building was empty. There was no one around. Mr. Sikorski took several gallons of gasoline stored by the loading dock in the building and spread that gasoline around the floor of the boiler room. He then lit on fire a rolled up magazine and touched the flame to the gasoline, starting the fire that caused the destruction of his building. He left immediately. He had already opened up several windows in the factory so the flames would spread rapidly. They did. The fire engulfed that building, which was primarily a wooden structure, like a firestorm.

The fire department responded immediately after receiving the first alarm. The alarm was made about fifteen minutes

REFLECTING ON ADVOCACY

Speeches cannot be made long enough for the speakers, nor short enough for the hearers.

—James Perry

after the fire started. Despite the best efforts of the firefighters, the fire intentionally started by Mr. Sikorski burned his building to the ground.

Here is a picture of that factory building before the fire, and here is another picture of it within hours after the fire began.

That is how Martin Sikorski—who now asks you to award him money for his destruction of his building—committed arson. But why? Why would the sole owner of a plastics company which provided jobs to people in this community burn it down? Why? The facts tell us why he committed arson.

Juror:

[Now that's more like it. This lawyer is telling us an interesting story in an interesting way. She's made her position very clear and persuasive. She has an intensity about her. She seems sincere, and I like her. Maybe the plaintiff should lose. Maybe the insurance company should win. It surprises me that I would think that. After all, insurance companies are reluctant to pay such claims, aren't they? Maybe not in this case. We'll have to see if the facts are there to support the story she told. Now I'm fully awake.]

§ 7.1 INTRODUCTION

A. Purposes

The opening statement provides the trial attorney with the opportunity to explain the evidence to the fact finder and to describe the issues to be presented during the trial. An opening statement has a significant impact on the jurors' and judge's initial understanding and impression of the case. Jury surveys have established that during final deliberations jurors often vote consistently with the early positions formed during the opening statement. This result may be caused by other trial events such as the effective introduction of evidence, credible witnesses, or a persuasive closing statement. Nonetheless, the more effective an opening statement is, the more likely a favorable verdict will be obtained.

The purposes of an opening statement are:

- To explain the evidence to the fact finder,
- To tell an interesting and compelling story,
- To explain to the fact finder what the case is all about including theories, issues, claims, defenses, and positions,
- To persuade the fact finder of the merits of the case,
- To motivate the fact finder to want to render a favorable verdict,
- To establish an appropriate atmosphere in the courtroom.

B. What Can Be Presented

This chapter describes the presentation of opening statements in a jury trial. Most of the strategies and techniques described in this chapter also apply to bench trials, but there are differences as explained in section 4.11.

1. Facts and Opinions

An opening statement presents facts and opinions which will be introduced as evidence. The facts that can be described include direct and circumstantial evidence and reasonable inferences drawn from this evidence. The opinions that can be described include admissible lay and expert opinions. Chapter 8 on Direct Examinations provides examples of such evidence.

The goal of the attorney is to tell a story about the evidence. Any admissible evidence, even if in dispute, can be presented. An attorney can refer to evidence from any source, including evidence introduced by opposing counsel. Not all evidence will be referred to during the opening. A skilled trial advocate selects significant facts and opinions that meet the purposes of an effective opening without including all details of the case or insignificant information.

2. Theories and Issues

Section 3.3 described the importance of selecting a case theory to support a favorable verdict. During the opening statement the advocate should use theme words and phrases to introduce and establish the case theories and issues.

3. Argument

The general rule is that it is improper to present arguments during an opening. An attorney cannot provide explanations, propose conclusions, comment on the evidence, or otherwise advance arguments. The attorney should, however, present the most persuasive opening possible, and a skilled trial advocate attempts to present an opening statement that touches the line of argument but does not cross over that line.

There is often a fine line between what is argument and what may be stated during an opening statement. There is often a fine line between what is a fact supported by the evidence and what is a conclusion drawn by the attorney. Different judges and attorneys disagree as to where these lines are to be drawn. This chapter contains examples of these differences, because of the difficulty in abstractly explaining what are appropriate and inappropriate statements.

4. The Law

In a jury trial, the judge explains the law to the jury. The attorney may make short, accurate references about the law during the opening in almost all jurisdictions. An advocate can concisely refer to the legal issues in the case, the elements that comprise a claim or defense, and the burden of proof. An advocate can also show how the facts establish the issues, prove the elements, and meet the burden of proof. An attorney may briefly show how the law applies to the facts or how the facts support the law. In a bench trial, the attorney can ordinarily discuss the law and explain legal issues to the judge in more detail.

5. A Test

In a jury trial, an opening statement consists primarily of statements based on evidence. One conservative "test" to determine whether an attorney can include information during opening is to determine whether a witness, a document or some other form of evidence will provide such information. If the answer is yes, the statement may be made during the opening; if no, then that statement is probably inappropriate and objectionable.

Adherence to this conservative test minimizes objections to an opening statement. Strict adherence, however, may deprive an opening statement of the persuasive explanation needed to be most effective, including an appropriate explanation of the case theory. Most judges and opposing lawyers allow more latitude in an opening statement than described in this test. In these situations an attorney may present a broader opening statement.

Ideally, an effectively presented opening statement would result in the jurors and judge jumping over the jury rail, hugging the attorney, and telling the client that the remainder of the trial is a mere formality and the client will win. This fantasy does not happen very often. Actually, there is no recorded instance of this ever occurring in the annals of trial practice, but it is an aspiration.

§ 7.2 PREPARATION

The preparation of an opening statement includes the selection of the evidence to be explained, the theories to be described, the law to be explained, the most effective way to present the information, and additional planning considerations discussed in this section.

A. Pretrial Evidentiary Rulings

When determining which evidence to present during the opening statement, the attorney must ascertain whether an in limine ruling is necessary before presenting that evidence. An opening statement may not refer to evidence that is inadmissible during trial. Pretrial evidentiary rulings permit the attorney to plan an opening statement knowing exactly what evidence will be admissible during trial.

Section 5.5(A) described the procedure of bringing a motion in limine to obtain a pretrial evidentiary ruling. An attorney may want to obtain an advance ruling to avoid an objection by the opposing lawyer to questionable evidence. An opposing attorney may want to obtain a pretrial ruling to prevent the jurors from hearing information that will not be admissible evidence during the trial.

Not all evidentiary problems will be resolved in a pretrial motion. The judge may defer ruling on admissibility until that point in the trial when the evidence is actually introduced. An attorney may decide not to seek a pretrial ruling for tactical reasons. An attorney may prefer to assume the evidence will be admissible, or may not want to suggest to the opposing counsel or to the judge that some evidence might be objectionable. In these and other situations the attorney may need to plan the opening statement without the benefit of a pretrial ruling, and without knowing exactly what evidence will be admitted during the trial.

B. Opening Based on Trial Events

An opening statement should be based in part on what has happened during the judge's initial explanations and jury selection. Remarks made during jury selection and during preliminary instructions by the judge to the jury may affect what should be said and how it should be said during opening. In jurisdictions where jury selection questioning has been extensive, it may not be as necessary for the attorney to spend time establishing a rapport with the jurors. But, where jury selection is limited, the attorney may need to provide the jurors with more information and may need to make certain the jurors have a favorable impression of the attorney during the opening. In a

similar fashion, where the judge provides an objective explanation of the issues in a case, it may not be necessary for the attorneys to detail the claims and defenses. But, where the judge gives few preliminary instructions, a detailed explanation of the issues, claims, and defenses may be necessary during the opening.

C. Opening Based on Final Argument

The final argument constitutes the foundation for the opening statement. The final argument must be planned before the trial starts. See section 11.3(A). If a fact, opinion, theory, issue, or position is not going to be a part of the closing statement, it should not be part of the opening statement or the rest of the case. The opening statement must be consistent with what will be presented in summation and should be based on what will be included in the final argument.

D. Anticipating Opponent's Positions

When preparing an opening statement, an attorney needs to review the case from the perspective of the opposition. The advocate must anticipate and attempt to diffuse the other side's opening statement, theories, evidence, and case. The more accurately an attorney anticipates the other side's positions, the more effective the attorney can be in presenting an opening statement that rebuts what the other side has said or will say.

E. Selecting Visual Aids and Exhibits

An attorney must decide whether to use visual aids or trial exhibits during the opening statement. Consideration should be given to the persuasive impact these devices may have on the jury and how they will make the opening statement more understandable and interesting. The use of visual aids and exhibits is described in sections 7.4(G) and 9.4.

F. Order of Opening Statements

Opening statements usually occur immediately after jury selection. The general rule is that the party with the burden of proof gives the first opening statement. A plaintiff/prosecutor has the burden of proof in a case and makes the first opening. The defendant then has an opportunity to present an opening immediately after the plaintiff/prosecutor has completed the initial opening. The defense may also have the option of delaying the opening until after the plaintiff/prosecutor has presented evidence and rested, as explained in section 7.2(H). In cases with multiple plaintiffs or defendants, the order of the opening statements is determined prior to trial by the judge, usually based on one or more of the following factors: which plaintiff has the more substantial burden of proof, the chronology of the factual events, which defendant has a counterclaim or an affirmative defense, and which defendant has the more substantial defense.

G. Length of Opening Statement

The opening statement should be long enough to explain what needs to be explained, yet short enough to maintain the attention of the fact finders. Some opening statements may only last five minutes, others will extend for an hour or more. Many opening statements last between ten to twenty minutes. There is no optimum length for an opening statement because each opening depends upon the evidence and circumstances of the case and the speaking ability of the attorney. Some judges may set limits on the length of an opening if the court anticipates the attorney may take an unreasonable amount of time. An attorney who anticipates that the opposing lawyer may exceed reasonable time limits may ask the judge to limit the opponent.

H. Waiving or Reserving the Opening Statement

An opening statement may be waived. In a jury trial, however, an opening statement should never be waived because of the advantage an effective opening statement provides. In a court trial, an opening statement may be waived for tactical reasons if an attorney has had an opportunity to fully explain the case to the judge prior to the trial.

