CHAPTER 1
THE OPENING STATEMENT

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SEC. 1.1 INTRODUCTION

The lawyer's role at trial is to present the evidence and arguments to the jury in a way best designed to achieve a satisfactory verdict. Unlike other states where the *voir dire* of potential jurors is the first opportunity to talk to them and to persuade them to come around to your point of view, New Jersey no longer permits that type of *voir dire*. The opening statement is your first chance. Whatever else an opening statement may be, it is a weapon. Use it.

SEC. 1.2 WHAT THE OPENING STATEMENT INVOLVES

A. THEME OF YOUR CASE

Few trial lawyers know for sure at the commencement of litigation whether the particular case will go to verdict. Most cases are settled before a jury is picked, and many of the rest are resolved by pre-trial motions. However, enough go to verdict to keep a good number of judges in 21 counties in this state busy week in and week out with trials. The Appellate Division primarily sits to review civil and criminal cases tried to verdict, rather than to review the far less frequent appeals from administrative agencies.

Sooner or later every lawyer, whether consciously or unconsciously, develops a theme for the case that goes to trial. The theme can be that the warning in a products liability case was so inadequate that any person of ordinary sense would never have realized the machine could not be used in that fashion. Or the theme may be that the warning was so clear, and the plaintiff so fully informed of the risks, that there was nothing any reasonable manufacturer could have done to prevent the misuse of the product and the resultant injury. Often the theme is in the eye of the beholder.

Whatever the theme may be, the best ones are those that account for all the facts: the good, the bad, and the ugly. There are very few cases where there is not something to be said of the other side's case. A good lawyer for the other side may be able to develop that evidence well enough to carry the day with the jury. Therefore, the theme and the trial lawyer's resultant trial strategy should take account of just about everything of consequence the jurors will hear and how they are likely to respond to that information.

In *Trying Cases to Win*, former Federal Judge for the District of New Jersey Herbert J. Stern concludes that openings are more important at trial than closing statements. Herbert J. Stern, *Trying*

Cases to Win (Volume I) (1991). He argues that opening statements persuade while closing statements simply confirm what has been proven during the trial. He is absolutely correct.

B. THE ATTORNEY'S CREDIBILITY

There is an old saying that you can lose your credibility only once in a trial. Once lost, it will rarely be retrieved. While the law is clear that a trial attorney cannot personally attest at trial to the credibility of a witness, the fact remains that the trial lawyer's credibility is an invaluable part of the trial. Jurors judge the trial lawyers as much as they judge the evidence. If they believe someone has urged them to accept a particular version of the facts — the words used in the opening may be as simple as "the evidence will show" — they will remember who told them in the opening statement that the offending car was driving at 70 mph when not a single witness, police report, or other item of evidence they see or hear ever has the car going above 40 mph.

A charge can be given to the jury that, if jurors conclude that a witness deliberately told them something had happened which never happened, they are at liberty to reject every other item of evidence testified to by that witness. While not part of the jury charge, jurors can conclude the same thing about the lawyers.

All this compels a conclusion that you must know your case before you stand up to deliver an opening statement. Never tell the jury that you will prove — or the evidence will show — that an event occurred or a statement was made unless you are confident that you have admissible evidence to support that position. If you have a genuine doubt that the trial judge will permit you to put an important document in evidence or to permit testimony from a particular witness, then it is better to remain silent on those points during the opening statement. *Do not throw away your credibility by promising something you cannot deliver.*

C. STATIC V. DYNAMIC

There are those who believe that the only static, *i.e.*, prefixed, aspect of a trial is the opening statement made on behalf of the state or the plaintiff. There is generally nothing at that moment to which a reply has to be given. There is no evidence that has to be countered. The first to speak knows what he or she will say or should say and then does so. The battle has started. The first to speak gets to define the field of battle.

The dynamic aspect of the trial essentially begins at the end of the first party's opening statement. Defense attorneys who are alert to the dynamics of the courtroom will grasp whatever opportunities appear as a result of the initial opening statement. If the State or the plaintiff has failed to indicate what sort of evidence will be presented on an important point, or does so only in the most casual way, the opportunity should be seized. An argument can be made, for example, that the issue of a motive was barely addressed by the State in its opening remarks but that the defense will present evidence (assuming it intends to do so) that, not only was there no motive for the defendant to commit the crime or to break the contract, it was very much against the defendant's interest to do so. The lesson for defense counsel is clear: *While you should have the ingredients of your opening statement ready in advance, do not hesitate to reorder them if the attorney who speaks first presents you with that opportunity.*

SEC. 1.3 LAW OF THE OPENING STATEMENT

There is very little law about what an opening statement is, how it is to be delivered, or things of that type. There is only one reference to the opening statement in the *New Jersey Rules of Court*. *Rule* 1:7-1(a) states: "Before any evidence is offered at trial, the State in a criminal action or the plaintiff in a civil action, unless otherwise provided in the pretrial order, shall make an opening statement. A defendant who chooses to make an opening statement shall do so immediately thereafter."

Probably the most that has ever been said about an opening statement in an appellate decision in this state is found in a 1960 opinion of the New Jersey Supreme Court. *Passaic Valley Sewerage Comm'rs v. Geo. M. Brewster & Son, Inc.*, 32 N.J. 595, 605 (1960), held:

> The fundamental purpose thereof is a most important factor in considering a question of legal adequacy. That purpose is 'to do no more than inform the jury in a general way of the nature of the action and the basic factual hypotheses projected, so that they may be better prepared to understand the evidence.' *Farkas v. Middlesex County Board of Chosen Freeholders*, (citations omitted); *Shafer v. H.B. Thomas Co.* (citations omitted). The judge already knows what the case is all about from the pretrial order. Counsel must be summary and succinct. Proposed evidence should not be detailed and it will be little more than an outline, quite frequently a fairly indefinite one by reason of the nature of the case. In no sense can it be argumentative or have any of the attributes of a summation. Nothing must be said which the lawyer knows cannot in fact be proved or is legally inadmissible.

When the court held that an opening statement cannot be "argumentative" but should be "summary and succinct," what did it mean? In a breach of contract case, for example, an attorney for the