Opening Statements:
You Never Have a Second Chance to Make a First Impression

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I. The Law of Opening Statements:

"The law is a sort of hocus-pocus science, that smiles in yer face while it picks yer pocket; and the glorious uncertainty of it is of more use to the professors than the justice of it."
– Charles Macklin (1697–1797)

Opening Statements and closing arguments are two of the stages of a trial that rarely invoke objections and even more rarely require much analysis of the law controlling the process. However, in order to effectively present an opening statement, and defend the client during the opposing side's opening, the practitioner must be well versed in the law which applies to the process.

Ohio Revised Code Section 2315.01(A) states that each party may make an opening statement. The Code states that:

(1) The plaintiff concisely shall state the plaintiff's claim, and briefly may state the plaintiff's evidence to sustain it.
(2) The defendant briefly shall state the defendant's defense, and briefly may state the defendant's evidence in support of it.

In **Maggio v. City of Cleveland** (1949), 151 Ohio St., 136, the Supreme Court addressed a situation where the plaintiff was injured while a passenger on a streetcar that was involved in a collision with a truck. During opening statement, the plaintiff's attorney stated that the plaintiff was married and that her husband "was hit in the head with an air hammer in the Pennsylvania shop and some short time after that accident his injuries, being so terribly severe, he lost his mind and was institutionalized." Defense counsel objected because the husband was not a party and the husband's condition would not be part of the evidence at trial. The jury awarded $10,000 and the city appealed.

The City of Cleveland argued that the opening statement exceeded the scope of the rules and placed the plaintiff in a sympathetic light such that the city was deprived of a fair trial. The Ohio Supreme Court held:

1. In keeping with subdivisions 1 and 2 of Section 11420-1, General Code [Section **2315.01(A)**, Revised Code], the function of an opening statement by counsel in a jury trial is to inform the jury in a concise and orderly way of the nature of the case and the questions involved, and to outline the facts intended to be proved.
2. Counsel should be accorded latitude by the trial court in making his opening statement, but when he deliberately attempts to influence and sway the jury by a recital of matters foreign to the case, which matters he knows or ought to know cannot be shown by competent or admissible evidence, or when he makes a statement through accident, inadvertence or misconception which is improper and patently harmful to the opposing side, it may constitute the basis for ordering a new trial or for the reversal by a reviewing court of a judgment favorable to the party represented by such counsel.

The Court reversed the verdict and remanded for a new trial. Since 1949, it seems that more latitude has been extended to counsel in opening statement.

In **Snyder v. Stanford** (1968), 15 Ohio St. 2d 31, 238 N.E.2d 563, the Court addressed a situation in which the defendant's counsel in a fire loss case discussed the fire department's opinions regarding the cause and origin of the fire even though the court previously indicated that these opinions were excluded. Plaintiff's counsel did not object during the opening. The **Snyder** court lessened the standard announced in **Maggio** and held that:

> [E]xcept where counsel, in his opening statement and closing argument to the jury, grossly and persistently abuses his privilege, the trial court *is not required to intervene sua sponte* to admonish counsel and take curative action to nullify the prejudicial effect of counsel's conduct. Ordinarily, in order to support a reversal of a judgment on the ground of misconduct of counsel in his opening statement and

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> closing argument to the jury, it is necessary that a proper and timely objection be made to the claimed improper remarks so that the court may take proper action thereon." (Emphasis sic.)

The **Snyder** court places the responsibility on the opposing counsel to object to the claimed improper statements or potentially waive the right to appeal. This is consistent with the duty to preserve the objection in a timely manner when addressing evidentiary objections.

Other decisions have held that the pervasive nature of certain statements or improper themes of a case can rise to the level of a "deliberate attempt to sway the jury."

Thamann v. Bartish, 167 Ohio App.3d 599, 2006-Ohio-3346. Accordingly, it seems that counsel should be careful to stay within the rather gray confines of the wide latitude discussed by the **Maggio** court and, if counsel strays outside of these confines, he or she should not do so frequently. Likewise, if counsel observes improper statements during opening, he or she should protect the record and make the appropriate objection. This will likely lead to a curative instruction from the court and will tend to make continued abuses by opposing counsel less likely.