Most jurisdictions permit the defendant to present an opening statement immediately after the plaintiff/prosecutor or to reserve the opening statement until the plaintiff/prosecutor rests and the defense case begins. Local rules or practice may prohibit or restrict the defense option of delaying the giving of an opening. In the vast majority of civil cases and in most criminal cases, the defendant should give the opening statement immediately following the opening by the plaintiff/prosecutor. This approach provides the jury with an explanation of both sides of the case, places the plaintiff/prosecutor's case in perspective, and counters an effective opening statement. When the defense opening is delayed, the jury may attach undue weight to the initial opening statement and not fully consider available defenses.

In civil cases, because of liberal discovery rules, pretrial conferences, and settlement negotiation efforts, the defense knows what issues the plaintiff will attempt to prove and what evidence will be introduced. In these cases, the advantages in immediately giving the opening usually far outweigh any advantage gained from delaying the opening. The defendant's own story is explained in full at the outset, and the jurors are provided with additional information and perspectives to be considered while the plaintiff presents evidence.

In criminal cases, there may be an advantage to the defendant in reserving an opening statement, especially where the prosecutor has had limited discovery and does not know what the defense will be. Reserving the opening statement in such situations prevents the prosecution from modifying the presentation of its case to reduce the impact of the anticipated defense. Also, in a case where alternative defenses

exist and a defense attorney is unsure what defense to use, it may be more effective to make that decision after the prosecution has presented its evidence. In some cases where the defense attorney is not certain whether the defendant will testify, delaying the opening may also be a useful tactic. Not giving an opening, however, may create an impression that the prosecution's case is stronger than it is.

I. Written Outline or Detailed Script

The material for an opening statement should be organized into an outline format. The outline should include the introduction, the body, and the conclusion. The use of an outline helps organize the facts and theories of the case into a readily accessible format. As the attorney prepares other aspects of the trial, this outline may be modified or altered and should remain flexible. Form 7.1, on the adjacent page, is an example of an outline of elements to be considered.

Some attorneys find it advantageous to prepare a complete opening statement. This draft may then be reviewed and improved. With this format, the attorney knows that the final script of the opening statement will contain everything that needs to be presented. The drawback of using a script during an opening statement is the temptation to read it to the jury. A better approach for the attorney is to prepare a key word outline of the script. After becoming completely familiar with the script, the attorney should be able to present the opening statement using only the key word outline. When notes or outlines are used, they should be used in a candid, forthright fashion.

J. Rehearsal

After the attorney has prepared the outline or script, practice is necessary to be adequately prepared for the presentation at trial. Opening statements should not be read aloud to the jury from a written script, nor should they be memorized. The attorney should not necessarily try to remember exact words used during the practice sessions, but rather express to the jurors the ideas that have been rehearsed in these sessions.

The attorney may want to think through the opening statement silently and then practice verbally, concentrating on content. As the content of the opening statement is mastered, the attorney can work on stylistic improvements. After this preparation the attorney should continue rehearsing the opening statement. The attorney may use an audience of colleagues, family, a mirror, or videotape for review and critique.

The attorney should rehearse until the story can be told in a persuasive, compelling manner. The key to an effective presentation of an opening statement is that the attorney knows the ideas and important phrases that need to be conveyed to the jury, is comfortable with this story, and can make a sincere, believable, and understandable presentation.

FORM 7.1
OPENING STATEMENT PLANNING WORKSHEET

Case _____ File _____

Case theory

Theme words of case

Significant issues

Structure

Introduction

Significant story facts

Event/circumstances

What/how/why it happened

Parties/witnesses

References to the law

Visual aids/exhibits

Case weaknesses

Request for verdict

Conclusion

Other tactics/approaches/techniques

Possible objections adversary may make

K. Local Requirements

The attorney should determine before the trial whether the trial judge has any special requirements or limitations or whether local court rules set limits on the opening statement. This determination avoids having the opening statement interrupted by the trial judge and reduces the chances of opposing counsel making objections. Local practice and procedures may restrict how an opening statement can be presented.

§ 7.3 ORGANIZATION

A. Structure

Opening statements must be presented in a structured fashion. The structure should allow the entire case to be framed in the opening and should help the jury understand the facts and theories easily. The following are examples of various structures:

1. Chronological

A chronological description of events is relatively easy to remember, makes sense, and is easy to understand. The attorney describes the events in the order in which they occurred. For example, in an employment law case, the opening can begin when the plaintiff was hired and conclude with the events occurring on the date the plaintiff was fired.

2. Flashback

The beginning of the opening can explain the end of the story, and the remaining story can be told by flashing back to earlier events. For example, in a murder case, the murder can be described first, followed by the events leading up to the murder, including the preparation and planning.

3. Parallel Actions

The actions of the plaintiff and the defendant or victim and criminal defendant can be told separately with the conclusion being the final event at which they came together. For example, in an automobile accident case, the routes of the plaintiff and defendant can be described with the conclusion being the collision.

4. Claims, Defenses, Topics

The opening can be structured around the claims, defenses or related topics that will be proved during the trial. For example, in a breach of commercial contract case, the opening can describe the elements: creation of a contract, its breach, and the resulting damages.

5. Order of Evidence

The opening can be structured to reflect the order in which the evidence is presented, the witnesses testify, and the documents are

introduced. For example, in a real estate case involving lay and expert witnesses and numerous documents, the opening statement can follow the order in which the witnesses will testify and documents will be introduced.

6. Liability and Damages

In civil cases, the opening can first discuss liability and then damages. For example, in a personal injury case, the story can describe how the accident happened and then what injuries the plaintiff suffered.

7. Mixture of Substructures

A number of these approaches can be used for parts of the opening, as substructures. For example, a civil case could begin with the flashback technique, use chronology to present the liability facts, and explain the damages in the order in which the witnesses will describe the damages.

B. Parts of the Opening Statement

An opening statement has at least three major parts: the introduction, the body, and the closing.

1. Introduction

An opening should begin with an introduction that draws the jurors into the case. At the beginning of the trial, and especially at the beginning of the opening statement, the jurors are usually alert. The principles of advocacy and persuasion explained in sections 2.4 and 2.5 apply with special force to the introduction of the opening statement.

The jury selection process, the remarks made by the judge, and the drama of the trial, combine to make the jurors curious and interested about the case. The beginning of the opening needs to be carefully planned to take full advantage of the jury's initial attention. Starting the statement in an interesting and dramatic way may be the most effective way to begin an opening.

Beginning remarks in an opening statement need to take into account what has occurred previously in a case. The beginning depends in part upon what introductory remarks and instructions the judge may have given and what information the jury has learned about the case during the jury selection process. An illustration of a judge's explanation follows.

Example (Judge):

Members of the Jury, at this beginning stage of the trial the attorneys will now make what is called an opening statement. Each of them will tell you the evidence that will be introduced in this case. After these opening remarks, each of

the parties will present their case. The plaintiff will proceed first, and present her witnesses and introduce documents which support her case. Defense counsel will then have an opportunity to cross-examine the plaintiff's witnesses. After the plaintiff introduces all her evidence, the defendant will then present witnesses and exhibits, and the plaintiff will have a chance to question the defense witnesses. After both parties have completed presenting their evidence, the attorneys will have an opportunity to summarize and explain the case to you in final argument. I will then instruct you on the law by explaining the law that applies to this case. You will then go to the jury room, deliberate and reach a verdict which will conclude this trial.

Counsel for plaintiff will now make the initial opening statement.

Ordinarily a judge provides a similar or even more concise explanation to the jury describing how the trial will be conducted. If the attorney is uncertain whether the judge will give any instructions, the attorney can request that the judge provide particular instructions and preliminary remarks concerning the purpose of the opening statement and the identity of the parties and attorneys. If a judge does not explain to the jury the trial procedures, the attorney may provide that information at some point during the opening statement.

a. Explanation of Purposes

An opening statement may begin with an explanation of who the attorneys are, who they represent, and the purposes of an opening statement. The following examples of introductory comments demonstrate how some lawyers begin their opening. These introductory remarks are familiar to most judges. The remarks are also familiar to many attorneys and provide a comfortable way to begin every opening statement, helping to get rid of initial nervousness.

Example (Purpose):

Members of the Jury, this opening statement allows me to explain to you the evidence that you will hear and see in this case. The evidence will be presented in bits and pieces and not in the order in which the events happened. This opening will provide you with an overview of the case and help you understand what happened.

Example (Explanation):

My name is Atticus Finch. I represent Tom Robinson, who is sitting here. I now have the privilege of speaking to you about the evidence that will be introduced during this trial. This case will be presented to you like a jigsaw puzzle. Each

witness who testifies and each document that is admitted will be a piece of that puzzle. At the end you will be able to put that picture together by yourselves. In the beginning, this opening statement allows me an opportunity to describe to you each of the pieces so that you will be better able to understand the complete picture.

Example (Personal Injury):

Ms. Duncan, the plaintiff, has suffered severe and permanent injuries caused by the negligent driving of the defendant, Mr. Bugatti. As you know, I am Max Steuer, the attorney representing Ms. Duncan. As the judge explained, this opening statement permits me to talk with you about what happened to cause that accident and to cause those disabling injuries. I will tell you the story of what happened and a summary of what the witnesses will describe.

Example (Employment Contract Case):

You have already met the plaintiff, Ms. Parker. She is in court today to be paid the salary the defendent promised to pay her. I am here today to present the facts through witnesses and documents which show that she is entitled to that money. You are here today to listen to that evidence and award her the money owed her.

