OPENING STATEMENT

Successful Trial Advocacy
Starts With Your Opening Statement

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I. INTRODUCTION

Many lawyers feel that an opening statement is the most critical part of your trial. Cases may be won or lost at opening.

According to the most extensive study ever done of the american jury, researchers concluded that eighty percent of the jurors will decide liability by the end of opening statements, and will not change their minds. "The University of Chicago Jury Research Study," H. Kalven and H. Zeisel (1966).

I don't personally subscribe to the finding of Kalven and Zeisel. I think their research more showed that jurors render a verdict in accord with their initial impression if the trial plays out according to the opening statement. Whichever is true, it is unquestionably true that a strong opening statement is very important. As often in life, you only get one chance to make a good first impression. It is certainly true that, if your opening statement is a poor one, or if you tell the jury you are going to prove things that you can't and don't, you are really playing with fire, and it is hard to come back from that kind of a start.

Keeping in mind this grave importance, we first review statutes and cases governing opening and then look to some general considerations in delivering a successful opening statement.

II. GEORGIA OPENING STATEMENT STATUTES

A. O.C.G.A. § 9-10-180. Time limits for arguments; nonfelony cases; appeals from inferior courts.[1]

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[1] Note the conflict with the following Uniform Superior Court Rule:

> 13.1 Time Limitations. Counsel shall be limited in their arguments as follows:

> Counsel shall be limited in their arguments to two hours on a side. In cases appealed from justices of the peace courts and county courts, counsel for neither party shall, without special leave of the court obtained before the argument is opened, occupy more than one-half hour in the whole discussion of the case after the evidence is closed.

B. O.C.G.A. § 9-10-181. Extension of time limit for argument after application therefor.[2]

> If counsel on either side, before argument begins, applies to the court for extension of the time prescribed for argument and states in his place or on oath, in the discretion of the court, that he or they cannot do the case justice within the time prescribed and that it will require for that purpose additional time, stating how much additional time will be necessary, the court shall grant such extension of time as may seem reasonable and proper.

C. O.C.G.A. § 9-10-182. Number of counsel who may argue case.[3]

> Not more than two counsel for each side shall be permitted to argue any case, except by express leave of the court; and in no case shall more than one counsel be heard in conclusion.

D. O.C.G.A. § 9-10-183. Use of blackboard, models, etc., in argument.

> In the trial of any civil action, counsel for either party shall be permitted to use a blackboard and models or similar devices

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> (A) Capital felony case in which the death penalty is sought -- 2 hours each side.
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> (B) Any other felony case -- 1 hour each side.
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> (C) Misdemeanor case -- 30 minutes each side.
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> (D) Civil cases other than appeals from magistrate courts -- 1 hour each side.
>
> (E) Appeals from magistrate courts -- 30 minutes each side.

[2] A similar provision appears in Uniform Superior Court Rule 13.2.

[3] This same provision applies to criminal actions under O.C.G.A. § 17-8-170, and also appears in Uniform Superior Court Rule 13.3.

in connection with his argument to the jury for the purpose of illustrating his contentions with respect to the issues which are to be decided by the jury, provided that counsel shall not in writing present any argument that could not properly be made orally.

E. O.C.G.A. § 9-10-184. Value of pain and suffering may be argued.

In the trial of a civil action for personal injuries, counsel shall be allowed to argue the worth or monetary value of pain and suffering to the jury; provided, however, that any such argument shall conform to the evidence or reasonable deductions from the evidence in the case.

F. O.C.G.A. § 9-10-185. Prejudicial statements by counsel; prevention by court; rebuke of counsel and instruction to jury; mistrial.[4]

Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same. On objection made, the court shall also rebuke counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds. In its discretion, the court may order a mistrial if the plaintiff's attorney is the offender.

G. Uniform Superior Court Rule 10.2. Opening Statements in Criminal Matters.

The district attorney may make an opening statement prior to the introduction of evidence. This statement shall be limited to expected proof by legally admissible evidence. Defense counsel may make an opening statement immediately after the state's opening statement and prior to introduction of evidence, or following the conclusion of the state's presentation of evidence. Defense counsel's statement shall be restricted to expected proof by legally admissible evidence, or the lack of evidence.

[4] This provision also appears in the criminal code at O.C.G.A. § 17-8-75.

