Cliff Cheatwood Inn of Court

January 2010

Ethics in Opening Statement:
Crossing the Line to Argument and to Matters Never to be in Evidence

Basic Scenario:

This is a bad automobile accident. It is an intersectional collision at the corner of Kennedy and Armenia that occurred on Thursday, November 12, 2009. There are 3 injured parties in two cars. A third car, a police car, may have contributed to the accident. As explained later, this lawsuit involves only two the parties, Pinkner v. Mum.

Phil T. Rich is the owner and operator of a brand new Porsche 911 Turbo S. He had a passenger, Michael "Vick" Pinkner. He was driving in the north lane of Kennedy heading west into a sunset. He may have been speeding, but there is no evidence that he is going more than 50-55 mph.

Sallie Mum is the owner, operator, and sole occupant of a Smart car. Armenia is a one-way street flowing south. She was in the far left lane, i.e. the eastern most lane.

In general, it appears that Rich was in his proper lane. Mum's car has extensive damage to the driver's side and she likely pulled in front of Rich. Rich's car has front end damage, but it rolled and hit a telephone pole that crushed in the roof. The car is just a mess.

Lt. Robert Murtaugh with TPD was driving Car 54 and was on shift that evening. He received a dispatch to respond with lights and siren to a reported bomb threat at the HCBA building. He was told that a secret cell of a Muslim terrorist group was in the building. He responded on the dispatch tape that his location was the corner of Armenia and Kennedy and that he would get there in two minutes. He reported nothing about this accident, but arrived at HCBA 5 minutes after he was dispatched and less than two minutes after dispatch received the first 911 call reporting the accident at Armenian and Kennedy.

Sallie Mum: Mum is the defendant in this lawsuit. She was badly injured in the accident and taken to TGH with low back injuries that ultimately resulted in paraplegia. Her husband is a professional wrestler. The couple has an auto policy with Good Hands Ins. Co. with very high limits. They has a beautiful 4-year-old daughter who knows nothing about the accident, but has been traumatized by her mother's injuries.

At the hospital, nurses obtained information from him on his next of kin because they believed he might not survive. However, he emerged from several hours of surgery, still in extremely critical condition. His family was at his bedside. As Mr. Pinkner drifted in and out of consciousness, he uttered various words and phrases, most of which were unintelligible to his family and doctors. However, after several hours of semi-consciousness, his vital signs took a sudden turn for the worse. One of the doctors said that he thought death was near. Suddenly, Mr. Pinkner opened his eyes wide and stated: "I knew I should have cut Phil off after his fifth beer, and I never should have allowed him to get behind the wheel."

After that utterance, Mr. Pinkner's condition began to steadily improve, and he survived the crash as well as the surgery. The nurse who heard Mr. Pinkner's statement wrote the statement into her nurse's notes as best she could recall it at the end of her shift, approximately 6 hours after Mr. Pinkner actually uttered the statement. The family is expected to testify that they heard no such statement.

Mr. Pinkner's claim will include a claim that he lost more than a year's income at his dog kennel and grooming business due to his injuries.

Phil T. Rich. He is not a party to this lawsuit, but Mum has named him as a Fabre defendant. Pinkner has never made a claim against him and has not accepted any insurance settlement from Rich. Rich is the partner with the money in the internet café and Pinkner is the sweat-equity partner in this business. There are rumors that Rich is actually Bobby Richeoni, a mobster from Philadelphia who disappeared--maybe in witness protection--but no one knows for sure.

His Porche is a $160,000 car with a top speed of 200. It has a Bucs sticker and a "support the troops in Iraq" sticker on its bumper. He was knocked unconscious in the accident and had slurred speech in the ambulance. He had several bad cuts and received 2 pints of blood at the hospital. If the hospital ever did a blood alcohol test, it is not in the hospital records when they were produced for trial. He did not receive a ticket in this accident. He has always maintained that he had a green light and that the Smart car suddenly pulled in front of him.

Lt. Robert Murtaugh: and the TPD are also Fabre defendants named by Ms.Mum. He is a 20-year veteran with an otherwise unblemished record. Lt. Murtaugh recently jumped into the Hillsborough River to save a workman who fell from a bridge under repair. When 9/11 happened, he drove nonstop to NYC and worked pulling bodies from the buildings. It has left him with a slight lung disorder. He has no explanation as to why the dispatch records and his own voice on the dispatch tape would seem to place him within feet of this accident. He simply claims to know nothing about an accident.

Mum, however, made an early claim against Murtaugh, maintaining that he startled her by flashing his lights and siren while right on her bumper. Faced with a paraplegic

Table Topics

[The scenario may give you examples to help with your discussion of these topics. Two tables will be assigned the same topic. The moderator will call on a pupil from your group to provide your group's answer.]

1. If there is no order on a motion in limine, and there is "bad stuff" in a deposition of a witness who will testify, can you ethically tell the jury that "the evidence will" show the "bad stuff" from the deposition if you think the judge is likely to exclude it?

2. Many lawyers believe that jurors often make up their minds after opening statements and before the evidence. What can you do in opening statement--without violating the rule against argument in opening statement--to convince the jury to keep an open mind? What can't you do?

3. If you are not certain whether an item of prejudicial evidence will be admissible or that a weakness in your case will actually come out during the trial, how do you handle these problems in opening statement?

4. Can you use a "theme" in opening statement that is legally irrelevant to the issues to be decided by the jury?

lawyer reasonably believes is criminal or fraudulent or repugnant or imprudent. Rule 4-1.16(c) recognizes that notwithstanding good cause for terminating representation of a client, a lawyer is obliged to continue representation if so ordered by a tribunal.

To permit or assist a client or other witness to testify falsely is prohibited by section 837.02, Florida Statutes (1991), which makes perjury in an official proceeding a felony, and by section 777.011, Florida Statutes (1991), which proscribes aiding, abetting, or counseling commission of a felony.

Florida caselaw prohibits lawyers from presenting false testimony or evidence. *Kneale v. Williams*, 30 So. 2d 284 (Fla. 1947), states that perpetration of a fraud is outside the scope of the professional duty of an attorney and no privilege attaches to communication between an attorney and a client with respect to transactions constituting the making of a false claim or the perpetration of a fraud. *Dodd v. The Florida Bar*, 118 So. 2d 17 (Fla. 1960), reminds us that "the courts are ... dependent on members of the bar to ... present the true facts of each cause ... to enable the judge or the jury to [decide the facts] to which the law may be applied. When an attorney ... allows false testimony ... [the attorney] ... makes it impossible for the scales [of justice] to balance." See *The Fla. Bar v. Agar*, 394 So. 2d 405 (Fla. 1981), and *The Fla. Bar v. Simons*, 391 So. 2d 684 (Fla. 1980).

The United States Supreme Court in *Nix v. Whiteside*, 475 U.S. 157 (1986), answered in the negative the constitutional issue of whether it is ineffective assistance of counsel for an attorney to threaten disclosure of a client's (a criminal defendant's) intention to testify falsely.

Ex parte proceedings

Ordinarily, an advocate has the limited responsibility of presenting 1 side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary injunction, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Rule 4-3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act;

(b) fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party;

(e) in trial, state a personal opinion about the credibility of a witness unless the statement is authorized by current rule or case law, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the culpability of a civil litigant, or the guilt or innocence of an accused;

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless the person is a relative or an employee or other agent of a client, and it is reasonable to believe that the person's interests will not be adversely affected by refraining from giving such information;

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

(h) present, participate in presenting, or threaten to present disciplinary charges under these rules solely to obtain an advantage in a civil matter.

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); Oct. 20, 1994 (644 So.2d 282); Sept. 24, 1998, effective Oct. 1, 1998 (718 So.2d 1179); Oct. 6, 2005, effective Jan. 1, 2006 (916 So.2d 655).

Comment

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a

MOTION IN LIMINE

- A motion in limine requests that the Court prevent a party from introducing evidence at trial that is improper, confusing, unfairly prejudicial, or to seek the prohibition of improper conduct. Typically, such a motion is filed and heard prior to trial.
- If evidence is excluded by a ruling on a motion in limine, it is up to the party to proffer such testimony or evidence. *Connell v. Guardianship of Hattie C. Connell*, 476 So. 2d 1381 (Fla. 1st DCA 1985).
- If the Court denies the motion, request that the denial be made without prejudice and also be prepared to object when your opponent presents the matter at trial. *Swan v. Florida Farm Bureau Insurance Company*, 404 So. 2d 802 (Fla. 5th DCA 1981).
- Prior notice of the motion is not necessary, if it is similar to an objection. *Dailey v. Multicon Development, Inc.*, 417 So. 2d 1106 (Fla. 4th DCA 1982).
- A motion in limine cannot be treated as a motion for summary judgment absent compliance with Rule 1.510, Florida Rules of Civil Procedure.
- A motion in limine may be sufficient to preserve an objection to the introduction of the evidence at issue depending on the nature of the Court's ruling. *See* §90.104(1)(b), Fla. Stat. *USAA Casualty Insurance Company v. Allen*, 17 So. 3d 1270 (Fla. 4th DCA 2009).

90-JAN MIBJ 42
90-JAN Mich. B.J. 42

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General

*42 PERSUASION IN OPENING STATEMENT [FNa1]

Generating Interest in a Convincing Manner

James A. Johnson [FNa2]

Setting aside voir dire, opening statement is the first opportunity to persuasively communicate with the jury without interruption. We are dealing with the modern jury, a sophisticated group of citizens with preconceptions and expectations for compelling presentations. It is an awesome opportunity to inoculate the jury and deliver a detailed narrative that personalizes your client and states your client's cause in a manner that epitomizes your theory. The opening statement, if properly presented, should persuade, and in some instances, move the jury to tears. It is an opportunity almost too good to be true, and it is so important that it should never be waived. In Michigan, the court may enter judgment on the opening statement for failure of counsel to disclose all the essential factual elements necessary to establish a cause of action. [FN1] Moreover, the Michigan Court Rules require an opening statement by both parties, and it can only be waived with the consent of the court and opposing counsel. MCR 2.507(A) states:

> Before the introduction of evidence, the attorney for the party who is to commence the evidence *must* make a full and fair statement of that party's case and the facts the party intends to prove. Immediately thereafter or immediately before the introduction of evidence by the adverse party, the attorney for the adverse party *must* make a like statement. Opening statements may be waived with the consent of the court and the opposing attorney. [Emphasis added.]

*43 Goals

Theoretically, the purpose of opening statement is to assist the jury to understand the testimony that will be introduced during the trial as it bears upon the salient issues. The rule of primacy teaches that what is heard first tends to be the most difficult to dislodge from someone's mind. The goal of the plaintiff's lawyer is to take full advantage of the law of primacy. At the beginning of opening statement, the jury is highly attentive and eager to learn what the case is all about. Do not waste precious minutes lecturing the jury about the purpose of opening statement. Instead, give them the theme of the case that will remain with them and shape their understanding throughout the trial. For example: "This is a case about a broken promise." It does not matter if your case is simple or complex--follow these time honored techniques in both state and federal court.

The purists will tell you that counsel should speak to the jury in a professional and dispassionate manner. They believe that what the jury wants to hear at the beginning of the trial is an explanation of what the lawsuit is

about. With this view, they outline the elements of the case so that the jurors will have a better understanding of what to expect and what to look for as the evidence unfolds. Finally, the purists insist that the **opening statement** should not be argumentative. Attorneys who adhere to this view are right in general and wrong in particular. An effective **opening statement** should subtly border on final argument. Counsel should create a scene in **opening statement** that is indelibly fixed in the minds of the jurors. *A lawyer who fails to argue the client's case in opening statement consistent with the canons of ethics and within the rules of procedure and evidence is simply not doing his or her job.*

A consummate trial lawyer may hear an objection from opposing counsel-- "Your Honor, he is arguing his case" or "He's summing up." If you hear those words occasionally during your opening statement, you have arrived as a trial lawyer. The objection is easily put to rest by repeating the magic words, "The evidence will show" or "I mean to prove that ...." In opening statement, counsel should be right on the edge of summation.

The advocate should use every phase of trial to persuade. Persuasion is an art practiced in its most subtle form in the opening statement. Whether a trial judge views your statements as argument is more a matter of your tone than content. If you think you have crossed the line, lower your voice and back up one step. The key is the selective use of language and the choice of words. Language is crucial to your case. The use of the right word, the right phrase, and the right sentence accomplishes in that perfectly subtle manner the creation of the proper subconscious mood of feeling that no amount of emotional appeal can equal. Also, the selection of facts and the order in which they are presented suggest the desired conclusion. Let the facts argue for you, without the use of conclusory language. Cadence, rhythm, tempo, and even your demeanor are effective persuasion techniques. A big pause lets the impact of what you just said sink in. A pause with a gesture, like taking off your glasses, forces the jury to think about your last statement and leaves them eager to hear what is coming next. A moment of complete silence is even more powerful.

Impact Phrases

You should use impact words and phrases in opening statement. They provide a word picture and evoke images in the minds of the jurors. For plaintiff's lawyers, impact words like "collision" and "mangled" should be used instead of "accident" and "crushed," which are appropriate for defense lawyers. An impact phrase such as "He is a prisoner in a wheelchair" is attention grabbing and goes right to the hearts, minds, and viscera of the jurors. And impact phrases have a lasting effect. At the beginning of the trial, the jury is at the peak of attention. Accordingly, plaintiff's and defense counsel should present an attention-getting statement of *44 the theory of the case. But be careful. Do not overdo it. Be selective. Use the right impact phrases that also appeal to reason. Here's a sampling:

"This is a case about a person who is less than a man and more than a man. Less than a man because ...."
"Accidents don't just happen ... they are caused ... by people."
"This lady is the mother of a boy who was killed at a railroad crossing."
"It is too late once the ball has been snapped for the coach to send in a different play."
"This is a case about a broken promise."
"This is not a case about justice .... This is a case about injustice. Only you, through your verdict, can do justice."
"This is a case about risk, rules, and responsibilities."

When you deliver your opening statement, do not engage in a lifeless, dull recitation of each witness's testimony. A tedious prediction of who will testify about what fact or event is not necessary. Allow the jury the joy of discovery during the evidence. A simple narrative permits the relevant connections to be made because they will occur naturally, as the story unfolds. The opening statement should be presented as a continuous persuasive story with a simple theme--the theory of the case. Create a theme that is carefully defined and artfully articulated and tells a human interest story. The first paragraph of the opening statement should develop the theme of your case and disclose your overall position in capsule form. Here is an example:

> "Ladies and gentlemen of the jury, *this is a case about a broken promise.* John Smith entered into an agreement with XYZ Insurance Company and paid his premiums religiously for five years. Mr. Smith bought a promise when he purchased his automobile liability policy: to protect him from this very type of loss. He relied on his paid-for promise and rightfully so, with piece of mind, knowing that when he put his trust in the hands of XYZ Insurance Company, he would be secure, safe, and protected. This lawsuit was filed because an unknown hit-and-run driver rear-ended Mr. Smith's car and then sped off--out of sight. Nobody knows where that pickup truck is to this very day. Because of the collision, John suffered a ruptured lumbar vertebrae, or what is commonly called a broken back. He will have this injury for the rest of his life. After he promptly notified XYZ Insurance Company of the collision, knowing that he had uninsured motorist coverage that provides protection for this very type of situation, XYZ refused to honor its promise. *A promise made is a debt unpaid.*"

Keep in mind that if you represent the defendant, you can easily arrange the persuasion techniques in favor of the defendant.

Another tool that should be in every litigator's arsenal is Power-Point. Integrating PowerPoint in your opening statement enables you to create visual images in the jurors' minds. Pictures are attention getters and attention keepers that will enhance your trial presentation by making it very persuasive and more memorable. Combining words with pictures is the key to persuasive communication in telling your client's story in a way that also motivates and inspires.