The advantage of these or similar preliminary remarks is that the jurors may better understand the purpose of the opening statement and the identity of the attorneys and parties. The disadvantage of such remarks is that they may not be the most persuasive way to begin the presentation of the case to the jury. The jurors should initially be told about the facts and case theory, and not primarily about opening statement procedures or the name of the attorney.

b. Explanation of Theme

An opening statement may begin with an explanation of the case theory described in a compelling and dramatic way to develop interest and persuade the jurors. The advantage of this approach is that the jurors gain a favorable impression of the case and are more likely to recall the theme words used to describe the important facts and issues. The disadvantage of such an approach is that issues may be overstated, or the opening too melodramatic.

Example (Personal Injury):

This case is about the life and death of a man, a husband, a father, and a productive member of this community. His name was Ward Nelson. He was killed when the jeep he was driving rolled over, throwing him out of the jeep and over the

cliff where he fell to his death. He was thirty-one years old with a family, a wife, two boys, and a full life ahead of him.

Example (Product Liability Plaintiff):

You are going to hear a case of corporate deception and the greed by one of the largest pharmaceutical manufacturers in the world. The case is about the marketing of a product, the Precon Shield, an untested and unsafe product. The case is about the selling of this product to thousands of women without caring about the serious injuries these women suffered because of this dangerous and defective product.

Example (Criminal Prosecution):

Members of the Jury, on a clear summer evening on July 15, Della Southern got off the commuter train in Elmhurst. She was coming from work in downtown Mitchell where she works as a legal assistant. The train pulled away from the station. She crossed the tracks and began walking towards her car parked a block from the train station in a parking ramp. As she walked into the entrance of the parking ramp, she heard a noise. She turned to her right and confronted that man (looking at the defendant). On behalf of the people of this state, I am here today to tell you the facts of what happened when she confronted that man (pointing to the defendant). After hearing those facts, it will be clear beyond a reasonable doubt that that man (turning to the defendant) brutally assaulted Ms. Southern and stole her purse, her money, and her sense of security and peace of mind.

Example (Criminal Defense):

This is a case of mistaken identity. Mr. Ramirez did not commit any crime on the evening of July 15. He is innocent of what the prosecutor has claimed he did. Under our system of justice, the prosecution has the burden to prove to you beyond a reasonable doubt that my client is guilty. Under our system of justice, Mr. Ramirez is presumed to be innocent. Indeed he is innocent as he sits here in this courtroom. The facts that you will hear in this case will convince you that there is more than a reasonable doubt that my client was anywhere near the scene of the crime. The case for the prosecution consists of one eyewitness who attempts to identify my client. That identification, members of the Jury, was made under circumstances which make it totally unreliable.

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2. The Body

The attorney should assume the fact finder knows nothing about the case and should design a presentation to explain each fact and element of the case in understandable terms. The lawyer's knowledge

of the case will be extensive and may cause obvious facts to go unmentioned during the opening. The attorney must keep in mind the fact finder will be hearing the full case for the first time.

An opening statement must answer at least six simple questions: who, what, how, where, when and why? Who is involved, what happened, how did it happen, where, when and why did it happen? The most effective way this information can be presented is usually by the attorney telling a compelling and complete story to the jury. This factual story constitutes much of the content of the opening statement. The story should parallel the substance of the trial evidence, and the summary that will be given in the closing argument. The attorney, particularly a defense counsel, may need to explain to the jury what the evidence will not show as well as what the evidence will show. Section 7.4 provides many examples of the components of the body of an opening.

3. Conclusion

An opening statement should have a strong conclusion. This may be achieved with a concise summary of the vital facts, with a compelling statement justifying a verdict, or with a dramatic summary of the major theme of the case. A strong conclusion will have an impact because the jurors often remember what they hear last. A strong presentation can be hindered by an apologetic or weak conclusion. The final words should be well thought out, so that no matter how lost the attorney gets, the conclusion will be effective both in words and delivery.

Example (Civil Plaintiff):

Members of the Jury, at the end of this trial, after you have heard all the evidence, we will ask that you find the defendant responsible for the damages suffered by Ms. Didrickson and that you find that the defendant must compensate her for her medical expenses, for the wages and income that she lost, and for the pain and suffering she has suffered as a result of the defendant's negligence. We are confident that you will return this verdict which will right the wrong the defendant inflicted on her.

Example (Civil Defendant):

Those facts clearly establish the defendant was not negligent and has no responsibility to the plaintiff in this case. At the end of this case, based on this evidence, you will conclude the defendant did no wrong and bears no responsibility. We will ask you, at that time, to return a verdict on his behalf, a verdict in support of Edmund Fitzgerald against the plaintiff.

Example (Criminal Prosecution):

At the conclusion of this trial, I will have an opportunity to talk with you again. I will discuss some of the things I've said today and the evidence you will hear in the trial. I will ask you at that time to return a just and fair verdict and find the defendant guilty of robbery.

Example (Criminal Defendant):

At the end of this case, I will discuss what you have heard and seen during the trial. By that time, you will have more than reasonable doubt that B. Baggins was involved in the incident. By that time, you will be convinced that Mr. Baggins did not steal the ring and is not guilty. By that time you will know he is innocent, and that you must return a verdict on his behalf.

C. Opening Statement Critique

Questions that may assist in determining whether an opening statement has been properly constructed include the following:

- Does the opening statement tell the jury what happened?
- Does the opening statement tell the jury why to find for the client?
- Does the opening statement make the jury want to find for the client?
- Does the opening statement tell the jury how to find for the client?
- Does the opening statement have a structure that is clear and simple?
- Is the opening statement consistent with what will be proved and with what will be argued in summation?
- Does the opening make them weep (not for you, but for your client)?

§ 7.4 CONTENT

The exact content of an opening depends upon the facts and circumstances of the case and the strategic and tactical decisions of the attorney. The following factors should be considered when preparing the opening statement.

A. Prefatory Phrases

Trial attorneys may use a variety of prefatory phrases during opening statements. Some common prefaces include "I will prove" and "the evidence will show." Whether prefatory phrases should be used is a matter of debate among trial advocates. Some lawyers suggest that none of these phrases should be used but that the attorney should

simply tell a story without any qualifying prefaces. Some trial advocates believe the attorney must use phrases like "I will prove to you" or "I will present evidence" to establish the attorney's position in a case and to have as powerful an influence as possible on the jurors. Other trial advocates believe that more objective phrases such as "the evidence will show" or "you will learn" are the more appropriate phrases. Some judges expect or require lawyers to preface their remarks with these phrases. In cases before these judges, counsel will need to comply with the judge's preference.

In trials where the attorneys have the flexibility to say what they want, the decision about whether a preface should be used and what the preface should state is usually a tactical decision. Those attorneys who feel strongly that they must tell the jurors what they will prove will use such prefaces. Those attorneys who believe that telling a story is more effective will not use certain phrases because they believe that such phrases as "I will prove" unnecessarily place the attorney in the center of the opening statement and de-emphasize the facts. Some attorneys also believe that phrases, such as "the evidence will show," reduce the impact of the story and remind the audience that what is being said has yet to be proved. These and other beliefs were discussed in section 2.4(A) and (B).

The use of some phrases during an opening may prevent a presentation from sounding like an argument. A neutral qualifying introduction such as "you will learn" or "the evidence will show" may be an effective way of preventing an objection. If this tactic is overused, however, and it becomes apparent it is being used to argue or to introduce otherwise inappropriate information, the judge will sustain appropriate objections.

Example (Criminal Case):

I will prove the defendant did not intend to shoot the gun. I will present evidence to you that will establish this incident was all a tragic accident.

Example (Civil Case):

You will learn from the evidence the defendant was negligent. Because he was negligent he is responsible for what happened. The facts will prove that because the defendant is responsible he must be held accountable and must compensate the plaintiff for what he did to her.

B. An Effective Story

The opening statement story should be told with simple language, in as dramatic a fashion as is appropriate, and in an interesting way. Things that make a story very interesting and very believable appear in

great works of literature, art, and theatre, and they are the same things that make an opening statement very effective. See section 2.4(I).

Example (Commercial Litigation):

This is a story of a lost business opportunity, a lost invention, a lost dream—lost by an inexperienced individual to a large corporation. On February 14, Dr. Kirbuck, while working hard and long hours, by herself for herself, in her home workshop, invented a new and innovative electronic computer device. Sometime later she visited the offices of the defendant—a very large corporation. She offered the defendent an opportunity to buy this invention. The lawyers for that corporation drafted an 18–page, single-spaced contract. The executives of that corporation told the plaintiff that if she wanted to market her invention she would need to sign this contract. She signed it. They signed it. She lived up to her end of the bargain. They have not lived up to their end of the contract. They breached the terms of that contract. They did not do what they told her they would do. They have not paid her what they told her they would pay her. We are here today to hold them to their promise, to their word, to the written contract.

Example (Negligence):

On the evening of July 20, Jamie Summers was just finishing the last half mile of her three mile run down Highway 100 here in Culver City. Mr. Bung had just finished drinking his fourth or fifth martini at the Mermaid bar. As Jamie was running about four miles an hour on the marked jogging path along Highway 100, Bung was weaving his car from side to side about 60 miles per hour along southbound Highway 100. Jamie never saw the car that ran her over. Jamie never saw the driver that killed her. She is gone. Her life is over. But we can see him, he is with us. He sits in that chair over there. This trial is to hold Mr. Bung responsible for the reckless killing and negligent homicide of Jamie Summers—a tragedy that should never have happened.

C. Details

The facts presented during an opening statement should be as detailed as necessary to provide a clear and complete story. The advantage of providing a very detailed story is that the story is usually perceived by the jury or judge as more credible and more persuasive. Detail that provides necessary information for a full understanding and explains sources of corroboration or credibility usually bolsters the essential aspects of a case. The disadvantage of detailing specific facts

is that the subsequent presentation of that evidence in the trial may not be as specific as the opening statement suggested. Further, too much detail is boring and unpersuasive.

Example (Personal Injury):

In this case defendants violated school district safety rules regarding gym activities. These rules require gym mats to contain two and a half inches of thick foam. The defendants were using two inch thick pads. The school district rules require one supervisor for every ten kids using the gym mats. The defendants had only one supervisor for twenty kids.