III. GEORGIA CASE LAW GOVERNING OPENING STATEMENT AND THE COMMENTS OF COUNSEL

During opening the attorney is allowed to state only what he expects the evidence will show. Waits v. Hardy, 214 Ga. 41 (1958). Although argument is not permitted, there is a fine line between improper argument and appropriate advocacy. Advocacy in opening statement requires you to choose your words carefully, using whatever figurative speech is appropriate, but not going so far as to get into argument. Of course, the trial court has broad discretion in drawing this line and will not be reversed on appeal absent a manifest abuse of discretion. Hospital Authority v. Smith, 142 Ga. App. 284 (1977). Generally, the Georgia courts give attorneys substantial latitude during opening statement.

For example, in Waits v. Hardy, supra, the Georgia Supreme Court found the statement that the attorney filed a "trumped-up" law suit was within the bounds of advocacy:

> The language used in the argument may be extravagant; but figurative speech is a legitimate weapon in forensic warfare if there are facts admissible in evidence upon which it may be founded.

In Beecher v. Farley, 104 Ga. App. 785 (1961) the court upheld the attorney's characterization of damages as "preposterous and absurd," by noting that the statement was related to what the defendant expected to show.

On the other side of the coin, the remark that "[a]lthough this is a civil case and not a criminal case, I submit to you that nonetheless it is a case of robbery" may be outside the scope of permissible advocacy, and within the realm of impermissible argument. Preferred Risk Insurance Company v. Boykin, 174 Ga. App. 269 (1985). However, the Court of Appeals affirmed the trial court's giving of curative instructions to the jury to disregard this statement, rather than declaring a mistrial. The appellate court held that

although the remark may have been impermissible, it was not so "outrageous or prejudicial" to require a mistrial. Again, the trial court has broad discretion in granting a mistrial and the appellate courts will not reverse that judgment unless that discretion is manifestly abused. Id. at 273.

The granting of a mistrial is only one of the consequences of making improper remarks during opening. Sometimes equally damaging to your case is the reprimand by the court. Not only are you embarrassed before the jury, you may also lose credibility with the jury, which may result in the ultimate loss of your case.

Aside from argument (wherever the line between argument and advocacy is drawn) there are at least three other areas to avoid in opening statement. It is impermissible to refer to inadmissible evidence or irrelevant matters. This is not only a legal requirement, but an ethical one, as well. Under DR-106, Code of Profession Responsibility, "a lawyer shall not state or allude to any matter that he has not reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence." Second, an attorney is not allowed to refer to prejudicial matters. Lastly, detailed instructions on the law are forbidden.

Some of the particular rules of the "cans" and "cannots" of counsel's statement to the jury include the following:

You may comment on the conduct of counsel in the defense of the case. This includes such things as amending the original version of a complaint or answer that may have been filed; the fact that a defense was added late in the case; pleadings may be read; etc. Purvis v. Atlanta N.R. Company, 145 Ga. 517 (1916); McBride & Company v. Macon Tel. Publishing Company, 102 Ga. 422, 999 (1897).

One may not read from the opinions of the courts in order to try to explain to a jury what the law may be. Barfield v. State, 89 Ga. App. 204 (1953) (although this may not apply in the retrial of a case where the law of the case has been established in previous adjudication, Commerce v. Bradford, 94 Ga. App. 284 (1956)).

As expressly provided by statute, blackboards may be used in counsel's presentation, although only that which might otherwise be presented orally may be illustrated on the blackboard. The statute has generally been applied to allow the reasonable use of other physical devices that may not constitute evidence for the purpose of illustrating counsel's contentions to the jury and what he or she expects to prove at trial. Lewyn v. Morris, 135 Ga. App. 289 (1975); Reynolds v. Reynolds, 217 Ga. 234 (1961).

It is improper to include in opening statement assertion of any facts that you do not have a good faith belief will be proved (directly, circumstantially, or by inference) at trial. See Malone Freight Lines, Inc. v. Pridmore, 86 Ga. App. 578 (1952). It is more difficult during opening to enforce this rule than at closing since it is only at closing when the actual evidence will be known. But lawyers who violate this principle and tell the jury things they do not intend to prove as a way of trying to bias a jury usually get caught when opposing counsel reminds a jury that they have been deceived and that the promises of proof made by counsel turned out to be false.

Counsel can never under any circumstances state his or her personal belief as to evidence, the merits, credibility of witnesses, or the proper outcome in the case. Georgia Power Co. v. Puckett, 181 Ga. 386 (1935).

