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FOR

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III. OPENING STATEMENTS

A. IN GENERAL

§ 38:15 Generally

The rules and case law governing opening statements in civil trials reflect an attempt to balance each party's right to cast its position in a favorable light with the other party's countervailing right to a fair trial. This balance is achieved by allowing parties to describe their intended proof in the opening statements while at the same time guarding against unfair prejudice that would result from references to inadmissible evidence. All this occurs in the context of the court's broad authority to regulate the conduct of the trial.[1]

§ 38:16 The right to make an opening statement

A party's right to make an opening statement at the start of trial is set forth in CPLR 4016,[1] which states in pertinent part:

> Before any evidence is offered, an attorney for each plaintiff having a separate right, and an attorney for each defendant having a separate right, may make an opening statement.

The right to make an opening statement is regarded as a

[Section 38:15]

[1]CPLR 4011 provides that "[t]he court may determine the sequence in which the issues shall be tried and otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum."

[Section 38:16]

[1]CPLR 4016(a).

substantial and important right in New York,[2] the denial of which may be grounds for requiring a new trial.[3] Although the right to make an opening statement applies in non-jury trials by the court and should also apply in trials by referee,[4] it understandably is most coveted and protected in a jury trial.

It generally is agreed, however, that the court in its discretion may limit the parties' time for making the opening statement.[5] Although not explicitly stated, the court's broad discretion under CPLR 4011 may justify limitations on the time allotted for opening statements.

While the right to make an opening statement does exist in non-jury trials, a denial of that right may not warrant reversal if the court is familiar with the issues of the case prior to trial.[6] In non-jury trials, judges already familiar with the issues from the pleadings, pretrial conferences, and earlier motions sometimes will dispense with the opening statement altogether and direct the parties to proceed with their proof.[7] This is the practice almost universally followed by certain judges in the New York County Commercial Division.

In the context of multiple parties, the court may also deny a party an opening statement if that party's rights (or, where ap-

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[2]See, e.g., Kappa Frocks v. Alan Fabrics Corp., 263 A.D. 326, 32 N.Y.S.2d 985 (1st Dep't 1942); Hartmann v. Dakins, 123 N.Y.S.2d 441 (Sup 1953) (stating that the privilege of opening is not only a substantial, but also an important, right).

[3]People v. Rodriguez, 211 A.D.2d 443, 620 N.Y.S.2d 372 (1st Dep't 1995); De Vito v. Katsch, 157 A.D.2d 413, 415, 556 N.Y.S.2d 649, 651 (2d Dep't 1990) (stating that the right to make an opening statement "is guarded with sufficient zeal that a protested denial of that right is error and may be a basis for ordering a new trial"; citations omitted); see also Reyes v. City of New York, 238 A.D.2d 563, 565, 656 N.Y.S.2d 379, 381, 117 Ed. Law Rep. 1092 (2d Dep't 1997) ("In a civil action, the plaintiff has the right, but not the obligation, to make an opening statement"); People v. Concepcion, 228 A.D.2d 204, 206, 644 N.Y.S.2d 498, 500 (1st Dep't 1996) (holding that due process and the statutory right to make an opening argument were not violated by court's repeated interruptions and admonitions to defense counsel to "tell the jury what you are going to prove" because court had amply charged the jury on the subject of burden of proof before the openings and in the final charge).

[4]CPLR 4318 provides that, unless otherwise specified in the order of reference, the referee shall conduct the trial in the same manner as a court trying an issue without a jury. See also 4 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.02.

[5]4 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.02.

[6]See Lohmiller v. Lohmiller, 140 A.D.2d 497, 528 N.Y.S.2d 586 (2d Dep't 1988) (holding that the denial of an opening statement was not reversible error where the court trying the divorce action was familiar with the parties' contentions raised prior to trial and had presided over open court stipulation as to certain facts).

[7]See also CPLR 4016 Siegel, Practice Commentaries.

plicable, liabilities) are "identical" to another party's rights or liabilities. This is because CPLR 4016 only affords an opening statement for a "separate right."[8] The requirement of "identical" rights is strictly construed because courts are reluctant to deny a party the right to address the jury, particularly where the denial of an opening statement would result in prejudice.[9]

Therefore, in complex commercial actions involving numerous plaintiffs and defendants, each party should assert its "separate right" to make an opening statement so as to present that party's forecast of the issues, evidence and views of the case. A party who fails to assert the right at the commencement of trial and before any opening statements are made will be deemed to have waived the right.[10]

§ 38:17 Order of opening statements

Perhaps most zealously guarded is the right to open first, which carries with it the correlative right to give the final closing statement or "last word" at the end of trial.[1] Because the party with the burden of proof enjoys the right to open first, that right usually belongs to the plaintiff.[2] The rule is not absolute, however,

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[8]CPLR 4016(a) (providing that "an attorney for each plaintiff having a separate right, and an attorney for each defendant having a separate right" may make an opening statement).

[9]See, e.g., Rosenzweig v. Blinshteyn, 149 A.D.2d 280, 544 N.Y.S.2d 865 (2d Dep't 1989) (stating that, despite the discretion afforded in CPLR 4011, the court in a joint trial may not prevent a party's attorney from addressing the jury and instead have an attorney for its insurance company represent it throughout proceedings); Tomassi v. Town of Union, 58 A.D.2d 670, 671, 395 N.Y.S.2d 747, 749 (3d Dep't 1977) (holding interests of driver as defendant, represented by attorney for insurer, were not so "separate and distinct" from interests of same driver as plaintiff, represented by private attorney, to require individual opening statements by both attorneys), modified on other ground, Tomassi v. Town of Union, 46 N.Y.2d 91, 412 N.Y.S.2d 842, 385 N.E.2d 581 (1978); see also Phillips v. Chevrolet Tonawanda Division of General Motors Corp., 43 A.D.2d 891, 352 N.Y.S.2d 73 (4th Dep't 1974) (holding it was reversible error to deny third-party defendant opportunity to address the jury).

[10]4 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.02.

[Section 38:17]

[1]CPLR 4016(a) states that "[a]t the close of all the evidence on the issues tried, an attorney for each [party having a right to make an opening statement] may make a closing statement in inverse order to opening statements." See also 4 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.04. For a detailed discussion of closing statements, see Chapter 44, "Final Arguments in Jury and Bench Trials" (§§ 44:1 et seq.).

[2]See also CPLR 4016 Siegel, Practice Commentaries; De Vito v. Katsch, 157 A.D.2d 413, 416, 556 N.Y.S.2d 649, 652 (2d Dep't 1990) (stating that the right to open is related to who has the burden of proof).

and the court in its discretion may alter the conventional order of the opening statements.[3]

The court determines who bears the burden of proof based on the pleadings (including amended and supplemental pleadings) as they stand at the commencement of trial.[4] The first opening statement may be given, for example, to a defendant who shifts the burden of proof by admitting the complaint's allegations and making affirmative defenses or counterclaims. Because the pleadings may affect a plaintiff's right to open first and close last, a court will examine carefully who bears, in substance rather than in form, the burden of proof at trial.[5]

Deciding who has the right to open first becomes more complicated in multiparty, consolidated, or joint trials. Where there are multiple parties having separate rights to make opening statements, the order of openings usually follows the order in the captions of the pleadings. A party claiming the right to open first should nevertheless do so at the commencement of trial and before any of the opening statements are made or else, not surprisingly, the privilege will be waived.[6]

In the commercial litigation context, parties often sue each other in different courts, resulting in parallel actions involving the same parties, facts, and issues. Where these actions are consolidated, a "priority rule" usually applies and the party who enjoyed the right to open first in the first-commenced action will be awarded the right to open first in the consolidated trial.[7] The "priority rule" is not followed where there are special circum-

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[3]See 4 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.05 ("[t]he power given the courts by CPLR 4011 to regulate the conduct and sequence of the trial would seem sufficient to permit deviation from the basic rule [governing the order of opening statements] in appropriate circumstances").

[4]4 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.05. See also De Vito v. Katsch, 157 A.D.2d 413, 416, 556 N.Y.S.2d 649, 652 (2d Dep't 1990) (stating that the right to open is determined with reference to the pleadings); James Conforti Const. Co. v. Neek Realty Corporation, 125 Misc. 876, 877, 212 N.Y.S. 393, 394 (App. Term 1925) (stating that the right to open in an action on promissory notes belongs to the party with the "real" burden of proof which must be determined by the pleadings).

[5]See Di Filippi v. Equitable Life Assur. Soc. of U. S., 61 A.D.2d 168, 401 N.Y.S.2d 532 (2d Dep't 1978), rev'd on other grounds, 45 N.Y.2d 939, 411 N.Y.S.2d 562, 383 N.E.2d 1155 (1978) (holding that the plaintiffs had the ultimate burden of establishing a valid contract); James Conforti Const. Co. v. Neek Realty Corporation, 125 Misc. 876, 877, 212 N.Y.S. 393, 394 (App. Term 1925) (stating that where the answer indicates the sole defense to a negotiable instrument is failure of consideration, the defendant has the burden of proof and should open first).

[6]4 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.10.

[7]See, e.g., Grimm & Davis v. Goldberg, 101 Misc. 2d 829, 422 N.Y.S.2d 319 (N.Y. City Civ. Ct. 1979) (wherein the right to the first opening statement

stances, such as where the party prosecuting the second action is more diligent than the party prosecuting the first.[8]

Although the judge who orders consolidation ordinarily decides who has the right to open first, the order of opening statements in a joint trial is usually determined by the judge actually presiding over the trial.[9]

§ 38:18 Permissible scope of opening statements

CPLR 4016 does not address the permissible scope of opening statements. Instead, the permissible scope of opening statements may be better defined by what counsel is not allowed to do in the opening statement. The case law reveals that, at a minimum, the substance of a party's opening statement is limited by the New York Rules of Professional Conduct[1] and what is otherwise prohibited by the court as unfairly prejudicial to another party.

A party is always free (and is usually expected) to state the is-

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was awarded to the plaintiff in the first-commenced action); Edgewater Machine Co. v. Weiss, 1 Misc. 2d 862, 85 N.Y.S.2d 655 (Sup 1948) (same); Hartmann v. Dakins, 123 N.Y.S.2d 441, 444 (Sup 1953) (holding that, where first action arising out of auto accident is commenced and issue is joined long before second action, plaintiff in first action has right to first opening).

[8]See, e.g., Rockaway Boulevard Wrecking & Lumber Co. v. Raylite Elec. Corp., 25 A.D.2d 842, 843, 270 N.Y.S.2d 1, 2 (1st Dep't 1966) (holding priority rule does not apply if the plaintiff in later-commenced action exhibits "greater diligence in the substantial prosecution of its action"); Grucci v. Mercury Chem. Co., 26 A.D.2d 788, 273 N.Y.S.2d 669, 670 (2d Dep't 1966) (holding there were no special circumstances warranting departure from the priority rule where plaintiff in the later-commenced action merely provided a list of witnesses, without specifying the nature, substance or materiality of the testimony). Special circumstances alleviating the "priority rule" are also found where the plaintiff in the second action had the burden of proof and served its summons and complaint only a few hours after the first plaintiff. See, e.g., Kappa Frocks v. Alan Fabrics Corp., 263 A.D. 326, 32 N.Y.S.2d 985 (1st Dep't 1942). Courts may also look to whether the second action could have been brought as a counterclaim to the first, Brink's Exp. Co. v. Burns, 230 A.D. 559, 245 N.Y.S. 649 (4th Dep't 1930), or for other circumstances warranting a departure from the priority rule. See, e.g., Buckley Const. Corp. v. Hungerford, 16 Misc. 2d 299, 185 N.Y.S.2d 823 (Sup 1958), order aff'd, 8 A.D.2d 757, 187 N.Y.S.2d 337 (4th Dep't 1959) (holding priority rule not followed where plaintiff in first action evades service of second action and plaintiff in second action joins issue first); see generally, 4 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.12.