Example (Technical Data):

We will hear a lot of technical data about this machine. We will see instruction manuals, diagrams, blueprints, and other documents. And although these engineering details may appear very complicated and technical, the basic issue in this case is simple and understandable. We will be focusing on one part of the machine which was properly designed, was safely used, and did not cause the accident.

D. Parties/Witnesses

Information about the parties and witnesses can be explained during opening. Jurors may be told who will testify and what each person will say. Witnesses should be described in a way that will make their story understandable and their testimony credible.

The jurors need to understand that a case involves people and not merely abstract legal problems. The more a party and key witnesses are personalized and described as individuals who will testify to what happened, the more likely the jurors will accept them and find them believable. Statements should be made which help the jurors identify, relate to, and empathize with the witnesses.

Whether every witness needs to be identified during opening statement depends on the facts of the case and the importance of the witness to the case. The more critical the individual is to the case, the more essential it is to identify that individual for the jury. If the testimony of the witness should be highlighted, identifying the witness in the opening statement will help to do so. If a distinguished expert will testify, identifying that expert will help. The less important the witness is the less necessary it is to identify that witness as a source of specific information.

Jurors have a difficult time identifying with witnesses who are not described during an opening. The jurors have no way of forming a picture in their mind of the witness. A party or witness who is present can be identified. Key witnesses may be present during the opening so

the attorney can introduce them to the jury. The names and identities of the witnesses can be written on a visual aid.

Many jurors will not remember the names of witnesses, and identifying witnesses may only distract the jurors from remembering more important details of the opening. Highlighting the source of the evidence by generically describing the witness (an eyewitness to the accident, a bank vice president, a police officer) may be sufficient. This identification helps the jurors understand the facts without burdening them with unnecessary names.

Statements about the background of a witness may also be included. This information can be effective if the jurors have things in common with the background of the witness or if the description portrays the witness as a responsible individual who can be believed. The backgrounds of minor or problem witnesses need not be detailed in the opening statement.

Describing a witness during the opening commits the attorney to calling that witness to testify. Only witnesses who are sure to be called ought to be described. If there is uncertainty about whether a witness will testify, no specific reference ought to be made to that witness. A defense attorney may decide not to call a witness to testify based on the way the plaintiff/prosecutor proved a case and should not specifically refer to these optional witnesses in the opening.

Whatever is said about a witness and testimony should be proved during the trial. An attorney should not offer incomplete information or exaggerate the background or testimony of the witness. Exaggeration may create unfulfilled expectations with the fact finder. Misstatements provide an opportunity for opposing counsel to correct the inaccurate or incomplete description during opening or comment during final argument on the failure to prove such statements.

Example (Corporation):

The defendant corporation is a group of people, of individuals, who work at all levels of the company to provide services to consumers. The people of this company include workers, managers, and shareholders. Gordon Gecko, who sits here, represents all those individuals involved in the company. He will stay throughout the entire trial, and he will also take the stand and testify.

Example (Witnesses):

Please consider the testimony of the witnesses carefully. Consider what they say and assess their believability. See which one has a position to protect or a reason to be less than honest. See which one was in the best position to observe what happened. We know what Mr. Jake will say in this case because we had an opportunity to ask him questions

under oath before trial. We are sure he will tell you the same things he told us. This is what he will tell you.

Examples (Experts):

Rachel Carson will testify that in her opinion this product is harmful to the environment. We will hear all about her environmental expertise, her extensive professional experiences, the many articles she has written, the teaching positions that she holds, and her reputation in her profession. We will also hear her expert opinion, the facts that support that opinion, and the reasons why that opinion is correct.

E. The Event

The description of the incident, occurrence, or event is a typical part of an opening statement, particularly when that occurrence is important. The description should be accurate and complete and should enable the jurors to create a clear picture in their minds. Verbal descriptions of scenes can become complicated if too much detail is given, or if complex descriptions are made. Only those details that portray the scene accurately should be given. It can be difficult for jurors to follow directions or visualize matters in the abstract. References to compass directions (north, south) degrees (a 90 degree turn), angles (a sharp right turn), and similar references are difficult to visualize. Visual aids and exhibits may be used to describe scenes in order to ensure that the jurors understand what is being described.

Example (Use of diagram in Civil case):

The streetcar was headed east, in this direction on the diagram, along Main Street. The bus stopped at this intersection here at the southwest corner of University Avenue. Main Street runs east and west, and University Avenue runs north and south along this line. The plaintiff, Stanley Kowalski, got off the streetcar at this intersection. He waited for the lights to change and waited for the walk sign to be lit up and then began walking in the crosswalk across Main Street to the northwest side of the intersection of Main and University to this spot.

F. Circumstances

Information about the circumstances surrounding the incident or event may be important and may need to be explained during the opening. Explanations of the time, date, weather, vehicles, equipment, and other information should be provided to the extent necessary. The more important the circumstance is to the story, the more detail should

be provided. If the time of the day is critical to the case, the precise time should be mentioned. If the exact weather conditions are important, atmospheric details should be provided. The extent to which details need to be described depends upon how precise the witnesses will be and how necessary it is that each juror visualize an accurate picture. It may be enough to describe a car as a "car" if a further description is not necessary. If it is important that each juror accurately visualize the bumper of a car, then a photograph of the bumper or an actual bumper should be shown to the jury or a detailed description given.

Example (Criminal case):

As Ms. O'Keefe walked down the first block towards her studio, she saw a number of apartment buildings on her left and to her right she saw a gas station, a grocery store, and a few homes. As she walked down the second block, she could see more apartments and more homes on both sides of the street. It was twilight. The streetlamps were on. There were three streetlamps on the second block: one in the middle and one at each end. The apartment buildings all had exterior lights that were turned on. The evening sky was clear.

G. Visual Aids and Exhibits

The use of visual aids and exhibits significantly increase the effectiveness of an opening statement. These devices help the jurors understand the facts and details of the case. Visual aids and exhibits can be particularly helpful in assisting the jurors in visualizing parts of a story. An attorney should use them whenever their use will make it easier for the attorney to explain and easier for the jurors to understand something.

Visual aids may be created exclusively for use during opening statement. Trial exhibits that will be real or demonstrative evidence during the trial can also be used. Some jurisdictions have restrictions on the use of visual aids and exhibits. Permission for their use should be sought from the judge before the opening to avoid an interruption or objection from opposing counsel. Most judges routinely permit their use. Some judges may be reluctant to permit the use of visual aids or exhibits because many lawyers do not use them in opening, and these judges may not be familiar with the use of exhibits.

Example (Injuries):

You will see some photographs of the plaintiff's injuries during this trial. Some of them may be difficult to look at. But you need to see them so that you can understand the

full extent of the plaintiff's injuries. They are not shown to you for their shock effect. If they do shock you somewhat, remember that they are really only a pale imitation of what the real injuries were and much less shocking than if you saw the real injuries in the flesh. I am going to show you a few now. This first one is how the plaintiff looked one day after the accident.

Example (Product Liability):

Here is a chart listing the design and manufacturing defects. We want to review each of these items with you. This first column lists the defects. This second column lists the dates when the defendant first knew about the defects, and this third column lists what injuries the defects caused. This chart will help you understand what went wrong and why it went wrong.

H. What Happened

The jurors must be told what happened. The facts and circumstances of a case dictate the parameters of this part of the story. A description of what happened includes references to the parties, the scene, and circumstances. An effective description includes statements that are objectively accurate, complete, and believable. A description that is too abstract, too subjectively biased or incomplete is not persuasive.

Example (Criminal case):

Mr. Jordan was holding the straps of the duffel bag in his right hand as he walked toward the gym. The defendant came up to him and grabbed one strap of the duffel bag and attempted to steal the bag from Mr. Jordan. Mr. Jordan immediately looked right at the defendant, and instinctively gripped the handle of the duffel bag tightly. As the defendant tried to pull the bag from Mr. Jordan, Mr. Jordan again looked at the defendant and pulled the duffel bag towards himself. The defendant held onto that bag, and was pulled closer towards Mr. Jordan until the defendant's face was only about a foot away from Mr. Jordan's face.

I. How it Happened

Usually an issue in a case will revolve around the question of how something happened, and an explanation will be part of the opening. An explanation of the facts that describe the "how" of what happened is essential.

Example (Civil case):

Ms. Moffetal suffered a ruptured disc in the accident. We will learn from the doctors who will testify that the spinal column is made up of a number of bones or vertebrae, one on top of the other. Between each of these bones is something called an intervertebral disc. It is shaped like a donut and acts like a shock absorber. The center of the donut is filled with something called nucleosis pulposis, a gelatin or jelly-like substance. If the vertebrae are jammed together pressure can be put on these "donuts" and the "jelly" squirts out the side (descriptive gesture). This is a rupture and the injury is called a ruptured disc. This model shows the vertebrae and discs.

Example (Civil case/Third party Defendant):

The evidence will show that it was Cornelius Krum who was at fault. Mr. Krum didn't oil the machine, and did not check to see if parts were worn. The machine was not faulty. Cornelius Krum ran the machine way too fast. The defendant did not cause the machine to explode, it was Mr. Krum. The defendant did not cause the plaintiff's injuries, it was Mr. Krum. The evidence will show that the defendant is not responsible for what happened, but rather Cornelius Krum was and is responsible.

J. Why it Happened

Explaining the what and the how of a story may not be sufficient if the why has not been explained. The why may not be of critical importance in a legal sense, but the jurors will be curious about why something happened. If a good reason exists to explain the "why," then a concise explanation should be included in an opening. If no good reason exists to explain an event, then an explanation should be avoided.

Explanations of why something happened usually are limited in an opening because a detailed or lengthy explanation may go beyond the evidence of a case and become improper argument. If an explanation cannot be based on direct or circumstantial evidence, then an explanation should be reserved for final argument.

Example (General):

Why were the defendants in a hurry? Because they were late for a skittleball game.

