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Opening Statement -- Making It Stick

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Opening Statement
Making it Stick
By Ronald L. Carlson and Michael S. Carlson

Every lawyer who sits down to plan her opening remarks for a coming trial has the same question: How far can I go in arguing my case during the opening statement? Can I mention the law? What about drawing a diagram of the accident on a blackboard? Will my opponent be able to stop me from displaying a couple of my dramatic exhibits to the jury?

Making one’s theory of the case “stick” from the very start of the trial depends mightily on how far the lawyer can go in opening statement. Where the defense is primarily a legal or statutory one, knowledge of whether counsel can guide the jury by reading a defense-friendly regulation to them is critical. If a plaintiff is catastrophically injured, exposing to the jury a photo of his mangled body at the scene of a collision is strong medicine at the start of the case. Is it allowed?

The aim of this article is to assist Georgia practitioners in effectively preparing an opening statement and to provide a blueprint for responding to objections that would frustrate that goal. By working within the legal boundaries that control opening remarks, counsel can creatively present their case at this vital stage of the trial. She can indeed make her theories stick.

Visual Aids

Suppose there is an issue in a criminal case regarding space and dimensions. Two people were killed in a stabbing attack. It took place late at night in a townhouse entryway. The defense claims the defendant, who was clearly alone that night, could not have committed the double homicide; a single person could not have controlled both victims without one of them running away. Wrong, says the prosecutor. The space where the murders occurred is so constricted that a burly attacker would have been able to pin two people down. An excellent way for the prosecutor to convey the tight fit is with an accurate diagram of the murder scene, drawn to scale. Working with the diagram in front of the jury to point out where the bodies were discovered gets everyone believing that the lone defendant could have pulled it off.

Where the defense is alibi, a defense attorney may strategically employ a timeline, demonstrating that the presence of the accused at a distant location precluded his presence at the crime scene when the crime occurred. He could not have been at point A at an established time and then traveled to point B in time to murder, the defense persuasively asserts.

Commercial civil cases, on the other hand, frequently involve a blizzard of names, dates and business associations. The jury will see this information as a morass of trivia unless counsel creates an opening statement strategy that dispels the confusion. The prepared chart seems to be the answer. When counsel is involved in a complex case and is dealing with a plethora of names, dates and companies, she is authorized to utilize charts which identify the “cast of characters.”

Retention of the otherwise distracting details improves remarkably. The names stick.

Will case law support the use of a prepared chart? The Georgia
Supreme Court says “yes.” In *Highfield v. State*, the Court allowed the use of a chalkboard listing the participants in the crimes and the expected witnesses. It was properly displayed in opening statement. In civil cases, a statutory rule allowing the practice has caused Georgia appellate courts to wax even more strident about the propriety of visual aids.

In *Lewyn v. Morris*, the Court of Appeals held that the trial court “overstepped its bounds” by sustaining an objection to use of a blackboard to identify the locations of the cars involved in a wreck.

*Lewyn* suggests an interesting possibility. There are dozens of areas of trial practice law where the bench can go either way on a contested question, without fear of reversal. Multiple issues fall under the umbrella of “judicial discretion.” Counsel’s right to go to the blackboard during opening may not be one of those. Under *Lewyn*, a successful claim of reversible error may be constructed around a trial judge’s arbitrary decision to bar use of the blackboard.

Of course, in this electronic age, some attorneys may prefer PowerPoint and other technological methods over a simple blackboard. The controlling case law does not preclude electronically creative strategies for previewing trial evidence.

**Display of Trial Exhibits**

Often a particular piece of physical evidence is critical to a case. This might be the object itself, like a gun or a knife or a gasoline tank, or a photograph of one of these items. Obviously, counsel wants the jury to be familiar with such evidence at the outset, but a nagging question resounds: Is displaying trial exhibits in opening statement allowed? As with visual aids, the answer supplied by the Georgia Supreme Court is “yes.” In *McGee v. State*, the Court ruled that displaying an exhibit during the initial remarks to the jury “is a permissible part of the opening statement, as its purpose is to help the jury understand and to remember the evidence.”

This technique often depends upon counsel knowing in advance that she can expose such items. At times like this, a pretrial motion in limine to admit particular evidence is advisable.

**Stating the Applicable Law**

In a criminal case, a federal prosecutor tells the jury:

“The accused is charged under...
There is a distinction between making brief reference to favorable legal principles on one hand versus intensively arguing the law on the other.

and accordingly the prosecutor’s comment was not prejudicial. United States v. Rodgers also approves prosecutorial legal direction to the jury. In opening statement the prosecutor explained: “It’s the United States Attorney’s responsibility to present this case to a grand jury. If the grand jury finds probable cause that a crime has been committed then an indictment is returned.” The defense complained on appeal about the nature of these remarks, to which complaint the Court of Appeals responded: “The prosecutor’s comment about the grand jury was merely prefatory to the reading of the indictment and was a correct statement of how a federal indictment comes to be.”

