

OPENING STATEMENTS

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I. INTRODUCTION

As the subtitle of this presentation ("Winning from the Beginning") suggests, among criminal trial lawyers these days, it is *de rigueur* to begin any discussion of The Opening Statement with an air of reverence, an assertion of its grave importance, an admonition that it should never be waived, and a recitation of impressive statistics. This is pretty heady stuff for North Carolina criminal lawyers who, prior to 1977, hardly knew how to spell "opening statement". See N.C. GEN. STAT. § 15A-1221 (1977).

Various studies show, we now know, that fifty per cent, or more than half, or the great majority, or eighty-five per cent, of all cases are decided by the jury on the basis of opening statements. Perhaps more reasonably, others suggest that, on the basis of opening, most jurors unconsciously become more receptive to one side than the other, and consciously decide for which side they are pulling and hoping. In any event, however great the potential impact of opening, *primacy* - the power of first impressions - is ordinarily cited as the force at work in the core of these outcomes.

Whatever the truth about the various statistical studies, it is no doubt true that opening statement has great potential for benefit. As with all trial events, however, there are some costs. Thus, the purpose of this paper is not to persuade counsel for the defendant always to make an opening statement. The purpose, rather, is to state the legal parameters of opening, to reveal its benefits and costs, and to explore the essential substance and form of its effective delivery.

II. PERMISSION

A. FEDERAL TRIALS

The defendant in a federal criminal trial is *not entitled* to make an opening statement. It is true that, in both federal and state court, a criminal defendant has a right to make a *closing summation* to the jury, a closing being deemed to be one of the "traditions of the adversary fact-finding process that has been constitutionalized in the Sixth and Fourteenth Amendments." *Herring v. New York*, 422 U.S. 853, 857 (1975). But there is no similar constitutional right to make an opening. *United States v.*

Salovitz, 701 F.2d 17 (2d Cir. 1983); see also *Coleman v. Paderick*, 382 F.Supp. 253, 254 (E.D.Va. 1974) ("A trial judge has no obligation to permit opposing counsel to make opening statements.").

Local Rules in each of North Carolina's three federal districts specifically authorize opening statements in civil trials. LOCAL RULE 26.01, EDNC; LOCAL RULE 208(a), MDNC; LOCAL RULE 9, WDNC. Generally, these Rules for civil trials authorize the parties to make opening statements, describing (without argument) their respective claims or defenses, and stating (without argument) the evidence by the parties expect to sustain those claims or defenses. *Id.* There are no similar local rules authorizing opening statements in criminal trials. And, unlike the local criminal trial rules in some federal districts, see, e.g., *Salovitz*, 701 F.2d at 18 (Connecticut), the local criminal trial rules in North Carolina's three federal districts do not incorporate the local civil trial rules by reference.

Of course, by custom, criminal defendants are almost universally permitted to make opening statements in the several federal district courts across the country. The practice of making opening statements in federal criminal court has been recognized as "long accepted as established and traditional in jury trials." *United States v. Stanfield*, 521 Fed.2d 1122, 1124 (9th Cir. 1975) ("We strongly believe that the well established and practical custom. . . should be continued."); accord *United States v. Hershenow*, 680 F.2d 847, 858 (1st Cir. 1982) ("A defendant in a criminal case has a right to make an opening. . . absent good cause shown to the contrary."). But even where openings are ordinarily allowed, they may be denied where counsel for the defendant does not expect to introduce evidence. *Salovitz*, 701 F.2d at 20; *Lewis v. United States*, 11 F.2d 745, 747 (6th Cir. 1926).

B. STATE (N.C.) TRIALS

In criminal jury trials in the Superior Courts of North Carolina, the defendant (as well as the State) is specifically authorized to make an opening statement after the jury is impaneled. N.C.GEN.STAT. § 15A-1221(a)(4); Rule 9, GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS. Note that the Statute requires only that the defendant be given "an opportunity" to make an opening, and that Rule 9 says the defendant "may make" an opening. *Id.* Thus, if the defendant fails to assert the right to make an opening, he or she will be deemed to have waived it. *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (1980), cert. denied, 450 U.S. 1025, reh'g denied, 451 U.S. 1012 (1981).