Example (Medical Negligence):

This is a case about medical negligence. Doctor Frank Burns was careless when he performed surgery on the plaintiff. He

is not a bad doctor. He is not unfit to practice medicine. He made a serious mistake, and he must be held responsible the same way any professional must be held responsible for a serious mistake that causes pain and suffering and damages. He made the mistake, in part, because he was tired. He had been up all night working at the hospital and had not slept.

K. Disputed Issues

The jury will focus on the disputed issues between the parties. A reference to the conflict in the evidence or testimony help the jurors understand what they have to decide.

Example (General):

There will be a dispute in the evidence presented to you—a disagreement about who said what. Ms. Scarlett will say the light was red, while Mr. Teal will say the light was green. The lawyers and the witnesses know about this dispute because we have had the opportunity to learn about the facts of this case before coming to trial and we know who will say what. After hearing both sides, we believe you will agree that Ms. Scarlett is mistaken and Mr. Teal is correct and find that the light was green.

L. Claims and Defenses

In most cases references to the claims or defenses should be made. These explanations focus the jury's attention on what they must decide.

Example (Civil plaintiff):

The evidence will show that defendant signed this contract and failed to deliver the goods that she promised to deliver to the plaintiff according to the terms of this contract. The issue you will need to resolve is whether the goods that defendant did ship were the goods the plaintiff ordered under the agreement.

Example (Civil defendant):

The primary question you will need to answer in this case is whether this piece of paper is a legally enforceable and binding contract. The evidence will show that this paper is not a contract and that defendant is not responsible to the plaintiff. Counsel for plaintiff has told you the type of goods the plaintiff expected to receive from the defendant. That is

not the main issue in this case. The main issue is whether this piece of paper is a legal contract.

M. The Law

The attorney may make a brief reference to the law and may blend a brief discussion of the law with the facts. Counsel may not explain the law in detail to the jury. See section 7.1(B)(4).

Example (Negligence by defendant):

You will learn that there was a stop sign at the intersection of Boardwalk and Park Place and that a person driving through that intersection must come to a complete stop and look in both directions before proceeding. The evidence will show that the defendant failed to come to a full, complete stop at the stop sign at the intersection of Boardwalk and Park Place as she was required by law to do.

Example (Lack of negligence):

Judge Cardozo will instruct you that negligence is the failure to exercise ordinary care—the failure to do something that a reasonable prudent person would have done under the same or similar circumstances. You will apply this legal standard to the facts of this case. When you do, it will be clear that the defendant did exercise ordinary care when she drove the buggy and is not responsible for the accident.

N. Burden of Proof

If the judge in preliminary instructions does not explain to the jury the burden of proof in the case, it may be appropriate to briefly mention the burden in the opening statement. A reference regarding the burden should be brief because references to matters of law must be limited. A reference to the burden should be made if doing so is tactically advantageous. Section 3.8(E) discussed burden of proof strategies in detail.

Example (Civil case):

This is a civil case. The burden of proof in a civil case is called "preponderance of the evidence." That means that the plaintiff wins if it is more probable than not that her story is true. We will prove that it is more likely than not that what the plaintiff said happened, actually happened. The burden of proof is not beyond a reasonable doubt, which is a much heavier burden. That applies in criminal cases, not in civil cases like this one. Judge Hand will explain this lesser

burden of proof later during the trial, and we will apply it to this case to show you why the plaintiff is entitled to your verdict.

O. Damages in a Civil Case

In a civil case the plaintiff needs to explain the types of injuries, expenses, and other damages. Damages that are recoverable under the claim brought by the plaintiff should be mentioned. In a contract case, the damages may be computed by referring to the terms of the contract or by establishing the lost income or profits. In a tort case, personal injury damages should include an explanation of the injury, diagnosis, treatment, and prognosis.

Example (Personal injury):

This case is about what happened to Scott Lane as a person. He was one person before the accident and a different person after. Your task is to put a value on the differences between what Scott was and what he has become and will remain for the rest of his life.

Example (Pain and suffering):

Plaintiff will tell you the horrors she went through during four months of intensive burn treatments. She will tell you that her twice daily bath was so excruciatingly painful she screamed. She will tell you that she has never experienced any pain like the pain caused from her burns. She will explain that she could not use enough drugs to eliminate the pain because the drugs made her even sicker. She will describe to you the pain with which she has to live.

P. Amount of Damages

Lawyers who prefer a detailed description of damages want the jurors to know from the outset the extent of the damages sought. Mentioning a dollar amount creates a frame of reference for the jury, provides them with some guidance for the trial, establishes the severity of the damages, suggests to the jury that the attorney knows what the case is worth, and preconditions jurors to a request in summation for a large damage award. Lawyers who prefer a minimal description of damages want the jurors to first hear the details during the trial. Not mentioning the dollar amount to the jurors during the opening delays the disclosure of damages to the introduction of damage evidence, creates suspense, avoids locking the attorney and witnesses into set positions, and gives the jury an opportunity to hear the witnesses describe the injuries before a request for specific damages is made.

If the injuries that caused the damages are slight, less emphasis should be placed on them. If the injuries that caused the damages are great, more emphasis should be placed on them during the opening. References to damage amounts may also be made during jury selection which may influence what should be said during the opening.

Example (Damages described):

This case involves the amount of responsibility that the defendant bears as a result of this tragedy. The law measures the amount of responsibility in dollars. You will hear evidence about the substantial injuries the plaintiff has suffered as a result of the accident. These damages amount to $1,256,000, which is a substantial amount of money—but an amount which is fair and reasonable because the responsibility the defendant has in this case is equally substantial.

Example (Damages reserved):

At the conclusion of the case, we will discuss the evidence that you have heard. We will ask at the conclusion of the case that you return a verdict that will fairly and adequately compensate the plaintiff for what she has been put through. We will also ask you to return a verdict which will include punitive damages—damages which punish the defendant for gross misconduct. Punitive damages are available under the law in cases of this nature when a manufacturer recklessly makes a product. Punitive damages tell the defendants they did something wrong and shouldn't ever do it again. The defendant corporation has a net worth in excess of $100 million. At the end of the case, I will come back and request you to award the plaintiff an amount of money that will compensate her for what happened and award her additional money that will tell the defendants they were reckless.

Q. Request for Verdict

An opening statement should contain an explanation of the verdict that the facts will support. This explanation should be clear and distinct so the jurors understand what conclusion they must reach to find for a party. Some attorneys will say that the facts require that the jury return a verdict because the client is entitled to or has a right to such a verdict. Other attorneys explain to the jurors that they will have an opportunity, and even a duty, to return a verdict based upon the facts of the case.

Example (Civil case):

Now I've told you what this case is all about. You will hear from the witnesses just what happened, and you will have documents that will support that testimony. At the close of all the evidence I am going to ask you to bring back a verdict in favor of the plaintiff and against the defendant in an amount to compensate her fully for her injury.

Example (Criminal case):

The facts will prove that the Defendant is guilty of murder in the first degree beyond a reasonable doubt. The testimony and exhibits will prove that the Defendant shot and killed J.R. Ewing. The evidence will prove that the Defendant intended to shoot J.R. Ewing, intended to kill J.R. Ewing, and that the Defendant thought about it for three days beforehand. These facts will prove that the verdict you are to return at the end of this case is first degree murder.

§ 7.5 TECHNIQUES

The following sections involve techniques that apply to the presentation of an opening statement. These approaches need to be reviewed to determine their applicability to an opening statement in a particular case.

A. Offensive/Defensive Approaches

An opening statement should lead the jurors to a conclusion that the client is entitled to the verdict. The plaintiff will naturally take the "offensive" and explain the story in a positive way. Some defense counsel may think it appropriate for the opening statement to be explained in a "defensive" way because the plaintiff/prosecutor has the burden of proof. A more effective tactic may be for the defense to take the offensive and explain what the defendant's evidence will prove and then defend the case by stating what the plaintiff's evidence will not prove.

Counsel for the defendant who presents an opening after the opening by the plaintiff/prosecutor must decide whether and how to respond to the opening by the opposing attorney. Defense counsel should be careful not to appear weak by responding to plaintiff in a completely defensive way. The opening by defendant should describe the case of the defendant and, after that has been explained, respond to the extent necessary to statements by the plaintiff/prosecutor in the initial opening statement. Even in a criminal case where the defendant will not testify, the opening statement for the defense should be as positive as possible. The defense will present evidence through cross-examination of the prosecution's witnesses, and this information can be used to support reasonable doubt.

At the end of the opening statement for the plaintiff, counsel for the plaintiff may raise some questions or make some remarks which the attorney suggests defense counsel should respond to or address during the opening for the defendants. Counsel for the defendant should present the prepared opening statement and should avoid directly responding to plaintiff's ploy, unless a response is necessary or would be more effective than not responding.

Example (Civil case):

At the end of her opening statement, counsel for the plaintiff suggested to you that I should tell you what facts we had which differed from the facts she explained to you. You may have wondered why I did not respond to the questions she raised until now. The facts that I just explained to you that you will hear from the witnesses who take that stand and which you will read in these documents will answer those questions. There is no need for me to do what plaintiff's counsel asked. You will do that later during your deliberations.

B. Anticipating Defenses

After making an opening statement, the plaintiff/prosecutor has no opportunity for rebuttal after the defense opening. The plaintiff should anticipate defenses and deal with them in the opening. In civil cases, the plaintiff will usually know the defenses the defendant will raise and can explain away such defenses.

Example (Accident case):

The defendant will try to avoid responsibility in this case by telling you the accident was Alice's own fault—that she wasn't watching where she was walking. But after hearing all the evidence, you will learn this was an area that people walked all the time and no one—including Alice—would expect there to be a hole in the ground.

Example (Automobile case):

Now I must tell you that the defendant will try to put some of the blame for this accident on James Dean. The defendant will claim that Mr. Dean should have stopped his car or swerved to avoid the accident. But you will learn the defendant came into that blind intersection so fast there was no way Mr. Dean could have avoided the collision—he just could not see or avoid the defendant's car.

