Succeeding in the Opening Statement

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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,1 the more considered view is that the opening statement is very important,2 is perhaps the most important component of the trial,3 and in many cases may actually determine the outcome of trials.4 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

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minds following the opening statements and never deviate from that judgment through deliberations.\textsuperscript{5}

In fact, the results of the University of Chicago Jury Project\textsuperscript{6} 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.\textsuperscript{7} However, notwithstanding the entirely fictional basis for this "study," it remains the case that the opening statement can be of utmost significance.\textsuperscript{8} 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."\textsuperscript{9} Thus, people do not merely receive information; they irresistibly interpret that information so as to give it meaning,\textsuperscript{10} even under circumstances in which the infor-

\textsuperscript{5} 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 statements).


\textsuperscript{7} 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).

\textsuperscript{8} Carlson & Imwinkelried, supra note 2, § 5.2, at 79.


\textsuperscript{10} Id.
information 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.\textsuperscript{11} 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."\textsuperscript{12} 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.\textsuperscript{13} Jurors might then naturally pay particular attention to evidence that confirms their formed beliefs and disregard incongruous evidence.\textsuperscript{14}

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.\textsuperscript{15} The perceptions created by the opening statement establish a "belief system" that colors the processing of the evidence received at trial.\textsuperscript{16} To some unspecifiable degree, that belief system should be expected to cause jurors to perceive, or possibly misperceive, the evidence in certain ways.\textsuperscript{17}

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

\textsuperscript{11} LUCAS \& MCCOY, supra note 4, § 8.3, at 115.
\textsuperscript{12} LAWRENCE S. WRIGHTSMAN, PSYCHOLOGY AND THE LEGAL SYSTEM 256 (1987).
\textsuperscript{13} CARLSON \& IMWINKELRIED, supra note 2, § 5.2, at 80.
\textsuperscript{14} WRIGHTSMAN, supra note 12, at 256.
\textsuperscript{15} ROBERT V. WELLS, SUCCESSFUL TRIAL TECHNIQUES OF EXPERT PRACTITIONERS § 6.01, at 177 (1988).
\textsuperscript{16} LUCAS \& MCCOY, supra note 4, § 8.1, at 110 \& § 8.3, at 115.
\textsuperscript{17} Id. at 114-15; Becton \& Stein, supra note 4, at 12.
and unfamiliar format, much like the commonly used metaphor of pieces of a jigsaw puzzle. 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. 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. Jurors are also more likely to hear details they expect to hear based upon the opening statement and to fail to notice inconsistent points. Consequently, a superior opening statement can predispose the jury favorably, preemptively affect the jury’s reception of the evidence and ultimately affect the eventual verdict.

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, believed and embraced, and least likely to be discarded. At this early

18 See TANFORD, supra note 1, at 143.
19 See WELLS, supra note 15, § 6.02, at 178.
20 Crawford, supra note 5, at 185.
22 LUCAS & McCOY, supra note 4, § 8.3, at 114.
23 Sams, supra note 1, at 28.
24 Becton & Stein, supra note 4, at 10.
25 DECOF, supra note 2, § 1.01[1], at 1-4; JOHN NICHOLAS IANNUZZI, HANDBOOK OF TRIAL STRATEGIES 239 (2d ed. 2001).
26 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.
27 Baum, supra note 5, at 18; LUCAS & McCOY, supra note 4, § 8.3, at 114.
succeeding in the opening statement

stage of the trial, jurors are most likely to be open-minded and impressionable, fresh and attentive, interested and curious, and willing to recognize that the lawyer speaking to them knows more about the case than they do.

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. At least in a jury trial, the opportunity to present an opening statement should never be waived. And while there might be some advantages to defense counsel to delay opening statement until it immediately precedes the presentation of the defense case, most experts advise that defense counsel present the opening statement immediately following the opening statements of the plaintiff or the prosecution. Leaving the opponent's opening statement uncontradicted in the minds of the jurors is extremely dangerous, and a delayed defense opening might be too late to reverse the impact of the prosecution's opening.