The defendant may choose to reserve opening until after the State rests its case. N.C.GEN.STAT. § 15A-1221(A)(4). In that event, the defendant is entitled to make the opening prior to the presentation of evidence. N.C.GEN.STAT. § 15A-1221(6). But if the

defendant reserves the opening, and then chooses to offer no evidence, the defendant loses the right to make an opening since, under those circumstances, the defendant actually would be making an additional closing summation. *Id.* (Official Commentary).

III. OPTION

Counsel for the defense, of course, is *not required* to make an opening statement. That is, counsel's failure to make an opening statement ordinarily does not give rise to a claim of ineffective assistance. *Finer, Ineffective Assistance of Counsel*, 58 CORNELL L.REV. 1077, 1093-94 (1973). This is true because, despite the benefits of opening, there may be sound reasons for not doing so in a particular case. Thus, whether to make an opening is a strategic decision counsel must make in each case. *United States v. Decoster*, 624 F.2d 196, 213-14 (D.C. Cir. 1979) (en banc) (a "tactical decision"); *Williams v. Beto*, 354 F.2d 698, 703 (5th Cir. 1965) (a "matter of professional judgment") *Commonwealth v. Tarver*, 253 Pa.Super. 185, 190, 384 A.2d 1292, 1295 (1978) ("particularly within the realm of trial strategy").

IV. LIMITATION

A. LENGTH

The North Carolina Statute authorizes "a brief opening". N.C.GEN.STAT. § 15A-1221(a)(4). The North Carolina Rule provides that opening is subject to such time limitations as may be imposed by the court. Rule 9, GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS.

B. CONTENT

1. FORECASTING - NOT ARGUING

It is generally agreed that "[t]he purpose of the opening statement is narrow and limited to a brief statement of the issues and an outline of what counsel believes he can support with competent and admissible evidence." A.B.A. Standards, *The Prosecution Function and the Defense Function*, 119 (1971). Clearly, the opening "is not an occasion for argument." *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring).

In North Carolina, the court is specifically authorized to impose limits on the scope of opening statements. Rule 9, GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS. And, North Carolina follows the general approach to openings, drawing a sharp line between the permissible forecast of evidence, on the one hand, and the impermissible statement of the law or argument of the case, on the other:

While the exact scope and extent of an opening statement rest largely in the discretion of the trial judge, we believe the proper function of an opening statement is to allow the party to inform the court and jury of the nature of his case and the evidence he plans to offer in support of it. See generally, 23A C.J.S., *Criminal Law* § 1086 (1961). It should not be permitted to become an argument on the case or an instruction as to the law of the case.

State v. Paige, 316 N.C. 630, 648, 343 S.E.2d 848, 860 (1986), quoting *State v. Elliott*, 69 N.C. 89, 93, 316 S.E.2d 632, 636, *disc. rev. denied, appeal dismissed*, 311 N.C. 765, 321 S.E.2d 148 (1984); accord *State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685, *cert. denied*, 479 U.S. 871 (1986) (counsel may present the issues involved in the case and give a general forecast of what the evidence will be).

2. FORECASTING CROSS-EXAMINATION

Counsel for the defendant, of course, may be planning to offer no evidence. In *State v. Paige*, *supra*, the Court said that, where that is true, counsel may point out facts which he or she reasonably expects to bring out on cross-examination.

3. ADVOCATING A PROCESS OF REASONING

Counsel may urge the jury to adopt a particular approach to considering the evidence in the case. This may be an important point when counsel plans to offer no evidence. In *State v. Freeman*, 93 N.C.App. 380, 378 S.E.2d 545, *disc. rev. denied*, 325 N.C. 229, 381 S.E.2d 787 (1989), the court held it to be improper for counsel to state, in opening, that the defendant was convinced the jury would find him not guilty if it looked at the evidence, and that there was "one thing about which there is no disagreement." *Freeman*, 93 N.C. App. at 390, 378 S.E.2d at 551. But it was held to be proper for counsel to say: "We ask that you consider each piece of this evidence carefully." *Id.* The Court said that it could "find nothing argumentative in that statement nor do we find that it violates any other rules relating to opening statements." *Id.* That same line was drawn in *State v. Mash*, 328 N.C. 61, 399 S.E.2d 307 (1991). There, the Court held that it was improper for defense counsel to argue what the State's witnesses would say and how the defense would contradict certain testimony. But it was proper for defense counsel to state: "I ask you to give attention to all of the witnesses." *Mash*, 328 N.C. at 65, 399 S.E.2d at 310.