In criminal cases, the constitutional rights of the defendant limit comments that can be made by the prosecution. The prosecutor may not directly comment on evidence the defense may produce. A prosecutor can explain evidence that will be introduced during the prosecutor's case and state indirectly that such evidence overcomes potential defenses, but the prosecution cannot comment on possible testimony by the defendant because the defendant need not and may not testify or present any witnesses.

C. Asserting Promises

A "promise" to the jury that certain evidence will prove a certain fact can be effective as long as the attorney can fulfill that promise. A promise that is not kept causes the jury to lose confidence in the attorney and other facts as well. A promise is a tactical approach that must be employed carefully. If a lawyer does make promises during an opening or otherwise asserts that certain evidence will be proved, the opposing lawyer should note all these statements and mention during summation all promises not kept.

Example (General):

I promise you that I will present evidence showing the defendant lied to the plaintiff about the value of this land. After hearing this evidence, you will conclude that the defendant misrepresented the facts and defrauded the plaintiff. At the end of this case, I will ask you to put us to the decisive test: Did we prove to you what we said we would prove? If we have, we will ask you then for a verdict in favor of the plaintiff against the defendant.

D. Making a Compact With the Jury

The attorney may make a covenant with the jury during the opening. The attorney may promise the jurors that the attorney will never mislead or misdirect them or intentionally misstate any evidence or exaggerate the facts. The attorney may ask the jurors to hold the attorney to this statement and to hold the opposing lawyer to the same strict standard. This approach impresses the jury with the sincerity of the lawyer and reduces the chances the opposing lawyer will engage in misdirection or exaggerations. This tactic ought to be reserved for those situations where there is a reasonable concern the opposing lawyer will present an unfair and improper opening statement.

Example (General):

Everything that I have told you in this opening about the evidence is what you will hear from this witness stand and see and read in this contract. I will prove that the events in

this case happened the way I described the facts. I ask you to hold the other parties to this same standard.

E. Employing Understatement

Understatement can be a useful credibility-building device for an opening statement presentation. Understating a case sets the expectation of the jury at a level that will be exceeded during the trial. The presentation of the evidence will then surpass the jury's expectations, enhancing the credibility of the case and the attorney. Understatement may also arouse the jury's curiosity. If the attorney does not describe all the details of an event or a conversation during the opening, the jurors may pay special attention because they have been eagerly waiting to hear or see the evidence. The use of understatement does have disadvantages. It may reduce the attorney's ability to explain the facts in a persuasive way, and jurors may initially perceive an understated case to be weaker than the attorney intended.

Example (Civil Case):

Judy and Doralee talked that day about Violet and her future with the group. They will take the witness stand and tell you what they said. When you hear what they said, you will understand the plans they had for Violet.

F. Avoiding Overstatement

The attorney should avoid the use of overstatement during an opening statement. The jury may be initially impressed, but this initial impression will not last long once the jury realizes the evidence does not match what the attorney stated during the opening statement. Further, opposing counsel may comment during closing argument about the absence of the exaggerated evidence from the trial.

Example (Criminal case):

Many normal people drink in moderation. Many normal people have car accidents. Many do both. They aren't hauled before the court as public menaces. My client is no more a public menace than they are.

G. Asserting Difficult Positions

The facts and issues in some cases will be more difficult for jurors to accept than in other cases. Usually, it is easier to prove that a person was negligent, failed to do something, or made a mistake rather than having to prove that a person intentionally did something, acted

very unreasonably, or lied. For example, in a negligence case where contradictory statements were made by the plaintiff and defendant regarding the color of a traffic light, the plaintiff can win by proving that the defendant could not accurately see the color of the light or was confused about the color of the light without proving the defendant is a liar. In some cases the difficult and uncomfortable position is necessary as part of the proof and these difficult facts must be addressed in the opening statement. For example, a discrimination case requires the plaintiff to prove the defendant committed a discriminatory act. In the opening statement, the attorney needs to tell the jurors exactly what will be proved.

Example (Civil case):

We will prove to you that the defendant stated that blacks were lazy and that he didn't want them working for him, and if it is not now appropriate for me to call the defendant a racist, by the end of the case it will be clear to you that he is a racist.

Example (Criminal case):

I will prove to you that the witness for the prosecution is a liar. Joe Isuzu, whom the prosecutor has described as the key witness in this case, has lied a number of times in the past regarding what he did on the night of February 15th. He lied to the police when they questioned him. And he took an oath to tell the truth and lied to a judge at a court hearing.

H. Describing Case Weaknesses

An attorney must consider whether to describe weaknesses in a case. Weaknesses that will be brought out in testimony must be presented in a candid and forthright manner. The weak points of the case may have been mentioned during jury selection and may require less attention in the opening statement. Weaknesses in a case that have not been explained to the jurors and that most likely will be mentioned during the opposition's opening statement or later in the case should be addressed during opening statement. An open and candid disclosure of such information usually increases the appearance of sincerity and credibility of the attorney while reducing the impact of the opposition's strong points.

Example (Negligence):

A moment ago, I told you that I would describe everything that happened. You will learn that Mickey Morissey had stopped at a local bar on his way home from work. Mr. Morissey will tell you himself that he had dinner and two or

three glasses of wine with dinner a couple of hours before the accident. The evidence will show, however, that that had nothing to do with the accident, which happened only because the defendant's car crossed over the center line.

Example (Contract):

We told you that we would put everything before you, the good and the bad. You will learn in this case that Bonnie Parker has a criminal record—she was convicted of income tax evasion over five years ago. But that has nothing to do with the fact that she had an employment contract with the defendant and that she has a contract right to her salary.

Example (Personal injury):

In the interest of fairness, and holding nothing back, you will hear evidence from J.J. Gittes that he was a trespasser—he did not have permission to be on the property when he got hurt. But you will learn that the owner, the defendant, must take care not to injure people who are on her property whether they have permission to be there or not.

I. Explaining the Absence of Evidence

During the opening the attorney can describe what facts will not be proved, what documents will not be introduced, and what evidence will not be presented, and briefly explain why such information will not be offered during the trial. Usually this explanation is appropriate where evidence does not exist or was not preserved. Jurors may wonder why some evidence is not introduced, and this tells them what they will not hear or see.

Example (Missing witness):

The van was behind schedule when Ms. Rayette boarded it. She will tell you it was about five minutes late. The driver of the van will not be able to tell you how late the van was because he moved away from our city over a year ago and cannot be located despite our very best efforts to find him.

Example (Absent evidence):

The evidence will be that Overland Motors did no testing on the Model C–11. Our expert, Dr. Necessiter, will testify that in his opinion proper testing would have shown the C–11 to be unreasonably dangerous and defective. Evidence will be before you that there was no warning.

J. Qualifying Remarks

Some attorneys emphasize to the jurors that what an attorney says during opening does not constitute evidence. Other attorneys may explain that the jurors' function is to determine the facts after hearing the evidence during the trial. Comments like this reduce the impact of an opening statement presentation and are often unnecessary because the same statement may be contained in the judge's preliminary instructions to the jury. Defense counsel may want to make such comments in an attempt to reduce the effectiveness of a particularly persuasive plaintiff's opening statement and to remind the jurors that they must wait to determine the evidence as it is introduced during the trial.

Example (General):

You will hear a lot of lawyer talk in this case. You have just listened to the opening statement for the plaintiff. What we lawyers say is not evidence. The judge will tell you that you are not to decide this case based upon what we as lawyers have said but rather what the evidence will prove. You are not to rely on lawyer talk in reaching the verdict in this case. You are to rely on the testimony of the witnesses who will come before you and testify and the documents that will be read to you. Now let me describe to you what the evidence will show.

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§ 7.6 PRESENTATION AND DELIVERY

The manner in which the attorney delivers the opening statement affects the jurors' understanding of the facts of the case, significantly influences their initial impression of the attorney and the strengths and weaknesses of the client's case, and shapes their perspective of the entire trial. The following factors are matters that will affect the quality of the opening presentation. These factors supplement the considerations relating to presentation and delivery explained in section 2.5.

A. Location of the Presentation

The attorney is usually more effective standing in front of the jury box and not behind a lectern or table. This stance usually holds the jurors' attention more than if the attorney hides behind a lectern. This is not to say that an effective opening cannot be presented using a lectern, but a lectern may unnecessarily interfere with an attorney establishing an effective presence with the jury.

In some courts, local court rules require that the attorney stand behind a lectern when presenting the opening statement. In these situations, the attorney should ask permission of the court to stand

away from the lectern in order to make a more effective presentation. If the attorney must remain at a lectern, visual aids or trial exhibits may be used to emphasize points and to provide some opportunity for movement away from the lectern.

B. Movement

Some movement is useful, particularly if the opening is long. Movement and stance should be orchestrated so as not to be distracting. An attorney may use movement as a transition or to provide emphasis. Movement that appears purposeless is usually distracting and should be avoided.

C. Distance From Jurors

The attorney must maintain an appropriate distance from the jurors. This distance should neither be so far away that personal contact is lost nor so close that the jurors feel uncomfortable. The exact distance depends upon the number of jurors; the size, energy, and presence of the attorney; the size, shape, and acoustics of the courtroom; and the content of the opening statement. A distance of between five and eight feet can be used as an appropriate guide, but the optimum distance varies in different circumstances. An attorney should observe the jurors' reaction and move close when appropriate and stand further away when necessary to avoid making the jurors uneasy. For example, when the attorney approaches the jury box, the attorney may stand in front of jurors in the front row, speak with a lower voice, and make primary eye contact with jurors in the second row.

D. Gestures

The attorney should use gestures that are appropriate to the content of the opening statement and that appear natural to the attorney. Gestures should be made even if the attorney stands behind the lectern. Jurors will become bored with a talking head, which is all that they might see if the attorney stands behind a lectern without using any gestures, movement, or visual aids.

