Chapter 29

Opening Statements

§ 29.01 OPENING STATEMENTS GENERALLY

Immediately after the attorneys announce that they are ready to begin trial and before the first witness is called, the prosecuting and defense attorneys (in that order) are permitted to make opening statements, sometimes called opening arguments or opening speeches.

In many jurisdictions the only recognized function of the opening statement is to assist the jury (or the court, in a bench trial) to follow the evidence with greater understanding, by being advised in advance how the testimony of each witness and the function of each exhibit fits into the whole case or the overall theory of the party who presents it. Counsel are accordingly expected to confine their opening statements to (1) outlining the substance of their respective cases; (2) naming their witnesses and summarizing the testimony of each; (3) enumerating the pieces of physical evidence or other exhibits that they will introduce and explaining what each is designed to show; and (4) relating each witness and piece of evidence to the theory of counsel's case (a process in which counsel are permitted to "state" but not to "argue" the inferences that they will subsequently ask the jury or the court to draw from the testimony and exhibits). *See, e.g., United States v. Dinitz,* 424 U.S. 600, 612-13 (1976) (concurring opinion of Chief Justice Burger), quoted with approval in *Arizona v. Washington,* 434 U.S. 497, 513 n.32 (1978) (dictum).

In other jurisdictions considerably more argumentative opening statements are permitted. In still others, the law is not clear regarding the precise function of the opening statement, and individual judges vary in the latitude they allow counsel.

As a practical matter, the trial judge's disposition is crucial in every jurisdiction because the line between describing a case and arguing it is inevitably fuzzy, and any good lawyer will attempt to use his or her first speech to the jury (or the court) to create a favorable impression. Nevertheless, counsel needs to ascertain before trial – both by legal research and by inquiry of local practitioners – whether the jurisdiction and the particular judge insist upon the narrower, "descriptive" form of opening statement or will tolerate a broader measure of argumentation and rhetoric. This is important both in planning the opening statement of the defense and in framing objections during the opening statement for the prosecution.

§ 29.02 THE OPENING STATEMENT FOR THE PROSECUTION

Counsel must be alert to stop the prosecutor from referring to inadmissible evidence in the prosecution's opening statement. *See, e.g.*, *State v. Gutierrez*, 2007-NMSC-033, 142 N.M. 1, 162 P.3d 156 (2007) (revering a conviction because the prosecutor told the jury in an opening statement that the defendant had refused to take a polygraph – a comment on the defendant's

silence that violated the Fifth Amendment). If the probable-cause hearing, pretrial investigation, or discovery has indicated any material prosecution testimony or evidence to which the defense is prepared to object on substantial grounds, defense counsel should raise the matter with the judge before the prosecutor's opening statement. In a jury trial, this should be done outside the hearing of the jury, either at the bench or while the jury is out of the courtroom. Counsel should explain the nature of the evidence and the respondent's objections to it, and counsel should ask that the prosecutor be prohibited from referring to this evidence in opening. In a bench trial, counsel should take the additional precaution of asking that, to the extent practicable, discussion of his or her objections be conducted without the prosecutor's relating the substance of the evidence, so as to avoid the judge's hearing it before ruling on its admissibility. Thus, for example, the parties can usually argue and the judge can rule on the prosecutor's right to present an out-of court statement within the dying-declaration exception to the hearsay rule without discussing the contents of the statement; and they can almost always resolve the defense's chain-of-custody objection to a writing (*cf.* § 8.18 *supra*) or the defense's *Melendez-Diaz* objection to a forensic-science report (see § 30.04(c) *infra*) without reference to the contents of the documents.

