THE OPENING STATEMENT

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I. INTRODUCTION

The opening statement is your opportunity to turn your case into a story. A story which will invoke interest, educate, and, most importantly, persuade to action. A story persuades not with the use of argument but with the presentation of facts, both strengths and weaknesses, in a way which will make the jury start the trial wanting to help your client. Think in terms of creating a story which, if they heard nothing else, will make the jury understand the case and want to find in your favor.

This paper will provide an overview of the law regarding an opening statement, a suggested outline for what an opening should include and some practical pointers on style and procedure.

II. SUMMARY OF THE LAW

There have been a number of decisions in the North Carolina Appellate courts, mostly criminal, which have discussed the proper bounds of an opening statement. One theme was very apparent in reviewing the case law; it is highly unlikely that substantive relief will be granted in North Carolina for a deviation from the rules in opening statement.[1] North Carolina Courts have generally held in those cases where error was found in the opening statement, that the error was cured by some other aspect of the judge's instructions, or that the error was not shown to be prejudicial. However, I urge you to abide by the well-established rules in order to avoid any interruption by opposing counsel or admonition by the Trial Court during this crucial first opportunity to speak to the jury at length about your evidence.

[1]You can be most confident that a violation of opening statement rules by a prosecutor will not be grounds for a new trial. This writer found no case where such relief was granted.

Rule 9 of the General Rules of Practice provides as follows:

> At any time before the presentation of evidence, counsel for each party may make an opening statement setting forth the grounds for his claim or defense.
>
> The parties may elect to waive opening statements.
>
> Opening statements shall be subject to such time and scope limitations as may be imposed by the Court.

Additionally, North Carolina General Statute Section 15A-1221(a)(4) provides as follows:

> Each party must be given the opportunity to make a brief opening statement, but the Defendant may reserve his opening statement.

Trial Courts have been afforded wide discretion in carrying out the last paragraph of Rule 9. In Keene v Wake County Hospital Systems, 74 N.C. App. 523, 328 S.E. 2d 883 (1985), the Trial Court limited opening statements in a medical negligence action to five minutes per party. This restriction was affirmed as being within the Trial Court's discretion under Rule 9. A five minute limitation was also imposed in State v Paige, 316 N.C. 630 343 S.E. 2d 848 (1986).

North Carolina Appellate Courts have also addressed the propriety of the scope of an opening statement. Although the primary cases have been criminal appeals, the principals would apply equally to the civil action. The North Carolina Supreme Court in Paige discussed the proper scope of an opening statement. In Paige the trial judge limited the defendant's statements as follows:

> You may only state what you contend your evidence will show. You may not comment on what the other party's evidence does or does not show. You may not characterize any witness. You may not comment on what the other lawyer may or may not argue. You may not argue the law. Solely and simply what you contend your evidence will show. I'll limit it to five minutes per person.

State v Paige, 343 S.E. 2d at 859.

After that initial instruction to defense counsel, the judge proceeded to interrupt the attorney during his opening whenever he strayed from those restrictions. Defense counsel in Paige was not allowed to tell the jury that the fact that his client had been accused of a crime was no evidence of guilt. After making such a statement, the Trial Court admonished him not to "argue the law". Defense counsel in Paige was also not allowed to argue the burden of proof of the state.

In analyzing whether or not the trial judge's actions in Paige were proper, the Court quoted from State v Elliott, 69 N.C. App. 89, 93, 316 S.E. 2d 632, 636, discretionary review denied, appeal dismissed, 311 N.C. 765, 321 S.E. 2d 148 (1984) as follows:

> While the exact scope and extent of an opening statement rests largely in the discretion of the trial judge, we believe that the proper function of an opening statement is to allow the party to inform the court and the jury of the nature of his case and the evidence he plans to offer in support of it. ... It should not be

permitted to become an argument on the case or an instruction as to the law of the case.

The Supreme Court in State v Paige cited that description of an opening statement with approval. The Court did rule, however, that defense counsel "should also have been allowed to state once without interruption that his client relied on the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt". State v Paige, 343 S.E. 2d at 859. Of course, the Court then concluded that defendant had not shown that the Trial Court's interruptions and restrictions in his opening were prejudicial and affirmed the Trial Court's ruling as to the opening statement. Therefore, the discussion of the scope of opening from State v. Elliott quoted above and cited with approval by the North Carolina Supreme Court, is the clearest statement available of the permissible scope of opening statements in North Carolina. The gist of the rule from these cases is that you must limit yourself to forecasting your evidence and, as discussed in State v. Paige, you should be able to state for the jury once, the nature of your legal contentions.

I commend the Becton and Stein article which appears in the appendix for a more detailed discussion regarding decisions from other jurisdictions which have addressed the scope of opening.

III. THE PREPARATION OF YOUR OPENING STATEMENT

Perhaps the most important concept to guide you in your preparation of opening statement is the well recognized learning principal of "primacy"; people remember best what they hear first. Therefore, it is critical to start your opening statement with a concise, clear headliner paragraph intended to capture interest and hopefully invoke action.