One may not refer to the wealth of property of a party under normal circumstances. Vazey v. Glover, 47 Ga. App. 826 (1933). However, there are certain circumstances, of

course, where the parties' financial circumstances may in fact be germane to the issues before the jury.

You may not ask the jury to put themselves in the position of a party to compare their own situation with that of any party. Doe v. Moss, 120 Ga. App. 762 (1969).

One may not mention the existence of liability insurance in ordinary negligence cases. Patillo v. Thompson, 106 Ga. App. 808 (1962). Violation of this prohibition is grounds for a mistrial or reversal. It cannot be cured by striking the comment or instructing the jury to disregard it. Rodgers v. Styles, 100 Ga. App. 124 (1959).

Statements to the jury that imply that there is insurance are equally forbidden. For example, plaintiff's counsel should not state that the defendant "does not care" about the amount of the verdict as a way of trying to communicate to the jury that defendant would not ultimately pay it, because it would in fact be covered by insurance. Thomas Milling Company v. Branch, 118 Ga. App. 857 (1968).

Personal attacks on opposing counsel are strictly forbidden.

While the credibility of witnesses may be challenged, even in scathing language, the witnesses themselves may not be attacked for reasons unjustified by the evidence or for reasons unrelated to the cause. DeFreese v. Beasley, 114 Ga. App. 832 (1966).

Counsel may not refer to what the outcome has been in other cases. Atlantic Coastline Railroad v. Coxwell, 93 Ga. App. 159 (1955).

While the State may not comment on the failure of the accused to take the witness stand in a criminal case, counsel may comment on the failure of a party to take the stand, to testify, or to rebut statements attributable to him. Miller v. Coleman, 213 Ga. 125 (1957).

One may not appeal to the jurors' prejudice against corporations, no matter how natural that may be. Brunswick & W.R. Company v. Wiggins, 113 Ga. 842 (1901).

Rarely is it advantageous for an attorney to respond in kind to improper statements of opposing counsel, and especially to personal attacks made by opposing counsel. Improper conduct of your opponent, of course, is not a justification for your own, notwithstanding the principle of law that injuria non excusat injuriam. Banks v. Kilday, 88 Ga. App. 307 (1953).

Normally physical exhibits and documents you intend to put in evidence cannot be shown to the jury during opening statement as they are not in evidence. However, in those courts where judges have more thorough pretrial procedures so that the introduction of exhibits is resolved before the trial commences, and all listed exhibits will be introduced upon tendering those objections that have been previously resolved, the judges will frequently allow you to display those kinds of exhibits to the jury and present them to the jury as well so that they may look at them during opening statements.

IV. GENERAL SUGGESTIONS FOR OPENING STATEMENT

A. Tell the clear, simple story.

The opening statement tells the jury what your case is about. Jurors have a difficult time understanding both the facts and the laws during jury service, particularly nowadays when cases are getting longer and longer and more and more complicated. This is understandable as most jurors are unfamiliar with legal concepts. With this in mind, it is important for your opening statement to tell a clear, simple story.

Chronological order is usually the easiest way to tell a story. One way to think of opening is to pretend you have met your friend for dinner and you begin by telling your friend "let me tell you what happened today," and proceed to tell who, what, how and why

in a simple narrative. Some people find it a good practice to actually give this opening to a spouse, friend or colleague. If that person does not understand the facts, then you need to work more on simplifying your opening.

Sometimes simplification is the hardest task of all, but it is essential to a good opening. You will have lived with this case for months or even years, but you must pare it down to the basics for the opening. Even the most complicated facts or legal theories can be broken down. For example, consider the following opening for an anti-trust case:

> What the Sherman Act says, in simple language, is that two or more people who are competing in the same market cannot get together and make an agreement that unreasonably eliminates competition from others. The Act protects competition, the governing rule of our economic system. If someone violates the Sherman Act by making such an agreement and injures another competition, they are responsible for damages. That is why we are here today. The defendants made an agreement eliminating competition and causing injury to the plaintiff.

One caveat: Although the importance of simplification can't be stressed enough, make sure you present enough facts to the jury to satisfy all the elements of your cause of action or counterclaim in order to survive a motion for directed verdict.