[9]See Rockaway Boulevard Wrecking & Lumber Co. v. Raylite Elec. Corp., 25 A.D.2d 842, 843, 270 N.Y.S.2d 1, 2 (1st Dep't 1966) (as distinguished from a joint trial, the judge who orders a consolidated trial also determines the order of opening statements); 4 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.12.

[Section 38:18]

[1]The New York Rules of Professional Conduct are available at 22 NYCRR 1200.

sues in the opening and set the framework for trial.[2] In so doing, the parties should be allowed in the openings to define the issues in the case by reference to claims, cross-claims, counterclaims, and defenses. A party may reveal the substance of the pleadings in the openings, including any statements, admissions, and allegations,[3] because "[t]he pleadings are before the court, not as evidence, but to point out the object to which evidence is to be directed."[4] The parties should also be permitted (unless barred by rule in certain types of cases other than commercial cases) to refer to damages or other relief (but not punitive damages) sought to the extent they are included in the pleadings.[5]

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[2]Tisdale v. Delaware & Hudson Canal Co., 116 N.Y. 416, 419, 22 N.E. 700, 701 (1889) ("it is customary and proper for counsel, in opening, to tell the jury what the issues are as well as what they expect to prove"); De Vito v. Katsch, 157 A.D.2d 413, 415 n.1, 556 N.Y.S.2d 649, 651 n.1 (2d Dep't 1990) ("the right [to make an opening statement] has long been recognized as one of supreme importance constituting a unique opportunity to advance one's cause, to communicate the issues to the jury, and to present the facts to be proven"; citations omitted). "The purpose of an opening statement is to permit the parties to advance their client's theory of recovery or defense before the jury. Counsel is permitted to present those facts that can be proven and communicate the issues to the jury." Miller v. Owen, 184 Misc. 2d 570, 570–71, 709 N.Y.S.2d 378 (Sup 2000). See Stines v. Hertz Corp., 45 A.D.2d 751, 752, 356 N.Y.S.2d 649, 651 (2d Dep't 1974) ("the opening statement is designed to establish the basic theory of a litigant's case as it will be presented at the trial, the litigant is not necessarily bound by every statement or omission made therein.").

[3]See, e.g., Braun v. Ahmed, 127 A.D.2d 418, 422, 515 N.Y.S.2d 473, 475 (2d Dep't 1987) (stating that a limiting instruction may be appropriate where the pleadings are used in opening or closing statements); Rice v. Ninacs, 34 A.D.2d 388, 392, 312 N.Y.S.2d 246, 251 (4th Dep't 1970) (stating that pleadings may be used in openings and closings even where they are not formally introduced into evidence).

[4]Tisdale v. Delaware & Hudson Canal Co., 116 N.Y. 416, 22 N.E. 700 (1889).

[5]That, at least, is the implication of the foregoing basic rules. Surprisingly, perhaps, there are no commercial cases discussing the limits of what may be said in openings regarding damages. Cf. Rice v. Ninacs, 34 A.D.2d 388, 392, 312 N.Y.S.2d 246, 251 (4th Dep't 1970) (it was not improper for plaintiff's counsel to state in summation the amount demanded in the complaint). However, the law that has developed in the area of personal injury and wrongful death damage claims is instructive. Because "there is no measure by which pain and suffering endured by a particular human can be calculated," such damage demands are viewed as pure argument and are disfavored. Braun v. Ahmed, 127 A.D.2d 418, 424, 515 N.Y.S.2d 473, 476–77 (2d Dep't 1987). Unlike such objective costs as medical bills and lost earnings, monetary damages for pain and suffering "are often unliquidated and depend entirely on the jury's appraisal." CPLR 4016 Siegel, Practice Commentaries. The law therefore permits only a prayer for general relief for such damages, both in the pleadings (CPLR 3017(c)) and in opening statements (CPLR 4016(b)). Specific amounts for pain and suffering can be suggested in closing argument, but will be subject to statutorily mandated cautions to the jury, to the effect that this is mere argu-

In the opening statement, the pleadings may serve to frame the disputed issues for trial. According to the Court of Appeals, the pleadings "mark the boundaries within which the proof must fall" and counsel are "permitted to point out where they claim those boundaries are, before they introduce their evidence."[6] A plaintiff may not introduce a different theory of the case in the opening statement and proceed to trial on those grounds without moving to amend the complaint. The opening statement may also be used to narrow the areas of dispute by including stipulations and admissions, and by stating undisputed facts.[7]

Under certain circumstances, the substance of the opening statement may expand the scope of the allowable proof at trial. For example, an incautious party may inadvertently expand the issues to be tried by acknowledging a claim or defense not raised in the pleadings,[8] or by failing to object to the assertion of a new claim or defense in the opposing party's opening statement.[9]

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ment by the attorney and they are not bound to agree. Notably, CPLR 4016 briefly permitted specific damage demands in opening statements in such tort cases, but the legislature quickly eliminated that provision, at the same time it mandated that complaints in such cases be limited to a general prayer for relief. CPLR 4016 Siegel, Practice Commentaries.

By contrast, there is nothing prohibiting a specific damage demand in pleadings in commercial cases, and the parties should be permitted to comment on those portions of the pleadings, as they could on any other. Likewise, if the measure of damages is going to be based on objectively calculable evidence to be introduced at trial, it would seem proper to preview that evidence in an opening even if it is not set forth in a pleading. However, counsel should be prepared to object to, and ask for a curative instruction, where more argumentative damage demands are made in an opening (such as for specified amounts of punitive damages or for the highly speculative future profits of a failed start-up business which will be supported only by opinion testimony).

[6]Tisdale v. Delaware & Hudson Canal Co., 116 N.Y. 416, 420, 22 N.E. 700 (1889).

[7]See Tisdale v. Delaware & Hudson Canal Co., 116 N.Y. 416, 419, 22 N.E. 700 (1889) (holding that, because the admissions contained in the pleadings admit of no controversy and require no proof, they may be read to the jury by the adverse party); Bowman v. Seaman, 152 A.D. 690, 692, 137 N.Y.S. 568, 570 (2d Dep't 1912) (wherein express admissions by plaintiff's counsel in the opening statement gave meaning to the ambiguous allegations of the complaint at trial); see also Warda v. State, 45 Misc. 2d 385, 386, 256 N.Y.S.2d 1007, 1008 (Ct. Cl. 1964) (wherein the claimants stipulated in opening statements that claims against one defendant were discontinued).

[8]See Baumis v. General Motors Corp., 106 A.D.2d 789, 790, 484 N.Y.S.2d 185, 187 (3d Dep't 1984), order aff'd, 66 N.Y.2d 777, 497 N.Y.S.2d 369, 488 N.E.2d 114 (1985) (rejecting plaintiff's claim of surprise where plaintiff's opening statement acknowledged defendant's intention to assert a defense not raised in the pleadings); Safran v. Man-Dell Stores, Inc., 106 A.D.2d 560, 562, 483 N.Y.S.2d 370, 371 (2d Dep't 1984) (holding that notice was not an issue in a negligence action where defendant's opening and closing statements addressed plaintiff's contention that defendant had created a dangerous condition); cf.

A party who promises through counsel's opening statement to produce certain documents or witnesses may later be questioned during trial or criticized during summation for failing to produce them.[10] Counsel should also be aware that an assertion made in the opening statement may open the door to rebuttal by the opponent with otherwise inadmissible evidence.[11]

Counsel may shape the issues for trial in the opening statement so long as they do not violate or prejudice another party's right to a fair trial. As one court explained:

> The rule allowing counsel when addressing the jury the widest latitude in discussing the evidence and presenting the client's theories falls far short of authorizing the statement by counsel of matter not in evidence, or indulging in argument founded on no proof, or demanding verdicts for purposes other than the just settlement

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Hutter v. Stokes, 170 N.Y.S. 1087 (App. Term 1918) (holding it was error for trial court to grant defendant's motion to dismiss for failure of proof on various issues where defendant's counsel had stated, in opening, that only one issue was in dispute); DuBose v. Velez, 63 Misc. 2d 956, 313 N.Y.S.2d 881 (N.Y. City Civ. Ct. 1970) (wherein an objection was timely where defendant stated in opening statement that plaintiff was limited to proof as alleged in the pleadings).

[9]Kaneb v. Lamay, 58 A.D.3d 1097, 1098, 872 N.Y.S.2d 224, 225 (3d Dep't 2009), leave to appeal denied, 12 N.Y.3d 709, 881 N.Y.S.2d 18, 908 N.E.2d 926 (2009) (holding trial court did not err in permitting party to pursue affirmative defense not raised in answer where the opening statements confirmed that the defense had been invoked before trial began, evidence relevant to the defense was admitted at trial without objection, and plaintiff did not claim surprise or prejudice or argue the defense had been waived until post-trial memorandum).

[10]See Bielich v. Winters, 95 A.D.2d 750, 464 N.Y.S.2d 189 (1st Dep't 1983) (holding plaintiff's failure to call an accountant as promised in an opening statement supported defendant's contention that plaintiff failed to establish damages with reasonable certainty); Brownlee v. Hot Shoppes, Inc., 23 A.D.2d 848, 259 N.Y.S.2d 271 (2d Dep't 1965) (holding that it is reversible error not to order defendant to produce contract referred to in pleadings and opening statement); Farber v. Jewish Community Center of Flatbush, 32 Misc. 2d 124, 223 N.Y.S.2d 769 (Sup 1962), judgment aff'd, 17 A.D.2d 985, 235 N.Y.S.2d 376 (2d Dep't 1962) (stating that, where a party refers to a witness in the opening statement, opponent may refer to the failure to call that witness in summation).

[11]Kane v. Triborough Bridge & Tunnel Authority, 64 A.D.3d 544, 545, 883 N.Y.S.2d 545, 546 (2d Dep't 2009) (affirming trial court's admission into evidence a report of an empirical study after defense counsel "opened the door" by suggesting in opening statement that there was no empirical evidence supporting plaintiff's expert opinion); but see Stewart v. Maitland, 58 A.D.3d 443, 869 N.Y.S.2d 784 (1st Dep't 2009), leave to appeal dismissed in part, denied in part, 13 N.Y.3d 922, 895 N.Y.S.2d 301, 922 N.E.2d 889 (2010) (because opening statement was "not part of the evidence," it did not "open the door" to evidence otherwise barred by Dead Man's Statute, CPLR 4519), lv. dismissed, 13 N.Y.3d 922 (2010).

of the matters at issue between the litigants or appealing to prejudice or passion.[12]

Accordingly, counsel may not refer to matters in opening statements that would unfairly prejudice the jury against an opponent or other party. Thus, references to insurance,[13] similar actions against a defendant,[14] criminal actions against the defendant or the lack of such actions,[15] or past efforts to procure a release from the plaintiff[16] may, alone or in combination with other prejudicial remarks,[17] compel the ordering of a new trial. However, it may be permissible to refer to material that will be used for impeachment even if such material would be inadmissible at trial.[18]

The canons of ethics set further limits on counsel's opening statements.[19] In setting the stage for trial in the opening statement, an attorney may not:

- state or allude to any matter that the attorney has no reasonable basis to believe is relevant to the case[20] or that will not be supported by admissible evidence;[21]

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[12]Cherry Creek Nat. Bank v. Fidelity & Casualty Co. of New York, 207 A.D. 787, 790, 202 N.Y.S. 611, 614 (4th Dep't 1924).

[13]Sperduti v. Mezger, 283 A.D.2d 1018, 1019, 724 N.Y.S.2d 250, 253 (4th Dep't 2001) (holding defense counsel's improper reference, during the opening statement in a personal injury trial, to plaintiff motorist seeking "double recovery" for work-related injuries, and indirect reference to double recovery, were not grounds for mistrial, where the court immediately sustained plaintiffs' objection to the use of the term "double recovery" and later instructed the jury that the "arguments, remarks, and summation of the opposing attorneys are not evidence"); Estes v. Town of Big Flats, Chemung County, 41 A.D.2d 681, 682, 340 N.Y.S.2d 950, 951 (3d Dep't 1973) (references to insurance in the opening statement constituted reversible error).