II. Win Early; Win Often:

"No eternal reward will forgive us now for wasting the dawn."
– Jim Morrison

Although the Voir Dire process permits opportunities for subtle persuasion, the Opening Statement is the first opportunity to overtly advocate for your client. Although the case law discussed above focuses on Opening as merely a clear and concise statement of what the evidence will show, the reality is that if the case is not presented well and aggressively during Opening, your client faces an up-hill climb for the rest of the case. The often cited Chicago Study was an analysis of jury behavior during the mid-1950s. It revealed that 80% of jurors' impression of the outcome of the case was the same after opening statement as it was during deliberation. Although this probably does not mean that 80% of jurors had made up their mind after Opening, it certainly shows that a well delivered Opening Statement is essential to be successful for your client.

Unfortunately, many opening Statements begin with a rather benign discussion of what an opening statement is, that it is not evidence, that it is a *Reader's Digest* version of the case or a movie trailer, designed to provide some detail to interest the audience in the rest of the story. This is an incredible waste of time and opportunity. When the defense lawyer stands for opening statement, the jury has just heard the plaintiff's side of the story. They wait to hear the other side, and maybe some righteous indignation at the accusations levied at the defendant during the plaintiff's opening. Instead, all-to-often the first five minutes of the defense opening gives them nothing but foreign phrases like "may it please the court" or worthless descriptions of why openings are done, and worst of all, a caution that "what lawyers say in opening is not evidence". If any of us were sitting as jurors, why in the world would we keep listening to someone who impliedly tells us that what he is about to say is worth nothing?

Instead, it is far better to start with a dramatic statement that encapsulates the theme of the defense. Consider the following:

> May it please the court, counsel, and ladies and gentlemen of the jury. I stand before you to offer the defendant's opening statement. This is not evidence but merely a description of what we believe that the evidence will show. We believe that the evidence will show that the defendant was not negligent and that the plaintiff's damages were not cause by this incident. On January 2, 2009, the plaintiff claims that he was injured in a motor vehicle accident. The evidence will show that the defendant was on his way to work when the accident occurred. The evidence will further show that the plaintiff did not seek medical treatment the day of the accident but instead reported to a chiropractor seven days later...

Although perfectly appropriate, would it not be better to actually tell the jury what you want them to do from the start? They already know what opening is and they certainly do not need to be reminded to question what an attorney tells them. They sit waiting to see advocacy. You should not disappoint them. Instead of the cookie cutter opening above, try this:

> The plaintiff cannot and should not win this case. She cannot and should not win for three reasons. Her claim for money damages will be defeated by the facts of the accident, the medical evidence, and most importantly by common sense. The facts of the accident will prove that it was she that caused this accident because she was speeding. The medical evidence will

> defeat her claim for money damages because it will prove that she claimed no injury at the scene, or the next day, or the next six days. Common sense will defeat her claim because we will learn that she had identical complaints of pain well before this accident.

Using such an approach can provide the lawyer with a consistent theme to rely upon throughout the trial. It will also engage the audience immediately and let them know what your client's position is in the case. It will also provide guideposts for the rest of the trial. This will lend a sense of cohesiveness to your questioning and arguments. Most importantly, it is much more interesting to hear.

III. Know Your Audience:

During Voir Dire, you worked very hard to get to know your jurors and maybe even develop a rapport. To effectively advocate for your client, you need to use what you learned to the client's advantage. For example, in the right case it might be valuable to voir dire the panel about their experiences of having been wrongfully accused of something. One or two jurors may have experiences they are willing to share during voir dire. You should try to use such a connection during your opening:

> We have talked about how it feels to be wrongfully accused. It can be very frustrating to feel that you cannot explain enough, or argue enough, or demonstrate enough, to avoid the accusations. This is how the defendant feels and he needs you to help resolve this dispute with the plaintiff.

In addition to linking your client's experience with some of the jurors, it will demonstrate that you were listening during voir dire. This is especially true if you make eye contact with the jurors who shared their story while you make this point. Whatever juror experiences you can use to link your client's case with their knowledge base will give your defense credibility and appeal with the audience.

IV. Control the Room:

Every trial lawyer knows that he or she is being watched and evaluated by at least one juror during most of the trial. They look for reaction to plaintiff's opening or comments and make judgments regarding your client's case based upon non-verbal clues they see while you are before them. This is not an article about body language or non-verbal communication. However, it is vitally important to demonstrate a mastery of the facts of your case and the room itself during opening statement. Many talented lawyers will walk around the courtroom during their opening. This can demonstrate a sense of comfort in the surroundings and control of the room. Even in court rooms where the judge insists that counsel stay at the lectern, standing next to the lectern removes an obstacle from between you and the jurors. This can lend a sense of sincerity as well as confidence.