B. Establish a "hook."

A hook is an advertising term describing a slogan, word, or phrase that grabs one's attention and sticks in their mind. Coca-Cola's "The Real Thing" and Dr. Pepper's "Be a Pepper" are examples of hooks. Ideally they evoke an image in a person's mind, but are also easy to remember. They are ideal for opening as the jury's attention and curiosity are at their peak because they know little or nothing about the case at that point. A hook can arouse the jury's interest and focus them on the major theme of your case immediately. That theme can then be carried throughout the trial and into closing. Below are examples of three ways of pulling the jury quickly and firmly into your case:

1. On March 5, 1989, Bill Jones was five years old. It was his last day on earth. How he died, why he died and why he should never have died is what this case is about.

2. On April 14, 1991 Betty Bryant was going to have her 7th birthday party. But Betty never made it because on April 12 her dress caught fire from the kitchen range and burned her to death.

3. Mary Ellis is dead. She died May 5, 1990 when the defendant, driving drunk, struck her head-on as she and her three small children returned from the movies.

These are effective ways to establish a lasting effect on the jury. However, one word of caution: Don't overdramatize it; don't let the emotion of your opening overshadow the facts. There is plenty of opportunity for emotion in closing argument, but the purpose in opening is to tell the jury the facts, straightforward and persuasively, and without muddying them with an abundance of emotion. Most jurors will be turned off by too much emotion at this early stage in trial. Once you have established their trust, you can let your emotions flow in closing argument. In summary, err on the side of understatement.

C. Maintain eye contact with the jury.

You should look directly at each juror one at a time as you speak during opening. Allow your focus to shift from one juror to another, but don't look at any one juror too long. Maintaining eye contact is important for two reasons. First, it establishes a rapport with the jury and lets each juror know you realize their importance to your client and his or her case. Establishing a rapport with the jury generally begins during voir dire. However, opening is the first opportunity you have to cement this relationship, partly because of the fewer number of jurors you are now addressing and partly because you can now get more into the facts. Sincerity is a key ingredient in any opening and it is hard for

a juror to doubt an attorney's sincerity when he or she looks a juror straight in the eye and says, for example, "The defendant defrauded my client, Mr. Harrell, out of $100,000.00."

Second, eye contact is important because it helps an attorney read the juror's reaction. The eyes are truly the window to the soul. While a juror can't communicate verbally to you during opening, her body language, including movement of the eyes, are important indicators of her feelings toward your case. The following story from an attorney is a good illustration:

> I had established a great rapport with one particular juror. From the beginning of opening the juror's eyes were focused on me, and I could tell he identified with my client and what had happened to her. However, at the end of opening when I mentioned a figure for damages, this same juror's eyes rolled up in his head as if to say, "That's a preposterous number." Had I not noticed this reaction, I would not have toned down my damages position and I might have lost a juror on damages when he was so clearly with me on liability.

Another attorney tells the story of how she wondered why the man in the back row of the jury box did not seem affected by her passionate opening concerning a young mother of three, killed by a drunk driver. Shortly after opening the juror fainted -- the emotion of the opening being too much for him. The attorney realized if she had been more attentive, she would have noticed his turning white and pasty during opening.

You can't change your opening or the presentation of your case for every juror, but it is vital to keep a pulse on jury reaction and to adapt as best you see fit. This decision is always a judgment call. In essence, have a game plan for trial, but be flexible enough to change it to keep the jury's attention. After all, they are the ones rendering the verdict.

D. <u>How much do you tell the jury about the trial process itself?</u>

There is a lot of variation in this practice, and the proper extent to which you want to talk about the jury generally will depend upon the particular circumstances of your

case. Naturally, if you have jurors who are on their third trial during that term of court, you need to tell them little about the trial procedure itself. Also, if you have a judge who gives a good overview of the trial process to the jury before you begin opening, you can skip over that also. Some lawyers almost seem to have a fetish about trying to tell jurors about what the trial process is all about. I have seen lawyers spend the majority of their opening statement time talking about what a trial is, how it proceeds, what the juror's function is, and so on -- so much time, in fact, that they realize they have no time left to address their case.

There is a reasonable balance here, and you have to figure out what it is in your particular trial. If a jury is literally empaneled "cold" after voir dire and you are the first to give an opening statement, they need to know something about what a trial is, how it is going to evolve, and so on. They will not only appreciate that and be more integrated into the process, so that they can function as effective jurors, they will also be able to understand better (1) the substantive part of your opening statement that relates to your case and (2) the entire presentation of your case. The jury has to understand what is going on in order to be able to assimilate all of the information that they are being bombarded with.