There are also certain collateral benefits to be obtained from a quality opening statement. At least in civil cases, a not insignificant number of

29 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).
30 CARLSON & IMWINKELRIED, supra note 2, § 5.2, at 80; DECOF, supra note 2, § 2.02, at 2-7; Jennings, supra note 3, at 35.
31 DECOF, supra note 2, § 1.03[1], at 1-8; Steven P. Grossman, Trying the Case: Opening Statements, CASE MD-CLE 7 (1999).
32 Jennings, supra note 3, at 35.
33 Crawford, supra note 5, at 185; Jennings, supra note 3, at 34.
34 BAILEY & ROTHBLATT, supra note 21, § 9:5, at 244; HAYDOCK & SONSTENG, supra note 2, § 7.2, at 297; Jennings, supra note 3, at 33.
35 75 AM. JUR. 2d, Trial, supra note 3, § 531, at 110; HAYDOCK & SONSTENG, supra note 2, § 7.2, at 297.
36 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.
37 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.
38 BAILEY & ROTHBLATT, supra note 21, § 9:2, at 242; Ordover, supra note 28, at 182.
cases are resolved by settlement immediately or shortly following the
opening statements.\textsuperscript{39} 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 oppo-
nent’s presentation, a superior opening statement can provoke a quick
conclusion to the trial.\textsuperscript{40}

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.\textsuperscript{41}

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.\textsuperscript{42}

\section*{II. Guidelines for an Effective Opening Statement}

\subsection*{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

\textsuperscript{39} CARLSON \& IMWINKELRIED, supra note 2, § 5.2, at 80.
\textsuperscript{40} Becton \& Stein, supra note 4, at 10.
\textsuperscript{41} Lundquist, supra note 4, at 171.
\textsuperscript{42} 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.
will be well-received. 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. 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. The most convincing factual points to be made during the closing should be the same points emphasized in the opening. 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, 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.

Generalizations about jurors are, for the most part, no more useful than generalizations about any other group of people. However, given the cir-

43 Lundquist, supra note 4, at 169.
44 Eannance, supra note 3, at 45.
45 HAYDOCK & SONSTENG, supra note 2, § 7.2, at 296.
46 Eannace, supra note 3, at 44; Jossen, supra note 5, at 1.
47 HAYDOCK & SONSTENG, supra note 2, § 7.2, at 296.
48 Lundquist, supra note 4, at 169.
cumstance 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.\footnote{Littleton, \textit{supra} note 29, at 295.} 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.\footnote{CONE \& LAWYER, \textit{supra} note 2, § 9.5, at 268; DECOF, \textit{supra} note 2, § 1.16, at 1-38; Littleton, \textit{supra} note 29, at 295; Weaver, \textit{supra} note 3, at 5.} If the opening statement is itself clear and straightforward, it will likely produce a relaxed confidence among the jurors.\footnote{Id.; TANFORD, \textit{supra} note 1, at 162.} The jurors are likely to be receptive to the attorney who makes them feel comfortable and competent in their role as jurors.\footnote{DECOF, \textit{supra} note 2, § 1.16, at 1-37 (twenty to thirty minutes); Eannace, \textit{supra} note 3, at 44; Jossen, \textit{supra} note 5, at 6; Weaver, \textit{supra} note 3, at 5 (thirty minutes).}

One fundamental means to implement this goal of simplicity is to narrow and describe the real factual issues in the case.\footnote{DECOF, \textit{supra} note 2, § 1.16, at 1-37.} 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.\footnote{HAYDOCK \& SONSTENG, \textit{supra} note 2, § 7.4, at 309.} A brief opening is more likely to retain the attention of the jurors,\footnote{Grossman, \textit{supra} note 31, at 11.} while a longer presentation runs an increased risk of boring the jurors.\footnote{CARLSON \& IMWINKELRIED, \textit{supra} note 2, § 5.5(D), at 89.} 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.\footnote{\textit{Id.}; \textit{Jossen, supra} note 5, at 1.} The attorney simply has to be selective about which details to include.\footnote{\textit{Id.; TANFORD, supra} note 1, at 162.}
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. 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. 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. 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.

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

59 HAYDOCK & SONSTENG, supra note 2, § 7.04, at 308.
60 BAILEY & ROTHBLATT, supra note 21, § 9:17, at 254.
61 TANFORD, supra note 1, at 164; Eannance, supra note 3, at 45.
62 TANFORD, supra note 1, at 164.
63 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, at 4; Brent D. Holmes, Opening Statements: A Plaintiffs’ Lawyer’s Guide, 83 ILL. B.J. 91, 92 (1995); Weaver, supra note 3, at 2, 7.
64 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.
65 BAILEY & ROTHBLATT, supra note 21, § 9:16, at 254.
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. The objective is to create a mental picture of the relevant events as if the jurors had themselves witnessed those events.