In *Frazier v. Cupp,* 394 U.S. 731 (1969), the Supreme Court held that a defendant was not constitutionally entitled to a mistrial when the prosecutor made a reference in opening to evidence that the prosecutor "reasonably expected to produce" (*id.* at 736) but that, as it turned out later, the prosecutor was unable to produce. Advance objection by defense counsel should dispel the reasonableness of the prosecutor's expectation that s/he will be permitted to introduce inadmissible evidence. If the judge expresses reluctance to "edit" the prosecutor's opening – as some judges will – counsel should point out that the precautionary restraint which s/he is requesting is nothing more than a safeguard against the risk of a mistrial which will be in no one's interest: The mistrial remedy will be obligatory if the prosecutor's opening adverts to damaging information that is later ruled inadmissible. *See, e.g.*, *United States v. Novak*, 918 F.2d 107 (10th Cir. 1990) (holding that a mistrial should have been granted because of the prosecutor's improprieties in opening: a prosecutor's opening statement should be an "objective summary of the evidence reasonably expected to be produced" but this "does not allow the prosecution to refer to evidence of questionable admissibility" (*id*. at 109). "To determine whether a prosecutor's failure to introduce facts at trial supporting statements made during opening argument should result in a mistrial, we look to whether the prosecutor acted in good faith and we look at the impact the statements had on the particular trial." *Id*. "During the government's opening argument, the prosecutor made two references to evidence tending to prove Novak's intent. First, over objection of defense counsel, the prosecutor was allowed to tell the jury that 'a citizen reported and provided information to the various DEA agents that the Defendant . . . was selling cocaine from his house . . . .' . . .The prosecutor also stated that the government would introduce evidence showing that the cocaine was 91% pure. ¶ The prosecutor failed to introduce evidence at trial to support either claim. The trial court ruled that the evidence regarding the citizen's tip was hearsay, and no evidence was sought to be introduced supporting the prosecutor's statement regarding the purity of the cocaine." *Id*. at 108. "The prosecutor . . . exceeded the permissible scope of an opening statement by referring to the information contained in the citizen's tip. Although the government argues that it was introducing this evidence to

establish the basis for the D.E.A.'s investigation, and not for the truth of the matter asserted, the prosecutor's actual statement to the jury far exceeded the government's asserted purpose. The statement that 'a citizen reported and provided information . . . that the Defendant . . . was selling cocaine from his house . . . ,' . . . cannot be equated with 'routine testimony' used by police officers to establish why they commenced an investigation. . . . Moreover, the prosecutor should have been well aware of the hearsay problems with this testimony given the government's resistance to Novak's efforts to require the government to disclose the name of the informant." *Id*. at 109.); *State v. Land*, 435 N.J. Super. 249, 88 A.3d 193 (2014) ("[D]efendants claim the right to a new trial because the prosecutor's opening statement articulated a theory of defendants' culpability based on a detailed description of evidence [– featuring the testimony of a witness named Watkins – which was] never presented. . . . [because Watkins later refused to testify despite an immunity grant. T]he State . . . insists that the prosecutor did not act in bad faith . . . ." *Id.* at 269, 88 A.3d at 205. ¶ "The absence of bad faith, however, does not provide quite the shield the State suggests. The principles espoused in our case law regarding consideration of a prosecutor's good faith arise from a concern that not every statement by a prosecutor at variance with the proofs should constitute grounds for reversal and that the public should not suffer the consequences of a reversal 'because of a prosecutor's dereliction.' *Id*. at 269, 88 A.3d at 205-06. "[A]t the time the opening was delivered there was considerable reason to doubt whether Watkins would testify. No one doubted . . . that without Watkins much of what the prosecutor asserted during her opening could not be proven. The prosecutor provided extensive details of defendants' alleged 'grudge' against Watkins and the other specific allegations never proven when only an outline or a roadmap of what the State intended to prove was required. The State's ill-advised opening demonstrated a level of imprudence that cannot be tolerated when pitted against defendants' right to a fair trial. . . . [A] new trial will be required as the only sensible means of redressing the prejudice caused to defendants even when actual bad faith may be absent" *Id*. at 269-70, 88 A.3d at 206.), *endorsed by State v. Greene*, 242 N.J. 530, 550, 233 A.3d 361, 373 (2020) ("A conviction that is the product of an unfair trial will not be saved because the prosecutor acted in good faith. When a prosecutor in an opening statement extensively describes the expected testimony of a key witness – testimony that fully inculpates the defendant in the crime or relates a defendant's confession – and the witness refuses to testify, no curative instruction is likely to have the desired effect of removing the taint of the forbidden information from the jurors' minds. That is certainly true of a confession that is erroneously conveyed to a jury." *Id*. at 552-53, 233 A.3d at 374. (Cases in other jurisdictions reversing convictions when the prosecutor's opening statement promised evidence that the prosecution subsequently failed to produce are collected in *id*. at 550-51, 233 A.3d at 373-74.)); *United States v. Millan*, 817 F. Supp. 1086, 1088-89 & n.2 (S.D.N.Y. 1993) (granting defendants' motion for a mistrial principally because "during opening arguments, the Government told the jury that 'the evidence will show' that [Investigator] Robles played a pivotal role in four undercover purchases of heroin" and the Government "intimat[ed] that Robles was a reliable, credible witness," even though the Government "should have been aware of the problems with its opening argument" because Robles himself was being investigated for "narcotics trafficking"; the Government "took no steps to resolve the predicament before the jury was empaneled," and ultimately informed the court that "Robles will not be called as a witness at trial"; "At a minimum, the Government