There is a distinction between making brief reference to favorable legal principles on one hand versus intensively arguing the law on the other. It is only the latter which is prohibited. Having said that, one commentary provides wise advice about how far counsel should push the envelope when urging law in opening:

[T]he attorney ought to avoid any extended discussion of the law. The witness usually cannot testify about the law, and it is therefore improper for the attorney to go on at any length during opening about the law. As we shall see, near the end of the opening while she is expressing confidence in her case, the attorney can make a passing reference to the burden of proof. If the attorney’s case rests on a statutory cause of action or defense which lay jurors are likely to be unfamiliar with, the judge has discretion to allow the attorney to read the statute during opening. However, if the attorney spends more than a few sentences discussing the law, the judge might intervene sua sponte; in the jury’s presence, the judge may remind the attorney that it is the judge’s province to instruct the jury on the law and admonish the attorney to refrain from legal instruction.

Colorful Language

Using colorful verbiage in closing argument is not only tolerated, but encouraged. Less has been said about the propriety of theatrical speech in opening statement. What if counsel wants to engage in dramatic language? Contrary to what courtroom folklore might suggest, counsel is entitled to utilize colorful language in opening statement. Georgia courts allow this in civil cases if the evidence supports the terms invoked. For example, no error was ascribed to the trial court’s allowing plaintiff’s counsel to refer to the defendant’s train as “barreling through Stockton” to characterize its speed at the time of the collision in question.

In Teems v. State, the Georgia Supreme Court allowed the prosecutor to state that the defendant was
"riding shotgun," to describe his occupancy in the passenger seat of a vehicle on the night of the murder. The court held that "[t]he remark was a colloquial and colorful way of stating what the evidence was expected to prove, but was not inappropriate or harmful error."14

Similarly, in federal courts it has been held that where colorful language of a prosecutor indicates "a permissible preview of the charges and the evidence to be presented at trial," no error is present.15 In a civil case, the United States Court of Appeals for the Eleventh Circuit determined that describing the opposing party in opening statement as having been "stoned out of his mind" was not error.16

In United States v. Johnson the defendants were convicted of sending bombs to injure and destroy British military helicopters in Northern Ireland. The trial lasted 28 days. Later, certain of the prosecution's opening remarks were challenged as improperly inflammatory. The prosecutor had characterized the Irish conflict in which the defendants were involved as "an echo of sadness from the graves of dead generations."17 Armed activism against England was described as "bloody but abortive."18 The prosecutor provided an image of ambush and sabotage committed by the Provisional Irish Republican Army, "amongst the hedgerows, stone walls and narrow lanes of the Irish countryside."19

How did the United States Court of Appeals react to this colorful language? Extremely well, according to the court's opinion. "The challenged statements, in our view, were not improperly inflammatory. Though vivid and rhetorical, against a background redolent of long continued violence and carnage they did not exceed the bounds of adversarial propriety."20

Don't Get Stuck

While it adds interest for counsel to utilize impact language, she needs to avoid getting carried away. At least three major pitfalls can trip her up.

First, if counsel becomes passionate and swings too wildly, she may make unwise concessions in her speech. In a federal trial these will bind her client and may cost the party a victory. As indicated in United States v. Blood, "a clear and unambiguous admission of fact made by a party's attorney in an opening statement in a civil or criminal case is binding upon the party."21

Georgia decisions have been mixed on the right to send a party down to defeat based upon what her attorney said in opening. In a civi' proceeding it seems that a client is bound by statements of her attorney made in open court when such statements are made in the client's presence and are not denied by the client.22 However, criminal cases appear to be different. A much higher level of certitude regarding the intent of the party to admit or concede a point is required.23 Notwithstanding, instead of simply relying upon unclear precedent in an effort to avoid the damage, why not exercise a measure of caution about making careless admissions during opening?

A second pitfall is abundantly clear in Georgia jurisprudence: If you promise too much in opening, it can be held against you. It is appropriate in closing argument for an opposing attorney to look back at the opening statement of an
opponent and deplore an opponent's omission of proof. Thus, it is appropriate for a defense attorney to argue as follows in closing a personal injury case: "The plaintiff promised in his opening remarks that he would supply, and I quote, 'ample proof of the plaintiff's damaged mental state as a result of this accident.' Members of the jury, where was the expert testimony regarding psychological injury? Not one expert took the witness stand to support his claim of post-accident mental trauma. I submit the plaintiff has broken the promise he made to you in his opening statement." Put bluntly, overstatement at the start can kill you in the end.