Rhetorical Questions

Asking questions and providing the right answers piques the jury's interest. An example of the use of rhetorical questions in opening statement is in order:

> "Members of the jury, you must be asking yourselves who is Mike Brown and what does he want? He is a truck driver who works with his hands, loading and unloading 50-pound boxes of cranberries for Acme Corporation. What does he want? He wants to justify your decision to compensate him with substantial money damages. Who is the defendant? The defendant is XYZ Corporation. It is the reason why you 12 good citizens of the community have been chosen to perform a next-to-divine purpose--the rendering of justice. What did XYZ Corporation do? Well, that takes us back to October 8, 2007. On that day ...."

The questions presented in the dialogue are the same questions that arise in the minds of the jury and the trial judge. Properly employed rhetorical questions are very persuasive.

The Defense Must Open

The defendant in a criminal case needs a good theme, just as much as, if not more than, the plaintiff in a civil case. For example: "This is a case of self-defense." Or if you can carefully talk about the burden of proof in opening statement, you have made great strides in improving your chances of an acquittal or a hung jury. Even when you have no real defense, never waive the opportunity to communicate with the jury. Get up and say something! Stress how important it is to everyone, not only the defendant, that the safeguards of the presumption of innocence be rigorously applied. Explain that the presumption of innocence does not end when the trial starts, but continues until and unless the prosecution presents believable evidence to the jury's satisfaction beyond a reasonable doubt on each and every element of the charged offenses.

In both state and federal court, I have too often seen defense counsel announce to the court, "Your Honor, we will reserve our opening statement." Without showing outward emotion, I cringe. Reserve your opening? Reserve what? The prosecution has just painted a picture of your client as a person who deals in drugs and conspires with those who sell them. Drugs have permeated our society and ruined thousands of lives, even some of the children, spouses, and friends of the jurors. Counsel must get up and change ***45** that picture or at least neutralize it--by showing that your client did not knowingly, with specific intent, violate the controlled substance laws. Defense counsel must remember that you are trying the case to the jury and not the judge. The rule of primacy dictates that defense counsel make an opening statement. You must defuse and neutralize the rule of primacy. *Get up! Get up! Get up!* Talk about how the burden of proof never shifts to the defendant. Tell the jurors in opening that "not guilty" means "not proved guilty." Early on, you must touch the hearts and minds of the jurors by showing how wrong these charges against the accused are. If you wait until the prosecution rests to begin your opening statement in a criminal case, you have--with rare exception--just sent your client to prison. Every criminal defense lawyer should know that it is an uphill climb. The criminal defendant is at a disadvantage from the beginning. The jury is thinking, He or she must have done something wrong; otherwise there would not be a trial.

Preparation

Patrick Henry said it best: "I have but one lamp by which my feet are guided, and that is the lamp of experience." [FN2] How does the young lawyer get experience? One way is to take the advice of the proverbial drunk, wrapped around a street light post who responded to an inquiry by a neatly dressed young gentleman carrying a cello: How do I get to Carnegie Hall? *Practice! Practice! Practice!* Persuasive advocacy takes a good deal of concentrated thought and imagination. *The opening statement must be prepared and rehearsed in advance.* Meticulous preparation yields dividends.

For additional guidelines and techniques in opening statement, read manuals and transcripts and attend seminars on trial practice. After you do that, reread this article. If you have any questions, do not call me, because I will be in court delivering my opening statement, where opposing counsel will rise to his feet and say, *"Your Honor, he's doing it AGAIN."*

FAST FACTS

The advocate should use every phase of trial to persuade. Persuasion is an art practiced in its most subtle form in the opening.

The defendant in a criminal case needs a good theme, just as much as, if not more than, the plaintiff in a civil

case. For example: "This is a case of self-defense."

Checklist of Dos and Don'ts

1. **Do** be in control of the courtroom before the jurors are seated.
2. **Do** develop a style to communicate with jurors so that they come to like you.
3. **Do** be persuasive by establishing a theme that is artfully articulated and will resonate with jurors.
4. **Do** be brief: 15 minutes or less; complex cases a little longer.
5. **Do** personalize your client.
6. **Do** reveal your weaknesses before your adversary does.
7. **Do** use demonstrative evidence: seek a stipulation from opposing counsel and get permission from the judge in pretrial conference.
8. **Do** maintain eye contact with each juror.
9. **Do** simultaneously try three cases: one for the jury, one for the judge, and one for the appellate court.
10. **Don't** apologize for any aspect of your case.
11. **Don't** tell the jury that what you say is not evidence.
12. **Don't** promise anything that will not be proven by the evidence.
13. **Don't** overstate your case.
14. **Don't** forget that your primary audience is the jury, so keep it simple but at the same time carefully perfect your record for appeal, if needed.
15. **Don't** use repeatedly the words "we will prove" or "the evidence will show." Use those words only once at the beginning and deliver your opening in a narrative form.
16. **Don't** waive opening statement, ever.

[FNa1]. *This article is dedicated to David W. Christensen, a partner in the Detroit personal injury firm of Charfoos & Christensen PC.*

[FNa2]. *James A. Johnson, of James A. Johnson, Esq. in Southfield, is a trial lawyer who concentrates on serious personal injury cases. Mr. Johnson is an active member of the Michigan, Massachusetts, Texas, and United States Supreme Court Bars. He can be reached at (248) 351-4808 or through his website at www.JamesAJohnsonEsq.com.*

[FN1]. *Vida v Miller Allied Industries, Inc*, 347 Mich 257; 79 NW2d 493 (1956).

[FN2]. Speech at the Virginia Convention, Richmond, March 23, 1775, in Beck, ed, *Bartlett's Familiar Quotations* (15th ed) (Boston: Little, Brown & Company, 1980), p 383.
90-JAN Mich. B.J. 42

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29 AMJTA 525
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Trial Technique

*525 SUCCEEDING IN THE OPENING STATEMENT

Kenneth J. Melilli [FNd1]

Abstract

Professor Kenneth Melilli discusses the value of a quality opening statement and the techniques and considerations useful to improving the quality of the opening statement.

I. The Importance of the Opening Statement

Despite some evidence that many trial lawyers do not regard the opening statement as deserving of a great deal of attention, [FN1] the more considered view is that the opening statement is very important, [FN2] is perhaps the most important component of the trial, [FN3] and in many cases may actually determine the outcome of trials. [FN4] The devotion to this principle is manifested in the breathtakingly widespread myth about the results of a study done by the University of Chicago Jury Project. According to this myth, that study concluded that eighty percent of jurors make up their *526 minds following the opening statements and never deviate from that judgment through deliberations. [FN5]

In fact, the results of the University of Chicago Jury Project [FN6] include no such conclusions concerning the impact of the opening statement, in large part due to the fact that the Project made no attempt to study the impact of the opening statement. [FN7] However, notwithstanding the entirely fictional basis for this "study," it remains the case that the opening statement can be of utmost significance. [FN8] Even in the absence of what is probably undiscoverable empirical data, common human experience, as well as sound psychological theory, suggest that the opening statement is of potentially great significance in affecting the ultimate jury verdict.

At least one theory of cognitive psychology is premised on the notion that the human mind is content only when "it can 'make sense' out of, [or] give meaning to, the stimuli to which it attends." [FN9] Thus, people do not merely receive information; they irresistibly interpret that information so as to give it meaning, [FN10] even under circumstances in which the information*527 is insufficient to support a definitive conclusion. Once a belief is formed, confirming evidence tends to be overvalued and conflicting evidence tends to be undervalued or even ignored. [FN11] This theory is, this author suggests, manifestly corroborated by common human experience, both at the individual level (e.g., my child is exceptionally talented) and the collective, or societal, level (e.g., the sun revolves around the flat earth).

In the context of the function of the jury, this theory suggests that the admonition to jurors that they form no

opinions until all the evidence has been presented may be more aspirational than realistic. As human beings striving to make sense of the information presented to them, jurors should be expected to form "a mental structure that aids in the processing and interpretation of information." [FN12] Because keeping a completely open mind is both difficult and stressful, jurors should be expected to form at least preliminary judgments, or working hypotheses, throughout the trial. [FN13] Jurors might then naturally pay particular attention to evidence that confirms their formed beliefs and disregard incongruous evidence. [FN14]

Given the almost irresistible human impulse to make sense of information, the opening statement is likely to influence the construct of a framework in the minds of jurors for receiving and interpreting the evidence to follow. [FN15] The perceptions created by the opening statement established a "belief system" that colors the processing of the evidence received at trial. [FN16] To some unspecifiable degree, that belief system should be expected to cause jurors to perceive, or possibly misperceive, the evidence in certain ways. [FN17]

Notwithstanding the fact that, as jurors are routinely instructed, the opening statement is not evidence, it is a mistake to underestimate the significance of the opening statement in the preparation and presentation of a case at trial. Evidence is presented to jurors at trial in a disjointed ***528** and unfamiliar format, [FN18] much like the commonly used metaphor of pieces of a jigsaw puzzle. [FN19] Although it is not a part of the puzzle itself, the picture on the cover of the puzzle box is a welcome assistant to the puzzle solver and undoubtedly influences the behavior during the puzzle solving. So too the opening statement, while not evidence, potentially influences the behavior of the jurors by creating a picture of what the jurors should expect to see after they have received all the pieces of evidence and knitted them together in a unified fabric.

Notwithstanding the greatest good faith on the part of jurors, one should reasonably expect that information presented during opening statements might come to be regarded as having the same weight as if it had come from the witness stand. [FN20] When the witness whose testimony has been previewed during the opening statement actually does testify, jurors might well fill in gaps in witness testimony based upon the details retained from the opening statement. [FN21] Jurors are also more likely to hear details they expect to hear based upon the opening statement and to fail to notice inconsistent points. [FN22] Consequently, a superior opening statement can predispose the jury favorably, [FN23] preemptively affect the jury's reception of the evidence and ultimately affect the eventual verdict. [FN24]

The uniqueness of the opportunity to influence during the opening statement is further established by the psychological principle of primacy, the axiom that what is perceived first is most likely to be remembered, [FN25] believed [FN26] and embraced, [FN27] and least likely to be discarded. [FN28] At this early ***529** stage of the trial, jurors are most likely to be open-minded and impressionable, [FN29] fresh and attentive, [FN30] interested and curious, [FN31] and willing to recognize that the lawyer speaking to them knows more about the case than they do. [FN32]

Given the potential impact of the opening statement upon the outcome of the trial, it is essential to use the opening statement as a crucial opportunity to persuade. [FN33] At least in a jury trial, the opportunity to present an opening statement should never be waived. [FN34] And while there might be some advantages to defense counsel to delay opening statement until it immediately precedes the presentation of the defense case, [FN35] most experts advise that defense counsel present the opening statement immediately following the opening statements of the plaintiff or the prosecution. [FN36] Leaving the opponent's opening statement uncontradicted in the minds of the jurors is extremely dangerous, [FN37] and a delayed defense opening might be too late to reverse the impact of the prosecution's opening. [FN38]

There are also certain collateral benefits to be obtained from a quality opening statement. At least in civil cases, a not insignificant number of *530 cases are resolved by settlement immediately or shortly following the opening statements. [FN39] Whether it is the recognition by an attorney or client of the strength of the opposing case or the quality of the opposing advocate, or the manifestly positive reception by the jury of the opponent's presentation, a superior opening statement can provoke a quick conclusion to the trial. [FN40]

Moreover, although in a jury trial an opening statement should be delivered exclusively to the jury, in all trials the judge is present and cognizant of the opening statements. A quality opening statement will educate the judge about the issues, the evidence and the connection between the two. Consequently, a clear and thorough opening statement will inform the judge in advance concerning the relevance of evidence not immediately apparent as such, thereby assisting the attorney in defeating any objections to such evidence on the grounds of relevance. [FN41]

Finally, in a number of jurisdictions the failure of the party assigned the burden of proof to state facts in the opening statement which establish a prima facie case can result in the dismissal of the claim or charge, or the disallowance of the defense. [FN42]

II. Guidelines for an Effective Opening Statement

A. Preparation

Because of the importance of the opening statement, it is a great mistake to believe that trial preparation should be concentrated on the presentation of the evidence and the closing argument, to the neglect of the opening statement. Adequate preparation of an opening statement demands careful consideration of the substance of the presentation and whatever steps need to be taken to insure that the form of the presentation *531 will be well-received. [FN43] Most of us are more precise in our written communications than in our spontaneous oral remarks. Consequently, for many attorneys, especially less experienced ones, the opening statement should be written and rewritten to insure the best content. [FN44] Thereafter, the delivery should be rehearsed to the optimal point of a smooth delivery that does not appear to be memorized or rehearsed.

Preparation of an opening statement cannot be accomplished in isolation from preparation of the other components of the trial. Obviously, one cannot prepare a preview of the evidence to be presented without having a firm grasp of that evidence. Perhaps less obviously, one cannot construct an effective opening statement without having some very specific ideas about the content of the closing argument. In fact, it makes a great deal of sense to prepare, at least conceptually, the closing argument prior to preparing the opening statement. [FN45] The most convincing factual points to be made during the closing should be the same points emphasized in the opening. [FN46] Moreover, if an item of evidence is insufficiently important to be included in the closing, then it almost surely ought not to be previewed in the opening, [FN47] and perhaps should not be presented at all.

B. Simplicity

The quality of a presentation cannot be evaluated independently of its likely impact upon its intended audience. Nothing is accomplished in an opening statement by way of sophistication, technical expertise, and thorough mastery of details if it is not understood by the jurors. Thus, an overarching limiting principle of an opening statement is that it must be understandable by the jurors. [FN48]

Generalizations about jurors are, for the most part, no more useful than generalizations about any other group of people. However, given the circumstance*532 of being selected for service on a jury, it is fair to say that many jurors initially feel uncomfortable in this unfamiliar role and stressed about their responsibility and their ability to comprehend the facts and reach a correct decision. [FN49] One way to ease that tension and to instill confidence among the jurors in their capacity for performing the task assigned to them is to convey that the matter before them is uncomplicated. [FN50] If the opening statement is itself clear and straightforward, it will likely produce a relaxed confidence among the jurors. [FN51] The jurors are likely to be receptive to the attorney who makes them feel comfortable and competent in their role as jurors. [FN52]

One fundamental means to implement this goal of simplicity is to narrow and describe the real factual issues in the case. [FN53] If the only real issue in the trial is the identity of the burglar, a complicated discussion by the prosecutor of the elements of burglary is at least useless and is likely counterproductive. Advising the jurors that the only issue is whether the defendant was the person who indisputably entered the home intending to steal will focus the jurors and relieve them of any anxiety that their task is multi-faceted and technical.

A second means to accomplish the goal of simplicity is to force oneself to be brief. [FN54] A brief opening is more likely to retain the attention of the jurors, [FN55] while a longer presentation runs an increased risk of boring the jurors. [FN56] A commitment to a brief opening statement usually means that the attorney cannot be terrifically detailed on every single point. However, it is unlikely that the jurors are able to absorb and retain a great many details from the opening statement. [FN57] The attorney simply has to be selective about which details to include. [FN58]

*533 This is not to say that an opening statement should be merely a broad overview lacking in any detail. Often it is the details that are compelling and persuasive. A good opening should include the details necessary to make the presentation clear and the proffered version of the events credible. [FN59] Once again, a good guideline as to which details to include is whether those very details are likely to be emphasized in the closing argument. Moreover, even significant details should be presented only once. [FN60] There will be ample opportunity for repetition in the presentation of the evidence and the closing argument, and repetition of facts in the opening statement is likely to lose the attention of the jurors.