[14]O'Hara v. Derschug, 241 A.D. 513, 272 N.Y.S. 189 (4th Dep't 1934).

[15]Humiston v. Rochester Institute of Technology, 195 A.D.2d 961, 601 N.Y.S.2d 751, 85 Ed. Law Rep. 918 (4th Dep't 1993).

[16]Raplee v. City of Corning, 6 A.D.2d 230, 176 N.Y.S.2d 162 (4th Dep't 1958).

[17]See, e.g., Shaw v. Manufacturer's Hanover Trust Co., 95 A.D.2d 738, 464 N.Y.S.2d 172 (1st Dep't 1983) (holding it was prejudicial error to allow defendant's counsel to inform the jury in an opening statement that the discharge review board found that the police officer who accidentally shot plaintiff acted reasonably); Vanderbilt v. Vanderbilt, 28 A.D.2d 861, 281 N.Y.S.2d 640 (2d Dep't 1967) (holding that husband was denied a fair trial where wife's counsel during opening and closing statements referred to husband's alleged misconduct with other women and mistreatment of wife).

[18]Carrasquillo ex rel. Carrasquillo v. City of New York, 22 Misc. 3d 171, 866 N.Y.S.2d 509 (Sup 2008).

[19]See generally New York Rules of Professional Conduct, Rules 3.3(a), 3.3(f), and 3.4(d). 22 NYCRR § 1200.

[20]Estes v. Town of Big Flats, Chemung County, 41 A.D.2d 681, 682, 340 N.Y.S.2d 950, 951 (3d Dep't 1973) (stating that, "[e]ven assuming a legitimate

- act as an unsworn witness by asserting personal knowledge of the facts in issue;[22]
- assert a personal opinion as to the justness of a cause, as to the credibility of a witness,[23] or as to the culpability of a party;[24] or
- engage in undignified or discourteous conduct which is degrading to a tribunal.

In some circumstances, the court may limit the use of graphs, charts, photographs, or other exhibits in the opening statement, requiring advance notice to the adversary party in order to preserve that party's right to object and also preventing the introduction of improper or inadmissible evidence.[25] A party is allowed, however, in the opening statement to state its intention to

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issue were present, the opening statement was not the proper time to comment on how [the issue] would be proven, particularly when no such proof would be offered into evidence during the trial?").

[21]See O'Connell v. Jacobs, 181 A.D.2d 1064, 583 N.Y.S.2d 61 (4th Dep't 1992), aff'd on other grounds, 81 N.Y.2d 797, 595 N.Y.S.2d 388, 611 N.E.2d 289 (1993) (wherein the judgment was reversed where attorney made prejudicial assertions without basis in opening statement after pretrial ruling that evidence of the assertions would not be admissible); Cohn v. Meyers, 125 A.D.2d 524, 509 N.Y.S.2d 603 (2d Dep't 1986) (ordering a new trial where defense counsel's prejudicial remarks in opening statement had no evidentiary basis and jury instructions did not adequately eliminate the prejudice); Getty v. Roger Williams Silver Co., 190 A.D. 672, 180 N.Y.S. 275 (1st Dep't 1920) (stating that counsel should not be allowed to state in opening that it will show evidence that is unlikely to be received into evidence). See also People v. Bonnen, 236 A.D.2d 479, 480, 653 N.Y.S.2d 648, 649 (2d Dep't 1997) (holding that opening statement by prosecutor that an additional victim was shot by defendant was unduly prejudicial and constituted an additional ground for reversal, where it was later admitted that there was no information as to that victim's whereabouts); cf. People v. Evans, 242 A.D.2d 948, 949, 662 N.Y.S.2d 651, 653 (4th Dep't 1997) ("Absent bad faith or undue prejudice [not present in this case], reversal is not required because the prosecutor fails to prove every statement or representation made during an opening statement.").

[22]See Senn v. Scudieri, 165 A.D.2d 346, 567 N.Y.S.2d 665 (1st Dep't 1991) (ordering new trial where counsel acted as unsworn witness during summation and cross-examination by offering unsworn statements alleging personal knowledge of facts).

[23]See Clarke v. New York City Transit Authority, 174 A.D.2d 268, 580 N.Y.S.2d 221 (1st Dep't 1992) (holding it was error for counsel to repeatedly accuse other side's witnesses of lying and to act as an unsworn witness in summation).

[24]See Rhoden v. Montalbo, 127 A.D.2d 645, 511 N.Y.S.2d 875 (2d Dep't 1987) (ordering new trial on damages where attorney gave expert medical testimony over repeated objection during opening statement).

[25]See English v. Genovese, 49 Misc. 2d 321, 267 N.Y.S.2d 283 (Sup 1966) (stating that, without proper foundation for receipt of photograph in evidence, reference to photograph in opening or closing would result in serious prejudice); see also Raney v. Suffolk Obstetrical and Gynecological Associates, P.C., 200 A.D.2d 612, 606 N.Y.S.2d 729 (2d Dep't 1994) (holding it is within court's discre-

introduce particular evidence, and subject to the court's discretion under CPLR 4011 and 4016, present that evidence in graphic or other demonstrative form if there is a reasonable basis for believing it will be admissible at trial and relevant to the case. Certainly, the use of such evidence should be allowed if there is no doubt concerning its admissibility.[26]

When a party violates the rules concerning opening statements, opposing counsel must make a timely objection or the opening statement is presumed unobjectionable and any alleged error is waived.[27] The objecting party should move to strike and seek curative instructions (where applicable) or, in rarer cases where curative instructions are insufficient to dispel the prejudice, move for a mistrial.[28] Timely objection to statements made during an opening statement, or a motion for mistrial, is necessary to preserve the objection or motion for appeal. The objecting party may interrupt the opening statement to make and record its objection or motion.[29] As a general matter, however, jurors' negative perceptions of overzealous counsel suggest that counsel should consider waiting until the opponent's opening statement

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tion to refuse permission to display a chart for the jury during summation); Carroll v. Roman Catholic Diocese of Rockville Centre, New York, 26 A.D.2d 552, 271 N.Y.S.2d 7 (2d Dep't 1966), order aff'd, 19 N.Y.2d 658, 278 N.Y.S.2d 626, 225 N.E.2d 217 (1967) (holding court did not abuse its discretion in permitting counsel to use a blackboard or chart during summation). As to graphics and other demonstrative evidence, generally, see Chapter 42, "Graphics and Other Demonstrative Evidence" (§§ 42:1 et seq.).

[26]See Visual Evidence in Opening of Trial, a very interesting letter from Philip R. Schatz to the Editor, 4/14/95 N.Y.L.J., p. 2, col. 6 and the various authorities (in jurisdictions other than the New York state courts) cited in the letter. See also Rubinowitz and Torgan, Getting the Picture: Using Exhibits Throughout a Trial, 7/31/08 N.Y.L.J., p.3, col. 1. As to a further discussion of this subject, see § 38:22 and Chapter 42, "Graphics and Other Demonstrative Evidence" (§§ 42:1 et seq.).

[27]Vavallo v. Consolidated Edison Co. of New York, Inc., 150 A.D.2d 556, 541 N.Y.S.2d 837 (2d Dep't 1989); Murphy by Carpentier v. Town of Schodack, 98 A.D.2d 911, 471 N.Y.S.2d 354 (3d Dep't 1983).

[28]Huff v. Rodriguez, 64 A.D.3d 1221, 1222, 882 N.Y.S.2d 628, 629 (4th Dep't 2009) (holding no abuse of discretion to grant mistrial following opening statement in which plaintiff's counsel stated that defendant would not be present at trial because he was serving a military tour in Iraq); Kojala v. Horner, 40 A.D.2d 1016, 338 N.Y.S.2d 921 (2d Dep't 1972) (ordering new trial where counsel's opening remarks about stricken testimony could not easily be erased from the minds of the jury).

[29]Schwartz v. Maimonides Hospital Center, 48 A.D.2d 709, 710, 368 N.Y.S.2d 258, 261 (2d Dep't 1975) (stating that "the trial court's admonition to counsel that he would not permit interruption of the opening statements or of the summations, and that any objections thereto should be recorded afterward, directly contravened counsels' duty and obligation to object when and if improper statements were made").

is completed before making an objection and seeking curative instructions or moving for a mistrial.[30]

§ 38:19 Dismissing complaint after opening statement

Very rarely, a court will grant a defendant's motion to dismiss the complaint after the plaintiff's opening statement.[1] A motion to dismiss made after the opening statement, but prior to the admission of evidence, is most appropriately viewed as a CPLR 4401 motion for judgment as matter of law.[2]

A court will grant a motion to dismiss if a pleaded cause of action is conclusively defeated by something clearly admitted as fact, or an admission of fact has been made in the opening statement that so completely destroys the plaintiff's case that nonsuit is justified.[3] Dismissing a complaint based on statements in the opening, however, "cannot be resorted to in many cases with justice to the parties, unless the counsel stating the case to the jury deliberately and intentionally states or admits some fact that, in any view of the case, is fatal to the action."[4]

A court deciding a motion to dismiss after the opening follows a

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[30]For a further discussion of these matters, see § 38:24.

[Section 38:19]

[1]Hardy v. State, 294 A.D.2d 400, 742 N.Y.S.2d 346 (2d Dep't 2002) (stating that, as a general rule, motions to dismiss at the completion of claimant's opening statement are not favored); Schomaker v. Pecoraro, 237 A.D.2d 424, 425, 654 N.Y.S.2d 830, 832 (2d Dep't 1997) ("Motions to dismiss a complaint after the plaintiff's opening statement are greatly disfavored.").

[2]See Beshay v. Eberhart L.P. #£1, 69 A.D.3d 779, 893 N.Y.S.2d 242, 244 (2d Dep't 2010); see also Riccio v. De Marco, 188 A.D.2d 847, 591 N.Y.S.2d 569 (3d Dep't 1992) (stating that CPLR 4401 motions should await presentation of evidence by opposing party, except that motions based on admissions are authorized at any time they are warranted). See generally Chapter 49, "Trial and Post-Trial Motions," (§§ 49:1 et seq.) for additional discussion of motions for judgment as a matter of law.

[3]Beshay v. Eberhart L.P. #£1, 69 A.D.3d 779, 893 N.Y.S.2d 242, 244 (2d Dep't 2010) (holding dismissal of complaint after opening statement warranted only where it can be demonstrated that the complaint does not state a cause of action, that a cause of action otherwise stated is conclusively defeated by a defense clearly admitted as a fact, or that plaintiff's counsel in the opening statement "by some admission or statement of fact, so completely compromised [the] case that the court was justified in awarding judgment as a matter of law"); Ballantyne v. City of New York, 19 A.D.3d 440, 797 N.Y.S.2d 506 (2d Dep't 2005) (same); Hoffman House v. Foote, 172 N.Y. 348, 65 N.E. 169 (1902); Gleyzer v. Steinberg, 254 A.D.2d 455, 679 N.Y.S.2d 154 (2d Dep't 1998) (same).