E. Eye Contact

One of the most effective ways to establish credibility and sincerity is to look directly at the jurors during the opening statement. Good eye contact also helps hold the attention of the jurors and allows the attorney to observe their reactions. Eye contact should be made with all the jurors and not just a few selected jurors. Eye contact does not mean staring. The eye contact must be varied, sufficiently long to establish a contact but not so long that it makes jurors uncomfortable.

F. Transitions

The opening statement is more effective if the attorney employs transitions in the presentation. Prefatory remarks, silence, a louder

voice, a softer voice, visual aids, movement, and gestures are all devices which can signal a transition.

G. Observing the Jurors' Reactions

The attorney must observe the jurors' reactions during the opening statement and adjust the presentation to their reactions when necessary. Some jurors express reactions regarding the facts of the case during the opening statement. The initial impressions displayed by a jury during the opening statement will also be useful in determining how the evidence is later presented and what might be an effective closing argument position. However, it is difficult to determine accurately what people are thinking just by watching them during a presentation. Care must be taken not to overreact, not to change an approach completely because of a perceived reaction, and not to focus on one or two jurors because they seem to be responding positively or avoid others because of a perceived negative reaction.

H. Notes and Outlines

When notes are used, the attorney should not pretend not to use them or try to sneak a peek. An obvious use of notes done openly can be effective. Jurors, most of whom would be very uncomfortable in a public speaking situation, understand the need to use notes.

Prepared outlines can be effectively employed in an opening conducted with the use of visual aids. A prepared diagram, blackboard, whiteboard, easel paper, or an overhead transparency may contain an outline of the opening which highlights important matters for the jurors and assists the attorney in explaining the facts.

§ 7.7 OBJECTIONS AND MOTIONS

A. Improper Comments

Certain statements and comments made during an opening are objectionable. References to the following evidence and the following comments are improper:

1. Referring to Inadmissible or Unprovable Evidence

Counsel must not refer to inadmissible evidence or unprovable facts during opening statement. This prohibition extends to evidence excluded by pretrial rulings, or likely to be excluded by the rules of evidence, as well as facts, opinions, or inferences that are not supported by evidence. The standard for determining whether an attorney may refer to specific evidence is whether the attorney has reasonable, good faith grounds to believe the evidence will be admissible. The standard to determine whether a matter can be proved is whether there is a source of available evidence to prove the matter. The opening statement is not to be used as a subterfuge to present inadmissible or nonexistent evidence to the jury or to circumvent the rules of evidence and professional responsibility.

Objection:

Counsel has referred to evidence that is neither admissible nor provable in this case. We request that the jury be instructed to disregard such evidence and that counsel be admonished for making such references.

Response to Objection:

- Explain the evidence law that supports the admissibility of the questioned evidence.
- Describe the source of evidence that will support the statement made.
- Advise the judge and opposing counsel before the opening that there will be a reference to potentially objectionable evidence, and seek a preliminary ruling by the judge as to its admissibility.
- Blame co-counsel for thinking up the idea.

2. Explaining Details of the Law or Jury Instructions

The attorney should not explain details of the law or give instructions to the jury. While making brief references regarding the law in the case is proper, lengthy descriptions or detailing of the law is not proper. These descriptions are only appropriate in summation.

The precise extent to which an attorney may refer to the law during an opening varies among jurisdictions and among judges. Some courts strictly limit an attorney's explanation of the law during opening statement, and some courts permit reasonable latitude to the attorneys to explain the law applicable to the facts. See section 7.1(B).

Objection:

Counsel is improperly explaining the law or jury instructions during opening statement.

Response to Objection:

- Avoid lengthy or detailed references to the law or jury instructions.
- Briefly mention the law or jury instructions several times during the opening, rather than describing it in one lengthy explanation.
- Combine a description of the facts with an explanation of the law to make these statements sound more factual in nature.
- Use prefatory remarks such as "The evidence will show" before explaining the law.

- Remind the jurors that it is the judge and not the attorneys who will explain the law to them.
- Explain to the judge you always wanted to be a judge and were just practicing.

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3. Making Argumentative Statements

Counsel should not make argumentative statements during the opening. The opening statement is primarily an opportunity for counsel to present the evidence that will be introduced and not to argue the facts, the law, or the case. See section 7.1(B).

Objection:

Counsel is arguing to the jury.

Response to Objection:

- Immediately request a bench conference to avoid being admonished by the court in front of the jury.
- Explain that the reference to the facts, law, or case is proper and necessary for the jury to hear during opening statement and is not an argument.
- Avoid speaking with an argumentative tone of voice, or with over-emphatic gestures, or in a loud, aggressive manner.
- Apologize to the judge and admit being a former high school debator.

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4. Stating Personal Beliefs and Opinions

The attorney should not give the jurors a personal opinion or belief concerning the evidence or the case. The jury is to determine the case based upon the facts and the law and not upon the personal statements of counsel. Phrases such as "I personally believe" or "It is my opinion" are objectionable. The lawyer may state, "I will prove" or "I submit" because the lawyer is not stating a personal position.

Objection:

Counsel is stating a personal belief or opinion.

Response to Objection:

- Rephrase the remarks and avoid interjecting personal opinions.

- Use phrases such as "We will present evidence to you that will show" and "You will learn that" rather than phrases that suggest your personal beliefs.
- Tell the judge that for once, you happen to be right.

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5. Putting the Jurors in the Place of the Party

Counsel may not ask jurors to put themselves in the place of a party or witness in determining an issue. The jurors are to base their verdict on the evidence and not substitute their personal experiences or reactions for that of the evidence presented in the case.

Objection:

Counsel is asking the jurors to improperly put themselves in the place of a party.

Response to Objection:

- Avoid suggesting the jurors put themselves in the place of a party or witness.
- Save references to the common life experiences of the jurors until final argument.
- Use general references to real life or common sense. The jurors will put themselves in the place of the witness or party without being asked to do so. For example, "Mr. Burns did what most people would do" and "Ms. Allen used common sense when she turned to the right."
- Tell the judge what time the party starts.

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6. Speculating About the Other Side's Case

A prosecutor in a criminal case cannot suggest what the defense will prove because the defense has no obligation to prove anything. Speculation as to the other side's case in a civil matter is argumentative, does not represent what the evidence will show, and is usually improper.

Objection:

Counsel is improperly speculating regarding what we will prove.

Response to Objection:

- Explain the statements relate to evidence the other side will introduce and are proper.

- Explain it is necessary to describe facts the other side will prove in order that the jurors understand all the facts of the case.
- Explain you were doing what any good inyestment banker would do.

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7. Making Disparaging Remarks

Counsel may not make remarks during opening statement which disparage opposing counsel, the opposing case, the opposing party, or witnesses. Such conduct is improper, unfairly prejudicial, and unethical. The judge should reprimand the offending attorney. Severely disparaging remarks may be a ground for a mistrial.

Objection:

Counsel is making improper remarks. Counsel has said I was mendacious and I ask your Honor to admonish counsel and insist she apologize to me.

Response to Objection:

- Try to explain that the remarks are not improper.
- Admit a mistake and apologize.
- Accept an admonition from the court without argument.
- Acknowledge being a jerk and accept whatever happens to you.

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8. Additional Prohibitions

The issues involved in specific cases may further restrict certain references made during opening statements. In a personal injury case, references to insurance are inappropriate. In a criminal case, a prosecutor cannot comment on the failure of the defendant to testify. In all cases, counsel may not refer to matters that may affect the passion or prejudice of the jury, such as appeals to the family circumstances of a party or references to the wealth or poverty of a party.

B. Objections

If an objection is made during opening, the judge will rule on the propriety of the objection. If the objection is sustained, the attorney should correct the mistake and continue with the opening. If the objection is to the content of the opening statement, then the subject ought to be avoided. If the objection is to the form of the statement, the statement can be rephrased. If the objection is overruled, the attorney should continue with the opening and may repeat or emphasize the statement, and may preface it with "As I was saying" or "Before the interruption."

Tactically, an attorney may decide not to object but rather write down what was said and use this against the opposing attorney in closing argument. Many attorneys extend a professional courtesy to one another and do not object during opening statement unless the opponent is saying or doing something that is clearly improper and damaging to the case. Most attorneys want the openings to be presented zealously and without interruptions. However, an objection and a request for a curative instruction may be necessary to preserve an issue for appeal.

C. Curative Instructions

After an objection has been sustained, the attorney making the objection should consider asking the judge to instruct the jurors to disregard the improper comment. This curative instruction may reduce the negative impact of the improper comment. Some jurisdictions require the curative instruction be requested to preserve an issue for appeal. A request for a curative instruction may call more attention to the improper statement, however, and ought not to be made if the disadvantage caused by highlighting the improper comment outweighs the effectiveness of the curative instruction. See section 4.8(C)(5).

D. Opening Statement Motions

An opposing party may bring a motion to dismiss or for a directed verdict on an issue in the case based on admissions made by counsel during opening statement. Admissions made during the opening statement can have a binding legal effect on the party. Because the opening statement is part of the record of the case, facts conceded by counsel during the opening statement may be admissions. This motion is seldom available because rarely will the opposing counsel make such adverse admissions.

A motion to dismiss or for a directed verdict may also be brought on the ground that the opposing party has failed to establish a prima facie case during the opening. Generally, the failure to mention specific evidence in the opening does not preclude subsequent introduction of the evidence at trial. As long as the pleadings and pretrial proceedings have placed matters in issue, the rules of evidence and not the scope of the opening statement determines what evidence will be admissible and inadmissible.

In a civil case, a trial court has the discretion to grant a summary disposition based upon the opening statement of counsel. If an opening statement contains admissions or fails to refer to sufficient supporting evidence, there may be grounds for a motion to dismiss, a summary judgment, or directed verdict. In criminal cases, a judge may direct a verdict for the defendant on the basis of the prosecutor's opening statement if no reasonable juror could convict the defendant based upon the facts stated in the opening statement.