In some courtrooms, attorneys are permitted to use certain exhibits in the opening with the acquiescence of opposing counsel. Many attorneys use visual aids in opening to supplement their oral presentations. These additions should be integrated conservatively and only when they make the jurors' task appear simpler and more understandable. [FN61] There is a risk that such presentations at this early stage of the trial, accompanied by only a general explanation, can create confusion and overwhelm or intimidate jurors. [FN62]

A third means to accomplish the goal of simplicity is to simplify your vocabulary. Avoid legal jargon. [FN63] Use ordinary, everyday language. [FN64] Explain all technical matters in words comprehensible to all of the jurors. [FN65] And do all this without ever revealing your doubts concerning the jurors' ability to comprehend the most sophisticated material.

*534 C. Storytelling

Whatever other goals you might hope to accomplish in the opening statement, certainly a fundamental purpose of the opening is to inform the jury of the events that are the basis for the claim or charge (or lack thereof) in the case. [FN66] The objective is to create a mental picture of the relevant events as if the jurors had them-

selves witnessed those events. [FN67]

In all but the most simple cases, the conveyance of the facts through the presentation of evidence is fragmented and, to some extent, out of logical sequence. [FN68] Only the most fortunate attorney will be able to call several witnesses, each of whom picks up the narrative at the point at which the last witness departed the witness stand and each of whom carries the tale forward to meet precisely the chapter to be told by the next witness. Consequently, the opening statement is likely the only opportunity to convey the story of the relevant events in its entirety and in a logical, sensible fashion. [FN69]

The attorney should seize this opportunity in the opening statement and do just that. As much as possible, move away from the unfamiliar devices of witness examinations and exhibits and move toward the routine and comfortable form of telling a story. [FN70] The objective is to verbally convey the jurors to the position of themselves having witnessed the described events. [FN71]

Like any good story, the narrative told in the opening statement should have a structure that makes it easy to follow and understand. [FN72] Absent some compelling reason to choose an alternative structure, the story component of the opening statement should be presented in chronological ***535** order. [FN73] A chronological presentation usually has the dual virtues of being the easiest method for arranging and delivering the relevant details, [FN74] as well as being the easiest for the jurors to follow and comprehend. [FN75]

In order to accomplish a clear, chronological presentation, avoid flashbacks. In other words, in recounting events in the opening, do not interrupt the sequence to refer back to earlier events or backgrounds. Anticipate all of the requisite general information and background facts, including basic biographical information concerning relevant persons, and present this information up front so that the story will not have to be interrupted to fill in such details later. [FN76]

In conveying your story to the jury, do not undercut the reliability of your own report. Do not tell the jurors that the story you are about to tell them is not evidence. [FN77] Although the jury will be so instructed by the court, such reminders from counsel are virtual directives to disregard what is said in one's opening statement. [FN78]

Strive instead to persuade the jury that the story told in the opening statement is accurate and reliable. Neither fluent with, nor terribly interested in, the rules of evidence, the jurors are more concerned with discerning the truth than they are with the technical restrictions upon considering certain sources of information. A convincing story in an opening statement should leave the jurors, as they commence deliberations, uncertain about, and even oblivious to, whether the foundation of their beliefs that certain facts are true is the witnesses who testified or the attorney who delivered the opening statement. [FN79]

In order to weave the opening statement into the fabric of information from which jurors will determine the truth, the attorney should subtly present herself as a source of such information and not merely as a ceremonial ***536** minister who simply introduces others who are the real sources of information. The best way to accomplish this is to tell the story as if revealing first-hand information. The attorney is like the hidden camera that witnessed and recorded all of the relevant events and now will play back the recording to show the incontrovertible reality to the jurors. The story component of the opening statement should generally be delivered in the same format as an eyewitness would recount personal observations.

This is to be sharply contrasted with the layering approach-that is, the hearsay witness who merely reports

what others have seen and what others will say. Consider for example the relative credibility of two reports on the weather, the first reporter advising that it is raining and the second reporter advising that a third person has stated that it is raining. Each of the two reporters may have only the accounts of others as sources of information. However, we will tend to credit the first reporter's forecast to a greater degree because of the certitude that accompanies the illusion of personal knowledge. So if the plaintiff will call a witness named Robert Johnson who will testify that the defendant was speeding, plaintiffs counsel should tell the jurors in the opening statement that the defendant was speeding, not that they will hear from Robert Johnson who will tell them that the defendant was speeding. [FN80]

Toward the same end, nothing would be less productive than to layer the story of the opening statement by previewing the trial itself, witness by witness. In other words, do not tell the jurors that they will first hear from Witness A, who will tell them facts X, Y and Z, followed by Witness B, who will tell them facts T, U and V, and so on. [FN81] Indeed, there is no need to mention witnesses at all, either by name or in general. [FN82] Usually, persons introduced by name in the opening statement should be the relevant actors in the events that are the subject of the claim or charge. If these persons will be witnesses, they should generally be described in ***537** the opening statement as characters in the story and not as storytellers themselves. [FN83]

D. Themes and the Theory of the Case

In every trial, each attorney must have a theory of the case-that is, a succinct statement as to why the plaintiff is (or is not) entitled to the relief sought, or why the criminal defendant is (or is not) guilty of the charged crime. [FN84] The theory of the case must be clearly conveyed to the jurors in the opening statement. [FN85]

The theory of the case-a simple explanation of why the facts entitle the party to prevail in the action-must be distinguished from the theme of the case. A theme is a phrase or other short verbal statement that metaphorically conveys the theory of the case. [FN86] So, for example, in a civil case in which the plaintiff purchaser's theory of the case is that the defendant sold a defective product because it was manufactured with inferior components, a theme could be the familiar phrase, "Garbage in, garbage out."

Many commentators suggest that a theme should be conveyed to the j jury in the opening statement. [FN87] Some advise that a theme should be presented in every case, [FN88] and one has even suggested that the primary purpose of the opening statement is to deliver the case's theme to the jurors. [FN89]

The recommendation of a theme is advanced primarily for two [reasons. First, a good theme is the best and quickest way to capture the (jurors' attention and focus them upon your theory of the case. [FN90] Second, ***538** even after being deluged with innumerable pieces of information, the jurors are likely to recall andremain focused upon a well-chosen theme. [FN91]

There is no serious quarrel with the proposition that trial counsel should attempt to seize the attention of the jurors. Favorable details that naturally capture attention should be emphasized, both in the opening statement and the presentation of the evidence. [FN92] And because the objective is to captivate the jurors emotionally as well as rationally, the opening statement should attempt to provoke the jurors to emotionally embrace the lightness of the speaker's cause. [FN93]

Not only is it important to command the interest of the jurors, [FN94] it is also absolutely critical to capture

that interest at the very outset of the opening statement. [FN95] Arguably, the most crucial portion of the opening statement is the first minute or two, [FN96] after which either the jurors will be eager to hear more and predisposed favorably, or that opportunity will be lost and the jurors will be at best unenthusiastic and at worst skeptical. Consequently, the attorney must offer something truly special at the very outset of the opening statement. [FN97] The opening is not the time to bore the jury with bland introductions, tired cliches or somnambulistic rhetoric about trial procedures and the importance of jury service. [FN98] This is the time to win over the jurors with a dramatic opening salvo. [FN99] Specifically, it is the time to mesmerize the jurors with an intriguing theme. It is then the time to enlist the jurors as soldiers in your cause with a forceful delivery of the theory of the case.

> This case, members of the jury, is about "garbage in, garbage out." It is a case about a manufacturer, the defendant, which, to increase its *539 profits at the expense of its customers, built a line of computers with what it surely knew were cheap, substandard parts. The result was computers that did not perform as advertised. The defendant then sold these defective computers to Mr. Jones, here, who had to watch his business collapse when those very computers failed to do what they were supposed to do.

The time to introduce the jurors to the theme and the theory of the case is at the very outset of the opening statement. [FN100]l after you have planted in the consciousness of the jurors the guidepost that should govern their every perception and evaluation throughout the trial.

But do not stop with this initial salvo. The continuing impact of the theme, and even of the theory of the case, demands that you return to them during the opening statement, at least once at the conclusion of the opening. [FN101] The theory of the case and the theme should be developed throughout the entire trial. [FN102] In the closing argument, both the theme and the theory of the case should be revisited, [FN103] ideally in the identical language used in the opening statement and preferably at both the beginning and conclusion of the closing.

All of these admonitions assume that the theme to be used is a good one. However, some themes are better than others, and some are not good at all. A good theme can be a valuable asset to the trial lawyer. However, a bad theme can leave the lawyer delivering the opening in much the same position as a speaker whose remarks begin with a joke at which no one laughs. If the jurors fail to perceive any significant connection between the theme and the theory of the case or, worse yet, if they fail to understand the reference to the theme at all, you may find yourself thereafter swimming upstream to reach the jurors. So, while the value of a good theme certainly mandates the devotion of significant time *540 and energy toward the creation of such an asset, you are probably better off dispensing with the theme entirely rather than presenting a bad theme. If the limitations of your case or your imagination leave you lacking a good theme, simply present the theory of the case in the opening statement as outlined above.

What makes a theme worthwhile? A good theme should have the following five characteristics. A good theme should be brief. It should be interesting. It should be obvious. It should be universally recognizable. And it should be easy to remember.

First of all, a good theme should be brief. It is essential that the theme be stated in just a very few words or sentences. [FN104] The essence of a good theme is that it is a catchy, quick and short reference that can be immediately understood by the jurors. A theme that is too long is like a highway billboard filled with fine print. It will not reach, and it will certainly not captivate, its intended audience. The theme must be a simple summary of the essence of the case. If the summary itself seems long and complicated, it is useless.

Second, a good theme should also be interesting. [FN105] The point of the theme is to grab the attention of the jurors with an intriguing analogue that parallels a factual scenario which, in its detailed account, might be, at least in part, relatively dry and uninteresting. [FN106] If the theme is itself uninteresting, then you may have simply covered an ugly face with an ugly mask.

Third, a good theme must be obvious. A theme is typically a metaphor for the underlying facts in the case, or at least it possesses the qualities of a metaphor because it is offered as something comparable to the case itself. However, if the theme does not seem to be an apt analogy to the facts in the case, the theme is at best useless and at worst counterproductive because the theory of the case might be perceived as no better than the theme. Even if the theme is appropriate, but the connection is not immediately apparent to persons of varied levels of intelligence and education who populate juries, it should be abandoned. A theme that works only with an explanation is like a joke that is funny only with an explanation. That joke is not very funny, and that theme does not work.

***541** Fourth, a good theme must be universally recognizable. [FN107] Themes frequently are, or include references to, items already known to the audience, such as proverbs, clichés, books, movies and the like. Because the theme is only as good as the strength of the analogue between the facts of the case and the thematic material, the theme will be lost upon any juror not familiar with the thematic reference. Consequently, obscure references are poor choices for themes. The attorney must be confident that the thematic reference is of sufficiently universal familiarity that each and every juror will perceive the connection.

Finally, a good theme must be easily remembered. [FN108] The theme is not repeated because we believe the jurors have forgotten it; it is repeated to remind the jurors of its usefulness as a guidepost for receiving the evidence. Hopefully, the jurors, if they have embraced the theme as a useful and appropriate analogue, will use the theme as such a reference even when not being reminded to do so. This desirable self-discipline by the jurors is only a realistic aspiration if the theme is simple and easy to remember. In fact, the attractiveness of the theme as a model for understanding the evidence may well be correlated to the ease of recalling the theme.

E. References to Parties

Beginning with the opening statement and throughout the trial, attempt to personalize your client and depersonalize the opposing client. [FN109] So in a civil case in which Albert Brown has brought suit against Cindy Davis, counsel for the plaintiff should refer to the parties as Mr. Brown and the defendant, respectively, while defense counsel should refer to the parties as the plaintiff and Ms. Davis, respectively. In a criminal case, the prosecutor should refer to the defendant exclusively as "the defendant" and not by name, [FN110] while defense counsel should refer to the defendant by name and never as "the defendant." [FN111] Never refer to your ***542** client as your "client," because you do not wish to convey that your efforts are merely for hire and not a consequence of personal conviction. [FN112] Physically touching your client under appropriate circumstances can convey the desirable inference of personal support and endorsement. [FN113]

F. Personal Credibility

Although the attorney is not a witness during the trial, it would be foolish to imagine that the personal credibility of the lawyer is irrelevant. In fact, the personal credibility of the attorney is extremely significant. [FN114] and can even impact the verdict. [FN115] The attorney is the most visible person that jurors will asso-

ciate with the client's case. [FN116] It is quite natural that jurors will assess the person of the attorney and develop feelings about the cause represented by the attorney based on those assessments. Consequently, it is essential that the trial lawyer establish a personal credibility and rapport with the jurors as early and often as possible. [FN117] Some thought should be given throughout the trial to creating or enhancing the jurors' perception of the attorney as trustworthy and likeable.

Other than during jury selection, the opening statement is the earliest opportunity to establish personal credibility. [FN118] The opening statement is also the stage of the trial at which that personal credibility is so critical. [FN119] After all, the only person the jurors hear from is the attorney, and therefore nothing said in the opening will have a positive impact if the jurors do not trust the attorney. [FN120]

It is probably the case that some or all of the jurors will presumptively mistrust you because you are a lawyer, [FN121] and it is certainly wise to proceed*543 under that assumption. Consequently, it would be wise to proceed during the opening statement, as well as throughout the trial, without reflecting the negative lawyer stereotype. [FN122] Any visual or verbal indications of arrogance, deception or bluster will only further alienate the jurors. [FN123] In particular, never talk down to the jurors or otherwise treat them condescendingly. [FN124] The objective should be to convince the jurors that, notwithstanding your profession, you are a member of the same species as the jurors themselves. Seemingly minor behaviors such as seizing the opportunity for self-deprecating humor can, as long as it appears to be genuine, [FN125] go a long way toward making the jurors comfortable with you personally. [FN126]

A speaker who is perceived by the listeners as interested in and committed to the welfare of those listeners will be perceived as more credible. [FN127] For the lawyer presenting the opening statement, this would include not only evincing empathy for the jurors personally, [FN128] but also identifying with the assignment of the jurors to discover the truth. [FN129] As the attorney begins the job of persuasion in the opening statement, she should appear as one who is there to assist the jurors in reaching a correct and just verdict. [FN130] Toward that end, use of the pronouns "we" and "us" (instead of "you") when referring to the goals and obligations of the jury, will subtly reinforce the desired association. [FN131]

In order for the attorney to establish credibility in the opening statement, she must project absolute sincerity in the contents of her representations. [FN132] The jurors are more likely to trust the lawyer who is, or at least *544 appears to be, candid. [FN133] This, of course, is relatively easy to accomplish in cases where the lawyer truly believes in her cause. [FN134] However, even in the absence of that luxury, the attorney must present an attitude of sincerity. [FN135] In addition to conveying the conviction of the messenger, the attorney must also convey her reliability. Thus, the attorney should attempt to exude fairness and sincerity in presenting her version of the case. [FN136]

Credibility is also established by a perception of competence. [FN137] That perception begins with the self-assessment of the attorney. Making sure not to even approach the line that separates confidence from arrogance, in the opening statement the attorney should exude confidence, both in herself and in her message. [FN138] The appearance of confidence will increase the credibility of the attorney, as is the case with witnesses who seem sure of their accounts. [FN139]

Competence is also independently assessed by the jurors based upon the manner and content of the opening statement. An attorney who appears to be extremely knowledgeable about the case will be perceived as competent. [FN140] This is not an illusion. The appearance of knowledge will likely exist only when it is a reality, and

the reality of extensive knowledge about the case will come about only as a byproduct of meticulous prepara- tion.

Knowledge alone, however, is not enough. The attorney will be perceived as competent and credible only if the attorney is articulate and can explain the case to the jurors. [FN141] Those qualities will be accomplished by some combination of ability, experience and rehearsal of the opening statement in the particular case.