[4]Hoffman House v. Foote, 172 N.Y. 348, 350–351, 65 N.E. 169 (1902); see Beshay v. Eberhart L.P. #£1, 69 A.D.3d 779, 893 N.Y.S.2d 242, 244 (2d Dep't 2010) (affirming dismissal of claim of liability for eye injury under Industrial Code where plaintiff's counsel admitted in opening statement that plaintiff had removed eye gear prior to the accident).

three step analysis. First, the court examines the pleadings, including the complaint and bill of particulars, to see if they allege sufficient facts to warrant submitting the case to the jury.[5] Second, the court assumes every material fact in favor of the plaintiff and affords every inference in support of the complaint, which is accepted as true or at least provable.[6] Finally, the court will grant the motion to dismiss only if the complaint is conclusively defeated either by a clearly and factually admitted defense, or by an admission or concession so "ruinous" to the plaintiff's case that dismissal is warranted.[7]

Dismissal is, therefore, unauthorized if there is any view of the complaint under which the plaintiff may succeed.[8] Likewise, because of the extreme nature of a dismissal premised on the plaintiff's opening statement, a court will allow an attorney opposing the motion either to make an offer of proof to the court or to correct or enhance the opening statement.[9]

Although defendants' motions to dismiss based upon opening

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[5]Reyes v. City of New York, 238 A.D.2d 563, 564, 656 N.Y.S.2d 379, 381, 117 Ed. Law Rep. 1092 (2d Dep't 1997) (the majority holding that dismissal of complaint after plaintiff's opening statement was proper as to one defendant and improper as to other defendant where plaintiff failed to establish existence of duty on part of first defendant in opening statement, pleadings, and other material in the record); Fuller by Fuller v. New York City Bd. of Educ., 206 A.D.2d 452, 614 N.Y.S.2d 557, 92 Ed. Law Rep. 1249 (2d Dep't 1994) (holding dismissal of action for personal injuries was appropriate where notice of claim, as amplified by bill of particulars and plaintiff's opening statement, did not state cause of action); De Vito v. Katsch, 157 A.D.2d 413, 416–417, 556 N.Y.S.2d 649, 652–653 (2d Dep't 1990); cf. DiPasquale v. Baker-Roos, Inc., 156 A.D.2d 941, 548 N.Y.S.2d 827 (4th Dep't 1989) (reversing dismissal where complaint and bill of particulars adequately apprised defendants of plaintiffs' claims of negligence).

[6]De Vito v. Katsch, 157 A.D.2d 413, 416–417, 556 N.Y.S.2d 649, 652–653 (2d Dep't 1990).

[7]Jackson v. City of Mount Vernon, 213 A.D.2d 892, 623 N.Y.S.2d 658 (3d Dep't 1995) (dismissing complaint after opening statement due to insufficiency of plaintiff's offer of proof); De Vito v. Katsch, 157 A.D.2d 413, 416–417, 556 N.Y.S.2d 649, 652–653 (2d Dep't 1990).

[8]See Brooklyn Nat. Bank of New York v. Schwartz, 242 A.D. 632, 272 N.Y.S. 115 (2d Dep't 1934) (judgment for defendants after plaintiff's opening reversed and new trial ordered where counsel in opening statement sufficiently indicated an intent to prove defendants' liability under either or both of two legally valid theories); cf. D.M.W. Contracting Co. v. Board of Education of City of New York, 259 A.D. 1081, 21 N.Y.S.2d 299 (2d Dep't 1940), judgment aff'd, 285 N.Y. 591, 33 N.E.2d 254 (1941) (holding that, accepting statements in plaintiff's opening statement as established facts, dismissal of plaintiff's contract action was proper).

[9]See Fuller by Fuller v. New York City Bd. of Educ., 206 A.D.2d 452, 453, 614 N.Y.S.2d 557, 558, 92 Ed. Law Rep. 1249 (2d Dep't 1994) (holding that dismissal of negligence action was proper where court afforded plaintiffs ample opportunity to correct or expand on the opening statement). In a multiparty

statements by plaintiffs' attorneys are more common, it also is possible, but more difficult, for plaintiffs to obtain a directed verdict as a result of statements or admissions in defense counsel's opening statement. Based on similar considerations, defense counsel's opening remarks are taken as true and given a construction most favorable to the defense.[10]

B. STRATEGIC CONSIDERATIONS IN COMMERCIAL TRIALS

1. In General

§ 38:20 Objectives of the opening statement in a bench trial

It is difficult to generalize as to the goals to be accomplished by making an opening statement in a bench trial, where the judge is the trier of fact. Those goals will vary widely from case to case, and judge to judge, depending on the extent of the prior familiarity of the judge with the facts and issues involved, the preferences of the judge in a non-jury setting and other idiosyncratic factors. Some judges in the New York County Commercial Division do not permit opening statements in a bench trial, and those who do want them to be brief and sharply focused. This reflects the judges' familiarity with the factual and legal issues based on the preliminary pretrial proceedings.

Nevertheless, in certain circumstances, an opening statement in a bench trial may be an event of great importance, in which the goals to be achieved are similar to those in a jury trial, as more fully discussed in the succeeding sections.[1] This would be particularly true when the judge does not have genuine pretrial familiarity with the factual and legal issues, where the controversy or subject matter is complex, and where the judge welcomes the opportunity to learn about the case in this manner before the introduction of testimony and the other evidence.

This is precisely what happened in a bench trial of a complex commercial controversy that was anticipated to be protracted and which in fact lasted about two months. At the invitation of the judge, following the suggestion of counsel, both sides made

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context, a complaint will not be dismissed merely because the plaintiff's opening statement focused on one codefendant, but largely ignored another. Schaefer v. Karl, 43 A.D.2d 747, 350 N.Y.S.2d 728 (2d Dep't 1973).

[10]Judge v. Continental Bank of New York, 216 A.D. 818, 215 N.Y.S. 624 (2d Dep't 1926) (wherein, although the trial court directed verdict in favor of plaintiff after defense counsel's opening, new trial ordered because defendant's general denial of the plaintiff's claim was sufficient to proceed to trial).

[Section 38:20]

[1]See §§ 38:21 to 38:27.

extensive opening statements which consumed the first day of trial. Plaintiff's attorney used graphic methods to depict the chronology and highlight the important events and nature of the claims. Both sides used the opening statements for the purpose of educating the judge in the framework of their respective cases, emphasizing the strengths and minimizing the weaknesses. For the judge, the opening statements provided an opportunity to question the parties' attorneys about anticipated factual issues and the legal underpinnings of the claims and defenses. In the circumstances of that case, the opening statements played an invaluable role, in a more dramatic way than other pretrial proceedings, in enabling the judge to have a well-informed command of the anticipated issues, facts and evidence, and the parties' positions.

§ 38:21 Objectives of the opening statement in a jury trial

As with a bench trial, the goals to be achieved in the opening statement to the jury are many and varied. Those goals require definition in light of the fact that the opening statement is a trial event whose form and content has a direct relationship with the anticipated evidence, the legal issues, the adversary's factual and legal position, the anticipated jury instructions, the anticipated jury verdict questions or interrogatories, and the summation that the attorney will ultimately deliver.

At the highest strategic level, the attorney's goal in delivering the opening statement is to take the second important step toward persuading the jury to render a verdict in favor of that attorney's client. Most often, the first important step is the jury voir dire.[1] Nevertheless, there is no doubt, as Judge Long of the Superior Court of the District of Columbia said in summarizing the literature on the subject, "an opening statement is just as important as a closing argument." Further, as she observed, one of the most common errors in trial practice is the failure to make a meaningful opening statement.[2]

In striving to achieve its strategic goal, the opening statement for both the plaintiff and defendant should be aimed at achieving a number of purposes. Those purposes include:

- introducing the themes that will be emphasized and reemphasized during the course of direct and cross-examination of key witnesses and the introduction of documentary and other

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[Section 38:21]

[1]See Chapter 35, "Jury Selection" (§§ 35:1 et seq.).

[2]Long, The Ten Most Common Errors in Trial Practice, Litig., Winter 1995 at 5.

evidence, and which will be the core themes of the closing argument to the jury;[3]

- previewing the important facts and evidence relating to those issues and doing that in a variety of ways:
  - (1) introducing the parties, the important witnesses and what they may testify to;
  - (2) introducing the case in narrative or chronological form to provide the jury with anchors or points of reference and to focus on crucial events or time periods;
  - (3) describing the extent to which documents will provide important evidence and in what manner;
  - (4) highlighting specific facts;
- projecting the trial process generally, including the roles that witnesses, documents, deposition testimony, and stipulated facts or admissions may play in the case; and
- defusing weaknesses and anticipating defenses or adverse testimony (normally without referring to such testimony).

In a jury trial, a secondary goal of the opening statement is the further education of the judge, particularly concerning the anticipated facts and evidence. This is important for at least three reasons. First, whatever the extent of preliminary pretrial proceedings, the more the judge knows, the better equipped that judge will be to make evidentiary rulings during the trial. Second, particularly from the defendant's standpoint, the opening statements enable the judge to begin focusing on the facts and the law for the later purposes of considering a motion to dismiss at the close of the plaintiff's case, or if the jury holds in favor of plaintiff, a motion for judgment notwithstanding the verdict. Third, unless the judge knows the lawyers from prior experience, the opening statements enable that judge to make an initial assessment of the skills and credibility of the lawyers—factors that may have an influence on the manner in which the trial is conducted and its outcome.

For counsel on both sides of the case, another important purpose of the opening statement is establishing an initial personal rapport with the jury by methods of presentation and style. This will serve as a building block toward establishing the lawyer's credibility and persuasiveness during the ensuing proceedings, through and including the final argument.

There are however, some purposes that are different for plaintiffs and defendants. In most cases, the plaintiff bears the burden of proof and therefore delivers the first of the opening statements. In that circumstance, ordinarily plaintiff's counsel

[3]See discussion of themes in §§ 37:29 to 37:32 concerning the Trial Game Plan and in § 44:10 concerning the final arguments in jury and bench trials.

should seek to establish themes and preview facts that will support the claim. For the defendant, however, there may be cases in which the goal of the opening statement may not be to preview facts that prove the defense, but in a more limited way simply cast doubt on important aspects of plaintiff's factual or evidentiary case. This would be true when the defendant wants "to hold its fire," and not alert the plaintiff and plaintiff's witnesses to the full range or substance of the defense, particularly important anticipated cross-examination. In some instances, therefore, from a strategic standpoint, the defendant's purposes may be best served by a much abbreviated or summarized view of the anticipated evidence, conjoined with a caution to the jury to keep an open mind until it has heard all of the defendant's evidence. A cautionary note to this strategy is that if too much of the plaintiff's case remains unanswered at this early stage of the trial (particularly where the trial lasts more than just a day or two), as the plaintiff's evidence is introduced and the trial proceeds, too much time will have elapsed, allowing the plaintiff's case to sink in and take hold.

It is not a purpose of the opening statement to "argue" the case and thus there is, as one judge said, "a severe distinction" between the opening statement and the closing argument or summation. Of course, every element of a party's trial presentation, including the opening statement, is part of a total forensic effort to persuade the jury to reach certain conclusions. As this judge pointed out, the common practice in New York courts against permitting "argument" in opening statements limits opening statements to introducing the facts that will come in evidence during trial and previewing what will be proven. Inferences that may be drawn from the evidence should be argued in summation, but arguing inferences is not allowed in the opening statement. The opening statement is also not the time or place for building an emotional argument. Nevertheless, the "severe distinction" may often be blurred and it may be hard to distinguish between previewing the evidence and impermissible argument.

§ 38:22 Preparing the opening statement

The first phase of the preparation of the opening statement is developing its structure in the context of the particulars of the case and the purposes to be served.[1] Like any other speech, it has an introduction, a body, and a conclusion. It should be structured in a way that presents the issues, and the facts and evidence pertaining to those issues, in a way that leads to the clearest pos-

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[Section 38:22]

[1]As to the purposes of the opening statement, see § 38:21.

sible understanding of the key events or facts supporting the claims or defenses. With rare exception, it is important for the jury to be alerted to the themes that will flow through the case and to have an idea of what is ahead. The introduction of the opening statement is important as a means of providing a brief preview of what will be covered in the body of the opening statement. That introduction serves as a segue to discussion of discrete elements of the trial presentation, such as the proof concerning liability, the proof concerning damages, the key elements of testimony of particular witnesses, crucial documents, the trial process and the other possible elements of the opening statement. The conclusion of the opening statement is important as a device for emphasis and repetition, in which the party's overall view of what will be proved can and should be summarized. For plaintiff, the conclusion also serves the purpose of preparing and cautioning the jury concerning what it is about to hear from defense counsel.

