

# Opening Statements

**William Pagan, Esq.**  
The Pagan Law Firm, P.C., NYC



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By: William Pagan, Esq.  
The Pagan Law Firm, P.C.  
805 Third Avenue, Suite 1205  
New York, New York 10022

[WPagan@thepaganlawfirm.com](mailto:WPagan@thepaganlawfirm.com)

## Law: CPLR R 4016. Opening and Closing Statements

(a) 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. At the close of all the evidence on the issues tried, an attorney for each such party may make a closing statement in inverse order to opening statements.

### First Opportunity to Present the Case to The Jury (other than Voir Dire):

- Shape the jury's perspective of the entire trial
- Establish credibility (enables jurors to trust the testimony, documents, and other evidence you will submit to them)

### Purpose:

- Peak further interest: movie trailer
- Present most compelling parts of your claim rather than entire claim
- Not mundane recitation of facts
- Not argument (arguments may not precede the introduction of evidence)

### Theme of The Case:

- What does the case center around? i.e., Personal responsibility? Unheeded complaints?
- All evidence should fit around theme
- Theme should resonate with people

## Opening of The Opening:

- Cut to the chase - Shows Confidence and preparation
- Set up: story of people, events and evidence
- Once is enough: “I will prove...”, “the evidence will establish...”

## Presentation:

- Present facts in a manner that leaves only one conclusion (don't misstate facts)
- Personalize your client
- Your client suffered real harm and is entitled to compensation
- Who are the players
- Ultimate responsibility (Argument?)
- Don't refer to inadmissible evidence
- Don't discuss opponent's evidence

## Style:

- Contract between you and jury – “I promise I will...; you promise you will...”
- But beware, Broken Promises

## Weaknesses In Your Case:

- No witnesses
- Accident not reported
- Failure to continue medical treatment
- Failure to seek medical treatment immediately after accident

### Harmful Facts:

- Surveillance video
- Criminal convictions (recent in time)
- Prior injury/claim to/for same body part being claimed in this case
- Admissions in hospital records/police reports
- Contradicting witness(es)

### Visual Aids:

- Picture tells a thousand words
- Already pre-marked in evidence?
- Notice to court?
- Notice to adversary?

### Defense Opening:

- Must address issues raised by plaintiff's opening – silence is a tacit admission
- Clear denial of liability
- Plaintiff's omissions

### Damages:

- To discuss or not to discuss – depends on you and your jury
- And if you do, how specific will you be

- Hard vs. soft damages
- Specific amount of money damages? Will you turn the jury off?

### Will Great Opening Win Your Case? Bad Opening Lose Your Case?

- Jurors do not make up their minds either way after opening. Claim that 80% of jurors decide case at opening is false. See, William L. Burke, Ronald L. Poulson, and Michael J. Brondino, *Fact or Fiction: The Effect of the Opening Statements*, 18 J. Contemp. L. 195 (1992).

## **FAILURE TO TIMELY OBJECT**

The plaintiffs' challenge to comments made by defense counsel in his opening statement is unpreserved for appellate review, since the plaintiffs failed to seek curative instructions or immediately move for a mistrial. *Crosby v Barry*, 2017 NY Slip Op 07705 (2d Dep't.)

Defendant did not preserve his challenges to the prosecutor's opening statement and summation.

Defendant either failed to object, made generalized objections, or, when his objections were sustained, did not request any further relief.... *People v Perez (David)*, 2017 NY Slip Op 51434(U) (App. Term 1<sup>st</sup> Dep't).

The defendant's contention that he was deprived of a fair trial by certain comments made by the prosecutor during his opening statement and summation is unpreserved for appellate review, since the defendant either failed to object to the challenged remarks or made only a general one-word objection. *People v Spigner*, 2017 NY Slip Op 06468 (2d Dep't.)

The defendant's contention that he was deprived of a fair trial by statements made by the prosecutor during her opening statement and on summation is unpreserved for appellate review because defense counsel did not object to the challenged remarks. *People v Lopez-Miralles*, 2017 NY Slip Op 06377 (2d Dep't.)

The defendant's contention that he was deprived of his right to a fair trial due to improper remarks made by the prosecutor during his opening statement and summation is unpreserved for appellate review since the defendant failed to object to any of the remarks he now challenges. *People v. King*, 2016 NY Slip Op 08092 (2d Dep't.)