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. 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.

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. The objective is to verbally convey the jurors to the position of themselves having witnessed the described events.

Like any good story, the narrative told in the opening statement should have a structure that makes it easy to follow and understand. Absent some compelling reason to choose an alternative structure, the story component of the opening statement should be presented in chronological

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66 DECOF, supra note 2, § 2.01, at 2-2.
67 TANFORD, supra note 1, at 164.
68 75 AM. JUR. 2d, Trial, supra note 3, § 516, at 93.
69 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.
70 HAYDOCK & SONSTENG, supra note 2, § 7.3, at 305; Grossman, supra note 31, at 8; Weaver, supra note 3, at 3-4.
71 Eannance, supra note 3, at 41.
72 HAYDOCK & SONSTENG, supra note 2, § 7.3, at 300.
order. A chronological presentation usually has the dual virtues of being the easiest method for arranging and delivering the relevant details, as well as being the easiest for the jurors to follow and comprehend.

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.

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. 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.

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.

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 cere-

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73 75 AM. JUR. 2d, Trial, supra note 3, § 516, at 94.
74 HAYDOCK & SONSTENG, supra note 2, § 7.3, at 300; Littleton, supra note 29, at 299-300; TANFORD, supra note 1, at 163.
75 HAYDOCK & SONSTENG, supra note 2, § 7.3, at 300; Littleton, supra note 29, at 299-300.
76 TANFORD, supra note 1, at 161.
77 CARLSON & IMWINKELRIED, supra note 2, § 5.5(A), at 83; Ordover, supra note 28, at 182; Weaver, supra note 3, at 8.
78 CARLSON & IMWINKELRIED, supra note 2, § 5.5(A), at 83; Ordover, supra note 28, at 182.
79 BAILEY & ROTHBLATT, supra note 21, § 9:15, at 253.
monial 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, plaintiff’s 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.  

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. Indeed, there is no need to mention witnesses at all, either by name or in general. 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

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80 See TANFORD, supra note 1, at 161-62; Weaver, supra note 3, at 7.
81 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.
82 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.
the opening statement as characters in the story and not as storytellers themselves.83

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.84 The theory of the case must be clearly conveyed to the jurors in the opening statement.85

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.86 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 jury in the opening statement.87 Some advise that a theme should be presented in every case,88 and one has even suggested that the primary purpose of the opening statement is to deliver the case’s theme to the jurors.89

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.90 Second,

83 TANFORD, supra note 1, at 161-62.
84 Becton & Stein, supra note 4, at 16.
85 Jossen, supra note 5, at 1.
86 See HAYDOCK & SONSTENG, supra note 2, § 7.1, at 294; Becton & Stein, supra note 4, at 16.
87 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.
88 Grossman, supra note 31, at 2; Weaver, supra note 3, at 5.
90 Ordover, supra note 28, at 176.
even after being deluged with innumerable pieces of information, the jurors are likely to recall and remain focused upon a well-chosen theme.\textsuperscript{91}

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.\textsuperscript{92} 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 rightness of the speaker's cause.\textsuperscript{93}

Not only is it important to command the interest of the jurors,\textsuperscript{94} it is also absolutely critical to capture that interest at the very outset of the opening statement.\textsuperscript{95} Arguably, the most crucial portion of the opening statement is the first minute or two,\textsuperscript{96} 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.\textsuperscript{97} The opening is not the time to bore the jury with bland introductions, tired clichés or somnambulistic rhetoric about trial procedures and the importance of jury service.\textsuperscript{98} This is the time to win over the jurors with a dramatic opening salvo.\textsuperscript{99} 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

\textsuperscript{91} \textsc{Haydock & Sonsteng, supra} note 2, § 7.3, at 303.
\textsuperscript{92} \textsc{Cone & Lawyer, supra} note 2, § 9.8, at 269.
\textsuperscript{93} Grossman, \textit{supra} note 31, at 3.
\textsuperscript{94} \textsc{Cone & Lawyer, supra} note 2, § 9.2, at 266.
\textsuperscript{95} \textsc{Ronald L. Carlson, Successful Techniques for Civil Trials} § 6:15, at 154 (2d ed. Supp. 2005).
\textsuperscript{96} Becton & Stein, \textit{supra} note 4, at 16.
\textsuperscript{97} Grossman, \textit{supra} note 31, at 1-2, 7.
\textsuperscript{98} \textit{Id}.
\textsuperscript{99} \textsc{Haydock & Sonsteng, supra} note 2, § 7.3, at 303.
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. Any introductions, pleasantries or housekeeping matters can wait until 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. The theory of the case and the theme should be developed throughout the entire trial. In the closing argument, both the theme and the theory of the case should be revisited, 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

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100 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; Eannace, supra note 3, at 42.