Once a structural outline is developed, the main task is to decide what should be said and, equally important, what should not be said. Those decisions require consideration of a number of factors. First and foremost are the themes, to be introduced in the opening statement, that will run throughout the presentation of the party's case. As has been pointed out, trial lawyers "frequently fail to make an opening statement that provides the fact-finder with a useful approach to the case, as distinguished from a prediction of what the witnesses will say."[2] The content of the opening statement should naturally flow from the decisions that are made in formulating the approach or themes to be followed in the case.[3] For example, when a plaintiff decides to give predominant emphasis to the devastating economic effect of the defendant's alleged failure to fulfill a contractual commitment, where injury rather than breach is the strongest element of the case, the content of the opening statement (although not ignoring the element of breach), should be molded to that theme of injury or harm. Conversely, if a plaintiff decides to give predominant emphasis to a defendant's intentional or flagrant breach of a contractual obligation, where proof of injury is weaker or less dramatic, the content of the opening statement should be molded toward establishing the theme of the deliberate wrongdoer.[4]

The projected length of the opening statement is a consideration of obvious importance, as is the level of detail. The reasonable span of attention and concentration of juries and judges is

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[2]Long, The Ten Most Common Errors in Trial Practice, Litig., Winter 1995 at 5.

[3]See discussion of the Trial Game Plan at §§ 37:29 to 37:32.

[4]As to the use of themes in summations, see § 44:10.

limited. This is doubly true in a commercial controversy involving unfamiliar and complex facts or details. Thus, even in a complex case, the opening statement should rarely exceed 60 minutes and in many cases should be briefer to the extent possible. The risk is not merely that the jury will not hear and understand, but as the opening statement drones on, the jury will become confused, uncomfortable, impatient, or even disabused of the party's case at the very inception of the trial.

In the jury trial of virtually every kind of commercial case, even the simplest ones, the appropriate use of visual aids of one form or another will enhance the clarity and persuasiveness of the opening statement.[5] It will do so by simultaneously engaging the visual and auditory senses of the jury, thereby enabling counsel to better focus the jury's attention and concentration.[6] With the use of such visual aids, it is possible to prepare a well-crafted opening statement of greater substance and longer duration; but even as to that, 45 to 60 minutes should be considered the outer limit.

In bench trials, the use of visual aids in opening statements (when permitted) can also be helpful in focusing the judge's attention and emphasizing the important aspects of the case.[7] However, the desirability of their use, as well as their content, will vary from judge to judge based on the judge's experience and proclivities. A judge who likes to be "walked through" the evidence may appreciate their use; other judges may not. Some judges may react negatively to the simpler type of graphics or other visual aids if they seem patronizing; others may not. For some judges, simply handing up a copy of a graph or chart may be a better technique than displaying that graph or chart digitized or on a large board or easel. In short, the use of visual aids in a bench trial, like many other aspects of the trial, should be tailored to the particular characteristics of the judge involved.

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[5]As to a full discussion of graphics, visual aids, and demonstrative evidence, see Chapter 42, "Graphics and Other Demonstrative Evidence" (§§ 42:1 et seq.).

[6]As Philip R. Schatz observed:

> No advocate should underestimate the utility of demonstrative evidence. Studies demonstrate that jurors best grasp issues and retain information when they receive it visually. In addition, studies indicate that the opening statement is the most effective opportunity to persuade, and the use of demonstrative evidence increases the persuasiveness of the opening by several orders of magnitude. It scarcely needs to be said that it is "far easier for the jury to really appreciate and understand a point being made, if in addition to an oral narrative description, they have the benefit of some visual aid." Schatz, Visual Evidence in Opening of Trial, 4/14/95 N.Y.L.J. 2, col. 6 (citations omitted).

[7]As to special considerations relating to the use of graphics in bench trials, see § 42:18.

The kinds of visual aids (whether electronic or other form) that should be considered in preparing the opening statement include, most prominently:

- profiles of the parties[8]
- a chronology of the principal events[9]
- blow-ups of portions of key documents such as pertinent contract provisions or extracts of important letters or memoranda
- reveals and pull-aways
- maps and diagrams
- graphics, such as bar or pie charts, showing annual financial results or other types of relevant information[10]

These visual aids provide points of reference, emphasis or repetition of particular events or facts as to what a particular witness will say or what may have been said in contemporaneous documents about those events or facts.[11]

Thus, in preparing the opening statement, consideration should be given to whether visual aids will be used in the openings, and if so, their content and manner of presentation. Counsel should be careful to avoid anything that is argumentative or arguably inadmissible, and limit visual aids to evidentiary matter that is clearly admissible. To construct an opening statement that includes reference to visual aids, and then have them stricken, is obviously detrimental. Although visual aids depicting evidence the party expects to introduce at the trial are essentially the same as counsel describing the anticipated evidence, the courts are considerably more guarded in permitting their use because of concerns of possible abuse.

Because opposing counsel will be afforded an opportunity to view and object to proposed visual aids before they are used, it is essential to have available a detailed summary of the evidentiary sources of all of the information shown on the visual aid.[12]

In addition to visual aids, the pleadings and the bill of particulars may be referred to during the opening statement in setting forth the claims that have been made, the defenses thereto, counterclaims and cross-claims, and in discussing the issues that are in dispute and those that are not. Also, "because

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[8]For a visual aid used in a trial of a complex partnership dispute, introducing the participants and facts, see § 38:34.

[9]For a visual chronology used in a trial of a complete partnership dispute, see § 38:35.

[10]For a pie chart showing the alleged division among the defendant general partners and others, see § 38:36.

[11]As to these and other matters relating to visual aids, see Chapter 42, "Graphics and Other Demonstrative Evidence" (§§ 42:1 et seq.).

[12]For an example of an organizational chart with record sources, see § 42:26.

the complaint, answer, and bill of particulars are often verified by the parties to the proceeding, they may be referred to as prior sworn statements and may be referred to and used by counsel in their openings for whatever tactical advantage may be gained."[13]

Preparation of the opening statement also requires serious attention to the relationship between what can be said at the outset of the case, what may be proved during the trial and what will be said in the closing arguments. An opening statement is essentially a contract made between counsel and jury, a series of promises as to what the trial evidence will show. Thus, if plaintiff's counsel says in the opening statement that documentary evidence will help corroborate the testimony of one of the plaintiff's witnesses that an important (but contested) conversation occurred at a particular time and place, and the evidence admitted at trial bears that out, plaintiff's counsel in the closing argument is in a position to remind the jury of the fulfillment of that promise of proof. If, however, plaintiff's counsel has misstated or overstated the projected evidence (i.e., there was no such documentary support for the testimony, or the documentary evidence was inadmissible and the defendant's objection to that evidence was sustained), defense counsel is in the position to remind the jury of the plaintiff's failure to fulfill that promise of proof.

Overstatement, not just misstatement, of projected facts and evidence during the opening statement may thus prove harmful and in some cases be fatal to the party's position. In a similar vein, the overstatement or misstatement of projected facts or evidence by plaintiff's counsel in the opening statement may prove immediately harmful if the opening statement of the defense attorney is able to expose the overstatement or misstatement.

§ 38:23 Presenting the opening statement

The opening statement is a "performance" by counsel intended to influence the jury, and it should be understood as just that. There are, however, no formulas for effective presentation other than preparation. What succeeds for one attorney will fail for another. The differing personalities, physical appearance, manner of speech, command of the language, background, and experience of counsel lead to widely different styles of presentation. Moreover, experienced counsel will vary their demeanor and style from case to case depending upon the composition of the jury, the

[13]DiBlasi, View from the Bench: Thorough Trial Preparation is Vital for Courtroom Success, 74-May N.Y. St. B.J. 21 (May 2002).

identity of the judge, the subject matter of the case, and other factors.[1]

Although the variables are too numerous to make discussion here worthwhile, there are a number of general observations that can be made concerning delivery of the opening statement:

- A very positive feature of an effective opening statement is the appearance of sincerity and belief in the client's case (without counsel expressing any personal opinions), and better yet, a genuine sincerity and belief in the case.
- Too often, counsel are anxious to make all their points and, under the pressure of time, speak too quickly. Rather than speaking in haste, making a large number of points (many of which may be missed, not understood, or worse yet, misunderstood), it is preferable to take one's time and make sure that what is said sinks in with the jury and is understood.
- Regardless of style, counsel's diction should be clear and voice modulated so that it can be heard by all of the members of the jury.
- Eye contact, which is a method of communication, should be developed with various members of the jury to the extent possible. Such eye contact, particularly in the opening statement, can be helpful in discerning juror's reactions or attitudes.
- Counsel's demeanor in the opening statement and throughout the ensuing proceedings should reflect genuine respect for the trial and judicial process and, without pandering or condescension, respect for the judge and the jury. Lawyers should be careful not to talk down to the jury.
- Reading from a written text should be avoided. The use of outlines, notes, or index cards is much preferred. Delivering an opening statement without notes can be more dramatic and impressive, but requires considerable experience and great talent, particularly in an opening statement of some length in a complex commercial trial.
- The opening statement is perhaps the only trial event that can be laid out in advance in detail, and is therefore capable of being rehearsed. Certainly for an inexperienced lawyer it is a good idea to do that. Many experienced trial lawyers do it as a matter of routine. Others do not, for fear that they will "peak" too soon and the rehearsal will be better than the performance. When the case is of sufficient magnitude to permit a mock trial,[2] a run through of an abbreviated opening statement and other

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[Section 38:23]

[1]For a detailed discussion of how to organize and present an opening statement, see §§ 38:25 to 38:27.

[2]As to mock trials, an extraordinarily valuable preparatory device, see § 39:10.

aspects of the trial proceedings provides an opportunity to test the possible effects of those performances.

§ 38:24 Objections made during opening statements

The question whether an objection should be made during the opening argument of adversary counsel, whether it should be made after completion of that opening statement, or whether it is not of sufficient importance to make any objection, may arise in a number of different circumstances, such as when adversary counsel:

- mischaracterizes the case;
- misstates the law or unduly discusses matters of law;
- engages in argument;
- offers or suggests improper opinions, including counsel's own opinion;
- makes prejudicial comments about the client or the client's lawyer, or introduces prejudicial subject matter; or
- introduces impermissible or inadmissible exhibits and visual aids.

At one end of the spectrum, there can be no justification for interrupting adversary counsel's opening statement with an objection as to trivial matters. At the other end of the spectrum, an interruption would be fully warranted as to a matter so prejudicial as to justify a motion for a mistrial. The problems arise with respect to matters in between.

There is a strong presumption, as a matter of practice and tactics, against interrupting adversary counsel with the assertion of an objection. Judges do not like it. Juries will generally not like it because, at the outset of the case, it shows some disrespect for the process and for adversary counsel. Interruption thus requires a judgment that a serious breach has occurred and that the judge will likely sustain the objection. Making the objection is a risk-laden tactic which, if it fails, damages the counsel making the objection.

This is especially true because counsel retains the opportunity, usually at a sidebar and outside the hearing of the jury, to object to particular remarks of adversary counsel after the opening statement has been completed. If the objection is sustained, the judge will usually give the jury a curative instruction, which may have the effect of embarrassing adversary counsel in the eyes of the jury at this early stage of the case.[1] If the objection is overruled, generally it will go unnoticed.

[Section 38:24]

[1]As to an illustrative experience of this matter, see § 38:28.

2. Practical suggestions for winning opening statements

Legions of state prosecutors have started their opening statements with the following preamble:

> Good morning, ladies and gentlemen. I am now privileged to make an opening statement on behalf of the People of the State of New York.
>
> An opening statement is like the picture on the cover of a jigsaw puzzle box. The pieces of evidence that will come in over the next week are the pieces of the puzzle. Those pieces will be laid before you by the testimony of the witnesses and physical evidence you will see and hear. But under the rules of evidence, those pieces come in a little bit at a time, with one piece here, one piece there. The picture on the cover—this opening statement—gives you a preview of what those pieces will all look like when assembled by the end of this trial so that you can better understand the evidence as it unfolds.
>
> And, as with many puzzles, you will see that there are a few pieces missing. Of course, no one was videotaping the defendant as he committed his crimes, and so the picture has a few small gaps here and there. But the pieces of the puzzle you will see will be more than enough to prove that the defendant is guilty beyond a reasonable doubt.