4. EXPLAINING FUNDAMENTAL PRINCIPLES

In *State v. Paige*, *supra*, the trial court had interrupted counsel's opening to prevent counsel's stating the fundamental principles upon which the defense would rely throughout the trial.

The Court held this was error:

We feel that defense counsel should also have been allowed to state once without interruption that his client would rely on the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt. While this statement is one of legal presumption and proof, the simple statement that the defendant intends to rely on these basic aspects of a criminal prosecution would not amount to an argument on the law and may be necessary in order to apprise the jury of the defendant's only defense when he does not plan to offer evidence.

Paige, 316 N.C. at 648, 343 S.E.2d at 860.

V. BENEFIT

As noted in the Introduction, the benefits of opening statement are, by now, widely acknowledged. Jurors are most aware, most interested, most rested, most fresh, and most receptive at the outset of the trial. Under the principle of primacy, it is at this time that first impressions become lasting impressions. Counsel must make the most of this first opportunity to speak personally to the jury and plant the conscious, and unconscious, seeds of victory.

VI. COSTS

A. INFLATING EXPECTATIONS

The greatest danger in making an opening statement is that of raising the jury's expectations to unrealistic heights. Counsel can easily do this by exaggerating the quantity or quality of the anticipated evidence. Counsel must be certain that the evidence will live up to the introductory ruffles and flourishes with which it is hailed in opening statement. The early morning's castle of primacy can be swept quickly away in the afternoon tide of reality. Thus, despite the desire for a great first impression, the watchword of the opening's forecast must be *understatement*. And if understatement leaves nothing much to forecast, it might be best to forego forecasting.

Obviously, overstatement results in a disappointed the jury. More critically, overstatement erodes counsel's, and the client's, most crucial asset: the advocate's credibility. In *State v. Moorman*, 320 N.C. 387, 358 S.E.2d 502 (1987), counsel for the defendant in a rape case promised the jury, among other things, "'one critical piece of evidence' which would demonstrate that defendant was physically and psychologically incapable of engaging in sexual acts." *Id.* at 400, 358 S.E.2d at 510. Counsel offered no such evidence. In granting the defendant a new trial for having been denied the effective assistance of counsel, the Court found

that this, and other unfulfilled opening statement promises, had a devastating impact on counsel's credibility and, therefore, on the jury's verdict. "A cardinal tenet of successful advocacy is that the advocate be unquestionably credible. If the fact finder loses confidence in the credibility of the advocate, it loses confidence in the credibility of the advocate's cause." *Id.*

In *Moorman*, the Court observed that counsel never had any basis for believing that there was evidence such as that promised. *Moorman*, 320 N.C. at 400-401, 358 S.E.2d at 511. It is not likely that counsel will promise evidence with no hope of its ever coming into existence. But it is quite possible that counsel's good faith belief (on Monday) that certain evidence will be available (on Friday) may turn out to have been misplaced. Counsel must be careful to forecast only sure things.

B. EDUCATING ADVERSARIES

As one educates the jury with opening statement, so one educates the prosecutor and the waiting state's witnesses with opening statement. And, while counsel may want the jury to have a clear, up-front grasp of counsel's theory and evidence, counsel may not want the prosecutor and the star witness to have a clear, up-front grasp of counsel's theory and evidence. An ill-conceived opening statement may provide an answer to the prosecutor's Job-like prayer: "Oh that one would hear me! Behold, my desire is, that the almighty would answer me, and that mine adversary had written a book." *Job* 31:35 (King James). If the benefit of writing a book for the jury is outweighed by the cost of writing a book for the prosecutor, do not write a book.

C. BURNING BRIDGES

As counsel lays out the defense's position, so counsel forecloses the defense's options. In some cases, counsel's need for continuing flexibility may be so great as to lead counsel to take no opening position. In other cases, counsel may wish to remain totally flexible for the duration of the State's case. In that situation, counsel may decide to defer opening or to make no opening. In every case, counsel should be keenly aware of the extent to which each detail of opening statement burns a bridge. When possible, wise counsel preserve some means of escape.

D. LOSING DRAMA

Every good storyteller knows that mystery, anticipation, and surprise are critical elements of any spell-binding tale.

