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Marcus A. Manos, Member-Nexsen Pruet, LLC

II. OPENING STATEMENT – SETTING THE STAGE FOR A SUCCESSFUL VERDICT: You (And Your Client’s) First And Best Impression

A. INTRODUCTION:

All trial lawyers instinctively know the importance of each juror. The jurors find the facts with little interference from the judge. The facts found by jurors rarely receive appellate review and reversal. Your first opportunity to impress and persuade each juror comes in the opening statement. You and your client need to make that first impression the best it can be – every time.

You have many “jobs” to do in opening, but you must tell the jury an interesting, colorful story. The story needs simplicity – make it as simple as you can, but do not over simplify a complex issue to the point you seem to be talking down to the jury. Jurors appreciate help—they recognize and punish perceived arrogance. You must use words, documents, video and other demonstrative exhibits to recreate events long past. You must breathe life into those events—give depth to the people involved and human impact to the consequences of the events. Both defendants and plaintiffs need emotion in opening, the jury expects it and you should use emotion in a sincere, direct way.

“[Opening] is the chance to reach for the free, uncluttered mind of the juror before the ennui of a trial of two weeks or more has anesthetized it. The jury will never again be as receptive as it is on the first day of trial. The experience is new. It is challenging. The jurors will be alert. First impressions are most important. Thus, in my mind the opening presents an unparalleled opportunity and, properly explored, can win many lawsuits.” A. Julien, *Opening Statements*, Preface p. vii (Callaghan, 1986).

The importance of an opening statement cannot be over emphasized. In a jurisdiction like South Carolina, with limited civil voir dire, the opening statement becomes your first

opportunity to impress, persuade and interact with the jury. Use the opening statement to achieve the following goals:

- Use simple, colorful terms to allow the jury to picture the important aspects and theories of your case;
- Highlight important evidence the jury will hear and see during the case;
- Anticipate key legal issues and terms that will be in the judge's charge and guide the jury how to evaluate;
- Give the jury a simple, clear and empathetic understanding of your client;
- Build credibility with the jury as an honest, well-informed, prepared communicator;
- Anticipate known "bad" evidence and give the jury a framework for evaluating it and seeing why it is not important to the outcome;
- Do these with presentation techniques and demonstrative aids that keep the jury interested and impact key points;
- Come back to the opening picture to "close" with a flourish.

These materials will break down each of the above points and then address the substantive legal limits on opening statements.

B. TECHNIQUE, PAINTING THE PICTURE: Sound, Simple Theories and Clear, Repeatable Themes.

The presentation of a lawsuit amounts to telling a story. The techniques do not differ greatly from those used by successful novelists, movie producers, historians, biographers, playwrights, or stage producers. Like historians or biographers, the attorney sifts through witnesses, documents, and other evidence to recreate past events. The attorney then takes the

techniques of the entertainment industry to help make that recreation memorable and persuasive to the eight or fourteen jurors comprising the primary audience.

Like a storyteller, the attorney focuses on certain key elements. First, the characters must be introduced. Human action interests listeners, not cold concepts. Second, the action of the past events must be relayed. Jurors need to know based on the key evidence what happened. Third, the emotion of the event and its consequences must be communicated. Humans understand and react emotionally, even the most technical patent infringement case contains a core of emotion concerning the misappropriation of an inventor's work or, if you represent the defendant, the unfair attempt to stop innovation and corner a market. Finally, the attorney must let the jury know what his client wants from the case.

Simplicity in presentation requires focus. Not every case can have a single theme, but the fewer themes the better. Each theme must be carefully focused on one central, clear proposition. I like to open with a straightforward thesis paragraph that sums up the case for the jury. Here are some examples of theme paragraphs from successful openings (where demonstratives were used appear in parenthesis):

1. May it please the Court, Counsel, Ladies and Gentlemen, Ms. X is seated before you, a 1982 graduate of the New York Fashion Institute of Design, and the founder and owner of my client, Little Designs, a one time \$15 million per year company employing 25 people. At the culmination of years of effort in 1999, Ms. X presented these designs (show each one on the screen) to Big Retail for sale, her original work going back to college included in each one. After one very successful season, no more orders followed, crippling her young, successful company and causing Little Design to shut its doors. But when she walked into Big Retail in June of 2001, she saw on the front display her very own designs (show discovered ones on screen)—under another, cheaper label from the Far East. (Show side-by-side comparison of garments and price tags). My name is....