## **OPENING THE DOOR IN OPENING**

The defense counsel opened the door to the admission of those statements in his opening statement. *People v. Santos*, 2017 NY Slip Op 04300 (2d Dep't.)

Here, defense counsel opened the door during his opening statement by describing defendant and LaDuke as "basically mirror images of each other." Therefore, it was proper for the People to submit evidence that Shedd identified defendant in a photo array and that, when



given a separate photo array containing LaDuke's picture, he did not recognize any photographs. *People v. LaDuke*, 2016 NY Slip Op 04978 (3d Dep't.).

Defense counsel opened the door to this testimony by emphasizing during her opening statement that the girls were not the only witnesses to the Brown murder, and that in fact 8 to 10 people had witnessed the shooting, thus suggesting that there would be no reason for the defendant to single out just three of the witnesses against his brother. *People v. Harris*, 117 A.D.3d 847, 985 N.Y.S.2d 643 (2d Dep't. 2014)

### **DIRECTED VERDICT AFTER OPENING (but see, Judicial Admissions)**

Plaintiffs' opening statement warranted dismissal of the negligence and negligent battery claims, because the claim that defendant Shepard used excessive force in handcuffing plaintiff Vaynshelbaum is fatally inconsistent with the negligence claims. However, plaintiffs' opening statement did not make any factual admissions that were fatal to their intentional battery claim based on Officer Shepard's alleged use of excessive force. *Vaynshelbaum v City of New York*, 2016 NY Slip Op 04302 (1<sup>st</sup> Dep't.).

During his opening statement, the workers' counsel admitted that the worker had removed his eye gear just prior to the accident, and, after he did so, he was struck by the flying debris. The appellate court held that this admission absolved the owner of liability under 12 NYCRR 23-1.8(a) and § 241(6). Accordingly, this cause of action was properly dismissed. *Beshay v Eberhart L.P. # 1*, 69 A.D.3d 779, 893 N.Y.S.2d 242 (2d Dep't. 2010).

Dismissal of negligence complaint immediately after plaintiff's opening statement was appropriate, even though such dismissals are disfavored, where complaint, as amplified by bill of particulars and opening statement, did not demonstrate that defendants had breached duty owed to plaintiff. *Perretti v New York*, 132 A.D.2d 537, 517 N.Y.S.2d 272 (2d Dep't 1987).

Court properly dismissed complaint at completion of plaintiff's opening statement for failure to state cause of action where plaintiff's counsel, by admissions and statements, subverted plaintiff's alleged cause of action. *Musso v St. Thomas Aquinas Church*, 213 A.D.2d 529, 624 N.Y.S.2d 912 (2d Dep't 1995).

[T]he court should not dismiss [after opening] unless there is "no doubt" that the plaintiff cannot recover....If, nonetheless, on the opening it becomes obvious that the suit cannot be maintained because it lacks a legal basis or, when taken in its strongest light, cannot succeed, the court has the power to dismiss and such rulings have been upheld. *De Vito v. Katsch*, 157 A.D.2d 413, 556 N.Y.S.2d 649 (2d Dep't. 1990).

### **JUDICIAL ADMISSION ON OPENING**

A factual assertion made by an attorney during an opening statement is a judicial admission. A judicial admission is not itself dispositive but merely evidence of the fact admitted. *Tullett Prebon Fin. Servs. v. BGC Fin., L.P.*, 111 A.D.3d 480, 975 N.Y.S.2d 18 (1<sup>st</sup> Dep't. 2013)

The trial court properly directed a verdict in plaintiffs' favor on the issue of defendants' negligent maintenance of the steps on which the injured plaintiff fell, based on defense counsel's admissions of negligence during his opening statement, which were not refuted by the evidence presented at trial, and were "fatal" and "ruinous" to any defense on this issue. *Echavarria v. Cromwell Assocs.*, 232 A.D.2d 347, 347, 648 N.Y.S.2d 600 (1<sup>st</sup> Dep't. 1996).

Formal judicial admissions take the place of evidence and are concessions, for the purposes of the litigation, of the truth of a fact alleged by an adversary. Informal judicial admissions are facts incidentally admitted during the trial. These are not conclusive, being merely evidence of the fact or facts admitted. *Wheeler v. Citizens Telcoms. Co. of N.Y., Inc.*, 18 A.D.3d 1002, 795 N.Y.S.2d 370 (3d Dep't. 2005)