*545 Courtesy is yet another characteristic that translates into greater personal appeal and even enhanced credibility. Jurors are likely to react favorably to attorneys who act professionally [FN142] and to be alienated by those who are hostile or discourteous, even toward their adversaries. [FN143] Moreover, a lawyer who appears to overreact to a situation with exaggerated indignation or rancor is likely to be perceived as a person whose assessments of the case itself should not be trusted. Should you refer to opposing counsel during your opening statement, be sure to do so in a professional manner. If objections or other circumstances cause you to intersect with opposing counsel, civility is the judicious choice of behavior.

Courtesy to the judge is even more important. Many trial attorneys apparently believe that it is desirable, or at least acceptable, to be perceived by the jurors to be at odds with the judge. This is manifestly ill-advised. Jurors likely enter the courtroom with at least a rebuttable presumption that the judge is wise and knowledgeable. Appearing disrespectful to one so exalted, or even appearing to have suffered the disapproval of one so omnipotent, can hardly augment one's status in the eyes of the jurors. During the opening statement, as during the trial generally, either suppress your displeasure with the judge or at least postpone its expression until the jurors are no longer present.

Courtesy is not merely the absence of bad manners. Take opportunities to treat the judge with appropriate deference and opposing counsel with suitable respect, although be careful not to appear obsequious or disingenuous. During the opening statement, immediately following the dramatic presentation of a theme and theory of the case, verbally and visually acknowledge the presence of the judge and opposing counsel. With the possible exception of strategically referring to the prosecutor as such, refer to opposing counsel by name.

Unless it is inconsistent with the desired atmosphere, pick moments to lighten the mood and nurture your audition as a likeable human being. Smile at the jurors at appropriate moments during the opening. [FN144] Humor can be an attractive trait, especially if it is directed at oneself. [FN145]

*546 G. Accuracy

The most fundamental human barometer of credibility is past performance: If you told me the truth yesterday, I will trust you today. If you lied to me yesterday, I will trust you neither today nor tomorrow. Consequently, in order to plant and nurture the seeds of trust in the opening statement, it is imperative that the attorney be honest with the jury and be accurate in her narrative. [FN146] Yet one of the most common mistakes in openings is exaggeration or overstatements by the attorney. [FN147] This absolutely must be avoided. Never exaggerate or overstate your case. [FN148] Never state or promise anything that you cannot, or even might not, be able to prove. [FN149] Never attempt to mislead the jurors or distort what the evidence will actually show. [FN150]

Promises made explicitly or implicitly to the jurors during opening statement are fine only if the promised evidence is delivered. [FN151] If you do not keep a promise, expect your credibility to suffer, [FN152] much

like the general credibility of a witness whuse testimony on a particular point has been exposed as erroneous. Undelivered promises in the opening statement may very well cause the jurors to lose faith in your entire case, not just in its representative. Perhaps most importantly, you should expect any significant discrepancies between your opening statement and the evidence to be exploited by opposing counsel. [FN153] Studies with mock jurors indicate that this sequence of events affects the verdict more negatively than a conservative and accurate opening statement. [FN154]

*547 H. Weaknesses and Bad Facts

The conventional wisdom is that weaknesses and bad facts should be admitted in the opening statement. [FN155] The rationales for this strategy are, in all but exceptional circumstances, compelling. First, the revelation of the harmful facts in your opening statement will soften the blow of the disclosure of these matters being presented by your opponent and might allow the revelation to occur in a less damaging form. [FN156] Second, confessing weaknesses and problems will enhance the jurors' perception of the disclosing attorney as fair and candid, just as nondisclosure can foster a contrary and counterproductive impression. [FN157]

Notwithstanding these weighty considerations in favor of disclosure, carefully consider in each circumstance whether mentioning a particular unfavorable item in the opening statement is truly advantageous. [FN158] For one thing, mentioning an item in the opening statement assigns to that item a significance it might otherwise lack. [FN159] If your position is that the unfavorable item is trivial, ignoring it in the opening and dealing with it forthwith during the presentation of the evidence might be the best way to signal to the jurors its unimport- ance.

If you plan to address a weakness or problem in the opening statement, consideration must be given to exactly what is to be said about it. There *548 is little point in previewing the other side's points of contention without advancing a counterpoint in your favor. So, for example, it has been suggested that weaknesses in the case should be discussed in the opening statement in a positive manner [FN160] and should be explained away. [FN161]

These are good pieces of advice when practicable. The problem, however, is that these strategies may not be available in a particular context. Often what makes a bad fact bad is that, from an advocate's perspective, there is nothing remotely positive to say about it. It is also not unusual that what makes a bad fact very bad is that there is absolutely no way to explain it away or diffuse it, especially in an opening statement during which argument is disallowed. [FN162] Consequently, while you should be extremely reluctant in opening statement to ignore a problem or weakness, you should be reasonably sure that including a reference to such matter is not an even worse choice before doing so.

It is often true that the best you can hope for is that there are enough good facts to secure the verdict of the jurors notwithstanding the weakness or bad fact. Sometimes the best you can do in opening statement is to acknowledge the problem as succinctly as possible and then to sequence the offsetting favorable facts in order to suggest, without improper argument, that the outcome should still be in your favor. [FN163]

I. Playing By the Rules

Certain things may not be said in opening statement. It is advisable not to say them. For those lawyers for

whom an ethical imperative is an insufficient incentive for compliance, there is a pragmatic justification as well. Improper opening statements are likely to be received with objections. Objections during opening statement, even when they are overruled, are damaging to the effectiveness of the opening because they disturb the flow and impact of the presentation with interruptions. [FN164] The trick is understanding exactly what can and cannot be said.

*549 1. Inadmissible Evidence

It is impermissible to preview evidence that will not be admitted at trial, either because it is inadmissible or because it cannot be produced. [FN165] The test for whether the evidence may be discussed in the opening statement is whether counsel, in good faith, has a reasonable basis for believing it will be admitted. [FN166]

It is risky to mention potentially inadmissible evidence in the opening statement. In the event the evidence is excluded, the jurors, perhaps with a reminder from opposing counsel, will remember the undelivered promise [FN167] and will distrust the lawyer who apparently misrepresented the evidence. [FN168] In this circumstance, the attorney could seek by a motion in limine an advance ruling on the admissibility of the questionable evidence. However, motions in limine for a determination that your own evidence is admissible (as distinguished from motions to exclude the evidence of your opponent) have the drawback of confessing that there is doubt as to the admissibility of the evidence. [FN169] The better course is to include in the opening statement only evidence the admissibility of which seems practically certain. [FN170]

2. Argument

Argument is not allowed in the opening statement. [FN171] The line between permissible preview of the evidence and impermissible argument is *550 neither obvious nor the object of any true consensus. [FN172] It has been suggested that statements are not argument if the lawyer can point to a witness or item of tangible evidence that will state precisely what is recounted by counsel. [FN173] Counsel crosses the line when she "interprets the facts," [FN174] "provide[s] explanations, propose[s] conclusions, comment[s] on the evidence," [FN175] or "draw[s] inferences." [FN176] In practice in many courtrooms, opening statements contain more argument than the rules technically sanction. [FN177]

Nevertheless, it is not necessary to argue in the opening statement to be effective. The central goal of the opening statement should be to persuade the jurors that yours is the side entitled to their verdict. [FN178] The key is to be persuasive without engaging in argument. [FN179] A good opening statement is one that allows the facts themselves to point to the desired conclusion without argument. [FN180] Trust that the same set of facts that persuaded you to proceed to trial will also persuade the jurors. [FN181] In fact, a detailed factual account may be even more persuasive than a more transparent and conclusory attempt to persuade. [FN182]

The art and skill of persuasion without argument is demonstrated in the selection and organization of the facts. [FN183] For every important conclusion, make a list of facts that support that inference. Be sure to include *551 each of these facts in the chronological story. Thereafter, collect those facts and group them together to maximize their cumulative suggestion of the desired conclusion. For example, defense counsel should not explicitly claim in the opening statement that a prosecution witness will be lying, but she can certainly mention in the opening statement that the witness was facing twenty years in prison, that the witness has entered into a plea bargain in which he faces only one year in jail, that his deal and sentence to be yet determined are contingent

upon his testimony in this trial, and that he obtained the deal only after telling the Government the same story the prosecution expects him to tell in this trial. These various facts may initially be presented to the jury at various points in the chronological sequence, but a good opening will return to them, recaptured as a group, and present them all as facts to be considered by the jurors as they listen to the testimony of the witness. No argument or conclusion need be stated in the opening as to the credibility of the witness.

One way to minimize objections that the opening statement is impermissible argument is to make it clear that you are merely previewing the evidence by intermittently including prefatory phrases such as "the evidence will show." [FN184] Some lawyers recommend this tactic, [FN185] and some judges require it. [FN186]

Unless required, this practice is undesirable. The perpetual interjection of such introductory phrases is boring, [FN187] deprives the opening of its narrative flow [FN188] and is a specific example of the undesirable layering of an opening statement that counters the subtle impression of the lawyer as a storyteller with first-hand knowledge. [FN189] Except in the rare circumstance in which counsel must unavoidably tread close to the boundary of impermissible argument, such phrases should not be used. [FN190] For the ***552** most part, with some effort and attention it is possible to construct an effective opening statement that is not argument and does not require the cushion of such prefatory language.

A particular issue that arises in this context is whether counsel should discuss only her own case or should discuss her opponent's evidence. You cannot speculate about your opponent's case, [FN191] but you can certainly discuss the evidence to be presented by the opposition to the extent that you are well-informed about it through discovery and pretrial investigation. [FN192] The real question is the tactical one of whether it is advantageous to do so.

Some authors suggest that counsel should, during the opening statement, discuss flaws in the opponent's case. [FN193] This would include, from the plaintiff's or prosecutor's perspective, anticipating and attacking defenses. [FN194] Others argue that it is usually a mistake to discuss an opponent's evidence, [FN195] and in particular that plaintiffs and prosecutors should not discuss anticipated defenses in the opening statement. [FN196] Because counsel is not permitted to argue against the opposing evidence in the opening statement, the thinking behind this latter recommendation is that counsel should not help the opponent to explain her case nor should counsel implicitly legitimize an opponent's position by even acknowledging it during opening statement. [FN197]

Neither approach can be justified as an absolute rule. Certainly a worst-case scenario would be constructing the opponent's case and then being blocked from dismantling it by a sustained objection that those efforts constitute impermissible argument. On the other hand, the strategic proscription against discussing the opponent's evidence is entirely unrealistic for defense counsel who do not intend to put on a defense case, a scenario which is not unprecedented in civil cases and not even uncommon in criminal cases. [FN198]

***553** The issue of whether to discuss the opponent's evidence must be addressed on a case-by-case basis. You should consider three questions when making this decision. First, as defense counsel, do you intend to put on a case? If the answer is no, then failing to discuss the plaintiff's or prosecutor's case would be tantamount to waiving opening statement entirely. Second, is your opponent's contention substantial, including assessing whether you have to acknowledge its factual validity and its legal significance? Third, do you have a potent antidote that can be presented in the opening statement that is not impermissible argument?

In answering this third question, consider that you are permitted to include in the opening statement facts

that you reasonably expect to elicit on cross-examination of the opposing witnesses. [FN199] You can even discuss the evidence that will not be presented by the opposition at trial. [FN200] This can be particularly useful to criminal defense attorneys, who enjoy the heightened burden of proof placed upon the prosecution. Thus, even in a trial in which no defense case will be presented, defense counsel can deliver a positive opening statement free of impermissible argument.

3. Discussing the Law

It is the province of the judge to instruct the jurors on the governing law. Consequently, counsel is not permitted to instruct the jurors on the law during opening statement. [FN201] Exactly what this rule means in practice varies by jurisdiction and even by individual judge. [FN202] Some courts jealously guard their exclusive province of instructing on the law [FN203] and therefore allow little or no discussion of the law in opening statement. Such tight restrictions are neither necessary nor conducive to providing the jurors with a context for appreciating the significance of the facts of the case. Consequently, most courts will permit brief discussions of governing law to provide a legal framework for counsel's theory of the *554 case, [FN204] and a quality opening should provide sufficient law to assist the jurors in understanding how the factual details relate to the elements of a claim or defense. [FN205]

In order to minimize the occasion for an objection from opposing counsel or even a sua sponte interruption from the court, any discussion of the law should be extremely brief [FN206] and meticulously accurate. [FN207] What will likely not be tolerated are detailed discussions of the law, [FN208] explanations of the law beyond the standard formulations, [FN209] presentations that appear as attempts to instruct the jury on the law [FN210] and arguments on the law. [FN211] In particular, any attempts to synthesize the law and the facts-that is, to explain what conclusions should be drawn from the application of the law to the facts of the case-will almost surely be halted by the court. [FN212]

One area in which this issue arises is the discussion of the burden of proof, and in particular the extent to which counsel during opening statement may point out that her opponent has the burden. In civil cases, the usual burden-preponderance of the evidence-is probably of too little significance to warrant much attention in the opening statement. [FN213] However, in criminal cases, it is usually essential for defense counsel to make clear to the jurors that the prosecution has the burden to prove every element of the charged crime beyond a reasonable doubt. [FN214] Most courts will permit this statement to be included in the defense opening, again, at least when it is a brief, accurate and generalized discussion of reasonable*555 doubt. Any attempt to suggest that there is reasonable doubt in the particular case is a most risky venture.

In any discussion of the law during opening statement, one tactic that might forestall an objection or judicial intervention is to acknowledge at the outset that the law is the province of the judge and that what you intend to do is a most minor intrusion into that province.

> Members of the jury, it is the job of Judge Robinson, not of the lawyers, to instruct you on the law. However, just to help you understand the significance of the evidence you are about to hear, let me briefly outline for you .

4. Personal Opinion

Express statements of personal opinion by counsel, whether in the opening or the closing, whether they concern the merits of the case, the quality of the evidence or the credibility of a witness, are not permitted. [FN215] This is not to say that you should not convey your personal opinion. It is essential that the jurors perceive you as personally believing in the cause on trial and personally convinced of the validity of everything you say in both the opening and the closing. These messages can be sent to the jurors, even in the opening statement, by the persuasive content of the opening as well as the apparent personal conviction with which it is delivered. What you cannot do is lazily and expressly intrude your personal thoughts, beliefs or feelings into your presentation. One very simple rule is to avoid the use of the word "I" in the opening statement. Almost invariably, what will follow that word will be an expression of personal opinion. Even when such is not the case, the word "I" can prompt an objection that you are expressing, or are about to express, your personal opinion. [FN216]

J. Responding to Objections

Despite the greatest efforts to offer nothing objectionable in the opening statement, counsel should nevertheless anticipate the possibility *556 of objections during her opening statement. In fielding such an objection, two goals should be paramount. First, one should attempt to defeat the objection. Second, regardless whether the objection is overruled or sustained, one should endeavor to minimize the disruption of one's opening statement.

The first goal-defeating the objection-is most likely to be accomplished if the objection is simply not well-founded. This is a corollary of good preparation. The attorney should scrutinize her planned opening statement and edit it to avoid exposure to meritorious objections. Moreover, in the process, counsel can probably identify portions of the opening that are most likely to provoke even meritless objections and prepare responses to predictable objections. [FN217] The other ingredient for defeating objections during opening statements is to respond quickly and confidently. [FN218] Maintain a courteous and professional demeanor. Do not appear flustered or annoyed, but do respond without hesitation and with the assuredness that will inspire the judge and the jurors to trust your position.

The second goal-minimizing the disruption-requires attention to both the length of time required to resolve the objection and the behavior of counsel upon returning to the delivery of the opening statement. If the nature of the objection appears to require a substantial pause in the opening, [FN219] you can certainly try to abort the interruption by suggesting that your own good faith is sufficient to overcome, or at least postpone, an objection that could have been raised more conveniently by a motion in limine rather than in the middle of your presentation. [FN220] In any event, once the objection is resolved, be sure to recover successfully. If the objection is overruled, be sure to repeat the challenged portion to solidify the perception of the jurors that you have been victorious and that even the judge agrees that the jurors should hear this. [FN221] If the objection is *557 overruled, rephrase or move on confidently to signal to the jurors that nothing of significance has been lost.