The art of storytelling is essential to effective and evocative communication. A good story is a cliff-hanging distillation of a series of events that, by themselves, suffer from too much complication over too long a period of time. A

great story is like a well-crafted joke - deliciously brief, immediately memorable, eminently repeatable, and virtually impossible to dismiss.

Kenneth Albers (Actor and Associate Artistic Director, Milwaukee repertory Theatre) in J. McElhaney, *Trial Notebook* 132 (3d ed. 1994). If counsel tells all the story at the beginning, there will not be much of a spell to bind, nor much curiosity with which to bind it; the story will lose impact and the jury will lose interest. In some cases, this factor alone may move counsel to make no opening. In every case, this factor should contribute to the shape of any opening counsel might decide to make.

VII. THE STATEMENT

A. STRUCTURE

1. INTRODUCTION (Make a Connection)

The first step is to open the juror's minds and hearts to the rest of counsel's statement and, thereafter, to all of counsel's case. Just as the principle of primacy suggests that opening is a powerful moment, so the principle of primacy suggests that the opening of the opening - the introduction - is the most powerful moment of all. This precious moment certainly should not be squandered on cliches about what an opening statement is (road map; picture of a jig-saw puzzle) or other traditional wisdom ("Nothing I say is evidence.").

This precious moment should not even be spent on a statement of the theme: "This is a case about . . ." To be sure, the theme is the most important substantive part of counsel's opening. But the problem with leading off with it is that its seeds may well fall on barren ground. Counsel must first prepare the soil, making the jurors receptive to counsel's proposal of a theme.

Counsel creates this receptivity by making a psychological connection with, by engaging, the jurors. This connection can be made with a statement that is simple, brief, noncontroversial, human, nonthreatening, and obviously true. For example, counsel may begin this way: "We are all gathered here - you, Judge Johnson, Mr. Morris [the D.A.], Mr. Lewis [the defendant], and me - we are all gathered here on common ground. Our shared purpose is to learn what happened out there in that dark night and, in the light of that knowledge, to see that justice is done."

2. THEME (State the Theory)

Once counsel has made the connection with the jurors, counsel should state the theory of the case. The underlying *skeleton* of counsel's theory (in clay-sculpting terms, its internal armature)

will be:

The defendant is not guilty
because there is a reasonable
doubt about . . ."

The ending to this statement will consist of either or both the identification issue and the corpus delicti issue. If counsel's focus is the corpus delicti issue, the theory will be that there is a reasonable doubt about the existence of one or more of the essential elements of the offense. If the focus is the identification issue, the theory will be that there is a reasonable doubt about whether the defendant is the person who committed the acts alleged. Always, counsel's theory must be supportable, legal, reasonable, comfortable, and lean. (Elsewhere, I have discussed in detail the nature of a theory of the case. See Smith, *A Theory of the Case for the Criminal Defense*, TRIALBRIEFS (Vol. 24, No. 3) 27 (1992); Smith, "Trial Preparation and Adopting a Theory of the Case" (N.C.B.A. Seminar, April 26, 1985); Smith, "Planning and Executing the Cross-Examination of the Prosecuting Witness in a Rape Case" (N.C.B.A. Seminar, August 24, 1984).

Of course, counsel may not, and should not, state the theory in such stark, sterile, skeletal terms in opening statement. Rather, what counsel must do in opening is state a theme that reflects the theory. The theme should be short and simple and capable of repetition and reverberation throughout the trial. And, because counsel may not argue conclusions, counsel must state the theme in factual (not legal) terms, and probably should head-off objections by intoning the prefatory "The evidence will show. . .". Thus, once counsel has made the connecting statement, counsel might state the theme: "The evidence will show that when Tom shot Bill, Tom believed that Bill had come to kill him.

3. TELL THE STORY

a. EVENTS. Once counsel has connected with the jury, and stated the theme, counsel should state the facts that the evidence will show. Counsel should do this as if telling a story. If counsel analyzes, marshals, and presents the facts in a clear, storytelling fashion, the logical outcome of the case will simply arise. In other words, it is not necessary for counsel to attempt to argue the legal outcome of the facts; the facts will speak for themselves, pointing the jury to the correct resolution of the conflict.

b. CHARACTERS. If voir dire and the court's instructions and the prosecutor's opening have not done so, counsel should be certain to make clear the identity of the parties and participants.

c. PLACES. If the several pertinent scenes and settings (including weather) of critical events have not been made clear, counsel should describe them.

d. TIMES. Counsel should clarify dates and times.