This is an apt description of the central purpose of an opening statement. An opening statement should draw a clear and compelling word picture of the party's story, so that the jury knows what to expect, and then listens to the proof as it comes in having been programmed to link each piece together in the way you want.

However, starting by describing the purpose of an opening, rather than stating your central theme, may not be the best use of those precious opening seconds when the jury's attention is fully focused on what the advocate has to say.[2] The goal of this section is to provide some practical pointers of particular relevance to commercial litigators trying to influence jurors who, at best, likely have little real conception of business matters and probably have many erroneous preconceptions about the commercial environment.

§ 38:25 Developing the themes of your opening statement

Focus on your strongest themes. A good lawyer, especially a

[2]For two very different (but complementary) extended essays on opening statements, see Mauet, Trial Techniques ch. IV (7th ed. 2007); and Nations and Singer, "Communicating During the Trilogy of Persuasion: Voir Dire, Opening and Summation," available at http://www.howardnations.com/persuasivejuryarguments/persuasion.pdf (last accessed Mar. 11, 2010).

good commercial lawyer, starts from the earliest involvement in a case to develop the themes—the playground justice stories and nuanced legal theories—that ultimately determine every strategic call in the case.[1] But, somehow, when it comes time to boil those themes down for an opening statement, lawyers can become so obsessed with minutiae that their themes are lost in a forest of trees. Or, just as bad, having lived with a case through years of discovery and motion practice, they may forget that concepts they take for granted are daunting to the typical juror.

One solution to this problem is to talk to a wide variety of nonlawyers and then pay close attention to their reactions and questions. You likely will find that you have taken things for granted that really need to be explained up front, and it may even be that, to a new audience, the case is about something far different from what you thought. It is critical that you focus your opening on the themes that resonate with plain, everyday folk.

Of course, the most powerful way to hone the presentation of your themes is through the use of a jury consultant, which should be done whenever a client is willing to pay for it. If the budget doesn't allow for this, however, attorneys should conduct their own "focus groups." Bring secretaries, messengers, loading dock personnel—as many non-lawyers as possible—into a conference room and try your opening on them. Run it by your friends and family at dinners and cocktail parties. Go up to strangers at a bar. In any way you can, lay out what you think your case is about, and then listen to what people get excited about, what they don't understand, what they define as "the real issue." Sometimes pretend you are representing the other side, and learn what issues you need to be most concerned about.[2]

Be wary of pleading in the alternative. It is often necessary and appropriate in an initial pleading to state alternative theories of the case. But there are serious risks in keeping conflicting theories alive at trial. You have been through discovery and have explored the facts more fully than was possible at the pleadings stage. You have tested your themes in jury research, formal or

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[Section 38:25]

[1]Regarding the importance of defining themes, and practical advice for testing them at the outset of a case, see Bocchino and Solomon, What Juries Want to Hear: Methods for Developing Persuasive Case Theory, 67 Tenn. L. Rev. 543 (2000); see also discussion of themes in §§ 37:29 to 37:32 concerning the Trial Game Plan.

[2]This is only a partial substitute for real jury research. For example, people who know you are likely to be biased too much in your favor and so will be less candid than strangers participating in a well-structured "social psychology experiment." Professional researchers also add an objectivity to the analysis and are better trained at teasing out and testing themes.

informal. Now you're going to try to convince the jury that the evidence is clear as to what happened. Offering inconsistent alternative theories cuts in the other direction, communicating that you still have no real idea exactly what the evidence will show—hardly a compelling way to win people over to your side.

The risk is not as great when presenting multiple legal arguments as to why the "provable" facts support a finding of liability, but the structure must not suggest any uncertainty on your part as to the proof. For example, a typical opening in a contract case might have a segment something like this:

> The evidence will show, ladies and gentlemen, that Defense Corp made an express, verbal promise to pay Plaintiff Co $2,500 for every widget it received. At the close of the case, I will ask you to order Defense Corp to live up to that promise. But even if you do not find that Defense Corp made such an express promise, the evidence will show that Defense Corp used the widgets in its production, and got paid good money for the finished product. So at a minimum you should make Defense Corp pay Plaintiff Co. what the widgets were worth on the alternative legal theory of quantum meruit, which the judge will explain to you at the end of the case.

Another attorney might handle the issues this way:

> Defense Corp accepted all the widgets Plaintiff Co manufactured and delivered. Now they don't want to pay the amount they promised, $2,500 a piece. Instead, they deny making that promise and claim they can pay Plaintiff Co only $500 per widget. But their own documents show that the widgets contributed great value to each of Defense Corp's products. We will ask you to hold Defense Corp liable to pay $2,500 per widget both because it promised to do so and because this is what the widgets were actually worth when Defense Corp used them. The judge will instruct you in two legal concepts, "an express promise" and "quantum meruit," both of which the evidence will show support Defense Corp's demand for payment.

Be very careful about handling admissions of partial responsibility. If a commercial case comes to trial, it is usually because each side has something meaningful to say and there is no clear answer as to who is right or wrong. Admitting some degree of fault may earn candor points, but to be effective, it has to be genuine. A half-hearted admission may be worse than an outright denial of fault.

For example, in a recent construction dispute, the general contractor was willing to admit that it could have done a better job but wanted the jury to require the subcontractors to pay the bulk of the damages. Jury research showed that when the general contractor admitted to 10% of the liability, many jurors actually held this against the company, awarding higher damages than in tests where the general contractor denied any fault whatsoever. Mock jurors said that they believed that if the

contractor was willing to admit any degree of responsibility, it could only be because its real culpability was even greater. Further jury testing was required to determine the "right" level of fault for this defendant to accept.

§ 38:26 Outlining the opening statement

Start at the finish line. As far in advance as possible, draft the jury instructions. This will help you identify the critical context for all your arguments. Take "ownership" of those concepts, building the magic words into your voir dire and opening statements, so that when the jury hears the legal instructions at the close of the case—the very last words spoken before going into the jury room to begin deliberating—they will be programmed to identify those concepts with your side of the case.

Next, write your closing argument. The closing differs in being pure argument, in which you marshal the evidence into logical points and draw inferences from the proof, rather than merely restating the chronology of events or painting a word picture of the anticipated proof. It can be far more detailed, because by then the jury has the necessary context to understand and remember.[1]

There are at least two reasons for writing the closing well in advance of trial. First, it serves as a checklist of the evidence you want to bring out, so that you can work backwards from there to draft your witness examination outlines effectively. Second, the closing and the opening should work together, with the opening serving as a series of promises of what the evidence will show and the closing confirming that you have lived up to your promises (while showing how the other side failed to do so). The larger point is that your most powerful themes must drive every act at trial, from voir dire right through handling questions from the jury during deliberations.[2]

When you are ready to outline the opening statement, begin with a common sense preamble summing up your most important themes. Jury researchers will tell you that the first few minutes of an opening statement are the most critical in a trial. This is one of the very few times where you can count on the full atten-

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[Section 38:26]

[1]See Chapter 44, "Final Arguments in Jury and Bench Trials" (§§ 44:1 et seq.).

[2]For a fuller discussion of the reasons for starting at the finish line and then "reverse engineering" the rest of your case—including how to tie this process into trial graphics as well as arguments—see Bocchino, Dobson & Solomon, What Juries Want to Hear II: Reverse Engineering the Verdict, 74 Temple L. Rev. 177 (Spring 2001).

tion of all of the jurors. Do not waste this precious opportunity thanking the jury in advance for their service, explaining the purpose of an opening statement, or introducing yourself and the parties (which, in any event, should have been done during voir dire and again by the court in its introductory jury charge).

Here are some illustrations of such preambles in commercial cases:

Case 1: Plaintiff's Preamble:

> This is the case of the dishonest partner. The evidence will show that the defendant, Joseph Smith, took almost three quarters of a million dollars that he was not entitled to from the jewelry business he owned jointly with Mary Jones. Not only did he wrongfully take that money but he made dozens of false entries in the books of Jewelry Co. to cover up what he did. The law says that Mr. Smith owed Ms. Jones a duty of utmost loyalty, which he violated by these dishonest deeds. At the end of the case, we will ask you to order him to pay back everything he took.
>
> I will now summarize the evidence you will hear that proves that Mr. Smith repeatedly violated the trust Ms. Jones placed in him.

Case 1: Defendant's Preamble:

> Ms. Jones's lawyer told you that this is the case of a dishonest partner, and he is right. But it is Ms. Jones, not Joseph Smith, who is being dishonest here. Every dime Joseph took out of the business was money he earned by his hard work. Joseph built this business from nothing, starting 40 years ago, with Thomas Jones, Mary's now deceased father. Ms. Jones inherited a 49% interest in the partnership from her father when he died but never spent a single second actually working in the business. Instead, she is using this trumped-up lawsuit to try to force Joseph Smith to sell the business so she can put more money in her pocket—money she never did anything to earn. Ms. Jones knew all about the $750,000 Joseph paid himself over five years. In fact, she approved all such payments in advance. She is now just pretending to be shocked to learn of these payments, simply as a tactic to force Joseph to liquidate this business—a business he has given his life to—for her own selfish gain.
>
> Let me explain in more detail what the evidence will really show.

Case 2: Plaintiff's Preamble:

> Ladies and Gentlemen, this case is about a building contractor who cut corners without permission and so built a massively defective building. The evidence will show that GC Co was hired to supervise the construction of a huge printing plant for Newz Company, and promised to make sure the plant was built according to very precise engineering plans. But GC Co then allowed the other contractors it hired to ignore those plans because GC Co wanted to make a couple of extra bucks. As a result, the sewage, water, electrical and fire prevention systems were left exposed to natural and predictable forces that eventually tore them right off the bottom of the Newz

Company printing plant. It cost over $25 million to repair those critical systems and we will ask you to order to GC Co to pay for these damages it caused.

Let me give you an overview of what I am going to cover for the rest of my time this morning.

Case 2: Defendant's Preamble:

In order to get some tax breaks from the city, Newz Company took a huge risk, building in what is basically a swamp. GC Co repeatedly warned Newz Company that this was a risky thing to do, and that if the newspaper really wanted to take such a risk, it had better be willing to use the best construction methods possible, whatever the cost. But Newz Company was cheap—in fact, it held meetings at least twice a week, every week, for two years, to find ways to save every possible penny. It had its own full time employees at the construction site every minute—plus it paid an engineering company to assign two professional engineers to do nothing else except watch over GC Co's shoulders. These Newz Company watchdogs constantly changed the plans in order to save money, and signed off on everything GC Co did. In the end, GC Co built exactly the plant Newz Company asked for—and now Newz Company wants to make GC Co the scapegoat for its own foolish choice to build in a swamp—and to do so on the cheap. We will ask you therefore to order Newz Company to pay GC Co the $1 million in fees Newz Company has held back, and to award Newz Company nothing.

I want to summarize for you now the evidence that Mr. Moore, the Newz Company attorney, chose not to tell you about in his opening. I will break that evidence down for you as follows.

Next, set out a logical outline of the body of your opening. After a punchy and powerful preamble, it is useful to give the jury an overview of the points you will be covering in the body of your opening. Setting forth the outline up front helps the jury follow along as the story unfolds and reduces the jurors' natural anxiety that they may "fail the test" at the end of the case. It also permits repetition—the classic Toast Master's advice to "tell them what you're going to tell them, tell them, then tell them what you've told them"—which is critical to winning advocacy.

In developing the outline, remember that you want to tell a story—a human interest story. This is very different from what many lawyers do when, say, giving oral argument on a motion to dismiss. Your story should explain the facts in a concise and compelling way, whether that story is told chronologically or structured by issue. For example, in the construction litigation example above, the plaintiff's lawyer might have followed the preamble with the following:

I want to cover four main things in the rest of my remarks this morning. First, I will explain the search that Newz Co made to find an expert to run this project, and the way GC Co sold itself as just

such an expert. Second, I will use some diagrams to explain in more detail what soil subsidence is and the steps GC Co was supposed to take to protect the pipes on the bottom of the building from the foreseeable and expected effects of this common condition. Third, I will preview the expert testimony you will hear that proves that GC Co just buried the pipes under the building directly in the dirt, making it inevitable that as the soil sank, it would pull those pipes down with it. Finally, I will describe how expensive and difficult it was to repair these problems once the building was up and running.