101 CARLSON, supra note 5, § 6:16, at 463; CONE & LAWYER, supra note 2, § 9.10, at 270; Eannace, supra note 3, at 44.

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

103 Eannace, supra note 3, at 44.
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 recogniz-
able. 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. The essence of a good
theme is that it is a catchy, quick and short reference that can be immedi-
ately 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 compi-
cated, it is useless.

Second, a good theme should also be interesting. 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. 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 counterproduc-
tive 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.

104 Carlson, supra note 5, § 6:16, at 461.
105 Weaver, supra note 3, at 2.
106 Eannace, supra note 3, at 42.
Fourth, a good theme must be universally recognizable. 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. 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. 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, while defense counsel should refer to the defendant by name and never as “the defendant.” Never refer to your

107 TANFORD, supra note 1, at 158.
108 DECOF, supra note 2, § 1.03[3], at 1-9.
109 CARLSON & IMWINKELRIED, supra note 2, § 5.5(A), at 82.
110 Eannace, supra note 3, at 44.
111 BAILEY & ROTHBLATT, supra note 21, § 9:18, at 255.
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. Physically touching your client under appropriate circumstances can convey the desirable inference of personal support and endorsement.

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 and can even impact the verdict. The attorney is the most visible person that jurors will associate with the client's case. 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. 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. The opening statement is also the stage of the trial at which that personal credibility is so critical. 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.

It is probably the case that some or all of the jurors will presumptively mistrust you because you are a lawyer, and it is certainly wise to pro-

112 Id. § 9:15, at 253.
113 CARLSON & IMWINKELRIED, supra note 2, § 5.5(A), at 82.
114 CARLSON, supra note 5, § 6:15, at 459.
115 Grossman, supra note 31, at 12.
116 Id.
117 DECOF, supra note 2, § 1.14[1], at 1-35; Weaver, supra note 3, at 4.
118 Crawford, supra note 5, at 184; Jossen, supra note 5, at 6.
119 Eannace, supra note 3, at 41.
120 Baum, supra note 5, at 20; DECOF, supra note 2, § 1.14[1], at 1-35.
121 DECOF, supra note 2, § 1.14[1], at 1-34; Weaver, supra note 3, at 4-5.
ceed 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. Any visual or verbal indications of arrogance, deception or bluster will only further alienate the jurors. In particular, never talk down to the jurors or otherwise treat them condescendingly. 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, go a long way toward making the jurors comfortable with you personally.

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. For the lawyer presenting the opening statement, this would include not only evincing empathy for the jurors personally, but also identifying with the assignment of the jurors to discover the truth. 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. 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.

In order for the attorney to establish credibility in the opening statement, she must project absolute sincerity in the contents of her representations. The jurors are more likely to trust the lawyer who is, or at least

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122 DECOf, supra note 2, § 1.14[4], at 1-36.
123 Id.; Jossen, supra note 5, at 6.
124 DECOf, supra note 2, § 1.07[1], at 1-18; Becton & Stein, supra note 4, at 18; Weaver, supra note 3, at 3.
125 DECOf, supra note 2, § 1.14[3], at 1-36.
126 Id. § 1.07[3], at 1-20.
127 WELLS, supra note 15, § 6.19, at 239.
128 Id. § 6.20, at 241.
129 Id. § 6.19, at 239.
130 Lundquist, supra note 4, at 170.
131 DECOf, supra note 2, § 1.06[3], at 1-17 & § 1.08[4], at 1-22.
appears to be, candid. This, of course, is relatively easy to accomplish in cases where the lawyer truly believes in her cause. However, even in the absence of that luxury, the attorney must present an attitude of sincerity. 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.

Credibility is also established by a perception of competence. 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. The appearance of confidence will increase the credibility of the attorney, as is the case with witnesses who seem sure of their accounts.

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. 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 preparation.

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. Those qualities will be accomplished by some combination of ability, experience and rehearsal of the opening statement in the particular case.