should have brought the allegations against Robles . . . to the Court's attention so that the matter could have been resolved before opening arguments, thus, avoiding the necessity for a mistrial."); *State v. Greene*, 242 N.J. 530, 535, 553-54, 233 A.3d 361, 364, 374-75 (2020) (the trial court should have granted a mistrial when a witness whom the prosecution intended to call and whose intended testimony the prosecutor described in opening statement – the defendant's grandmother, whom the prosecutor intended to call to testify to the defendant's having "confessed [to her] his guilt in the shooting death of the victim" – refused to testify; even though there is "no reason to doubt that the prosecutor acted in good faith," and "Greene did not request a mistrial after . . . [the grandmother] refused to testify but instead requested a curative instruction," and the judge complied with defense counsel's request by giving a curative instruction, the prosecutor's description of the confession in opening statement made "an ineradicable impression in the mind of a juror that no curative instruction likely could erase" and resulted in a violation of the defendant's federal and state constitutional rights to a fair trial; when a prosecutor's "opening describes particularized details of the defendant's guilt through the expected testimony of a witness who does not materialize at trial, there arises the potential for irremediable prejudice"); *State v. Land*, 435 N.J. Super. 249, 250, 269-70, 88 A.3d 193, 194, 206 (2014) (reversing a conviction and remanding for a new trial because "the prosecutor's opening statement . . . informed the jurors they would receive evidence from an individual who never testified"; "at the time the opening was delivered there was considerable reason to doubt whether Watkins would testify," and "[n]o one doubted then – or now – that without Watkins much of what the prosecutor asserted during her opening could not be proven."). *See generally* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE MONITORS AND MONITORING, PROSECUTION FUNCTION (4th ed. 2017), Standard 3-6.5(d), *Opening Statement at Trial* ("When the prosecutor has reason to believe that a portion of the opening statement may be objectionable, the prosecutor should raise that point with defense counsel and, if necessary, the court, in advance. Similarly, visual aids or exhibits that the prosecutor intends to use during opening statement should be shown to defense counsel in advance.").

Counsel also should listen for and object to any overly eloquent or emotional opening arguments by the prosecutor (unless s/he prefers to treat them as "opening the door" and to respond in kind), on the ground that they exceed the proper scope of opening statement and are argumentative. *See State v. Rivera*, 437 N.J. Super. 434, 99 A.3d 847 (2014) ("A prosecutor's opening statement should be limited to what the prosecutor 'will prove' and 'not anticipate' the prosecutor's summation." *Id*. at 446, 99A.3d at 854. "A prosecutor's declaration of a defendant's guilt, at best, implies that it is the prosecutor's opinion. [See § 36.11(a) subdivision (4) *infra* for authorities holding that such expressions are universally held improper.] Our Supreme Court suggested that prosecutor may state such a belief if he or she makes it 'perfectly plain' that the belief 'is based solely on the evidence that has been introduced at trial.' . . . But that cannot be made "perfectly plain" in opening statements when no evidence has been presented." *Id*. at 449, 99A.3d at 856.); *accord, Watters v. State*, 129 Nev. 886, 889, 313 P.3d 243, 246 (2013) (reversing a conviction because "[t]he prosecutor [in her opening statement] used the PowerPoint first to display . . . [a] booking photo [of the defendant], then to add the word 'GUILTY,' while she wrapped up: 'So after hearing the evidence in the case, we're going to ask you to find the