2. May it please the Court, Counsel, Ladies and Gentlemen of the Jury, Sam Jones sold supplemental insurance products and did a great job of it. (show picture of Sam with award for production) Damon Smith founded Great Insurance Co. with the goal of gathering the best sales force to present its highly competitive products and offered to pay the

best rates in the industry to get that sales force (show promotional piece for sales people). As a result, Damon Smith of Great Insurance Co. hired Sam Jones and others like him to help get its products out and he shared Great Insurance profits by paying Sam and the rest of the sales force very well (Sam getting award with Great Ins. Co.). Damon Smith, Sam Jones and Great Insurance Co. succeeded and others fell behind. The response of Revolutionary Insurance to this vigorous competition for talent became this lawsuit, rather than compete to entice and retain the best sales persons, Revolutionary ran to Court to block competition. The evidence will show nothing unfair or illegal occurred, just the competition that allows people the chance to take the best job available. My name is....

3. Ladies and Gentlemen, Anna Z died last September at the age of eight. The School District that cared for her every day allowed a 17 year old, Steven Driver, to take her home that afternoon on a school bus route he had only driven twice before. Steven Driver stopped at the wrong place, down the hill from where Anna's Aunt, Karen Z, waited for her to cross the road. Driver stopped at the bottom of a hill blocking the view of oncoming traffic, a place not approved by the State for a school bus stop. When Driver saw Anna walking down the side of the road on his side, he did not wait to see if she crossed the street but turned off his protective lights and stop sign and started forward, exposing Anna to the traffic when she tried to cross the road behind the van that had stopped behind Driver's bus. As Anna crossed, Kathy Speedy came over the hill, going ten miles over the speed limit, never saw Anna because of the bus and van. Speedy hit Anna and drug her 100 feet down the pavement in front of her horrified Aunt. Anna somehow lived through the agony. When the paramedics arrived she was conscious, but Anna did not make it to the hospital.

4. Ladies and gentlemen of the jury, a tragedy occurred when the concrete truck driven by George Teamster for my client Local Cement hit the back of a stopped car with no brake lights on the entrance ramp to I-26. A tragic accident caused by the Ms. T's stopping where she never should have, for no reason anyone can discern, without brake lights. George Teamster did everything he could to avoid this unexpected and dangerous event, but a truck coming down hill at the legal speed limit can only stop so fast. Mr. Blanks described that accident to you in great detail in his opening and he described the suffering that resulted from

it quite well. What he failed to describe for you is how it happened—George Teamster did not go too fast, did not fail to brake, did not fail to keep a look out—he drove with due care, a concept the judge will tell you about at the end of this case. He could not avoid the car which stopped for no reason at a place where, as the police report recites, no automobile is to ever stop. Simply, this accident is not the fault of George Teamster or his employer Local Cement.

[The first two openings are from my cases. The third from a case I defended many years ago where Dick Harpootlian represented the plaintiff and the last one is from a case defended by me. The names of the parties have been changed in each excerpt.]

The point in each case is to encapsulate the theme up front. Make it clear, make it appealing.

C. THE IMPORTANT EVIDENCE

After introducing the characters and the theme, the next step is to preview the evidence. The modern courtroom makes this a more exciting process than it used to be. You don't just have to preview the documents and forecast the witness statements. Highlight and show key documentary evidence. If you have a videotape or animated reconstruction of events, use portions. For a complex business case or intellectual property case, I always find building a time line using power point an effective way to illustrate points and focus the jury's attention on key events. Use clips from video depositions when appropriate.

In today's litigation surprise at trial is very rare. There is no point "hiding" something in your opening. If your opponent is capable and used discovery, he or she already knows what is coming. Present all your key evidence to the jury, take your best shot now.

At the same time, beware promising evidence that you THINK may come out. The jury will remember your opening, and if you promised a piece of evidence that either does not develop or is kept out by the court, the jury will remember. If they don't, you can count on your opponent reminding them.

Whether you represent a plaintiff or a defendant, discuss damages. The jury needs to know up front what the plaintiff wants them to do, likewise the jury needs to know an alternative if they find liability but are uncomfortable awarding the pie in the sky. You

should always conclude by telling the jury what your client expects them to do when they render a verdict or, to translate loosely from Latin, speak the truth.