K. Making Objections

Some commentators recommend objecting during opening statement simply to disrupt one's opponent. [FN222] Such a practice is unprofessional and probably counterproductive. [FN223] The jurors might well surmise your real purpose and hold you in low regard as a result. [FN224] In any event, perhaps in part due to this practice, many judges disfavor objections during the course of opening statement. [FN225] A few courts permit such objections to be made only at the conclusion of the opening statement. [FN226] Historically, objections during opening statement are made less frequently and are sustained a lower percentage of the time than during

the presentation of the evidence. [FN227] If counsel objects and the objection is overruled, the jurors have witnessed an early pronouncement by the judge that the objecting attorney is incorrect, if not disingenuous. [FN228] Even if one does object successfully, there is little point in doing so if the opponent can simply rephrase and accomplish the same result. [FN229]

All of these considerations dictate a conservative and restrained exercise of objections during your opponent's opening statement. Only object during the opening statement if you are virtually certain that the objection will be sustained [FN230] and if the material to be excluded is truly important. [FN231] A trial attorney reticent to object during the course of her opponent's opening statement is not without weapons to combat an overly *558 creative opening. If the offense is foreseeable, you can seek a pretrial ruling that evidence is inadmissible or that a particular matter should not be the subject of opening statement. [FN232] Moreover, if opposing counsel is excessively ambitious during her opening, you can remind the jurors during closing argument that the evidence fell far short of that promised by your opponent. [FN233]

L. Style and Presentation

As in many other contexts, in communications with jurors it is not just what you say, it is also how you say it. Thus, most trial lawyers are sufficiently astute to devote significant attention to the form, as well as the content, of their presentations. Too often, however, attorneys focus exclusively upon their speech patterns. This is unfortunate, for there is a solid basis for the conclusion that people receive and retain information better if they acquire it both visually and aurally, as opposed to solely aurally. [FN234] Consequently, a thorough consideration of the form of the presentation of the opening statement should include both what the jurors are hearing and what they are seeing.

What the jurors are hearing, of course, is your voice. We can start with the simple, but nevertheless critical, admonition not to speak too quickly. [FN235] Any time a speaker who knows a subject well addresses an audience that does not share the speaker's fluency with the subject, the situation is ripe for an excessively speedy verbal presentation. Consciously slow down. Pause at intervals to give the jurors a chance to absorb the information most recently conveyed before refilling their plates with new items to digest.

No matter how interesting a speaking voice one has, if it remains constant throughout a presentation, the attention of some or all of the audience will be lost. [FN236] Some attorneys strive to captivate and inspire jurors *559 with an emotionally charged delivery throughout the opening statement. This is a mistake. Despite the dynamic delivery, it is nevertheless monotonous if it is unvarying. [FN237] Moreover, such a performance is just not credible; you cannot be truly emotional about every statement in the opening.

The key is variety. You have three variables with which to work: speed, tone (or emotional intensity) and volume. Choose a conversational tone at an unremarkable speed and volume as a baseline for the majority of the opening statement. [FN238] Maintain the attention of the jurors by occasionally varying each of the three variables, either individually or in various combinations. [FN239] A point of emphasis can be signaled to the jurors by a dramatic variance in tone, speed or volume. This subtle message can be accomplished by adjusting the speed or volume in either direction; even speaking noticeably softer or slower can raise the attention of the jurors and the perceived importance of the spoken words. [FN240]

Concerning what you present to the jurors visually, start with where you position yourself. In order to promote your personal credibility and rapport with the jurors, do not place or even allow any unnecessary barriers

between yourself and the jurors. Unless restricted by the court to a podium or lectern, do not use one. [FN241] Position yourself where your entire person is visible to the jurors. Position yourself close enough to the jury box to foster a personal relationship with the jurors, [FN242] but not so close as to make the jurors uncomfortable or to enter the area the jurors might regard as their area of privacy. [FN243]

*560 While delivering the opening statement, look directly at the jurors, [FN244] not at others in the courtroom, not at the floor in front of the jurors and not at the wall behind them. Look directly into the eyes of each juror, long enough to establish real contact but not so long as to create discomfort. [FN245] Move your gaze from one juror to another, including each juror in turn. [FN246] By doing so, you will enhance your credibility and apparent sincerity, as well as hold the attention of the jurors. [FN247]

Do not read a prepared opening statement. [FN248] In fact, to the fullest extent possible, do not use any notes in the opening. [FN249] Doing so will allow the eye contact, rapport and aura of sincerity that are so advantageous in an opening statement.

With regard to the visual presentation to the jurors, moving about the courtroom and using your hands to make gestures can be a very positive component of a good opening statement. [FN250] You would not pay a premium price to deliver a sales pitch on television instead of the radio and then present your message by audio alone. For much the same reason, an attorney should not stand fixed in one place with her hands only useless appendages throughout the opening statement. In order to liberate your hands as tools in your presentation, do not carry anything (such as a pen or notes) during the opening statement unless you intend to use it as a prop. [FN251]

Some movement, as distinguished from unwavering immobility, is an asset simply because it suggests that the lawyer is comfortable and confident. [FN252] Generally, however, movement and gestures are most effective*561 if they are purposeful [FN253]-that is, the actions of the attorney compliment the spoken words and assist in conveying the desired message. [FN254] Movement and gestures that do not bear any apparent relationship to the verbal message, such as aimless pacing, are at best useless and at worst distracting. [FN255]

Consequently, some thought should be given to orchestrating movements with a desired visual compliment to the auditory message. [FN256] Certain actions or behaviors that are described verbally in the opening statement can be visually displayed by the attorney. If the objective of your words is to create a mental image for the jurors of someone opening a door, talking on the telephone or pointing to the defendant at a lineup identification, you can only be more successful by demonstrating those actions; it is as if the jurors were there and witnessed the action themselves.

Even in the absence of an actual dramatic correspondence between the words and actions of the attorneys during the opening statement, movement and gestures can have the desired complimentary effect. For example, a gesture can be a nonverbal mechanism for emphasizing a particular point. [FN257] Relocating oneself to a different position in the courtroom can compliment the transition from one portion of the opening statement to another. [FN258]

M. Observing Jurors' Reactions

Throughout the trial, at least some members of the jury will display behaviors (such as frowns or nodding heads) indicating that whatever is in play at that moment is being received favorably or unfavorably, is compre-

hensible or not understood, and the like. For that reason, trial *562 attorneys should keep a portion of their focus upon the jurors at all times in the courtoom. During the opening statement (and even during the opening statement of your opponent), watch the jurors to observe these reactions, trust your instincts in interpreting these behaviors, and make any appropriate adjustments, both during the opening and throughout the trial. [FN259]

N. Concluding the Opening Statement

At the conclusion of the opening statement, counsel must specify the actual verdict she desires from the jurors. [FN260] In doing so, one must be careful not to engage in impermissible argument. [FN261] One relatively safe way to achieve this goal, consistent with the notion that the opening statement is a preview of the remainder of the trial, is simply to tell the jurors that you will have an opportunity to speak with them again after the evidence has all been presented, and that at that time, based upon that very evidence, you will ask them to return the specified, desired verdict. [FN262]

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[FN1]. Murray Sams, Jr., My Approach to **Opening Statements** for the Plaintiff, in APPROACHES TO ADVOCACY 27 (Grace W. Holmes ed., 1973); J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND **ETHICS** 143 (2d ed. 1993).

[FN2]. RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE § 5.3, at 80 (2d ed. 1995); AL J. CONE & VERNE LAWYER, THE ART OF PERSUASION IN LITIGATION § 9.1, at 266 (1966); LEONARD DECOF, ART OF ADVOCACY: OPENING STATEMENT § 1.01[1], at 1-4 (2005); ROGER HAYDOCK & JOHN SONSTENG, TRIAL: THEORIES, TACTICS, TECHNIQUES § 7.1, at 293 (1991).

[FN3]. 75 AM. JUR. 2d Trial § 513 (1991); Alston Jennings, My Approach to Opening Statements for the Defendant, in APPROACHES TO ADVOCACY 33 (Grace W. Holmes ed., 1973); John J. Eannace, An Art-Not a Science: A Criminal Lawyer's Perspective on Opening Statements, NAT'L BAR ASS'N MAGAZINE, Dec. 11, 1997, at 41; Dianne Jay Weaver, Opening Statements, 2 ANN. 2000 ATLA CLE 1385 (2000).

[FN4]. RICHARD H. LUCAS & K. BYRON MCCOY, THE WINNING EDGE: EFFECTIVE COMMUNICATION AND PERSUASION TECHNIQUES FOR LAWYERS § 8.1, at 109 (1993); Weyman I. Lundquist, Advocacy in Opening Statements, in THE LITIGATION MANUAL: TRIAL 168 (John G. Koeltl & John Kiernan eds., 1999); Charles L. Becton & Terri Stein, The Opening Statement, 20 TRIAL LAW. Q. 10 (1990).

[FN5]. CONE & LAWYER, supra note 2, § 9.1, at 266; Richard J. Crawford, Opening Statement for the Defense in Criminal Cases, in THE LITIGATION MANUAL: TRIAL 185 (John G. Koeltl & John Kiernan eds., 1999); DECOF, supra note 2, § 1.01[1], at 1-4; Robert J. Jossen, Opening Statements: Win it in the Opening, 10 THE DOCKET 1, 6 (Spring 1986); Weaver, supra note 3, at 1. For slight variations on the report of the conclusion of the University of Chicago Jury Project, see 75 AM. JUR. 2d Trial, supra note 3, § 513 (80% of jurors reach the same verdict as their opinion after the opening statement); David B. Baum, The Plaintiff's Approach in Opening Statement, in PERSUASION: THE KEY TO SUCCESS IN TRIAL 18 (Grace W. Holmes ed., 1978)

(majority of jurors make up their minds after opening statements and never change); RONALD L. CARLSON, SUCCESSFUL TECHNIQUES FOR CIVIL TRIALS § 6.15, at 460 (2d ed. 1992) (80% of jurors favor one side after opening statements); HAYDOCK & SONSTENG, supra note 2, § 7.1, at 293 (jurors often vote consistently with opinions formed immediately after opening statements); Lundquist, supra note 4, at 168 (opening statements determine the winning party in 85% of jury trials); Becton & Stein, supra note 4, at 10 (65 to 80% of jurors make up their minds following opening statements and never deviate from that judgment through deliberations); Eannace, supra note 3, at 41 (80% of jurors favor the ultimately prevailing party after opening state- ments).

[FN6]. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966).

[FN7]. CARLSON & IMWINKELRIED, supra note 2, § 5.2, at 79; TANFORD, supra note 1, at 144-45; William Lewis Burke et al., Fact or Fiction: The Effect of the Opening Statement, 18 J. CONTEMP. L. 195, 195-97 (1992).

[FN8]. CARLSON & IMWINKELRIED, supra note 2, § 5.2, at 79.

[FN9]. PAULINE GRIPPIN & SEAN PETERS, LEARNING THEORY AND LEARNING OUTCOMES 76 (1984).

[FN10]. Id.

[FN11]. LUCAS & MCCOY, supra note 4, § 8.3, at 115.

[FN12]. LAWRENCE S. WRIGHTSMAN, PSYCHOLOGY AND THE LEGAL SYSTEM 256 (1987).

[FN13]. CARLSON & IMWINKELRIED, supra note 2, § 5.2, at 80.

[FN14]. WRIGHTSMAN, supra note 12, at 256.

[FN15]. ROBERT V. WELLS, SUCCESSFUL TRIAL TECHNIQUES OF EXPERT PRACTITIONERS § 6.01, at 177 (1988).

[FN16]. LUCAS & MCCOY, supra note 4, § 8.1, at 110 & § 8.3, at 115.

[FN17]. Id. at 114-15; Becton & Stein, supra note 4, at 12.

[FN18]. See TANFORD, supra note, at 143.

[FN19]. See WELLS, supra note 15, § 6.02, at 178.

[FN20]. Crawford, supra note 5, at 185.

[FN21]. F. LEE BAILEY & HENRY B. ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS § 9:1, at 241 (2d ed. 1985).

[FN22]. LUCAS & McCOY, supra note 4, § 8.3, at 114.

[FN23]. Sams, supra note 1, at 28.

[FN24]. Becton & Stein, supra note 4, at 10.

[FN25]. DECOF, supra note 2, § 1.01[1], at 1-4; JOHN NICHOLAS IANNUZZI, HANDBOOK OF TRIAL STRATEGIES 239 (2d ed. 2001).

[FN26]. CONE & LAWYER, supra note 2, § 9.20, at 276; LUCAS & McCOY, supra note 4, § 8.1, at 109-10; Becton & Stein, supra note 4, at 15; Weaver, supra note 3, at 1.

[FN27]. Baum, supra note 5, at 18; LUCAS & McCOY, supra note 4, § 8.3, at 114.

[FN28]. Baum, supra note 5, at 18; LUCAS & McCOY, supra note 4, § 8.1, at 109-10 & § 8.3, at 114; Abraham?. Ordover, Persuasion in the Opening Statement, in THE LITIGATION MANUAL: TRIAL 176 (1999).

[FN29]. DECOF, supra note 2, § 2.02, at 2-7; Martin W. Littleton, Opening to the Court or Jury, in CIVIL LITIGATION AND TRIAL TECHNIQUES 295 (Harry Sabbath Bodin ed., 1976).

[FN30]. CARLSON & IMWINKELRIED, supra note 2, § 5.2, at 80; DECOF, supra note 2, § 2.02, at 2-7; Jennings, supra note 3, at 35.

[FN31]. DECOF, supra note 2, § 1.03[1], at 1-8; Steven P. Grossman, Trying the Case: Opening Statements, CASE MD-CLE 7 (1999).

[FN32]. Jennings, supra note 3, at 35.

[FN33]. Crawford, supra note 5, at 185; Jennings, supra note 3, at 34.

[FN34]. BAILEY & ROTHBLATT, supra note 21, § 9:5, at 244; HAYDOCK & SONSTENG, supra note 2, § 7.2, at 297; Jennings, supra note 3, at 33.

[FN35]. 75 AM. JUR. 2d, Trial, supra note 3, § 531, at 110; HAYDOCK & SONSTENG, supra note 2, §7.2, at 297.

[FN36]. BAILEY & ROTHBLATT, supra note 21, § 9:1, at 240-41; CARLSON & IMWINKELRIED, supra note 2, § 5.4, at 81; HAYDOCK. & SONSTENG, supra note 2, § 7.2, at 297; IANNUZZI, supra note 25, at 241; John C. Shepherd, The Defendant's Approach in Opening Statement, in PERSUASION: THE KEY TO SUCCESS IN TRIAL 21,21 (Grace W. Holmes ed., 1978); TANFORD, supra note 1, at 170.

[FN37]. DECOF, supra note 2, § 2.02, at 2-7; HAYDOCK & SONSTENG, supra note 2, § 7.2, at 297; Ordover, supra note 28, at 176, 182; TANFORD, supra note 1, at 170.

[FN38]. BAILEY & ROTHBLATT, supra note 21, § 9:2, at 242; Ordover, supra note 28, at 182.

[FN39]. CARLSON & IMWINKELRIED, supra note 2, § 5.2, at 80.

[FN40]. Becton & Stein, supra note 4, at 10.

[FN41]. Lundquist, supra note 4, at 171.

[FN42]. 75 AM. JUR. 2d, Trial, supra note 3, § 513, at 91; CARLSON, supra note 5, § 6:21, at 469; DECOF,

supra note 2, § 1.10[1], at 1-28; HAYDOCK & SONSTENG, supra note 2, § 7.7, at 332; Ordover, supra note 28, at 181; TANFORD, supra note 1, at 154; Becton & Stein, supra note 4, at 10; Jossen, supra note 5, at 13; Weaver, supra note 3, at 4.