E. Focus the jury's attention on a couple of specific factors in the trial.

You can find every kind of an opening statement in the abundance of well-tried cases. A different kind of opening statement is appropriate on different cases. But one good general rule about an opening statement, in addition to providing a jury with the overview and roadmap of your case, is to attempt to focus their attention on some critical elements of evidence, and then link those elements to the verdict.

For example, let's say you know you are going to be able to show that the plaintiff in a personal injury case has been a malingerer on some other occasion. At the end of your opening statement as a defense attorney, you may wish to say something like this:

> Now, what we think the case is going to boil down to is this. Is the plaintiff really the kind of person that his lawyers would like you to believe he is? Was he really hurt like he is going to tell you he was, or is he pumping up any real injury he might have actually sustained in order to try and get a big award he is not entitled to? After you have heard all of the evidence, ladies and gentlemen, I think you are going to conclude that Mr. Snake is, unfortunately, a malingerer, someone who likes to get something for nothing. Listen to the evidence you hear on that question for the next two days, ladies and gentlemen, and see what you think about the plaintiff and whether he has tried that before. If that's what you find, ladies and gentlemen, I think you will also find that a verdict for the defendant is the true and right verdict in this case.

So long as this kind of commentary during opening statement is relatively contained, it does not become improper argument. True enough, it is going a bit beyond a pure statement of what the evidence will be, but it is an organizational technique that allows you to help the jury focus on some of the evidence and what the case is all about. If properly and reasonably done, without going overboard, you will not meet an objection.

F. Keep your contract with the jury.

The opening statement is like a contract with the jury because you are telling them what you expect the evidence to prove. Don't break that contract, or your opposing counsel will properly tear you up. It undermines your credibility with the jury, possibly fatally so.

When you get to closing, you will probably want to remind the jury of your opening (and possibly your opponent's opening), and remind them how the evidence fit right into what you told them that it would. The opening lays out the script for the trial,

the witnesses should follow that script, then your closing argument should tie it all together as powerfully as you can.

G. Have the jury keep an open mind.

If you are defending a case, and especially a criminal case, one of your key objectives during opening is to try and get the jury to keep an open mind during the trial. When the evidence starts rolling in, again, especially in a criminal case, the most natural thing for people to do is to decide right and wrong, innocence and guilt, and the verdict right at the outset.

In talking to the jurors about the trial, defense counsel needs to pay particular attention to reminding the jury that there are two sides, and one side happens to go first. It is human nature to believe in what you have heard first, since it is all you have heard. It is not human nature to keep an open mind after that. The more successful you are in doing this, the more you can diminish the effectiveness of the plaintiff's presentation. Some jurors get so cranked up on being skeptical during the opening part of the case, whether civil or criminal, that it loses the effect on them that it might otherwise have if defense counsel's cautionary talk was less effective.

H. Talk about the historic role of trials and jurors.

For most jurors these days, 95 percent of their exposure to the trial process is from the media. A comfortable combination of TV, movies, and criticism of juries that is funded by insurance company networks, manufacturers, and other paid mouthpieces for "big money" who are afraid of the consequences of a jury empowered to hear and determine the truth. Jurors are often cynical and skeptical about their own function, and about the role of lawyers, witnesses, and everyone else effected with trials. This is a

dangerous state of affairs for any party, plaintiff or defendant, state or accused, who is seeking a just result in the case. Cynical jurors cannot perform their function effectively.

As a matter of fact, the american trial advocacy process is a culmination of thousands of years of evolution of a system of justice that is second to no other that has ever existed in any other country at any other time. We, as lawyers, have an important role in the trial process and in making sure that it works effectively. But ultimately, dedicated, honest, sincere jurors are the most critical players in the whole process. If they don't take their work seriously, or if they are cynical, it won't work. You need to do what you can to remind jurors of the very real importance of their function. Many lawyers find that the best way of doing this is to place the role of the jury in the evolution of our trial process is a historical context and to remind them that our trials are the product of thousands of years of trying to come up with the best system of justice.

V. CONCLUSION

The opening statement is the most critical stage at trial. You can lay the foundation to win or lose your case in those key forty minutes or so before the jury. But if you tell the jury a simple, yet powerful story; establish a hook; maintain eye contact and rapport with the jury; avoid unnecessary objections by opposing counsel; focus the jury on a couple of specific factors; keep your contract with the jury; and help them maintain an open mind (if you represent the defendant) you should be well on your way to winning your case.

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