Defendant *guilty* on possession of stolen vehicle, *guilty* on grand larceny auto, *and guilty* on failure to stop on a police officer's signal."). If the law or the judge allows the prosecutor to make a relatively argumentative opening, defense counsel may nevertheless wish to object to particularly dramatic flourishes or heavy sales pitches. *See, e.g.*, *United States v. Somers*, 496 F.2d 723, 737 & n.26 (3d Cir. 1974) ("although the Assistant United States Attorney paid lip service to the legitimate purpose of an opening, . . . he nevertheless departed from that objective by studding his opening with overly-dramatic, unnecessary characterizations"); *Commonwealth v. Culver*, 2012 PA Super 172, 51 A.3d 866, 874-76 (Pa. Super. 2012) (prosecutor's "'yelling and menacing as he repeatedly put his finger in the faces of the Defendant and defense counsel'" and engaging in other "animated and intimidating behavior during the opening and closing statements" contributed to the need for a mistrial, and "could alone serve to justify the granting of a new trial"; "At best, such behaviors demonstrate a lack of professionalism in the courtroom. At worst, they could be interpreted as intentional conduct intended to inflame the passions of the jury or to instigate a reaction from the defendant or his counsel. What is clear is that such behavior has no part in the rational, logical, and contemplative evaluation of the evidence that should occur during a criminal trial. ¶ The deprivation of an individual's liberty should never turn upon the theatrical presentation of arguments or evidence, the volume and tone of an advocate's voice, or due to physical acts of intimidation. That such behavior occurred in front of a jury only serves to increase its potential prejudicial effect. While we might presume that a trial judge could resist the prejudicial effect of such theatrics, especially where the trial judge had prior experience with a particularly dramatic attorney, we cannot assume the same when a case is tried before a jury. A jury might well become distracted from their task by the theatrics of an over-zealous prosecutor."). *See generally* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE MONITORS AND MONITORING, PROSECUTION FUNCTION (4th ed. 2017), Standard 3-6.5(c), *Opening Statement at Trial* ("The prosecutor's opening statement should be made without expressions of personal opinion, vouching for witnesses, inappropriate appeals to emotion or personal attacks on opposing counsel"). In a jury trial, if counsel's objection is overruled, counsel may wish to ask in the alternative that the judge remind the jury that the statements of counsel are not evidence, and that the jury should keep an open mind and form no impressions about the case until they have heard the evidence that the *witnesses* will give. (If the prosecutor has been histrionic, counsel can also request that the judge tell the jury that the court is confident the jurors will not be swayed by theatrics on the part of the lawyers but will decide the case solely on the basis of the jury's appraisal of the evidence that will later be presented.)

§ 29.03 THE OPENING FOR THE DEFENSE

§ 29.03(a) The Opening Statement for the Defense in a Jury Trial

Counsel will need to think carefully about how general or specific the defense opening should be. There are various reasons why counsel might prefer to refrain from addressing the facts in detail and instead to give a very general opening statement. A general opening of this sort might focus on:

(1) the prosecution's burden of proof,
(2) the importance of the jurors' keeping an open mind until they have heard all the evidence,
(3) the gravity of what is at stake for the respondent at the trial, and
(4) the weighty responsibility of the jurors in deciding the fate of another human being,

and might conclude simply by

(5) thanking the jurors in advance for their serious and impartial consideration of the case.

The considerations militating in favor of such a general opening include: (i) the danger of committing the defense to a particular tack when counsel cannot be certain what turns the prosecution's evidence may take or what specific openings for rebuttal it will leave – or when the ultimate decision whether to present any defense evidence at all will turn on how persuasive the prosecution's case-in-chief ends up being; (ii) a tactical concern about tipping off the prosecution to the defense's intended evidence and strategies, thereby making it possible for the prosecution to tailor its case-in-chief to counter the defense's plans; (iii) the risk that an opening statement which reveals a specific defense may lead the court to allow the prosecution to present in its case-in-chief evidence which it otherwise could not present except in rebuttal (*see United States v. Gomez*, 6 F.4th 992 (9th Cir. 2021) (because defense counsel indicated in an opening statement that the defendant would rely on the defense of entrapment, the prosecution was permitted to present evidence of the defendant's gang affiliation in its case-in-chief, as bearing on predisposition); and (iv) the need to guard against overstatement of the defense case, which could reflect badly on the respondent and undermine any merit the defense evidence may possess (*see, e.g.*, *Boyd v. United States*, 473 A.2d 828, 833-34 (D.C. 1984) (rejecting a defense challenge to the prosecutor's "not[ing] [in closing argument] the dearth of evidence supporting three facts which defense counsel had earlier asserted" in opening statement)).