Many times the jury will face a difficult challenge in their deliberations. If the plaintiff is likable it can be difficult for jurors to find against that plaintiff. It can be powerful and helpful to the jury to break the ice by appearing to tell the plaintiff what you hope the jury will tell him later in the case. An example of this is;

> We know that it is difficult to say no to nice people. The plaintiffs are nice folks who had an accident. They have sued the defendant over this accident but the evidence will show that they must lose this case. We are asking you to uphold your sworn duty as jurors and consider the evidence in this case without sympathy. It can be a hard job to tell nice people no. But the evidence of this case will compel you to do just that, to tell the plaintiff (now looking at the plaintiff) "No, Mr. Plaintiff, you cannot win this case."

This must be done very carefully as it is very close to being argumentative. However, it once again confirms what you want the jury to do and perhaps makes the jurors a little more comfortable with their decision process.

V. Control the Damage:

"Into each life some rain must fall. Some days must be dark and dreary."

– Henry Wadsworth Longfellow

Every case has its problems. Some cases have bad facts and some have a lack of facts. These problems will be magnified if they are ignored during your opening statement. Addressing these problem issues early permits you to control how they are delivered to the jury. Chances are that the plaintiff's attorney has already brought up the issues. Hiding from them will not make them go away. More importantly, the jury will probably be waiting for you to address these negative issues. You must be prepared to address negative or nonexistent facts and control the damage they cause. The particular way to do this is likely to be different in every case.

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Sometimes it is your client that is the negative you must control. With the current news cycle discussing perceived abuses by financial corporations, jury bias against insurance carriers seems to be running very high. If you are defending a client that brings some real or perceived negative baggage, it is imperative that you discuss this early. A skilled attorney will probably have brought up these issues during voir dire but doing so in opening is just as important. Doing so will reinforce the points you made during voir dire and can be used to counteract the plaintiff's arguments during opening. An example of this is:

> As you know, I represent ABC Insurance Company. We have all heard the same stories about some of the financial institutions in our country and many of them are not so favorable. Because of that I am both proud and concerned to represent them here today. I am certainly proud to represent ABC because the evidence will show that they made all the right decisions in this particular case. But I am also concerned because it will be very tempting for the plaintiff, and even the jury, to judge ABC by the negative feelings we all have against some other financial institutions that have nothing to do with this case. It would be the easiest thing in the world for the plaintiff to try to score points in this case by lumping ABC in with un-named others we have read about in the paper and seen on TV. But your job as jurors is not to take the easy path. You owe it to your fellow members of this community to focus on the facts of this case and not be persuaded by arguments or implications that seek to take advantage of these negative feelings toward companies that are not involved in this case.

Addressing negatives such as the type of company you represent, whether it be an insurance carrier, oil producer, or chemical plant will help defuse the plaintiff's attempts to paint your client with an unfavorable brush.

VI. Timing is everything:

An opening statement is not and should not be a long-winded discussion of every single point of evidence that will come out during trial. Accordingly counsel must focus on those points and concepts that provide the most bang for the buck. It is possible that due to pending evidentiary rulings or strategic reasons, you cannot discuss certain evidence. When faced with this situation it is often advisable to give the jury a guidepost. For example, this technique can be used effectively to focus the jury on certain parts of planned cross-examination of a witness or party. If you know that you will be scoring points against the opposing expert but do not want to tip your hand, you can give a guidepost to the jury during opening statement by saying something like,

> The plaintiff will rely upon evidence from their professional witness, Mr. Expert. However his opinion is not absolute and should be subject to the same scrutiny you give any other witness. You should pay attention to how he has testified in the past on similar issues or how he answers questions regarding his experience. This may give you some insight on the value of his opinion.

This technique will allow you to alert the jury without completely giving up the element of surprise with the expert on cross-examination.

VII. Finish Strong:

It is just as important to finish your opening on a high note as it was to begin with a strong assertive statement. Many times you can simply say the same two sentences you started with. You must plan your finish just as carefully as you planned your beginning. Chances are that the jury will not hear from you again for a while and you should leave a lasting impression. Finally, always keep in mind the advice of our 32nd President, Franklin D. Roosevelt regarding effective public speaking. He said; *"Be sincere; be brief; be seated."*

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