[FN43]. Lundquist, supra note 4, at 169.

[FN44]. Eannance, supra note 3, at 45.

[FN45]. HAYDOCK & SONSTENG, supra note 2, § 7.2, at 296.

[FN46]. Eannace, supra note 3, at 44; Jossen, supra note 5, at 1.

[FN47]. HAYDOCK & SONSTENG, supra note 2, § 7.2, at 296.

[FN48]. Lundquist, supra note 4, at 169.

[FN49]. Littleton, supra note 29, at 295.

[FN50]. CONE & LAWYER, supra note 2, § 9.5, at 268; DECOF, supra note 2, § 1.16, at 1-38; Littleton, supra note 29, at 295; Weaver, supra note 3, at 5.

[FN51]. Littleton, supra note 29, at 295; Jossen, supra note 5, at 1.

[FN52]. CONE & LAWYER, supra note 2, § 9.5, at 268.

[FN53]. Id.; TANFORD, supra note 1, at 162.

[FN54]. DECOF, supra note 2, § 1.16, at 1-37 (twenty to thirty minutes); Eannace, supra note 3, at 44; Jossen, supra note 5, at 6; Weaver, supra note 3, at 5 (thirty minutes).

[FN55]. DECOF, supra note 2, § 1.16, at 1-37.

[FN56]. HAYDOCK & SONSTENG, supra note 2, § 7.4, at 309.

[FN57]. Grossman, supra note 31, at 11.

[FN58]. CARLSON & IMWINKELRIED, supra note 2, § 5.5(D), at 89.

[FN59]. HAYDOCK & SONSTENG, supra note 2, § 7.04, at 308.

[FN60]. BAILEY & ROTHBLATT, supra note 21, § 9:17, at 254.

[FN61]. TANFORD, supra note 1, at 164; Eannance, supra note 3, at 45.

[FN62]. TANFORD, supra note 1,at 164

[FN63]. CARLSON & IMWINKELRIED, supra note 2, § 5.6, at 93; DECOF, supra note 2, § 1.04[2], at 1-10; Littleton, supra note 29, at 296; Sams, supra note 1, at 29; TANFORD, supra note 1, at 172; Eannace, supra note 3, at4; Brent D. Holmes, Opening Statements: A Plaintiffs' Lawyer's Guide, 83 ILL. B.J. 91, 92 (1995); Weaver, supra note 3, at 2, 7.

[FN64]. CARLSON & IMWINKELRIED, supra note 2, § 5.6, at 93; CONE & LAWYER, supra note 2, § 9.5, at 268; TANFORD, supra note 1, at 172; Eannace, supra note 3, at 4; Holmes, supra note 63, at 92; Weaver, supra note 3, at 2.

[FN65]. BAILEY & ROTHBLATT, supra note 21, § 9:16, at 254.

[FN66]. DECOF, supra note 2, § 2.01, at 2-2.

[FN67]. TANFORD, supra note 1, at 164.

[FN68]. 75 AM. JUR. 2d, Trial, supranotel, § 516, at 93.

[FN69]. Id.; Lundquist, supra note 4, at 168. During the opening statement, an attorney may wish to advise the jury of the disorder inherent in the presentation of the evidence and the superior opportunity for understanding that is the opening statement. Lundquist, supra note 4, at 170. This should encourage the jurors to devote their full attention to the opening statement.

[FN70]. HAYDOCK & SONSTENG, supra note 2, § 7.3, at 305; Grossman, supra note 31, at 8; Weaver, supra note 3, at 3-4.

[FN71]. Eannance, supra note 3, at 41.

[FN72]. HAYDOCK & SONSTENG, supra note 2, § 7.3, at 300.

[FN73]. 75 AM. JUR. 2d, Trial, supra note 3, § 516, at 94.

[FN74]. HAYDOCK & SONSTENG, supra note 2, § 7.3, at 300; Littleton, supra note 29, at 299-300; TANFORD, supra note 1, at 163.

[FN75]. HAYDOCK & SONSTENG, supra note 2, § 7.3, at 300; Littleton, supra note 29, at 299-300.

[FN76]. TANFORD, supra note 1, at 161.

[FN77]. CARLSON & IMWINKELRIED, supra note 2, § 5.5(A), at 83; Ordover, supra note 28, at 182; Weaver, supra note 3, at 8.

[FN78]. CARLSON & IMWINKELRIED, supra note 2, § 5.5(A), at 83; Ordover, supra note 28, at 182.

[FN79]. BAILEY & ROTHBLATT, supra note 21, § 9:15, at 253.

[FN80]. See TANFORD, supra note 1, at 161-62; Weaver, supra note 3, at 7.

[FN81]. See IANNUZZI, supra note 25, at 242; Ordover, supra note 28, at 177; TANFORD, supra note 1, at 163; Weaver, supra note 3, at 7.

[FN82]. DECOF, supra note 2, § 1.05[3], at 1-15. The exception is when the witness's identity and characteristics add to the persuasiveness of the narrative. Id.; Jennings, supra note 3, at 36. An expert witness is the most common example. A criminal defendant who will commit to testifying at the time of the defense opening statement might also fit within this exceptional category of witnesses.

[FN83]. TANFORD, supra note 1, at 161-62.

[FN84]. Becton & Stein, supra note 4, at 16.

[FN85]. Jossen, supra note 5, at 1.

[FN86]. See HAYDOCK & SONSTENG, supra note 2, § 7.1, at 294; Becton & Stein, supra note 4, at 16.

[FN87]. CARLSON, supra note 5, § 6:15, at 459; CONE & LAWYER, supra note 2, § 9.10, at 270; DECOF, supra note 2, § 1.17, at 1-39; TANFORD, supra note 1, at 160.

[FN88]. Grossman, supra note 31, at 2; Weaver, supra note 3, at 5.

[FN89]. Grossman, supra note 31, at 2.

[FN90]. Ordover, supra note 28, at 176.

[FN91]. HAYDOCK & SONSTENG, supra note 2, § 7.3, at 303.

[FN92]. CONE & LAWYER, supra note 2, § 9.8, at 269.

[FN93]. Grossman, supra note 31, at 3.

[FN94]. CONE & LAWYER, supra note 2, § 9.2, at 266.

[FN95]. RONALD L. CARLSON, SUCCESSFUL TECHNIQUES FOR CIVIL TRIALS § 6: 15, at 154 (2d ed. Supp. 2005).

[FN96]. Becton & Stein, supra note 4, at 16.

[FN97]. Grossman, supra note 31, at 1-2, 7.

[FN98]. Id.

[FN99]. HAYDOCK & SONSTENG, supra note 2, § 7.3, at 303.

[FN100]. See CARLSON, supra note 5, § 6:17, at 463; DECOF, supra note 2, § 1.03[3], at 1-9; Ordover, supra note 28, at 176; Eannance, supra note 3, at 42.

[FN101]. CARLSON, supra note 5, § 6:16, at 463; CONE & LAWYER, supra note 2, § 9.10, at 270; Eannance, supra note 3, at 44.

[FN102]. See CARLSON, supra note 5, § 6:16, at 462; DECOF, supra note 2, § 1.17, at 1-39; Weaver, supra note 3, at 2.

[FN103]. Eannace, supra note 3, at 44.

[FN104]. CARLSON, supra note 5, § 6:16, at 461.

[FN105]. Weaver, supra note 3, at 2.

[FN106]. Eannace, supra note 3, at 42.

[FN107]. TANFORD, supra note 1, at 158.

[FN108]. DECOF, supra note 2, § 1.03[3], at 1-9.

[FN109]. CARLSON & IMWINKELRIED, supra note 2, § 5.5(A), at 82.

[FN110]. Eannace, supra note 3, at 44.

[FN111]. BAILEY & ROTHBLATT, supra note 21, § 9:18, at 255.

[FN112]. Id. § 9:15, at 253.

[FN113]. CARLSON & IMWINKELRIED, supra note 2, § 5.5(A), at 82.

[FN114]. CARLSON, supra note 5, § 6:15, at 459.

[FN115]. Grossman, supra note 31, at 12.

[FN116]. Id.

[FN117]. DECOF, supra note 2, § 1.14[1], at 1-35; Weaver, supra note 3, at 4.

[FN118]. Crawford, supra note 5, at 184; Jossen, supra note 5, at 6.

[FN119]. Earmace, supra note 3, at 41.

[FN120]. Baum, supra note 5, at 20; DECOF, supra note 2, § 1.14[1], at 1-35.

[FN121]. DECOF, supra note 2, § 1.14[1], at 1-34; Weaver, supra note 3, at 4-5.

[FN122]. DECOF, supra note 2, § 1.14[4], at 1-36.

[FN123]. Id,; Jossen, supra note 5, at 6.

[FN124]. DECOF, supra note 2, § 1.07[1], at 1-18; Becton & Stein, supra note 4, at 18; Weaver, supra note 3, at 3.

[FN125]. DECOF, supra note 2, § 1.14[3], at 1-36.

[FN126]. Id. §1.07[3],at 1-20.

[FN127]. WELLS, supra note 15, § 6.19, at 239.

[FN128]. Id. §6.20, at 241.

[FN129]. Id. §6.19, at 239.

[FN130]. Lundquist, supra note 4, at 170.

[FN131]. DECOF, supra note 2, § 1.06[3], at 1-17 & § 1.08[4], at 1-22.

[FN132]. BAILEY & ROTHBLATT, supra note 21, § 9:15, at 253; CONE & LAWYER, supra 2, §9.2, at 266 & § 9.19, at 275.

[FN133]. BAILEY & ROTHBLATT, supra note 21, § 9.19, at 275; Becton & Stein, supra note 4, at 18.

[FN134]. DECOF, supra note 2, § 1.12[6], at 1-32.

[FN135]. Weaver, supra note 3, at 7.

[FN136]. DECOF, supra note 2, § 1.14[4], at 1-36; Weaver, supra note 3, at 7.

[FN137]. Eannace, supra note 3, at 41.

[FN138]. DECOF, supra note 2, § 1.14[3], at 1-36; Weaver, supra note 3, at 7.

[FN139]. Becton & Stein, supra note 4, at 18; Jossen, supra note 5, at 6.

[FN140]. Becton & Stein, supra note 4, at 12.

[FN141]. Lundquist, supra note 4, at 169; Becton & Stein, supra note 4, at 12.

[FN142]. Jossen, supra note 5, at 6.

[FN143]. Ordover, supra note 28, at 183; Jossen, supra note 5, at 12.

[FN144]. Jossen, supra note 5, at 12.

[FN145]. Id.

[FN146]. CONE & LAWYER, supra note 2, § 9.2, at 266; DECOF, supra note 2, § 1.14[2], at 1-35.

[FN147]. TANFORD, supra note 1, at 144, 166.

[FN148]. BAILEY & ROTHBLATT, supra note 21, § 9:17, at 255; CARLSON & IMWINKELRIED, supra note 2, § 5.5(D), at 86; DECOF, supra note 2, § 1.14[2], at 1-35.

[FN149]. BAILEY & ROTHBLATT, supra note 21, § 9:17, at 255; DECOF, supra note 2, § 1.14[2], at 1-35; Eannace, supra note 3, at 42; Weaver, supra note 3, at 8.

[FN150]. DECOF, supra note 2, § 1.14[2], at 1-35.

[FN151]. HAYDOCK & SONSTENG, supra note 2, § 7.5, at 321.

[FN152]. BAILEY & ROTHBLATT, supra note 21, § 9:17, at 255; HAYDOCK & SONSTENG, supra note 2, § 7.5, at 322; Eannace, supra note 3, at 42.

[FN153]. CARLSON & IMWINKELRIED, supra note 2, § 5.5(D), at 86; IANNUZZI, supra note 25, at 240; TANFORD, supra note 1, at 166; Eannace, supra note 3, at 42.

[FN154]. Tom Pyszczynski etal., Opening Statements in a Jury Trial: The Effect of Promising More Than the Evidence Can Show, 11 J. APPLIED SOC. PSYCHOL. 434, 440-41(1981).

[FN155]. 75 AM. JUR. 2d, Trial, supra note 3, § 516, at 95; BAILEY & ROTHBLATT, supra note 21, § 9:11, at 249; Baum, supra note 5, at 20; CARLSON, supra note 5, § 6:16, at 462; CARLSON & IMWINKELRIED, supra note 2, § 5.5(D), at 91; DECOF, supra note 2, § 1.18[1], at 1-43 to -44; HAYDOCK & SONSTENG, supra note 2, § 7.5, at 323; Littleton, supra note 29, at 305; Ordover, supra note 28, at 178; TANFORD, supra note 1, at 164; Eannace, supra note 3, at 42; Holmes, supra note 63, at 92; Jossen, supra note 5, at 7, 10; Weaver, supra note 3, at 5.

[FN156]. BAILEY & ROTHBLATT, supra note 21, § 9:11, at 249; CARLSON, supra note 5, § 6:16, at 462; CARLSON & IMWINKELRIED, supra note 2, § 5.5(D), at 91; DECOF, supra note 2, § 1.18[1], at 1-43 to 44; HAYDOCK & SONSTENG, supra note 2, § 7.5, at 323; Littleton, supra note 29, at 305; TANFORD, supra note 1, at 164; Holmes, supra note 63, at 92; Weaver, supra note 3, at 5.

[FN157]. 75 AM. JUR. 2d, Trial, supra note 3, § 516, at 95; CARLSON & IMWINKELRIED, supra note 2, § 5.5(D), at 91; DECOF, supra note 2, § 1.18[1], at 1-43; HAYDOCK & SONSTENG, supra note 2, § 7.5, at 323; TANFORD, supra note 1, at 164; Weaver, supra note 3, at 5.

[FN158]. BAILEY & ROTHBLATT, supra note 21, § 9:11, at 249; Grossman, supra note 31, at 5-6.

[FN159]. See ROBERT H. KLONOFF & PAUL L. COLBY, SPONSORSHIP STRATEGY: EVIDENTIARY TACTICS FOR WINNING JURY TRIALS 12, 88, 166 (1990).

[FN160]. DECOF, supra note 2, §§ 1.18[1] & 1.18[2], at 1-44; TANFORD, supra note 1, at 164; Eannace, supra note 3, at 42.

[FN161]. BAILEY & ROTHBLATT, supra note 21, § 9:11, at 249.

[FN162]. See infra notes 171-200 and accompanying text.

[FN163]. BAILEY & ROTHBLATT, supra note 21, § 9:11, at 249.

[FN164]. Littleton, supra note 29, at 296.

[FN165]. CARLSON, supra note 5, § 6:20, at 467-68; DECOF, supra note 2, § 2.03[2][b], at 2-14; HAYDOCK & SONSTENG, supra note 2, § 7.2, at 295 & § 7.7, at 327; TANFORD, supra note 1, at 151; Eannace, supra note 3, at 45; Jossen, supra note 5, at 10.

[FN166]. CARLSON, supra note 5, § 6:20, at 468 n.15; DECOF, supra note 2, § 2.03[2][b], at 2-16 to 18; HAYDOCK & SONSTENG, supra note 2, § 7.7, at 327; Lundquist, supra note 4, at 173; TANFORD, supra note 1, at 151.

[FN167]. Jossen, supra note 5, at 10.

[FN168]. Littleton, supra note 29, at 300; Lundquist, supra note 4, at 172.

[FN169]. HAYDOCK & SONSTENG, supra note 2, § 7.2, at 295.

[FN170]. DECOF, supra note 2, § 1.06[5], at 1-18; Littleton, supra note 29, at 300; TANFORD, supra note 1, at 167.

[FN171]. DECOF, supra note 2, § 2.03[2][d], at 2-23; HAYDOCK & SONSTENG, supra note 2, § 7.1, at 294, § 7.7, at 329; Lundquist, supra note 4, at 173; Sams, supra note 1, at 31; TANFORD, supra note 1, at 143, 149; Becton & Stein, supra note 4, at 21; Eannace, supra note 3, at 42, 45; Jossen, supra note 5, at 10, 13.