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133 BAILEY & ROTHBLATT, supra note 21, § 9.19, at 275; Becton & Stein, supra note 4, at 18.
134 DECOF, supra note 2, § 1.12[6], at 1-32.
135 Weaver, supra note 3, at 7.
136 DECOF, supra note 2, § 1.14[4], at 1-36; Weaver, supra note 3, at 7.
137 Eannace, supra note 3, at 41.
138 DECOF, supra note 2, § 1.14[3], at 1-36; Weaver, supra note 3, at 7.
139 Becton & Stein, supra note 4, at 18; Jossen, supra note 5, at 6.
140 Becton & Stein, supra note 4, at 12.
141 Lundquist, supra note 4, at 169; Becton & Stein, supra note 4, at 12.
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 and to be alienated by those who are hostile or discourteous, even toward their adversaries. 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. Humor can be an attractive trait, especially if it is directed at oneself.

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142 Jossen, supra note 5, at 6.
143 Ordover, supra note 28, at 183; Jossen, supra note 5, at 12.
144 Jossen, supra note 5, at 12.
145 Id.
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.146 Yet one of the most common mistakes in openings is exaggeration or overstatements by the attorney.147 This absolutely must be avoided. Never exaggerate or overstate your case.148 Never state or promise anything that you cannot, or even might not, be able to prove.149 Never attempt to mislead the jurors or distort what the evidence will actually show.150

Promises made explicitly or implicitly to the jurors during opening statement are fine only if the promised evidence is delivered.151 If you do not keep a promise, expect your credibility to suffer,152 much like the general credibility of a witness whose 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.153 Studies with mock jurors indicate that this sequence of events affects the verdict more negatively than a conservative and accurate opening statement.154

146 Cone & Lawyer, *supra* note 2, § 9.2, at 266; Decof, *supra* note 2, § 1.14[2], at 1-35.
147 Tanford, *supra* note 1, at 144, 166.
150 Decof, *supra* note 2, § 1.14[2], at 1-35.
H. Weaknesses and Bad Facts

The conventional wisdom is that weaknesses and bad facts should be admitted in the opening statement. 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. 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.

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. For one thing, mentioning an item in the opening statement assigns to that item a significance it might otherwise lack. 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 unimportance.

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

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155 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.

156 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.

157 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.

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

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 and should be explained away.

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. 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.

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. The trick is understanding exactly what can and cannot be said.

160 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.

161 BAILEY & ROTHBLATT, supra note 21, § 9:11, at 249.

162 See infra notes 171-200 and accompanying text.

163 BAILEY & ROTHBLATT, supra note 21, § 9:11, at 249.

164 Littleton, supra note 29, at 296.
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.\textsuperscript{165} 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.\textsuperscript{166}

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\textsuperscript{167} and will distrust the lawyer who apparently misrepresented the evidence.\textsuperscript{168} 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.\textsuperscript{169} The better course is to include in the opening statement only evidence the admissibility of which seems practically certain.\textsuperscript{170}

2. Argument

Argument is not allowed in the opening statement.\textsuperscript{171} The line between permissible preview of the evidence and impermissible argument is

\textsuperscript{165} 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.

\textsuperscript{166} 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.

\textsuperscript{167} Jossen, supra note 5, at 10.

\textsuperscript{168} Littleton, supra note 29, at 300; Lundquist, supra note 4, at 172.

\textsuperscript{169} HAYDOCK & SONSTENG, supra note 2, § 7.2, at 295.

\textsuperscript{170} DECOF, supra note 2, § 1.06[5], at 1-18; Littleton, supra note 29, at 300; TANFORD, supra note 1, at 167.

\textsuperscript{171} 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.
neither obvious nor the object of any true consensus.\textsuperscript{172} 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.\textsuperscript{173} Counsel crosses the line when she "interprets the facts,"\textsuperscript{174} "provide[s] explanations, propose[s] conclusions, comment[s] on the evidence,"\textsuperscript{175} or "draw[s] inferences."\textsuperscript{176} In practice in many courtrooms, opening statements contain more argument than the rules technically sanction.\textsuperscript{177}

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.\textsuperscript{178} The key is to be persuasive without engaging in argument.\textsuperscript{179} A good opening statement is one that allows the facts themselves to point to the desired conclusion without argument.\textsuperscript{180} Trust that the same set of facts that persuaded you to proceed to trial will also persuade the jurors.\textsuperscript{181} In fact, a detailed factual account may be even more persuasive than a more transparent and conclusory attempt to persuade.\textsuperscript{182}