The purpose for a summary disposition based upon the opening statement is judicial economy. A trial is unnecessary if, based on the opening statement, it is obvious that no claim, defense, or case exists. Summary dispositions are rarely granted. Opening statements usually contain more than enough information to support a claim or defense. If a case is so weak that no facts exist to support a claim or defense, the weakness will be apparent at the pretrial stage and the case should be dismissed or settled at that time. If counsel fails to refer to facts sufficient to support a claim or defense, the trial judge may allow the case to go to trial. If such a summary disposition motion is granted, and evidence exists which was not described in the opening, the losing side should move to reopen the case and supplement the opening statement.

Other possible motions include:

- A motion to have the court set restraints on the opponent's opening regarding time, scope, detail, and demeanor. If an attorney exceeds the reasonable standards for an opening, this motion may be granted.
- A motion by plaintiff to present additional facts in rebuttal to defendant's opening. This unusual motion may be appropriate in a situation in which the defendant raises unanticipated issues.
- A motion to change venue for an opening on Broadway.

INSTRUCTIONS TO COUNSEL (AND PARTIES) PRIOR TO COMMENCEMENT OF JURY TRIALS

1. THE AUDIBILITY IN THE COURTROOM IS LIMITED. PLEASE SPEAI THE MICROPHONES AND KEEP YOUR VOICE UP.

2. WHEN YOU READ, PLEASE DO SO SLOWLY, SO THE COURT, THE JUF THE COURT REPORTER CAN HEAR AND UNDERSTAND EVERY WOR

3. WHEN YOU USE A NAME WHICH WOULD BE UNFAMILIAR T(REPORTER, PLEASE SPELL THAT NAME.

4. SIT WHEN WITNESSES SWORN.

5. RISE FOR JURY.

6. RISE TO MAKE OBJECTIONS.

7. DON'T TALK TO JURORS.

8. WAIVE APPEARANCE OF DEFENDANT (OR PARTIES) AT SIDEBARS.

9. LAW TO JUDGE EARLY IN THE CASE.

10. REQUEST TO CHARGE TO JUDGE EARLY IN THE CASE.

11. HAVE ENOUGH WITNESSES AVAILABLE.

12. COUNSEL TO PREMARK EXHIBITS THEMSELVES AND COUNSEL AF EXCHANGE COPIES PRIOR TO INTRODUCTION.

13. COUNSEL TO KEEP LIST OF EXHIBITS WHICH WILL BE GIVEN TO THE WHEN DELIBERATIONS COMMENCE.

14. DO NOT REQUEST THAT I DECLARE, IN THE PRESENCE OF THE JURY,] AN EXPERT IS "QUALIFIED." IN THE ABSENCE OF AN OBJECTION, ASSUMED THAT THE EXPERT IS QUALIFIED.

15. CONSENT TO FIVE (5) JUROR VERDICT IN CIVIL CASES.

16. LOOSELEAF BOOKS FOR EVIDENCE FOR JURORS (JURY NOTEBOOKS

17. GENERALLY TRIAL WILL NOT BE HELD ON FRIDAYS.

18. WHEN PUBLISHING EXHIBITS TO THE JURY, PLEASE GIVE THE EXHI TO JUROR NUMBER ONE, WHO WILL START THE PROCESS. (EXPI FURTHER).

19. DON'T TRIP OVER ELECTRICAL CORDS.

20. ONLY ONE (1) ATTORNEY PER WITNESS.

Compilation of Codes, Rules and Regulations of the State of New York Currentness
Title 22. Judiciary
Subtitle A. Judicial Administration.
Chapter I. Standards and Administrative Policies
Subchapter C. Rules of the Chief Administrator of the Courts
Part 100. Judicial Conduct (Refs & Annos)

22 NYCRR 100.3

Section 100.3. A judge shall perform the duties of judicial office impartially and diligently

(A) *Judicial duties in general.* The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

(B) *Adjudicative responsibilities.*

(1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(2) A judge shall require order and decorum in proceedings before the judge.

(3) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.

(5) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding.

(6) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except:

(a) *Ex parte* communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the *ex parte* communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed-upon matters.

(e) A judge may initiate or consider any *ex parte* communications when authorized by law to do so.

(7) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

(8) A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This paragraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This paragraph does not apply to proceedings in which the judge is a litigant in a personal capacity.

(9) A judge shall not:

(a) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;

(b) with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

(C) *Administrative responsibilities.*

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered. A judge shall not appoint or vote for the appointment of any person as a member of the judge's staff or that of the court of which the judge is a member, or as an appointee in a judicial proceeding, who is a relative within the fourth degree of relationship of either the judge or the judge's spouse or the spouse of such a person. A judge shall refrain from recommending a relative within the fourth degree of relationship of either the judge or the judge's spouse or the spouse of such person for appointment or employment to another judge serving in the same court. A judge also shall comply with the requirements of Part 8 of the Rules of the Chief Judge (22 NYCRR Part 8) relating

to the appointment of relatives of judges. Nothing in this paragraph shall prohibit appointment of the spouse of the town or village justice, or other member of such justice's household, as clerk of the town or village court in which such justice sits, provided that the justice obtains the prior approval of the Chief Administrator of the Courts, which may be given upon a showing of good cause.

(D) *Disciplinary responsibilities.*

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a substantial violation of this Part shall take appropriate action.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action.

(3) Acts of a judge in the discharge of disciplinary responsibilities are part of a judge's judicial duties.

(E) *Disqualification.*

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) (i) the judge has a personal bias or prejudice concerning a party; or (ii) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge knows that: (i) the judge served as a lawyer in the matter in controversy; or (ii) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter; or (iii) the judge has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other interest that could be substantially affected by the proceeding;

(d) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the sixth degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding;

(ii) is an officer, director or trustee of a party;

(iii) has an interest that could be substantially affected by the proceeding;

(e) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding or is likely to be a material witness in the proceeding.

(f) The judge, while a judge or while a candidate for judicial office, has made a pledge or promise of conduct in office that is inconsistent with the impartial performance of the adjudicative duties of the office or has made a public statement not in the judge's adjudicative capacity that commits the judge with respect to:

(*i*) an issue in the proceeding; or

(*ii*) the parties or controversy in the proceeding.

(g) Notwithstanding the provisions of subparagraphs (c) and (d) of this section, if a judge would be disqualified because of the appearance or discovery, after the matter was assigned to the judge, that the judge individually or as a

fiduciary, the judge's spouse, or a minor child residing in his or her household has an economic interest in a party to the proceeding, disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

(F) *Remittal of disqualification.* A judge disqualified by the terms of subdivision (E), except subparagraph (1)(a)(i), subparagraph (1)(b)(i) or (iii) or subparagraph (1)(d)(i) of this section, may disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Credits

Sec. filed Aug. 1, 1972; amd. filed Nov. 26, 1976; renum. 111.3, new added by renum. and amd. 33.3, filed Feb. 2, 1982; amds. filed: Nov. 15, 1984; July 14, 1986; June 21, 1988; July 13, 1989; Oct. 27, 1989; repealed, new filed Feb. 1, 1996; amds. filed: Feb. 21, 2006; March 6, 2006 eff. Feb. 28, 2006. Amended (C), (E).

Current through amendments included in the New York State Register, Volume XXXIV, Issue 10, dated March 7, 2012.

22 NYCRR 100.3, 22 NY ADC 100.3

End of Document

Compilation of Codes, Rules and Regulations of the State of New York Currentness
Title 22. Judiciary
Subtitle B. Courts.
Chapter IV. Supreme Court
Subchapter E. All Departments
Part 1200. Rules of Professional Conduct (Refs & Annos)
22 NYCRR 1200.0
Section 1200.0. Rules of Professional Conduct

Rule 1.16: Declining or terminating representation.

(a) A lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

(1) bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or

(2) present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

(1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged; or

(4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action with which the lawyer has a fundamental disagreement;

(5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;

(8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;

(9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(10) the client knowingly and freely assents to termination of the employment;

(11) withdrawal is permitted under Rule 1.13(c) or other law;

(12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or

(13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

Rule 3.3: Conduct before a tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

Rule 3.4: Fairness to opposing party and counsel.

A lawyer shall not:

(a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Rule 3.5: Maintaining and preserving the Impartiality of tribunals and jurors.

(a) A lawyer shall not:

(1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal when the recipient is prohibited from accepting the gift or loan but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Part 100 of the Rules of the Chief Administrator of the Courts;

(2) in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except:

(i) in the course of official proceedings in the matter;

(ii) in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer;

(iii) orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or

(iv) as otherwise authorized by law, or by Part 100 of the Rules of the Chief Administrator of the Courts;

(3) seek to or cause another person to influence a juror or prospective juror by means prohibited by law;

(4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order;

(5) communicate with a juror or prospective juror after discharge of the jury if:

(i) the communication is prohibited by law or court order;

(ii) the juror has made known to the lawyer a desire not to communicate;

(iii) the communication involves misrepresentation, coercion, duress or harassment; or

(iv) the communication is an attempt to influence the juror's actions in future jury service; or

(6) conduct a vexatious or harassing investigation of either a member of the venire or a juror or, by financial support or otherwise, cause another to do so.

(b) During the trial of a case a lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(c) All restrictions imposed by this Rule also apply to communications with or investigations of members of a family of a member of the venire or a juror.

(d) A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge.

Rule 3.6: Trial publicity.

(a) A lawyer who is participating in or has participated in a criminal or civil matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness or the expected testimony of a party or witness;

(2) in a criminal matter that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal matter that

could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Provided that the statement complies with paragraph (a), a lawyer may state the following without elaboration:

(1) the claim, offense or defense and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal matter:

(i) the identity, age, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the identity of investigating and arresting officers or agencies and the length of the investigation; and

(iv) the fact, time and place of arrest, resistance, pursuit and use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission or statement.

(d) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this

paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(e) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.0