Tell your story; not the other party's story. It is appropriate, maybe even essential, in an opening statement to anticipate what the other side is going to argue and try to inoculate the jury against those arguments. However, this should be done in the middle of your opening, not at the outset or the end, where you should be reinforcing your strengths. Also, it is best to do so indirectly, while telling your story, rather than wasting your precious time before the jury affirmatively explaining the other side's arguments. For example, in a breach of contract suit on a verbal agreement, avoid the following:

You will hear that the contract upon which Plaintiff Co relies was not put in writing, it was merely an oral promise. I'm sure the lawyer for Defense Corp will argue that this contract would have been put in writing if the promise really was something Plaintiff Co cared about. But I'll ask you to pay close attention to the law as the judge will instruct you at the end of this case. You will learn that in a case like this, the law says an oral promise is just as binding as a written promise.

Rather than being so defensive, the facts might make it possible to recast the "problem" as a positive. For example:

The evidence will show that these two companies have been dealing with each other for years. The two owners always did business based on a handshake. They never put any of their contracts in writing because they never needed to—at least, not until 2009, when Defense Corp got in money trouble and suddenly used the absence of a written contract as its excuse for not doing what it had promised. But the judge will tell you at the end of the case that the law expects Defense Corp to keep its promises, to live up to its word, and it doesn't matter whether that promise is just spoken or written down.

When developing your outline, it is tempting to put in everything that you expect will come out at trial. There are several problems with an opening that goes on at too great a length. First, the jury will lose interest, especially now that jurors have been programmed by television crime shows to expect opening statements to last a few minutes or less. This means they will tune out and will not absorb your big picture themes. Second, it is unwise to promise more than you have to. No matter how well your witnesses are prepared, they inevitably will disappoint you

when they take the stand and are stricken by performance anxiety or are effectively cross-examined. You will be held to account at closing for any promises you make in your opening.[3] Third, saying more than absolutely necessary could have unanticipated effects upon your client's appeal rights.[4]

This does not mean that you should only mention critical facts and themes once. Jurors' minds wander in and out of an opening statement. Repetition, verbally and visually, is critical to grooving the path in their minds that leads to a verdict in your favor. But try subtly to alter the way the point is made each time, to maintain interest and to avoid insulting those jurors who actually are paying close attention and who might think that you don't respect their intelligence.

Prepare the jury for deposition testimony. Even jurors who have sat in other cases may not have been exposed to the extensive use of deposition testimony that is common in a commercial case. It is useful to explain to the jury in your opening that substantial evidence may come in this way, perhaps using a statement along the following lines:

> In New York, before trial, witnesses appear under oath and answer questions at what is called a deposition. At a deposition, the witness takes exactly the same oath to tell the truth as witnesses at trial. That sworn testimony is written down by a stenographer just like the court reporter over there will do at this trial. As a result, that deposition testimony can be introduced here at trial, just as if

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[3]See Bielich v. Winters, 95 A.D.2d 750, 464 N.Y.S.2d 189 (1st Dep't 1983) (holding that plaintiff's failure to call an accountant as promised in an opening statement supported defendant's contention that plaintiff failed to establish damages with reasonable certainty); Brownlee v. Hot Shoppes, Inc., 23 A.D.2d 848, 259 N.Y.S.2d 271 (2d Dep't 1965) (holding that it is reversible error not to order defendant to produce the contract referred to in pleadings and opening statement); Farber v. Jewish Community Center of Flatbush, 32 Misc. 2d 124, 223 N.Y.S.2d 769 (Sup 1962), judgment aff'd, 17 A.D.2d 985, 235 N.Y.S.2d 376 (2d Dep't 1962) (stating that, where a party refers to a witness in opening statement, opponent may refer to failure to call that witness in summation).

[4]Baumis v. General Motors Corp., 106 A.D.2d 789, 790, 484 N.Y.S.2d 185, 187 (3d Dep't 1984), order aff'd, 66 N.Y.2d 777, 497 N.Y.S.2d 369, 488 N.E.2d 114 (1985) (rejecting plaintiff's claim of surprise where plaintiff's opening statement acknowledged defendant's intention to assert a defense not raised in the pleadings); Safran v. Man-Dell Stores, Inc., 106 A.D.2d 560, 562, 483 N.Y.S.2d 370, 371 (2d Dep't 1984) (holding that notice was not an issue in negligence action where defendant's opening and closing statements addressed plaintiff's contention that defendant had created a dangerous condition); cf. Hutter v. Stokes, 170 N.Y.S. 1087 (App. Term 1918) (holding it was error for trial court to grant defendant's motion to dismiss for failure of proof on various issues where defendant's counsel had stated, in opening, that only one issue was in dispute); DuBose v. Velez, 63 Misc. 2d 956, 313 N.Y.S.2d 881 (N.Y. City Civ. Ct. 1970) (objection was timely where defendant stated in opening statement that plaintiff was limited to proof as alleged in the pleadings).

> the witness was here on the stand. You will hear a fair amount of such testimony in this trial. In order to make it as interesting as possible, we will put that evidence before you by having one person sit in the witness chair and read the answers while I read the questions, just as if those questions were being asked here and the answers were being given here before you.

Use common names, not impersonal labels. It is unwise to refer to the entity you represent as "the plaintiff" or "the defendant." This depersonalizes the client and makes it harder for the jury to identify with the story. It may also be less clear than using names—you know well which party is a plaintiff or a counterclaim defendant, but the jury understands names better. Even worse is referring to the party you represent as "my client." In addition to being impersonal and less clear, it may convey to the jury that you are just a "hired gun" making arguments you were paid to make—at the very time you are trying to convey a sincere belief in that party's human interest story.

This advice holds up not just for party names, but also for critical events. It may be more powerful, for example, to refer to a contract as "Defense Corp's solemn promise," rather than always calling it "the Requirements and Supply Agreement of December 16, 2009."

End with a clear statement of what you expect. Surprisingly, many attorneys fail to clearly explain in their opening statement what it is they want that jury to do at the end of the trial. Consider the following as a way to wrap up an opening:

> Thus, the evidence in this case will show that BB Corp made a clear promise to provide ball bearings to Press Co in a timely fashion. Based on all the facts, it was reasonable for Press Co to count on BB Corp to live up to that promise, and Press Co therefore relied on that promise by purchasing the rest of the very expensive materials necessary to build several huge printing presses. These materials cost Press Co $2 million. But BB Corp broke its promise by not delivering the ball bearings and Press Co was unable to get a refund or make any use of all that other equipment. This meant Press Co was out of pocket $2 million. It also lost the $500,000 in profit it would have made from the sale of those finished printing presses. As a result, at the end of this case, we will ask you to order BB Corp to pay Press Co two and a half million dollars.

Remember your audience. It probably goes without saying that an opening statement to a judge should be very different from an opening statement to a jury, if the judge even permits an opening. A judge will expect to hear a case described with more emphasis on the bottom line disputed facts, and with more discussion of legal concepts, than would a jury.

It is just as true that the opening statement should be tailored as much as possible to the individual jurors. Effective advocates

will weave in examples and allegories that touch on the lives of the jurors, as they were revealed during voir dire. For example, if one juror works in the family business, and the case involves just such a business, that fact should be particularly noted in the opening (without, of course, expressly mentioning that juror, who could just as easily be mortified by the attention as pleased, or be turned off by what could be viewed as pandering). Allegories and metaphors are very useful; draw them from the professions, personal lives and favorite television shows of your jurors.

§ 38:27 Tips for effective presentation of an opening statement

Use plain language. We as lawyers tend to think of lawsuits too much as an intellectual or legal puzzle. To jurors in particular, there needs to be a common sense, human interest story, even in commercial cases: "This person promised to do something then never did so." "This company promised to pay and didn't." "That company promised to provide software that worked, but it never did." "This party cheated that party." While there may be complicated facts and legal theories underlying each such statement, especially in the opening they need to be stated in common sense terms with emotional resonance.

Whatever one thinks of Ernest Hemingway, his plain-spoken way of writing is a perfect model for an opening statement. As much as possible, an opening statement should avoid using technical terms. Instead of saying that "Defense Corp breached a contractual obligation under a supply contract," for example, try: "Defense Corp broke its promise to deliver widgets within three months."

One exception is to "own" the jury charge by building references into your opening and witness examinations of the actual charge language the judge will use. If the case is about "reasonable reliance," and the jury will be so charged, then you need to start programming the jury to identify that legal requirement with your proof. Similarly, if legal presumptions or other concepts such as burden-shifting are going to play a material part in your case, it is best to incorporate them into a segment of your opening so that the jury doesn't get confused later. The point is to describe them in plain English, as simply as possible.

Make your opening a visual experience. We live in a visual world and most jurors now expect visual stimulation, if you are to hold their interest. Moreover, different jurors have different learning styles; some learn better by reading things than by listening. And everyone seems to learn better when presented with facts both aurally and visually. Thus, research has shown that, on average, after three days jurors remember about ten

percent of facts presented to them *only* verbally, and about twenty percent of evidence presented to them *only* visually. On the other hand, jurors who *both* see and hear something recall about 65% of that material three days later. Put another way, an attorney who presents the opening story both verbally and visually has more than a six-fold advantage over an attorney who merely talks to the jury.[1]

Many commercial courts are prewired for the electronic presentation of evidence on monitors or projected on large screens. Off-the-shelf computer programs such as PowerPoint are so easy to use that it may not be necessary to hire expensive trial consultants, although such outsourcing usually produces a superior product and frees up the trial attorney for other tasks.[2] Graphic evidence, such as timelines or charts showing relationships, may work better as boards and blow-ups. But in whatever form, on whatever the trial budget, strive to make the opening—indeed, the entire trial—a compelling visual experience.

Another advantage of thinking of an opening statement as a visual experience is that it enables the attorney to get away from notes and to speak directly to the jury. Rather than reading from a script, the attorney can stand before the monitor or the screen and respond naturally to the prompting of those images as they are revealed, rather than looking down at a typewritten script on a podium. This will tend to help the attorney naturally make eye contact with the jurors, and be more animated and varied in pace and tone.

One special issue that arises when making an electronic opening is whether the images need to be disclosed in advance to opposing counsel and the court. Judges vary in their practices here.

[Section 38:27]

[1]Preiser, "Demonstrative Evidence in Criminal Cases," Trial Diplomacy Journal, 4, pp. 30–32 (1980); "Weiss-McGrath Report" by McGraw-Hill, cited in Dombroff on Demonstrative Evidence (New York: John Wiley & Sons, 1983). See also Vogel, Dickson & Lehman, Persuasion and the Role of Visual Presentation Support: The UM/3M Study, Minneapolis, MN: Management Information Systems Center, School of Management, University of Minnesota, 1986; Parker, "Applied Psychology in Trial Practice," Defense Law Journal, 7, 33–45.

[2]The National Institute for Trial Advocacy puts out two very useful publications in this regard: "Powerpoint For Litigators" and "Effective Use Of Courtroom Technology." The authors have arranged for two examples of excellent "generic" PowerPoint presentations to be posted on the Internet for your consideration. The first explains the numerous stages of the initial public offering process and the other illustrates a fraudulent "round robin" transaction (showing how actual exhibits can be "imported" into the display). See http://www.doar.com/commercial-lit-book, which displays these PowerPoint presentations as "movies," to illustrate how the slides "reveal" the text (albeit much more quickly than the speaker would do in an actual case) (last accessed Mar. 11, 2010).

Some will insist that the entire electronic presentation be previewed in order to avoid objections; others only want to preview animations or other demonstrative aids to determine whether they are prejudicial or too argumentative for an opening. Still other judges do nothing in advance and merely rule on objections as made. The advocate will have to inquire as to the practices of each individual judge.