Secondly, although jurors take their role extremely seriously, do not overtax their patience or ability to listen for long periods of time. It is wise to always keep your opening as short as necessary to cover the essentials.

I suggest that each opening statement should have the following components:

1. THE HEADLINER STATEMENT.

This is the portion of the opening that you should perhaps spend the most amount of time on. You want to select your words carefully with the goal of concisely describing the case. Keep in mind that you are going to follow with details later. **DO NOT USE THIS PRECIOUS BEGINNING TO DO ANY OF THE FOLLOWING:**

- Introduce yourself again.

- Thank the jury (they are not there by choice)

- To tell them what an opening is. (that's what the defense attorney does after you have given a good opening)

- Tell them what a trial is.

2. AN INTRODUCTION TO THE NATURE OF THE CLAIM AND THE PRIMARY PEOPLE INVOLVED.

Think of this as the who, what, where, when and why portion of every good newspaper article.

3. THE FORECAST OF THE EVIDENCE.

Your opening should introduce the jury to the important facts of the case. You can choose the exact method that you feel most comfortable with for each case. For example, if a case has many witnesses you will want to avoid getting bogged down in the introduction of witnesses but simply tell the story based on what you know all of the evidence will show. On the other hand, if you are trying a case that involves three witnesses, you may very well want to introduce each of your witnesses.

Several different organizational techniques are effective. Telling the story chronologically is perhaps the easiest for the jury to follow. Another method, generally referred to as "Flashback", can begin with the end result and then insert events from the past to tell the story about how this terrible result came about. This method may be particularly dramatic if the injuries are profound. Another common organizational technique is the description of "Parallel Actions"; in which you describe first the conduct of the plaintiff, and then switch to conduct of the defendant, until you have the stories literally collide at the crash which is the subject of the law suit. Experiment with all of these and see what works best for each case.

In the typical automobile collision personal injury claim, you will of course want to allocate your time wisely between those facts necessary to determine liability and those facts relating to the injuries and damages. I always prefer to review my evidence of negligence before reviewing the evidence of damages so as to avoid the perception from the jury that you are attempting to persuade with developing sympathy for your client.

4. YOUR CONCLUSION.

You want to end on a powerful note; one that will incorporate the theme that you have developed in the case. Be sure that you tell the jury what you will be asking them to do at the close of the trial. This does not mean that you have to tell them a specific dollar amount, but at least let them know that you will ask them to find that the defendant is liable to pay damages. You can tell them that at the close of the case you will discuss with them in greater detail what reasonable compensation means in this case. Some attorneys believe you should go ahead and give them a specific dollar amount early so they can start getting use to it. The risk with that is you may shock them because they don't yet know enough.

IV. PRACTICE POINTERS FOR THE PREPARATION AND DELIVERY OF OPENING.

1. IS YOUR OPENING STATEMENT ARGUMENTATIVE?

We all know that you are not allowed to argue during an opening statement. Although as a practical matter most of your adversaries and the court will allow reasonable inferences to be drawn from the evidence and stated in your opening, you may not argue. What does that mean? Perhaps the most conservative and safest rule to follow, and I assure you one that will prevent objections from being sustained, is to ask yourself the following question as to each of

your statements in your prepared opening: Is there a witness, or a document, which will state this fact?

Mindful of the parameters of State v. Paige, you may state your legal contentions of what you intend to prove without being argumentative. For example:

> We will prove to you that on December 25, 1991, the defendant drove his truck negligently by crashing into the rear end of Ms. Smith's vehicle causing the injuries you will hear about today.

Although in the purest sense, this is an argument because the defendant will be saying that facts support a different conclusion; that being no negligence or that injuries were not caused by the collision. However, such a statement of your contentions is permissible and not argument.

2. BE MINDFUL OF POTENTIAL EVIDENTIARY PROBLEMS.

You want to avoid telling a jury about evidence which ends up not being admitted. Such a mistake will cost you dearly in credibility and will give opposing counsel a nice bit of closing argument which she might not have otherwise had:

> Ladies and gentlemen, I want to remind you that when Mr. Mills gave his opening he told you that he would present evidence showing that my client was drunk at the time of the collision. Now, have you heard any such evidence? No you have not. The plaintiff's case may have sounded like a case of merit during the opening, but now that we have seen the actual evidence, we can all see that it is nothing but a house of cards.

What can you do to minimize this? I suggest you do the following analysis for each opening you prepare:

a. Do I have any potential problems of having the evidence I intend to talk about in opening excluded from evidence?

b. Can I have the court rule in advance of opening on this issue by way of a Motion in Limine?

c. Are there parts of the defendant's case which I want to eliminate from her opening by filing a Motion in Limine?

By going through the above analysis you can avoid making promises of evidence that you can't keep.

Many judges do not like to stake themselves out on evidence rulings before trial. The court will often reserve the issue for ruling once the evidence is being presented. If that happens, then at least request that the court order defense counsel not to discuss evidence which was the subject of your Motion in Limine in his opening statement.