Of course, a detailed opening has substantial countervailing benefits. This is a crucial opportunity for counsel to present the defense's theory of the case to the jury in the form of a compelling narrative, priming the jury to view the prosecution's evidence with a critical eye and to appreciate how all of the points that counsel will make in cross-examinations of prosecution witnesses fit into a larger story that the defense is telling at trial. A detailed opening also enables counsel to engage more effectively with the jury in the way that storytellers do with an audience. Although counsel will already have had at least some opportunity to interact with the jury during *voir dire*, and although even a general defense opening does allow counsel to set a tone that engages the jurors' attention and trust, there is often no substitute for a detailed, vivid opening in which counsel speaks to the jury about the heart of the case and helps the jury see the world from the defense's perspective. Finally, if (as is usually the case), the prosecution presents a detailed opening, counsel's failure to respond in kind may leave some jurors feeling like counsel has no effective rejoinders. (Of course, a general opening can explain that the defense is not

commenting on the evidence at this point because the prosecution bears the burden of proof – and counsel can use *voir dire* to pave the way for an explanation of this sort (see § 28.08 *supra*) – but some jurors nonetheless may regard a general defense opening as a sign of weakness.)

In some circumstances, it may be possible to reap many of the benefits of a specific opening without incurring its potential costs by deferring the defense opening statement until after the close of the prosecutor's case. Most jurisdictions permit defense counsel – either as a matter of right (*see*, *e.g.*, *Rodriguez v. State*, 109 A.3d 1075, 1080 n.12 (Del. 2015); *Hampton v. United States*, 269 A.2d 441, 443 (D.C. 1970) (dictum)) or in the discretion of the trial judge (*see*, *e.g.*, *State v. Gumm*, 1995-Ohio-24, 73 Ohio St. 3d 413, 431, 653 N.E.2d 253, 269 (1995)) – to "reserve" opening until the beginning of the defense case, after the prosecution "rests." But even where this option is available, defense counsel is often better off giving his or her opening statement immediately after the prosecutor's, to avoid the adverse psychological effect upon the jury of hearing only the prosecutor's side of the case at the outset. Standard 4-7.5(a) of the AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE MONITORS AND MONITORING, DEFENSE FUNCTION (4th ed. 2017), *Opening Statement at Trial*, puts the matter this way:

> "Defense counsel should be aware of the importance of an opening statement and, except in unusual cases, give an opening statement immediately after the prosecution's, before the presentation of evidence begins. Any decision to defer the opening statement should be fully discussed with the client, and a record of the reasons for such decision should be made for the file."

Our own view is that there are more reasons and occasions for deferring the defense opening statement than this "unusual cases" formula suggests, but that the remainder of Standard 4-7.5(a) has got it exactly right.

When presenting a specific opening statement, counsel will want to craft it in a way that takes full advantage of the opportunities for effective storytelling. Prior to trial, counsel presumably will have used his or her theory of the case to develop a central narrative or story that s/he intends to present to the jury at trial. See § 6.06 *supra*. The opening statement allows defense counsel to introduce the jury to each of the central elements of the story: its characters, actions, settings, instruments, and motivations. By invoking available scripts in the jury's repertoire of stock scripts, counsel can prime the jury to view all of the upcoming testimony through a defense-friendly narrative. See §§ 6.06(b), 6.06(d) *supra*. *See also* PHILIP N. MEYER, STORYTELLING FOR LAWYERS (2014).