Some key points to remember:

- Don't Promise What You Can't Deliver
- Be Exact, Be Visual, Use Deposition Clips
- Address Damages NOW.

D. ANTICIPATE THE CHARGE

Everyone knows the opening is the time to preview the evidence and give the theme. But without the context of the applicable law, the opening cannot have a full impact on the jury. I believe, and research tends to support, that the vast majority of jurors try to apply the law given by the judge. Research also tells us that jurors generally respect the judge, seeing him as a neutral, who tries to help them do a difficult job. The more of the judge's charge you can work into the opening, the better.

I do not mean to suggest that the opening becomes a chance to argue all the legal points. This would bore the jury, invite objection, and might be found too argumentative. But as you conclude a section on a key issue, you can summarize and fit it into the law. For example:

Candy Designer did see Mr. Kook's photograph, and it did inspire her to create a design for boys clothes about off road racing. Candy Designer used her own experience to come up with the colors, shapes and background used in her appliqué. The only similarity, as you can see here on the screen, is that both involve an all terrain vehicle in the mud. As his honor will tell you at the end of this trial, copyright protects a photographer from copying—copyright does not give the photographer control over the idea or subject matter of the photograph. Anyone seeing the photograph and inspired by it can then create his or her own art—just as Candy Designer did.

By putting the evidence into the context of the charge at this early stage you begin shaping the jury's thought pattern to follow your evidence and make it fit into what the judge, the most respected participant in the trial, later tells them.

This approach does take some risks. Very few judges want to commit to the charge before or during trial. Many issues are left open to see how the evidence plays out. The more information you can get on what the judge will likely charge, the better you can shape your opening to fit that charge.

E. THE CLIENT AND PERCEPTION

While studies and my experience tell us that juries try to do justice and apply the law, human nature dictates that a jury can more easily find in favor of a person or organization they like. How the jury perceives your client can make a difference. Lay the foundation for a positive perception in opening.

Your client must look respectful, interested in the proceedings and sincere. You must paint a similar picture of your client while humanizing the events that gave rise to the case. Everything that makes your client an accessible human being doing understandable things helps your case. In representing a corporation, you must humanize it through the actions and attitudes of its employees and agents. Most people work for an organization, and many of them care about and like that organization. You must show them that the organization involved in this lawsuit is one that deserves respect and consideration.

When you defend a lawsuit involving personal injury or the destruction of a business opportunity, you must often deal with the sympathy that naturally goes out to the injured, dead or failed plaintiff. First, remind the jury that sympathy, while natural, does not form a legal basis for decision. Second, if you possess anything from discovery that undermines that sympathy by showing the plaintiff overstates the claim or manipulated a fact, do it. In the automobile accident case mentioned above, a surviving child from the automobile who was seven at the time of the accident testified in deposition two years later about the concrete truck bearing down on the car while it was off the road and never even trying to stop. The testimony contradicted all the facts from eyewitnesses, the accident report of the police, and both reconstruction experts. It appeared to be contrived to maximize horror and damages and I said it was a manipulation of the child to create a better case during opening. I think it worked to counter the natural sympathy.

F. YOU AND PERCEPTION

You must build a relationship with the jury. The foundation of the relationship comes from sincerity and credibility. You do not want to exaggerate, make statements that cannot be supported, engage in unnecessary sparring with the Court or opposing counsel. Opening begins your relationship with the jury.

The opening is yours and your style should dictate how you do it. I happen to have some teaching experience as a graduate assistant teaching undergraduates and teaching high school. I try to think of what good teachers do—make the material exciting and interesting. The jury should want to learn about the case as you set it out. Also, you want to establish your credentials as a knowledgeable guide—I find it effective to mention the discovery process and how I have learned about the case through discovery and experts and now want to impart some of that to the jury. This cannot come across as arrogant or looking down on the jurors. Good teachers don't intimidate students, they earn their respect.

I suggest using eye contact and moving in front of the jury (if the court allows) to help make you accessible to the jurors and show your sincerity. You do not want to read from notes—your presentation should communicate that you are a master of the facts and law of this case. Having an outline and referring to it from time to time does not take away, but reading or constantly referring to notes will weaken the presentation and your image of mastery.

For the most part, avoid the generalized opening—talk about your case with reference to your case. The jury wants to know about this case, not the generalized canned openings that defendants sometimes give about being fair, having to go second, two sides to every story etc. That being said, I do believe that the defendant should always remind the jury of the judge's admonition to wait until they hear all the evidence and argument before deciding.