The art and skill of persuasion without argument is demonstrated in the selection and organization of the facts.\textsuperscript{183} For every important conclusion, make a list of facts that support that inference. Be sure to include

\textsuperscript{172} HAYDOCK & SONSTENG, supra note 2, § 7.1, at 294.
\textsuperscript{173} CARLSON & IMWINKELRIED, supra note 2, § 5.5(D), at 87; HAYDOCK & SONSTENG, supra note 2, § 7.1, at 294.
\textsuperscript{174} DECOF, supra note 2, § 2.03[2][d], at 2-24.
\textsuperscript{175} HAYDOCK & SONSTENG, supra note 2, § 7.1, at 294.
\textsuperscript{176} Ordover, supra note 28, at 178.
\textsuperscript{177} HAYDOCK & SONSTENG, supra note 2, § 7.1, at 294; Ordover, supra note 28, at 178.
\textsuperscript{178} 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.
\textsuperscript{179} TANFORD, supra note 1, at 144; Becton & Stein, supra note 4, at 21.
\textsuperscript{180} BAILEY & ROTHBLATT, supra note 21, § 9:19, at 255; Eannace, supra note 3, at 42.
\textsuperscript{181} TANFORD, supra note 1, at 144.
\textsuperscript{182} Becton & Stein, supra note 4, at 21.
\textsuperscript{183} 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.
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.” Some lawyers recommend this tactic, and some judges require it. Unless required, this practice is undesirable. The perpetual interjection of such introductory phrases is boring, deprives the opening of its narrative flow 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. Except in the rare circumstance in which counsel must unavoidably tread close to the boundary of impermissible argument, such phrases should not be used. For the

184 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.

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

186 HAYDOCK & SONSTENG, supra note 2, § 7.4, at 307.

187 Sams, supra note 1, at 29-30.

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

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

190 Becton & Stein, supra note 4, at 21; Weaver, supra note 3, at 3.
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, 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. 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. This would include, from the plaintiff's or prosecutor's perspective, anticipating and attacking defenses. Others argue that it is usually a mistake to discuss an opponent's evidence, and in particular that plaintiffs and prosecutors should not discuss anticipated defenses in the opening statement. 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.

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.

191 HAYDOCK & SONSTENG, supra note 2, § 7.7, at 330.
192 Id. § 7.1, at 293.
193 Jossen, supra note 5, at 10.
194 HAYDOCK & SONSTENG, supra note 2, § 7.5, at 320; Eannace, supra note 3, at 42.
195 TANFORD, supra note 1, at 166.
196 DECOF, supra note 2, § 1.19[1], at 1-46 & § 1.19[3], at 1-47.
197 Id.
198 Ordover, supra note 28, at 181.
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. You can even discuss the evidence that will not be presented by the opposition at trial. 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. Exactly what this rule means in practice varies by jurisdiction and even by individual judge. Some courts jealously guard their exclusive province of instructing on the law 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

199 DECOF, supra note 2, § 2.01[3], at 2-6; HAYDOCK & SONSTENG, supra note 2, § 7.5, at 319.
200 See HAYDOCK & SONSTENG, supra note 2, § 7.5, at 324.
201 See Eannace, supra note 3, at 45.
202 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.
203 See DECOF, supra note 2, § 1.11[1], at 1-29.
case, 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.

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 and meticulously accurate. What will likely not be tolerated are detailed discussions of the law, explanations of the law beyond the standard formulations, presentations that appear as attempts to instruct the jury on the law and arguments on the law. 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.

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. 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. 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 reason-

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


208 See *id.* § 7.7, at 328; Jossen, *supra* note 5, at 11.


211 See CARLSON, *supra* note 5, § 6:15, at 459-60.


213 See Becton & Stein, *supra* note 4, at 18.

able 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.215 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.216

J. Responding to Objections

Despite the greatest efforts to offer nothing objectionable in the opening statement, counsel should nevertheless anticipate the possibility

215 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.

216 See DECOF, supra note 2, § 1.06[5], at 1-18 & § 2.03, at 2-30 to -32.
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. The other ingredient for defeating objections during opening statements is to respond quickly and confidently. 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, 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. 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. If the objection is

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219 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.
220 See Melilli, supra note 218, at 589-90.
221 See Decof, supra note 2, § 1.06[4], at 1-17.
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. Such a practice is unprofessional and probably counterproductive. The jurors might well surmise your real purpose and hold you in low regard as a result. In any event, perhaps in part due to this practice, many judges disfavor objections during the course of opening statement. A few courts permit such objections to be made only at the conclusion of the opening statement. 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. 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. Even if one does object successfully, there is little point in doing so if the opponent can simply rephrase and accomplish the same result.