There are a number of rhetorical devices that can be useful in attaining these goals. Defense opening statements usually should have a theme. They should strike a simple, clear, dramatic note, summing up the defense theory in a single image – or in a set of short, strongly connected phrases – that the jury or the judge will not forget and that will shape their perception and evaluation of the evidence. For example:

> You will see that the prosecution's case depends on Mr. Jones having three legs. The complaining witness had a bear hug on one of them, and Mr. Jones was standing on the second when he supposedly kicked the complaining witness.
>
> Or:
>
> But unless the assumed time of entry is right, the whole investigation you will hear so much about was wrong: They questioned the wrong shift of employees at the gas station, they identified and traced the wrong car, and they caught the wrong man.

Rhetorical questions often offer a useful vehicle for prompting the jury to view the prosecution's case with skepticism and to watch for specific problems in particular prosecution witnesses' accounts. As suggested in § 6.06(b) *supra*, the opening statement may be an ideal opportunity to explicitly (or, if that cannot be done, at least implicitly) allude to a well-known book or film or TV series that will cause the jury to favor the defense's story and/or to be critical of the prosecution's.

§ 29.03(b) The Defense Opening in a Bench Trial

In some jurisdictions it is customary for both sides to waive opening statement in a bench trial. This custom probably is based upon the assumption that judges know enough law to be able to deduce the prosecution's and respondent's theories of the case from the presentation of the evidence without the benefit of opening statements. Where this is the custom, it is usually advisable to comply. In a bench trial, much depends upon maintaining the good will of the judge. If the accepted practice is to waive opening and the prosecutor has followed this practice, the judge may well be irritated by what s/he views as defense counsel's insistence on wasting the court's time.

In some cases, however, it is crucial to alert the judge to the defense theory of the case before the judge hears the prosecution's witnesses so that s/he will have that alternative perspective in mind while listening to the prosecution's testimony. This is particularly true in cases in which the defense theory will not emerge clearly during cross-examination of the prosecutor's witnesses and will first become evident from defense testimony. In these cases counsel should courteously but firmly insist upon his or her right to present an opening, explaining that s/he intends to be brief. If the local custom is such that an opening is truly an extraordinary event in a bench trial, counsel should consider adding that s/he understands that openings are unusual but that the case is itself so unusual that an opening is essential. (Of course, counsel will then have to deliver on the promise to demonstrate that the case is, in fact, an extraordinary one.)

The suggestions offered in the preceding section for a defense opening in a jury trial largely apply to bench trials as well. But, in a bench trial, it is usually ill-advised to present an opening statement that merely recites general doctrines like the prosecution's burden of proof,

because the judge will probably resent counsel's presuming to lecture the court about the basics of criminal law. Accordingly, in cases in which counsel cannot afford to be committed to a particular theory at the beginning of the trial, it is usually advisable to reserve opening until after the conclusion of the prosecution's case-in-chief.

§ 29.03(c) Defense Opening Statements in Co-Respondent Trials

In a co-respondent trial, each respondent has the right to present an opening statement. In such trials, counsel will need to be alert to the risk that a co-respondent's lawyer may say something in opening that could prejudice counsel's client. Counsel should speak with the lawyer[s] for the co-respondent[s] before trial to find out whether this is likely to be a problem. If that turns out to be the case, counsel should seek to reach an accommodation that will fulfill the objectives of the other lawyer[s] without harming counsel's client. Should that prove to be impossible, counsel should raise the matter with the judge before opening statements begin (and, in a jury trial, outside the presence of the jury). *Cf.* § 29.02 *supra*. If the conflict is very severe, counsel may need to seek a severance. See § 18.10(c) *supra*. In a jury trial, if such a motion for severance is denied or if counsel does not pursue this remedy, counsel may wish to seek a cautionary jury instruction.

In a joint trial in which counsel and the attorney[s] for the co-respondent[s] are presenting a united front, the defense can maximize its advantage by having one (or more) defense attorney[s] deliver an opening statement after the prosecutor's opening, and the other defense attorney[s] deliver an opening statement at the commencement of the defense case. Many judges will allow this procedure, since the cases have been joined for the prosecutor's and the court's convenience, and the joinder should not prejudice the defense attorneys' prerogative to make separate decisions about when they wish to present their opening statements.