It is generally a mistake in a commercial case for a lawyer to become strident or overly emotional. The jury and the judge are trying to decide whom to believe. A calm, credible lawyer who proceeds rationally through the evidence, without being admonished by the court for going beyond the proper bounds of an opening statement, begins on the best possible footing to establish the credibility that will carry all the way through to closing argument.

This is not to say that passion is uncalled for, or that an opening statement should be bland and bloodless. But blatant appeals to emotion in a typical commercial dispute are likely to do more harm than good.[3] It also does not help your credibility to have curative instructions given following your opening, so avoid the objectionable behavior identified in § 38:18 above.

Vary your pace, tone and visual cues. Do not drone on. Turn the television monitors off from time to time. Stop and take a sip of water as a visual cue that you are moving to a new topic. These variations in pacing serve to call the wandering mind of a juror back to the task at hand.

Use hand gestures sparingly. While it is not necessary to remain woodenly positioned behind the podium, excessive hand movements, or bouncing around the courtroom, is distracting and annoying.

Adding rhetorical questions is another way to stimulate interest and to illustrate critical themes. The questions can then be posed again—and answered—in summation. For example, a defense attorney might include the following in the opening:

> Press Co claims it relied on a verbal promise from BB Corp that in only three short months BB Corp could manufacture and deliver 10,000 precisely crafted ball bearings. Press Co says this promise was critical, because it needed the ball bearings in order to manufacture several huge printing presses it had a chance to sell to Newz Co. for millions of dollars.
>
> The owner of BB Corp absolutely denies having promised he could make so many precisely crafted ball bearings that quickly. He will

[3]For a useful discussion of the trial lawyer as "credible leader," see "Courtroom Credibility: 10 Habits to Make You An Effective Leader," by Samuel H. Solomon, available by request by email to mailto:sam@doar.com.

> tell you that there was a simple misunderstanding during the key telephone call.
>
> As the evidence comes in, I suggest you ask yourself this, ladies and gentlemen: Would a sophisticated company like Press Co enter into such an important arrangement without sending so much as a single email to confirm that the ball bearings really could be manufactured and delivered in only three months? Would it be reasonable to rely on just a telephone conversation for something so important?

Rehearse, get feedback, edit and rehearse again. The opening statement is one of the few things that can be prepared well in advance with some confidence that it will go off pretty much as planned. Some lawyers say they don't like to rehearse their opening too many times, because they are afraid that it will become stale. Experience suggests that the adrenaline rush of trial will prevent this, and that coming across as overly prepared is a much smaller danger than that of being unclear. So repeated rehearsal in front of others is strongly encouraged. Afterwards, test for weaknesses by asking open ended questions, such as: "What part of the story did you want to hear more about? What were our strongest and weakest points? Could you tell me in your own words what you think really happened here?"

If at all possible, watch the judge who will be sitting on your case at several trials before yours, to see how the judge handles opening statements (and otherwise runs the courtroom). See how the judge reacts to objections. What is the court's practice with regard to explaining the purpose of an opening statement to a jury in the preliminary charge? Does the judge insist that lawyers remain stationary at the podium, as is becoming more and more common? How does the judge feel about the display of evidence or demonstrative aids in an opening? Knowing these things may help you avoid the distraction and embarrassment of having an objection sustained, plus make you generally more calm and comfortable.

COMMERCIAL LITIGATION IN NEW YORK STATE COURTS

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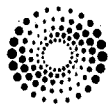

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§ 38:7 Preliminary jury instructions

n. 8.

Replace "Mar. 11, 2010" with:
May 7, 2014

III. OPENING STATEMENTS

A. IN GENERAL

§ 38:16 The right to make an opening statement

n. 4.

Replace last sentence in footnote with:
See also 8 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.02 (2d ed.).

n. 5.

Replace text of footnote with:
8 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.02 (2d ed.).

n. 6.

Add text at end of footnote:
; Saggese v. Steinmetz, 83 A.D.3d 1144, 1145, 921 N.Y.S.2d 360 (3d Dep't 2011) (holding denial of an opening statement was harmless error where court was fully familiar with the facts of the case, the parties and their arguments from prior court appearances).

n. 10.

Replace text of footnote with:
8 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.02 (2d ed.).

§ 38:17 Order of opening statements

n. 1.

Replace second sentence of footnote with:
See also 8 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.04 (2d ed.).

n. 3.

Replace citation to "Weinstern, Korn & Miller" citation with:
8 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.05 (2d ed.)

n. 4.

Replace first sentence of footnote with:
8 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.05 (2d ed.).

n. 6.

Replace text of footnote with:
8 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.10 (2d ed.).

n. 8.

Replace citation to "Weinstern, Korn & Miller" with:
8 Weinstein, Korn & Miller, New York Civil Practice ¶ 4016.12 (2d ed.).

§ 38:18 Permissible scope of opening statements

n. 8.

Add text at end of footnote:
An opening statement that places a matter in issue can also open the door to the admission of evidence at trial. Sanchez v. City of New York, 97 A.D.3d 501, 505, 949 N.Y.S.2d 368 (1st Dep't 2012) (counsel opened the door to evidence of

n. 21.

Add text to footnote before "cf.":
Rodriguez v. City of New York, 67 A.D.3d 884, 885, 889 N.Y.S.2d 220 (2d Dep't 2009) (counsel's reference in opening statement to matters as to which no evidence or expert testimony would be presented was unduly prejudicial, requiring new trial);

n. 26.

Add text at end of second sentence of footnote:
; Simberg, Displaying Digital Media During Opening Statements: Tactics, Techniques, and Pitfalls, 60 DePaul L. Rev. 789 (Spring 2011).

n. 27.

Add text at end of footnote:
Cunningham v. Anderson, 85 A.D.3d 1370, 1375, 925 N.Y.S.2d 693, 698 (3d Dep't 2011), leave to appeal dismissed in part, denied in part, 17 N.Y.3d 948, 936 N.Y.S.2d 71, 959 N.E.2d 1020 (2011).

§ 38:19 Dismissing complaint after opening statement

n. 1.

Add text at end of footnote:
; Burbige v. Siben & Ferber, 89 A.D.3d 661, 662, 931 N.Y.S.2d 898, 899 (2d Dep't 2011) (holding "the grant of [a CPLR 4401] motion prior to the close of the opposing party's case generally will be reversed as premature even if the ultimate success of the opposing party in the action is improbable"); Okunubi v. City of New York, 109 A.D.3d 888, 889, 971 N.Y.S.2d 338, 339 (2d Dep't 2013), leave to appeal denied, 22 N.Y.3d 858, 981 N.Y.S.2d 368, 4 N.E.3d 380 (2013) (grant of CPLR 4401 application prior to close of opposing party's case is "disfavored" but may be warranted where plaintiff has " 'by some admission or statement of fact, so completely compromised his or her case that the court was justified in awarding judgment as a matter of law' "). See also Oscanyan v. Arms Co., 103 U.S. 261, 263, 26 L. Ed. 539, 1880 WL 18888 (1880) (holding concessions made by attorney during opening statement bound the client, holding "any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof").

n. 2.

Add text at end of first sentence of footnote:
; Westchester Mall, LLC v. Hedvat, 104 A.D.3d 678, 678, 961 N.Y.S.2d 214 (2d Dep't 2013) ("Dismissal at the conclusion of an opening statement is disfavored."); Pipelias v. City of New York, 99 A.D.3d 685, 685, 952 N.Y.S.2d 87 (2d Dep't 2012) (holding "the granting of [CPLR 4401] motion prior to the close of the opposing party's case generally will be reversed as premature even if the ultimate success of the opposing party in the action is improbable"); Nieves v. City of New York, 95 A.D.3d 612, 612, 945 N.Y.S.2d 656 (1st Dep't 2012) (same); Kamanou v. Bert, 94 A.D.3d 704, 704, 941 N.Y.S.2d 260 (2d Dep't 2012) (same); Okunubi v. City of New York, 109 A.D.3d 888, 890, 971 N.Y.S.2d 338, 339 (2d Dep't 2013), leave to appeal denied, 22 N.Y.3d 858, 981 N.Y.S.2d 368, 4 N.E.3d 380 (2013) (affirming judgment to defendant after opening statements, where plaintiff's counsel admitted facts establishing probable cause to arrest plaintiff, which justified dismissal of plaintiff's claims for false arrest and malicious prosecution).

n. 7.

Add text at end of footnote:
; Warme v. City of New York, 89 A.D.3d 548, 548, 932 N.Y.S.2d 690, 690 (1st Dep't 2011) (affirming dismissal of complaint where plaintiff's opening state-

ment and proffer of proof thereafter failed to set forth prima facie case of negligence against defendants).

n. 8.

Add text at end of footnote:

; Caruso v. Northeast Emergency Medical Associates, P.C., 85 A.D.3d 1502, 1506 n.5, 926 N.Y.S.2d 702, 707 n.5 (3d Dep't 2011), appeal withdrawn, 18 N.Y.3d 856, 938 N.Y.S.2d 863, 962 N.E.2d 288 (2011) (denying directed verdict based on comments by plaintiff's counsel in opening statement where, viewed in defendant's favor, comments "are not so self-defeating as to be characterized as an admission warranting a directed verdict").

B. STRATEGIC CONSIDERATIONS IN COMMERCIAL TRIALS

2. *Practical suggestions for winning opening statements*

§ 38:24.50 Purpose of an opening statement *[New]*

Legions of state prosecutors have started their opening statements with the following preamble:

> Good morning, ladies and gentlemen. I am now privileged to make an opening statement on behalf of the People of the State of New York.
>
> An opening statement is like the picture on the cover of a jigsaw puzzle box. The pieces of evidence that will come in over the next week are the pieces of the puzzle. Those pieces will be laid before you by the testimony of the witnesses and physical evidence you will see and hear. But under the rules of evidence, those pieces come in a little bit at a time, with one piece here, one piece there. The picture on the cover—this opening statement—gives you a preview of what those pieces will all look like when assembled by the end of this trial so that you can better understand the evidence as it unfolds.
>
> And, as with many puzzles, you will see that there are a few pieces missing. Of course, no one was videotaping the defendant as he committed his crimes, and so the picture has a few small gaps here and there. But the pieces of the puzzle you will see will be more than enough to prove that the defendant is guilty beyond a reasonable doubt.

This is an apt description of the central purpose of an opening statement. An opening statement should draw a clear and compelling word picture of the party's story, so that the jury knows what to expect, and then listens to the proof as it comes in having been programmed to link each piece together in the way you want.

However, starting by describing the purpose of an opening, rather than stating your central theme, may not be the best use of those precious opening seconds when the jury's attention is fully focused on what the advocate has to say.[1] The goal of this section is to provide some practical pointers of particular

relevance to commercial litigators trying to influence jurors who, at best, likely have little real conception of business matters and probably have many erroneous preconceptions about the commercial environment.

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[1]For two very different (but complementary) extended essays on opening statements, see Mauet, Trial Techniques ch. IV (8th ed. 2010); and Nations and Singer, "Communicating During the Trilogy of Persuasion: Voir Dire, Opening and Summation,"available at http://www.howardnations.com/persuasivejuryarguments/persuasion.pdf (last accessed May 7, 2014).

§ 38:27 Tips for effective presentation of an opening statement

n. 1.

Add text at end of footnote:

; Simberg, Displaying Digital Media During Opening Statements: Tactics, Techniques, and Pitfalls, 60 DePaul L. Rev. 789 (Spring 2011).

n. 2.

Replace "Mar. 11, 2010" with:

May 7, 2014

n. 3.

Replace text of footnote with:

For a useful discussion of the trial lawyer as a "credible leader," see Courtroom Credibility: 10 Habits to Make You An Effective Leader, by Samuel H. Solomon, available at http://www.doar.com/marketing/newsletters/credibility.pdf (last accessed May 7, 2014).

Add footnote 4 at end of last paragraph:

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[4]For additional tips on delivering an effective opening statement, see David R. Marriott & Richard Sullivan, Opening to Win, 11/14/2011 N.Y.L.J. S7, col. 1.