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 and if the material to be excluded is truly important. A trial attorney reticent to object during the course of her opponent’s opening statement is not without weapons to combat an overly

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222 Lundquist, supra note 4, at 174.
224 DECOF, supra note 2, § 1.06[2], at 1-16.
225 John C. Conti, Trial Objections, 14 LITIG. 16, 17 (Fall 1987).
226 Melilli, supra note 218, at 587.
228 BAILEY & ROTHBLATT, supra note 21, § 9:19, at 256; Lundquist, supra note 4, at 173.
229 DECOF, supra note 2, § 1.06[2], at 1-16.
230 CONE & LAWYER, supra note 2, § 9.21, at 276; TANFORD, supra note 1, at 173; Grossman, supra note 31, at 13-14.
231 CONE & LAWYER, supra note 2, § 9.21, at 276.
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. 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.

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. 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. 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. Some attorneys strive to captivate and inspire jurors

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232 Haydock & Sonsteng, supra note 2, § 7.2, at 295; Lundquist, supra note 4, at 173.
233 Tanford, supra note 1, at 174.
234 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.
235 Eannace, supra note 3, at 44.
236 Bailey & Rothblatt, supra note 21, § 9:15, at 253; Eannace, supra note 3, at 42.
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.\(^{237}\) 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.\(^{238}\) Maintain the attention of the jurors by occasionally varying each of the three variables, either individually or in various combinations.\(^{239}\) 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.\(^{240}\)

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.\(^{241}\) 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,\(^{242}\) but not so close as to make the jurors uncomfortable or to enter the area the jurors might regard as their area of privacy.\(^{243}\)

\(^{237}\) DECOF, supra note 2, § 1.12[2], at 1-31.

\(^{238}\) 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.

\(^{239}\) 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.

\(^{240}\) DECOF, supra note 2, § 1.12[3], at 1-31.

\(^{241}\) 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.

\(^{242}\) DECOF, supra note 2, § 1.08[5], at 1-23; HAYDOCK & SONSTENG, supra note 2, § 7.6, at 326.

\(^{243}\) DECOF, supra note 2, § 1.08[5], at 1-23; Lundquist, supra note 4, at 169; Eannace, supra note 3, at 44.
While delivering the opening statement, look directly at the jurors,244 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.245 Move your gaze from one juror to another, including each juror in turn.246 By doing so, you will enhance your credibility and apparent sincerity, as well as hold the attention of the jurors.247

Do not read a prepared opening statement.248 In fact, to the fullest extent possible, do not use any notes in the opening.249 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.250 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.251

Some movement, as distinguished from unwavering immobility, is an asset simply because it suggests that the lawyer is comfortable and confident.252 Generally, however, movement and gestures are most effec-

244 BAILEY & ROTHBLATT, supra note 21, § 9:15, at 253.
245 CARLSON & IMWINKELRIED, supra note 2, § 5.6, at 93; Eannace, supra note 3, at 44.
246 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.
247 HAYDOCK & SONSTENG, supra note 2, § 7.6, at 326.
248 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.
249 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.
250 Weaver, supra note 3, at 4.
251 CARLSON & IMWINKELRIED, supra note 2, § 5.6, at 94.
252 Holmes, supra note 63, at 92.
tive if they are purposeful— that is, the actions of the attorney complement the spoken words and assist in conveying the desired message. 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.

Consequently, some thought should be given to orchestrating movements with a desired visual compliment to the auditory message. 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. Relocating oneself to a different position in the courtroom can compliment the transition from one portion of the opening statement to another.

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 comprehensible or not understood, and the like. For that reason, trial
attorneys should keep a portion of their focus upon the jurors at all times in the courtroom. 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.  

**N. Concluding the Opening Statement**

At the conclusion of the opening statement, counsel must specify the actual verdict she desires from the jurors. In doing so, one must be careful not to engage in impermissible argument. 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.

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259 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.  
261 TANFORD, *supra* note 1, at 165.  
262 DECOF, *supra* note 2, § 1.21[3], at 1-57 to -58.