Opening the Door

A final pitfall worthy of mention is the inartful speech that allows one's opponent to open a can of worms. Assume there is certain damaging evidence that your opponent is barred from exposing. Can you activate his right to disclose the prejudicial stuff by your own opening statement? Yes, say the Georgia courts, and examples abound. Evidence otherwise prohibited under a motion in limine, for example, can be introduced after an opening statement by the movant explores the proscribed topic. Similarly, the United States Court of Appeals for the Eleventh Circuit has ruled that in federal courts, a verbal attack by a lawyer on a witness during opening is sufficient to allow introduction of evidence on direct which is typically only relevant after the witness' credibility has been attacked upon cross-examination.

Objection Strategy

In this segment of the article, we shift gears. What should be counsel's objection strategy during opposing counsel's opening? While it makes good sense to avoid casual or technical objections during an opponent's opening, there will be times when a lawyer is virtually compelled to object. It is hornbook law in Georgia that an objection to an offensive opening must be made when the offending remark is uttered, and not later. Some cases even hold that waiting to the end of an opposing attorney's speech and then moving for a mistrial is too late.

Checklist of Objections

A list of relevant objections to an improper opening statement may be helpful at this point. In Georgia, objections can and should be made for the following:
- Addressing jurors by name
- Argument of the law
- Arguing the credibility of expected witnesses
- Arguing facts, and drawing inferences and conclusions from them
- Emotional appeals
- Inflammatory rhetoric
- Racial or ethnic appeals
- Referencing inadmissible evidence

Argument

The central objection that will likely be made to your opening, or which you will be compelled to assert against an opponent, is "objection, argument." Argument occurs when your opponent infers or concludes from the expected evidence. A hypothetical example from defense counsel's opening in a civil fraud case illustrates: "Members of the jury, the real culprit in this case is the plaintiff's first witness, the plaintiff himself, Harry S. Dexter. Wait to form impressions until you have heard my cross-examination. In between his falsehoods, I will tear out the few bits of truth contained in this man. It will be tough. But at the end of the day, you will be able to conclude that the supreme liar in the case is none other than Mr. Dexter!"

Objectionably argumentative statements usually take one of three forms. First, there is an improper diatribe about credibility of a witness, as the prior paragraph illustrates. Next, the attorney sometimes improperly draws an inference from the circumstantial evidence in the case. Finally, the attorney ought to avoid any extended discussion of the law.

It is helpful to note what does not constitute improper argument. Counsel's description of the trial process—who goes first and who goes last—is not argument. Further, counsel does not err by "framing the case," as when she tells the jury what the key issue will boil down to.

Preparation

This article would be incomplete without a word about preparing the successful opening. It is advisable to practice the opening statement in advance of trial. Few lawyers become good persuaders by giving their speeches for the first time at trial. Practice them in nonlegal settings, on friends and with family. It is a truism that speaking in public — the very thing a lawyer must do when delivering a courtroom opening — is a major fear faced by human beings. Practice and rehearsal help to control this fear.

Conclusion

Perhaps no area of trial practice is as critical or enigmatic as that of
opening statements. It is an area that successful lawyers must master, because a slow start can doom one's effort. As one commentator remarked: "A trial is like an athletic contest in this respect: It's hard to come from behind and win."32

While some pundits of trial advocacy claim that as many as 80 percent of jurors decide the outcome of a case right after openings, few sources provide specific, case-based guidelines as to what is and is not allowed. As a consequence, advocates all too often artificially constrain their initial presentations to juries, and fail to make the kind of "first impression" that will last.

In criminal cases, a prosecuting attorney may state in opening statement what she expects in good faith that the evidence will show during the trial of the case.33 Similarly, in the civil context, Georgia courts authorize counsel to state to the jury what she expects to prove at the trial.34 Within those parameters, attorneys are entitled to use compelling language, show exhibits and illustrate their theories with visual aids.

With jurors becoming more and more demanding about the level of advocacy counsel must employ at all stages of a trial, trial lawyers must know of all the legal tools at their disposal. Hopefully, this article has provided Georgia practitioners with guidance and a fresh perspective on achieving more during their critical opening statements.

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Endnotes

7. 981 F.2d 497, 499 (11th Cir. 1993).
8. Id.
14. 256 Ga. at 676, 352 S.E.2d at 781.
15. United States v. Hoekler, 765 F.2d 1422 (9th Cir. 1985).
18. Id.
19. Id.
20. Id.
21. 806 F.2d 1218, 1221 (4th Cir. 1986).
29. Carlson and Imwinkelried, supra note 9, at 119.