4. INCLUDE FUNDAMENTAL PRINCIPLES

Counsel should explain that the defendant is presumed to be innocent, that the State has the burden of Proof, and the evidence must be sufficient to establish guilt beyond a reasonable doubt.

5. EXPLAIN THE PROCESS

If the court and counsel have not already explained the various trial events that are about to follow, counsel now should do so.

6. SUMMARIZE AND CONCLUDE

Counsel should reiterate the major factual points, summarize the defendant's position, thank the jury, and sit down.

B. STYLE

1. BE PREPARED

Counsel should prepare the opening with great care. Having prepared the case with great attention to minute detail, counsel now should prepare for opening by standing back and taking a larger view. Moving from microscopic to telescopic, counsel now should seek to understand, and prepare to explain, the justice that inheres in the natural logic of counsel's position. Ideally, counsel should deliver the opening with no notes; the message is clear: the logic is so sure and simple that counsel does not need to write it down to remember what it is. If counsel uses notes, the fewer the better.

2. BE LEGAL

The spell of an effective opening can be easily broken by objections. Thus, counsel should prepare the opening within the permissible bounds. Those bounds, of course, vary greatly from judge-to-judge and from prosecutor-to-prosecutor. If counsel is a stranger in a strange forum, counsel should try to find out the leeway which the court and counsel's adversary interpret the rules governing opening. If counsel still has questions, counsel should just inquire of the court directly. And if counsel anticipates making an argument that will approach the edges of permissibility, counsel may want to bring it to the court's attention and get a preliminary ruling.

3. BE ALERT

Despite counsel's best effort to be legal, the adversary may interpose an objection during opening statement. In anticipation of this moment, counsel should be generally familiar with the rules governing opening statements. (See Parts II and IV, above.) And counsel should be able to go to a bench conference and state at least a theoretical justification for the statement that is being made.

When the objection comes, counsel should (a) pause, (b) make a mental note of counsel's place in the statement, (c) await the court's ruling or instruction, (d) accept the ruling gracefully, and (e) press on.

4. BE DIRECT

Do not explain the purpose of an opening statement. Do not say, "we contend", or "we submit", or "we think". Simply speak in terms of what *is*. It is absolutely critical that counsel reach the jury on a personal level, cutting through the walls that ordinarily separate people from each other. The best way to do that is to be direct. When counsel begins by saying, "It is now time for opening statement; here's mine," counsel puts distance between counsel and the jury.

5. BE PERSONAL

Counsel should address the jury on a personal level, making eye contact with each juror. Counsel should refer to the client, by name, in the most personal way that is appropriate under the circumstances.

6. BE CLEAR

Counsel should strive to be clear, using plain english with simple words, short sentences, and logical progression. Counsel and the cause get extra credit for clarity.

7. BE FAIR

As discussed above, counsel's credibility is the case's most valuable asset. Not only must counsel avoid overstatement, counsel must present and array the facts fairly.

8. BE DYNAMIC

Counsel should be dynamic. That is, counsel should choose language, and use voice inflection, gestures, and movement, that engage the jurors emotionally. Jurors act on their feelings through their intellects. Counsel must touch their feelings. Counsel can do this when counsel believes in, and feels the emotion

of, the position he or she is taking, and loses himself or herself in the moment.

VIII. ACKNOWLEDGEMENTS AND RESOURCES

In the preparation of this paper, as in the preparation of various opening statements through the years, I have relied, directly and indirectly, consciously and unconsciously, to some extent, on the following excellent discussions of opening statement:

A. G. Nicholas Herman and Barry T. Winston, *Enter Opening Statement*, TRIAL 56 (July, 1995).

B. Allen A. Bailey, *Opening Statement: Drop the Bomb and Head for Home*, TRIALBRIEFS 24 (3d Quarter 1992).

C. JAMES W. MCELHANEY, TRIAL NOTEBOOK 124-37 (1994).

D. THE LITIGATION MANUAL (J. Koeltl 2d ed. 1989).

E. LAWRENCE SMITH AND LORETTA MALENDRO, COURTROOM COMMUNICATION STRATEGIES 332-41, 597-655 (1985).

F. THOMAS MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 49-83 (1980).