G. THE PROBLEMS - Deal With Them Now

The warts in your case do not disappear. Your adversary learned about them through discovery and prepared for trial planning to attack your case at your weakest points. You need to “workshop” these issues throughout the trial. The first step is to confront them in opening. You must discuss it with the jury in a spirit of candor. Tell them about the problem, why it exists, and then why it should not matter as to the outcome of the case.

A common example involves a plaintiff with a serious, but unrelated, criminal history.

Ladies and Gentlemen, I want to share with you a fact about Mr. Jones' background that will come out during the trial. Seven years ago while out of work, he wrote a series of bad checks to pay the living expenses of his family. He was convicted of four counts of passing bad checks and served 18 months in prison. He paid the price for his wrongdoing and has been diligently employed and law abiding ever since. The incident had nothing to do with this case, occurred years before the events here. Mr. Jones paid his debt to society, served his sentence, and society promised him a fresh start. You may, of course, consider how this impacts his credibility, but remember it had nothing to do with the Defendants' conduct here. The testimony about Defendants' conduct will come from many sources other than Mr. Jones, his word is not your only measure for what happened in this case.

The opening effectively confronts a credibility issue you know is coming. The defense, if it handles this well, will respond that this lawsuit, like passing bad checks, is about getting money. If Mr. Jones willingly did one dishonest thing to obtain funds, should you rely on his evidence presented here in another situation where he stands to profit from a favorable verdict.

When something normally viewed as "bad" happened for your client, explain it. Here is an example from Alfred Julien's book of a defense attorney explaining a tractor-trailer's jackknifing.

We frankly tell you that the tractor-trailer jackknifed down the hill, but we will show you no one was to blame. It was just one of those accidents that occur with mechanical equipment. If just the fact of jackknifing alone would spell the difference between winning and losing this case, we wouldn't be here in the first place because we admit that happened. But listen to the judge's charge at the end of the case, and he will tell you that it's negligence

that counts, failure to be careful. This is a case where the jackknifing occurred without the failure of care on anyone's part, just an accident.

A. Julien, *Opening Statement* at § 1.03.

Anticipating the bad that you know will come at trial and “workshopping” to the jury is an essential part of every opening statement.

H. THINGS NOT TO DO IN OPENING

Most of the material above stresses how to construct an effective opening. There are consistent errors that lawyers make that take away from the strength of opening. These are the “don'ts” of opening.

- Don't use “legalese” and complex language. Use simple concepts and active verbs, build a story point by point. Even the most complex case can be broken into simpler pieces and built up.
- Don't use self-depreciation as an icebreaker. Your client wants the jury to respect your knowledge and expertise, self depreciating comments take away from this. There are rare circumstances where they can add a bit of humor, but usually they fall flat and do not impress the jury.
- Do not give the pretense of fairness. The old saws where you preface your remarks about what I say isn't evidence, listen to the witnesses. You want the jury to believe you, they will hear from the judge that your statements aren't evidence, don't reinforce this. Be sure of your facts and communicate forcefully.
- Don't use distracting mannerisms. Jingling the change in your pockets, playing with a pen, pulling your ear all distract from presentation. Instead use gestures as a means of reinforcing your speech.
- Don't include unimportant details or interesting side trips—stay focused on what is important.
- Don't hold back important points trying to surprise your opponent.
- Don't take any more time than is necessary.
- Don't be rude or hostile to your opponent or the court.
- Don't read your opening.

- Don't go into detail on what a specific witness will say. Foreshadow the key testimony.
- Don't ever waive opening.

I. THINGS TO DO IN OPENING

- Fully explain your case.
- Tell a story, share it with the jury showing you know it and believe in it.
- Make eye contact with all the jurors.
- Use a well-modulated voice with simple words and sentences, using the active voice.
- Use documents on screen, videotape, power point and other visual aids.
- Emphasize with gestures.
- Discuss damages and the relief your client wants.

J. THE CLOSING OF OPENING – HIT IT AGAIN

People remember things they hear first, things they hear last, and what is repeated. Repetition can make an opening too long. But it is vital to return to your opening theme paragraph at the end of opening and once again stress the key issue and outcome. Do this every time.