[FN172]. HAYDOCK & SONSTENG, supra note 2, § 7.1, at 294.

[FN173]. CARLSON & IMWINKELRIED, supra note 2, § 5.5(D), at 87; HAYDOCK & SONSTENG, supra note 2, § 7.1, at 294.

[FN174]. DECOF, supra note 2, § 2.03[2][d], at 2-24.

[FN175]. HAYDOCK & SONSTENG, supra note 2, § 7.1, at 294.

[FN176]. Ordover, supra note 28, at 178.

[FN177]. HAYDOCK & SONSTENG, supra note 2, § 7.1, at 294; Ordover, supra note 28, at 178.

[FN178]. Baum, supra note 5, at 17; CONE & LAWYER, supra note 2, § 9.2, at 267; HAYDOCK & SONSTENG, supra note 2, § 7.5, at 319; Jennings, supra note 3, at 34; Ordover, supra note 28, at 176; TANFORD, supra note 1, at 143; Eannace, supra note 3, at 45.

[FN179]. TANFORD, supra note 1, at 144; Becton & Stein, supra note 4, at 21.

[FN180]. BAILEY & ROTHBLATT, supra note 21, § 9:19, at 255; Eannace, supra note 3, at 42.

[FN181]. TANFORD, supra note 1, at 144.

[FN182]. Becton & Stein, supra note 4, at 21.

[FN183]. CARLSON & IMWINKELRIED, supra note 2, § 5.5(D), at 88; Lundquist, supra note 4, at 168; Ordover, supra note 28, at 178; Eannace, supra note 3, at 42.

[FN184]. Crawford, supra note 5, at 190; DECOF, supra note 2, § 1.06[2], at 1-16; HAYDOCK & SONSTENG, supra note 2, § 7.4, at 307.

[FN185]. CARLSON & IMWINKELRIED, supra note 2, § 5.5(D), at 86; HAYDOCK & SONSTENG, supra note 2, § 7.4, at 307.

[FN186]. HAYDOCK & SONSTENG, supra note 2, § 7.4, at 307.

[FN187]. Sams, supra note 1, at 29-30.

[FN188]. DECOF, supra note 2, § 1.06[3], at 1-17; TANFORD, supra note 1, at 170; Weaver, supra note 3, at 3.

[FN189]. See supra notes 81-83 and accompanying text; HAYDOCK & SONSTENG, supra note 2, § 7.4, at 307.

[FN190]. Becton & Stein, supra note 4, at 21; Weaver, supra note 3, at 3.

[FN191]. HAYDOCK & SONSTENG, supra note 2, § 7.7, at 330.

[FN192]. Id. § 7.1, at 293.

[FN193]. Jossen, supra note 5, at 10.

[FN194]. HAYDOCK & SONSTENG, supra note 2, § 7.5, at 320; Eannace, supra note 3, at 42.

[FN195]. TANFORD, supra note 1, at 166.

[FN196]. DECOF, supra note 2, § 1.19[1], at 1-46 & § 1.19[3], at 1-47.

[FN197]. Id.

[FN198]. Ordover, supra note 28, at 181.

[FN199]. DECOF, supra note 2, § 2.01[3], at 2-6; HAYDOCK & SONSTENG, supra note 2, § 7.5, at 319.

[FN200]. See HAYDOCK & SONSTENG, supra note 2, § 7.5, at 324.

[FN201]. See Eannace, supra note 3, at 45.

[FN202]. HAYDOCK & SONSTENG, supra note 2, § 7.7, at 328; TANFORD, supra note 1, at 149; Grossman, supra note 31, at 9; Jossen, supra note 5, at 11.

[FN203]. See DECOF, supra note 2, § 1.11[1], at 1-29.

[FN204]. CARLSON, supra note 5, § 6:16, at 462 & § 6:22, at 471; DECOF, supra note 2, § 2.03[2][d], at 2-23 to -24; HAYDOCK & SONSTENG, supra note 2, § 7.2, at 294, § 7.4, at 316; Ordover, supra note 28, at 179; TANFORD, supra note 1, at 149-50; Jossen, supra note 5, at 11.

[FN205]. See Grossman, supra note 31, at 9.

[FN206]. See DECOF, supra note 2, § 1.11[1], at 1-29.

[FN207]. See HAYDOCK & SONSTENG, supra note 2, § 7.2, at 294.

[FN208]. See id. § 7.7, at 328; Jossen, supra note 5, at 11.

[FN209]. See Ordover, supra note 28, at 179.

[FN210]. See HAYDOCK & SONSTENG, supra note 2, § 7.7, at 328.

[FN211]. See CARLSON, supra note 5, § 6:15, at 459-60.

[FN212]. See Ordover, supra note 28, at 179.

[FN213]. See Becton & Stein, supra note 4, at 18.

[FN214]. See BAILEY & ROTHBLATT, supra note 21, § 9:6, at 245; Jossen, supra note 5, at 11.

[FN215]. See DECOF, supra note 2, § 1.06[5], at 1-18 & § 2.03, at 2-30 to - 32; HAYDOCK & SONSTENG, supra note 2, § 7.7, at 329; Eannace, supra note 3, at 45.

[FN216]. See DECOF, supra note 2, § 1.06[5], at 1-18 & § 2.03, at 2-30 to - 32.

[FN217]. MICHAEL R. FONTHAM, TRIAL TECHNIQUE AND EVIDENCE § 4-11, at 129 (1995).

[FN218]. See Kenneth J. Melilli, Objecting and Responding Effectively, 23 AM. J. TRIAL ADVOC. 559, 582-84 (2000).

[FN219]. This could well be the case if opposing counsel claims that the evidence you are previewing will be inadmissible, seemingly requiring the court to become fully informed in order to rule on the future admissibility of that evidence.

[FN220]. See Melilli, supra note 218, at 589-90.

[FN221]. See DECOF, supra note 2, § 1.06[4], at 1-17.

[FN222]. Lundquist, supra note 4, at 174.

[FN223]. Grossman, supra note 31, at 13-14.

[FN224]. DECOF, supra note 2, § 1.06[2], at 1-16.

[FN225]. John C. Conti, Trial Objections, 14 LITIG. 16, 17 (Fall 1987).

[FN226]. Melilli, supra note 218, at 587.

[FN227]. Grossman, supra note 31, at 13-14.

[FN228]. BAILEY & ROTHBLATT, supra note 21, § 9:19, at 256; Lundquist, supra note 4, at 173.

[FN229]. DECOF, supra note 2, § 1.06[2], at 1-16.

[FN230]. CONE & LAWYER, supra note 2, § 9.21, at 276; TANFORD, supra note 1, at 173; Grossman, supra note 31, at 13-14.

[FN231]. CONE & LAWYER, supra note 2, § 9.21, at 276.

[FN232]. HAYDOCK & SONSTENG, supra note 2, § 7.2, at 295; Lundquist, supra note 4, at 173.

[FN233]. TANFORD, supra note 1, at 174.

[FN234]. See IRVING GOLDSTEIN & FRED LANE, GOLDSTEIN TRIAL TECHNIQUE §§ 10.17, 10.18, 10.31 (2d ed. 1969); Becton & Stein, supra note 4, at 21-22.

[FN235]. Eannace, supra note 3, at 44.

[FN236]. BAILEY & ROTHBLATT, supra note 21, § 9:15, at 253; Eannace, supra note 3, at 42.

[FN237]. DECOF, supra note 2, § 1.12[2], at 1-31.

[FN238]. See BAILEY & ROTHBLATT, supra note 21, § 9:15, at 253, 254; DECOF, supra note 2, § 1.12[2], at 1-31; Weaver, supra note 3, at 4.

[FN239]. CARLSON, supra note 5, § 6:16, at 461; TANFORD, supra note 1, at 172; Eannace, supra note 3, at 42; Weaver, supra note 3, at 4.

[FN240]. DECOF, supra note 2, § 1.12[3], at 1-31.

[FN241]. CARLSON & IMWINKELRIED, supra note 2, § 5.6, at 94; DECOF, supra note 2, § 1.08[5], at 1-23; HAYDOCK & SONSTENG, supra note 2, § 7.6, at 325; Ordover, supra note 28, at 183; TANFORD, supra note 1, at 171; Eannace, supra note 3, at 44; Weaver, supra note 3, at 8.

[FN242]. DECOF, supra note 2, § 1.08[5], at 1-23; HAYDOCK & SONSTENG, supra note 2, § 7.6, at 326.

[FN243]. DECOF, supra note 2, § 1.08[5], at 1-23; Lundquist, supra note 4, at 169; Eannace, supra note 3, at 44.

[FN244]. BAILEY & ROTHBLATT, supra note 21, § 9:15, at 253.

[FN245]. CARLSON & IMWINKELRIED, supra note 2, § 5.6, at 93; Eannace, supra note 3, at 44.

[FN246]. Ordover, supra note 28, at 182-83; TANFORD, supra note 1, at 172; Becton & Stein, supra note 4, at 18; Jossen, supra note 5, at 12.

[FN247]. HAYDOCK & SONSTENG, supra note 2, § 7.6, at 326.

[FN248]. BAILEY & ROTHBLATT, supra note 21, § 9:19, at 256; CARLSON & IMWINKELRIED, supra note 2, § 5.6, at 93; Eannace, supra note 3, at 44, 45; Jossen, supra note 5, at 11-12.

[FN249]. Ordover, supra note 28, at 182-83; TANFORD, supra note 1, at 172; Eannace, supra note 3, at 45; Holmes, supra note 63, at 91.

[FN250]. Weaver, supra note 3, at 4.

[FN251]. CARLSON & IMWINKELRIED, supra note 2, § 5.6, at 94.

[FN252]. Holmes, supra note 63, at 92.

[FN253]. CARLSON & IMWINKELRIED, supra note 2, § 5.6, at 94.

[FN254]. Eannace, supra note 3, at 44.

[FN255]. CARLSON & IMWINKELRIED, supra note 2, § 5.6, at 94; HAYDOCK & SONSTENG, supra note 2, § 7.6, at 326.

[FN256]. CARLSON & IMWINKELRIED, supra note 2, § 5.6, at 94.

[FN257]. DECOF, supra note 2, § 1.12[3], at 1-31; See HAYDOCK & SONSTENG, supra note 2, § 7.6, at 326.

[FN258]. CARLSON & IMWINKELRIED, supra note 2, § 5.6, at 94; HAYDOCK & SONSTENG, supra note 2, § 7.6, at 326-27; Holmes, supra note 63, at 92.

[FN259]. DECOF, supra note 2, § 1.08[6], at 1-23 to 24; HAYDOCK & SONSTENG, supra note 2, § 7.7, at 327; Weaver, supra note 3, at 3.

[FN260]. CARLSON & IMWINKELRIED, supra note 2, § 5.5(E), at 92; HAYDOCK & SONSTENG, supra note 2, § 7.4, at 318; TANFORD, supra note 1, at 165; Becton & Stein, supra note 4, at 18.

[FN261]. TANFORD, supra note 1, at 165.

[FN262]. DECOF, supra note 2, § 1.21[3], at 1-57 to -58.
29 Am. J. Trial Advoc. 525

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"Opening statement"—An interview with Alfred Julien

Alfred Julien is associated with the law firm: Julien, Schlesinger & Finz, New York. He is a past president of ATLA, New York State Trial Lawyers, and Metropolitan Trial Lawyers. He lectures for the Practicing Law Institute, New York State Bar Association as well as other groups on trial techniques and environmental law. He is the author of numerous articles and the book Opening Statements.

TDJ: You are known as the master of the opening statement. Your book "Opening Statements," has been alchemized into a legal bible for trial advocates. Speakers on the CLE circuit refer to it constantly. How do you account for the observation made by one of your peers that your opening statement and your summation are almost identical?

AJ: One reason my opening and summation are so similar is because of the emotion that I evoke in each. A good trial lawyer must be able to arouse fervid emotion in himself, and in so doing, will most certainly cause the listener to become emotionally involved. My opening remarks employ all of the techniques that have been taught for years on summation. The key to each is to be persuasive; hold nothing back. During opening, I take advantage of the first opportunity afforded to talk to the jurors apart from jury selection. This is the time to have the jurors feel the capacity of the lawyer; to become attuned to his or her personality and through the proper dialogue, feel the lawyer's deep belief in the case. This is when I touch on all the problems and bring them out into the open. I call this "workshopping."

The jury must understand the context of the parties' legal contentions and know what the law demands, but an astute lawyer conveys this information in a comprehensible manner.

It is imperative in opening that the plaintiff's counsel present an overview of the entire case so that there is no chance that anything vital will be said for the first time when the defense speaks. The jurors are alert now and their minds are open; they are ready to have you translate to them all of the facts enveloping the case and these facts should be translated by using everyday parlance just as in summation. The jury must understand the context of the parties' legal contentions and know what the law demands, but an astute lawyer conveys this information in a comprehensible manner.

My opening statement in a criminal case also borders on summation in that I give a preview in opening of what will be heard during my summation. I once tried a very important criminal case . . . important because my client was a lawyer who was charged with perjury. I became very emotionally wrapped up in that case because of my closeness to the client, and because I knew that my client was faced with a considerable amount of time to be spent in jail and the loss of his license. The case took a month to try and I gave my usual opening statement representing the defendant; it was very detailed. I told the jury what the case was about explaining how unjustified the charge was against my client. I went into great detail as to why I thought it was unjustified. Not only was this a very long and difficult case, but the judge was leaning heavily against us. Fortunately the jury leaned our way! When the verdict came down in favor of the defendant, a most unusual thing happened, I broke down and cried. I stepped into the hallway and I really broke down. The foreman came up to me and said, "Mr. Julien, why are you crying?" Then he said, "This jury never had any doubt about your case from the time of your first summation a month ago." He had called it summation. Then it clicked with me, of course it's summation. I had been doing that right along during my opening statements, but I had never put a label on it. What smart lawyer wouldn't want to have two full summations? That was the genesis of the idea and I have been teaching that theory throughout the country ever since. I think that I have been able to change the thinking of many lawyers on what was once considered archaic . . . an archaic introductory remark of what's going to happen during the course of the trial.

TDJ: We are talking about technique; that has to be learned and developed through years of trial experience. You're the expert; but wouldn't your opening statement have to vary with each case?

AJ: I use the same opening/summation statement in all types of cases. While I am known for personal injury work, I often try criminal cases, especially white collar crime, anti-trust and security cases. The idea of the opening is always the same whether I am representing the defendant or the plaintiff; it is very detailed. Why is it so detailed on the defendant's side? After all, many experienced trial lawyers have been saying for years that they like to keep things in reserve on the defense so that they can surprise the jury after the case has gone on for some time. That may have been good thinking at one time, but it isn't anymore. In these days of complete discovery, even to some extent in criminal cases, through the use of pre-trial motions, there is little opportunity for complete surprise. A wise lawyer knows what the other side will bring out. That is why it is so important to reach the minds of the jurors early. Perhaps this is even more important for the defense, because the defense comes in early in the case, and a good defense lawyer wants the jury to be aware of some of the things they are going to hear when the plaintiff or prosecutor is putting on his or her case.

The idea of the opening is always the same whether I am representing the defendant or the plaintiff; it is very detailed.

A good opening statement in a criminal case *especially* borders on summation. If my opening statement does not draw from the district attorney the complaint that I am "summing up," I am not doing a good job.

The theme of defendant's opening statement in a criminal case must be: "ATTACK!" You must touch the viscera of the jurors by showing how wrong this charge is against the defendant. Stress how important it is to everyone, not only the defendant, that the safeguards of the presumption of innocence, and proof of guilt beyond a reasonable doubt, must be applied rigorously in this case.