K. THE LAW OF OPENINGS, LEGAL LIMITS AND OBJECTIONS

In both federal and state trial courts in South Carolina, counsel may make an opening statement in a civil trial. The opening statement should cover the facts alleged in the pleadings, the evidence which will establish those facts and the theory of the case. Counsel should not argue during opening. Counsel may publish the pleadings, although I cannot think of one instance where this makes for a really effective opening. See S.C.R. Civ. P. Rule 42(g) and U.S.D.C. Local Rule 83.VI.01 for the general rules. Although not specified in the rules, Plaintiff opens first followed by Defendants. Some judges still allow Plaintiff a rebuttal opening, but that is becoming a rare practice.

Counsel's unequivocal statements in opening constitute an admission, just as if made in a pleading or in response to a request to admit. Thus, you must remember to be very careful in what you admit in opening. The Court of Appeals of South Carolina affirmed a directed verdict in favor of an automobile accident plaintiff in part because defense counsel

admitted injuries were sustained in the accident in opening in *Collins v. Bisson Moving & Storage, Inc.*, 332 S.C. 290, 303-304, 504 S.E.2d 347, 354-55 (Ct. App. 1998). The court relied upon the attorney's binding power as agent for the client in court proceedings to find that the client admitted the third element of negligence, harm proximately caused by the accident.

Counsel may also open a new issue and essentially amend the pleadings by discussing a new theory or issue in opening. If the opponent does not object and evidence on the issue follows, the issue has been tried by consent. Thus, the Court of Appeals of South Carolina found that the trial court properly considered the defense of set off of gambling winnings, even though not raised in the pleadings, because it was mentioned in opening without objection and witnesses were questioned regarding it in *McCurry v. Keith*, 325 S.C. 441, 446-47, 481 S.E.2d 166, 169 (Ct. App. 1997).

Similarly, evidence normally not admissible can be allowed in because the opponent mentioned the issue in opening statement. Generally in professional negligence cases the jury should not be allowed to consider the impact of any verdict on the professional's general reputation. But in *Hoeffner v. The Citadel*, opposing counsel told the jury in his opening that any verdict against the doctor would not affect his general reputation. The Supreme Court of South Carolina held that this opened the door to the defense showing that a verdict would harm the doctor's overall reputation. *Id.*, 311 S.C. 361, 366-67, 429 S.E.2d 190, 193 (1993).

Objections during opening statement are a difficult call. I generally try to avoid making them, but if you allow the introduction of an issue not admissible or already precluded on a prior motion you may be deemed to have waived the right to object later. See, *Watson v. Chapman*, 343 S.C. 471, 481, 540 S.E.2d 484, 489 (Ct. App. 2000). Making a timely objection can keep out improper attempts by counsel to inject prior conduct or other highly prejudicial material. See, *Ballou v. Sigma Nu General Fraternity*, 291 S.C. 140, 157-58, 352 S.E.2d 488, 498-99 (Ct. App. 1986). You must be alert during you opponent's opening and object to major issues or inadmissible evidence that can harm your case. Otherwise you may confront an issue of waiver later. Do not waste the time of the court and jury on *de minimis* issues that will be overruled.

When your opponent objects during your opening, handle it quickly without much argument and get back to the point. Repeat the point you were making so the jury does not lose it. You do not want the rhythm and effect of your opening to be dictated by your opponent's objections. You want to preserve the atmosphere you are creating—an unfolding tale of how your client has been wronged or falsely accused.

L. RECOMMENDED READING

I received Alfred Julien's book on openings at the William Spong Invitational Moot Court held at William & Mary in 1986. I read it then in law school and it has been an invaluable resource to me in practice, but it is now out of print. I would be happy to share my copy if anyone would like. The other three resources recommended here are all short, pithy articles that really help with some aspect of opening. All can be found on Westlaw. If you go to West Thompson's home page and search under "opening statement" you will find some very good ATLA publications as well.

A. Julien, *Opening Statement* (Callaghan & Co. 1986).

E. King and K. McWilliams, "Effective Opening Statements," *The Practical Litigator*, (American Bar Association, Nov. 2004).

G. Powell, "Opening Statements: The Art of Storytelling," 31 *Stetson L. Rev.* 89 (2001).

T. Galligan and P. Zwier, "Technology and Opening Statements: A Bridge to the Virtual Trial of the Twenty-First Century," 67 *Tenn. L. Rev.* 523 (2000).