I know, in a negligence case, certain things I say are going to evoke a "built-in" response in a jury. If I say, "This case is against a doctor who had a patient who he knew to be critically ill; he was called that night, but he refused to make a house call." Or, perhaps an infant was ill and the doctor would not

[illegible] exemption for his deceased spouse if he hadn't remarried—but having taken a new wife before the end of the year, he's limited to the exemption for her [Rev. Rul. 71-158, CB 1971-1, p 50].

Question 2: Suppose Husband paid $3,000 in medical expenses incurred by Wife prior to her death. Even though Husband couldn't claim the exemption for her, can he deduct the medical costs he paid for her?

—TAX-SAVING ANSWER→ Yes, subject to the percentage limitations. A taxpayer can deduct medical expenses of anyone who was his spouse either when the expenses were incurred or when they were paid. So Husband can deduct his medical outlays for both wives [Rev. Rul. 57-310, CB 1957-2, p 206].

TRIAL TECHNIQUES . . .

How to Make Effective Opening Statements to the Court

Opening statements are not restricted to jury trials. In most jurisdictions (and probably in all, if requested by counsel) cases tried by a judge without a jury also call for opening statements. Here are some tips on what to do to make your opening statements in non-jury cases effective.

How to arrange a strong statement: Present the content of your statement in the following sequence, an order that is most understandable to any judge:

1. State your claims or your defenses to the opponent's claims.

2. Then state the issues the judge must decide.

3. Next, summarize the evidence supporting your claims or defenses, with the strongest evidence stated first. *Don't narrate the facts in detail.* This may be desirable to a jury, to arouse its interest. But it is too verbose for a judge. So keep the narration brief.

4. Next, state the conclusions the judge must reach to bring you victory.

5. Finally (but only if you are for plaintiff, or with defenses to them if you are for defendant.

What are the questions (issues) the case presents and what is your evidence upon them?

When did the significant events occur?

Where did they occur?

How should the judge answer the questions (his conclusions) and *how* should he rule after doing so?

How to hit the targets in an opening statement: A skillful opening statement hits these targets squarely. *It informs! It explains! It showcases!* It informs the judge about the nature of the case and about your claim or defenses more clearly, more completely, and more coherently than your pleadings. It explains the issues more vividly than your trial brief. And it showcases your favorable facts more effectively than your evidence.

Summarize the history of the case in a few brief sentences. State the claims and defenses concisely and clearly, preferring short words over long; simple sentences over compound. Explain the issues in the same order that they are made up in the pleadings, but avoid using the same technical jargon that appears there (a judge's aural I.Q. is always a good deal lower than his visual). Present the conclusion you want him to reach on each issue and then tell him why you think he will reach them. Give him a synopsis of the evidence that justifies each.

Adapted from one of the many useful trial techniques that appear in *Winning to the Court*, by Judge Robert L. Simmons, available from Executive Reports Corporation, Englewood Cliffs, N.J. 07632. It costs $39.95, and it is available for 15 days free examination.

come to see the infant that night, which later resulted in death or very serious complications, I will get a natural response or reaction of repugnance. Our society still remembers the old "horse and buggy" doctor who did come to the house. There is a very negative response to the doctor who refuses to make a call when somebody is seriously ill. People don't like to think about the "big earner" who refuses to respond to his patient's needs.

A product liability case is really a consumer case and the public is very conscious of the word "consumer." The jury does not have to put itself in the shoes of the litigant in order to identify with a consumer. The patient who is dissatisfied with a hospital for a particular type of wrong treatment is a consumer. I like to say, "this consumer is unhappy or disappointed with a product," or "This is a consumer case involving a defective lawn mower, or vacuum cleaner."

Language is so crucial to your case. You know how lawyers talk? We go through law school and are taught the language of the law. *Res judicata ... res gestae, executrix, administratrix ...* why some people don't even know who the plaintiff or the defendant is. We need to use the language of the people. Simply said, "This lady is the mother of a boy who was killed at sea," or "this man is the father of a woman who was recklessly run down by a bus."

A lawyer must forget the language he learned in law school. Return the language of the law to the language of the living. We must use terms and expressions that we live with in our daily lives. The juror hears *res gestae* and he asks: "What is he saying? I'm a bus driver," or, "I'm a cab driver; I'm a barber." The lawyer who uses difficult phrases once, is going to use them again and again and he does himself a disservice. Jurors wonder why that lawyer is parading that kind of stuff around. While the jurors are thinking about the meaning of some word, they lose the thread of the case. Then, when the other lawyer gets up and speaks in simple terms, the jurors are going to listen. That lawyer will reach the minds of the jurors and that's really what persuasion is all about.

To persuade, we have to tune in not to our wave length, we must tune in on the *listener's* wave length. I find it helpful, when I go out of town to try a case, to arrive a few days early. I read the local paper and I listen to the way the people speak, by visiting bars and restaurants. That's how to pick up expressions and phrases that can later be used in court.

TDJ: What are some hyper-taboos you can think of?

AJ: Never, especially during opening or summation, nose-scratch or face-scratch or scratch any other part of the body. It is so distracting, and I've seen it done by both male and female attorneys. There are lawyers who simply cannot stop themselves from doing this. The "picketeer" is most annoying; the picketeer walks up and down the length of the jury rail with his/her head down, rarely looking at the jury. Interminable pacing in front of the jury is a very bad show. Of course there has to be some movement; the trial lawyer cannot remain rooted to one spot, but shifting has to be restrained and not too obvious.

If my opening statement does not draw from the district attorney the complaint that I am "summing up," I am not doing a good job.

I knew an attorney who used to swing his Phi Beta Kappa key in a most annoying manner. Don't crack your knuckles or use nervous gestures. If you must gesture, make sure they are broad rather than miniscule because no one who expects big money should make less than expansive gestures!

Never focus all your attention on one juror, especially not on a good-looking member of the opposite sex. Other jurors wonder why they aren't as important. You have to eyeball the jury, but use caution and don't show partiality.

TDJ: How do you handle objections?

AJ: As I mentioned before, if I have not been interrupted by my opponent, I am probably not being effective. I want to hear the objection. Of course there are occasions where the judge will side with a particular objection. He may say, "Mr. Julien, I think that is of the nature of summation rather than opening." That ruling is easily handled. I say, "Yes. People of the jury, I mean to prove that." Then I go on with exactly what I was saying before. By adding the magic threshold of words: "I mean to prove that" ... everything becomes admissible.

Ordinarily, I don't recommend saying "I mean to prove," but where it is needed because the court feels more secure in hearing that talismatic phrase, then it must be used. I prefer a good opening ... the telling of a story for instance. I wouldn't say, "We'll bring a witness here who will tell you ..." I would rather say, "The fact is, this young boy who was killed at sea was doing a job far too much for him. Far too much for any one person. Two or three were needed to do that job." I like that better than, "We will prove to you that it should have been done that way."

Other methods that I have used to handle interruptions from my opponent are, for example, by saying, "I have not interrupted my opponent, although I do disagree with much that he has said to you. I believe we should have the right to speak without interruption as much as possible. Since I did not interrupt him, I am sure that he will not interrupt me." I look at my opponent when I say this. Sometimes that works, other times stronger methods must be used. "Well, I didn't interrupt my opponent, but now he's interrupting me for the fifth time ... for the sixth time and for the seventh!" Once, an opponent said to the court, "I object to Mr. Julien's counting my objections. I want to tell the jury that I have a right to interrupt." The judge said, "Yes. The lawyer does have the right to interrupt. Mr. Julien, please continue." Then I was interrupted again. The judge finally said,

"Now that's the eighth time you've been interrupted!"

TDJ: I imagine you have seen trial lawyers lose cases by *not* using your recommended methods. What about someone taking your advice and using your techniques against you . . . who wins?

AJ: I once had an opponent who "over-played" what I suggest. This was a case involving an alleged stock fraud and the United States government was prosecuting my client. The United States attorney had a copy of my book . . . I knew this before the trial began because they had referred to it in their brief to the court saying: "Mr. Julien usually says more in defense than he's committed to say and I want to stop him before he even starts." The judge looked at the brief and he said, "What else is new?" I knew that they were aware of the book and they were going to use that kind of technique too . . . full disclosure. Now, their case depended upon the testimony of a man (an alleged) co-conspirator who had turned government's evidence in acceptance of a plea bargain. He thought he would receive leniency if he agreed to testify for the government. He had a very bad personal record. He was in the antique business and had stolen, or misused, the proceeds of goods which had been entrusted to him for sale. He had stuck a lot of people; running up bills with everybody. When the people opened, the prosecutor said, "Mr. L. is going to be our principal witness in this case and I want you to know the good as well as the bad." That had a familiar ring to it as I had used phrases like that in my book. He went on, "This man has a bad commercial record." That's where he left it, except he said once his witness had "deep-sixed" some records. When it was my turn, I said to the jury, "I wouldn't have mentioned anything at all about it, but the prosecutor has decided to tell you about his prime witness, Mr. L., but he hasn't told you very much has he? I think you ought to know that this man climbs over partition walls over week-ends to destroy records which his employees are keeping. Also, he stuck hundreds of people by failing to remit monies to them for property that was entrusted to him. The government knows these things, and knows that he's not somebody you can rely on." At this point my opponent stood up and said, "I object to this! Mr. Julien has no right to go into this . . . it isn't material to the case." Whereupon the judge said, "Of course it isn't material, but you opened the door to it, therefore, it is perfectly proper for Mr. Julien to refer to it." I think the prosecution had opened the door and misused the technique which I espouse and he went too far with it. The business of disclosing everything about your case has to be done with a bit of reserve. A good trial lawyer senses what's appropriate and what isn't. When you go too far, you may be bringing in things which your opponent would never have had an opportunity to bring in. Once it is in the open, you'll never have a chance to get it closed.

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Lawyers in the main do not appreciate the importance of timing. Even the cadence, the expression and the tempo employed in language. I speak slowly when I make a speech and even more so during trial. Nobody gets lost. They can keep up with me and comprehend what I'm saying. If you speak too rapidly, you may lose part of the jury. If your voice is constantly on the same level, monotony sets in. You should adjust your voice to that of your opponent. If he or she talks rapidly . . . staccato-like, what a relief it is going to be to the jury when you get up and start speaking in a well-modulated voice; a slower pace, accelerating only when there is a point to be made. The jury that has been bored by your adversary is not likely to be bored by someone who is in contrast.

Timing is so critical throughout the trial: when should you bring in the important witness? what is the best time to introduce the important piece of evidence? If you were to use the time when recess is about to be reached to hit an important point, how wonderful it would be! Just think, to have the jury leave remembering as the last thing that happened in the case, an important piece of evidence that you will capitalize on when it comes time for summation. If it comes, instead, in the middle of the day, surrounded by other things, it gets lost. The jury, already confused, goes home confused. Just before recess is the time to reach the minds of the jurors.

Timing is also vital regarding not only what you say, but how long it takes you to say it. I believe that any opening exceeding forty-five minutes, except in a very unusual case, is probably too long. Likewise, any summation that goes over an hour and a half, and my cases are generally long because they are so complicated and important, is beginning to slide downhill. If there is an occasion where I must take more than the hour and a half to sum up, I ask the Court if we may take a break . . . get some relief, and because of my age, the judge understands what I mean by relief! I'm usually granted that time, and because the jury has been interrupted for a little while, when I get started again, I begin with damages so that I don't lose any climax that I was building previously.

I learned about timing as an actor. I was a terrible actor; in fact, it has been said that I may have had something to do with the killing of vaudeville. Nevertheless, I found this experience to be very valuable later in my life-long profession.

TDJ: Some trial lawyers advocate the use of a notebook for easy reference. Do you keep notes or reference books with you?

I don't keep notes, but I have notes kept for me. I have an associate with

me during trial and he or she takes notes. I do keep memo sheets and references regarding subject matter in advance of trial. I jot down a phrase about something that I want to ask a witness about. I will not be reading anything while I am addressing the Court. I never read notes during opening statement. My mind is fresh at that time. I want to be looking at the jurors. If you have a pad in front of you that you keep looking at, or if you are jotting things down, you detract from the main theme. That's an obstruction. During opening, eye to eye contact is the best way to establish a relationship with the jury.

When you go too far, you may be bringing in things which your opponent would never have had an opportunity to bring in.

In summation, I sometimes have written out headings, in other words, one or two sheets before me with subject matter—headings, so that I am sure not to overlook important items. I keep this over to the side, positioned between myself and the jury. Lawyers who do too much writing, harm themselves. You must watch the witness. You must not miss the twist of the mouth, or the tightening of the throat muscles, something vital that is taking place that he or she is reacting to, or you will miss an important chance to use that gesture. It is particularly bad to be wedded to a pad and pencil while jury selection is taking place. You must watch every jury person as he/she moves to the jury box. The way they walk ... the aggressiveness or labile manner of their walk will indicate the difference between possible leaders of the jury and those who just go along with the others.

TDJ: Let's go over your list of losers. You say there are some definite examples of how to lose a jury. What are those?

AJ: The lawyer who begins by saying: "Now, you know neither I nor my opponent was present at the scene ... we didn't see what happened. We don't know all the facts, we only know what we've been told. You will get the testimony from the witnesses. I think they will tell you the following." It is so much better to be sure of the facts. Better to say, "Now, this is what happened. This is how it occurred. This is why we are in court." The jury doesn't want to hear that the lawyer doesn't know the facts and is depending on other people to unravel the case. When the lawyer states that there is some doubt, and that this doubt can't be resolved until you hear the witness, the jury loses faith in your ability. That's a sure loser.

The lawyer who uses time-worn expressions, or even up-to-date expressions that are beginning to wear thin like: "the bottom line is" or "you know." The lawyer who has everything written out and insists on reading to the jury. He or she is missing the vital eyeball contact. That's the mirror of the mind; it shows you what that person is thinking. Don't miss that chance!

Likewise, any summation that goes over an hour and a half, and my cases are generally long because they are so complicated and important, is beginning to slide downhill.

TDJ: Could you give us an example of where you felt you had won your case by the time you finished your opening statement?

AJ: I once tried a polio case. This was the first recovery by somebody who had taken the Sabin vaccine and as a result, got polio. There had been several of those cases tried and none of them won. This was in New York about ten or more years ago. It was necessary to "workshop" a problem in the case. I like to do that in opening statement. The problem was that everyone in the world knew what an effective weapon the Sabin vaccine was against polio. Millions of people throughout the world had benefitted from having received the vaccine, and here I was attacking this vaccine on behalf of one person. I had to make the jury understand that this wasn't a matter of weighing risk against benefits. In other words, many people may benefit at the expense of one who has suffered. It was important to explain to the jury immediately while their minds were fresh: to the person who is disabled as a result of this vaccine, it isn't percentage; it's 100 percent. It isn't a small risk against a great benefit. "She had no benefit ... she's had to bear the entire risk. She should not be bearing this terrible burden for the rest of her life. The company that manufactured the vaccine ... the company that secured the financial benefits from its use, that company did not warn sufficiently of the potential risks. It caused this terrible disease to afflict an innocent person ... this client. *They* should be paying the cost of it, not the client. Her risk is entire; her life is destroyed. As for the others who have benefitted, that's a credit to the company and they have been paid adequately for it. Causing harm to this lady calls for recompense. This is the only means of getting it; this case before the jury now, the case that you people on the jury want to hear." I felt that by the end of that opening (which I have condensed here) the case was won. I could see by the slow nodding that you sometimes get, that indicates approbation and says: "you make sense" or, "that's an interesting idea." We went all the way in that case and it worked out very well.

It is so much better to be sure of the facts. Better to say, "Now, this is what happened. This is how it occurred. This is why we are in court."

Remember, there will be many more opening statements than final summations in your career. An opening statement, well delivered, sometimes promotes the very settlement that makes it unnecessary to have summation. That's why we have more of one than the other. Failure to make use of a proper opening statement to win lawsuits indicates that some lawyers are ignoring one of the most potent weapons in the trial strategist's arsenal.