3. TURN WEAKNESSES INTO STRENGTHS.

You should strive to incorporate facts into your opening which your opposition is planning on using during their defense. This is not done by arguing how the particular fact

doesn't really hurt your case, but is done by simply getting the information before the jury in a favorable light. Then when they hear the defense talk about it, it will not be as persuasive and certainly will have lost any "shock" value. If the jury hears about it first from you, then you will not sound defensive or like you are making excuses. You are "taking the sting out" of the defense in this way.

Let me use an example which actually occurs with great regularity in soft tissue injury cases. Most people over the age of 40 will have some degree of degenerative disc disease. The defendants will want to ultimately argue to the jury that the plaintiff's real problems arise out of the pre-existing condition of degenerative disc disease and that the defendant's conduct has nothing to do with that. During your preparation of the trial you will have done your homework and talked with your expert about this issue. The burden in North Carolina for getting a jury instruction on aggravation or activation of a pre-existing injury is a fairly easy burden to meet. Most orthopedic surgeons will agree to the following:

a. That most people over a certain age have some degree of degenerative disc disease.

b. That a person can go through their entire life without having any symptoms from the degenerative disc disease.

c. That a person with asymptomatic degenerative disc disease can become symptomatic as the result of a trauma such as a rear-end collision.

When you prepare your opening, you will know whether or not your expert is going to give you an opinion that the trauma from the collision activated or aggravated the pre-existing condition of degenerative disc disease. If you know that she will, then you can handle what may otherwise be a weakness during your opening in the following way:

> Ms. Smith was 42 years old when the defendant hit her with his truck. Before that she had been very physically active, not only in caring for her family around the household but in her employment as an electrician. She climbed ladders, she lifted heavy objects, she vacuumed and mopped floors and she camped with her family. Before this collision, she had never experienced any pain in her back and neck which she now lives with on a daily basis.
>
> Now, I do not mean to try to tell you that Ms. Smith was a perfect specimen of physical fitness before the collision. To the contrary, Ms. Smith, like many people her age, had what is referred to by physicians as "degenerative disc disease". Most of us know it simply as arthritis; that degeneration of joints which goes along with getting older. I want you to listen closely when Dr. Marcus Welby tells you how most people have some degree of degenerative disc disease and that many people go through their entire lives without having any symptoms of pain from that condition. Dr. Welby will tell you that in his opinion this collision caused the activation of symptoms from this degenerative disc disease. I tell you this because I want you to listen closely to that evidence, then listen closely to what Judge Brannon will tell you about Ms. Smith's right to recover damages for the activation of that condition.

Another example of how you may want to get in front of the jury something that you know the defense is going to hammer away at is the fact that you are dealing with soft tissue injuries which are hard to prove by objective, hard evidence. You have probably already

touched on the notion during your jury selection but I suggest that you go ahead and mention that again in your opening:

> Ladies and gentlemen, I also want to speak with you just a moment about some of the things that you will not see or hear about in this case. You will not see photographs of terrible cuts and scars; you will not see x-rays of broken bones. Ms. Smith's injuries are commonly referred to as "soft tissue" injuries. Those are injuries to the tendons, ligaments and muscular system of the body. Although these may be injuries which cannot be documented with photographs or x-rays, Dr. Welby will tell you that they are none the less injuries which cause real pain for Ms. Smith; injuries which caused severe muscle spasms in Ms. Smith and continue to affect her life in ways that healed broken bones would not.

4. CAN YOU USE EXHIBITS AND CHARTS?

I always like to use an exhibit or chart if possible. However, clear it with the Trial Court before your opening. Some judges are not comfortable with the use of an exhibit during opening statements so be sure to advise the judge of exactly what you intend to use during the pre-trial conference and make sure that it is going to be acceptable. I see no distinction between reciting verbally what a witness is going to say and using charts or photos to illustrate what the evidence is going to be.

5. BE YOURSELF.

It is essential that you present yourself to the jury with confidence and sincerity. The two most important keys to your ability to do so are: Be Yourself and Be Prepared. If you are well prepared you will be able to talk about the case with confidence. If you relax with yourself and not try to emulate others, then you will present your case with sincerity.

Having said that, let me caution you that the opening is not the part of the trial to be emotional or passionate. You will want to let the jury see you work for a while and let them learn to trust you before being emotional in your delivery. At the point of the opening statement they are more interested in learning the facts about the case rather than being worked up emotionally. Besides, you will be amazed how emotional a low-keyed presentation of terrible facts can be (if you're lucky enough to have a case with terrible facts). Once the jury has seen you work and know that you are well prepared and work hard, they will be more receptive to passion and emotion in the closing. Being overly zealous and passionate in your opening will also be more likely to create an overstatement of your case and to draw an objection as being argumentative.

6. NEVER, EVER READ YOUR OPENING.

Trust yourself! If you have prepared well and know your case, you can deliver your opening without reading it. Of course it will not be precisely as you have written it down, but who cares! The increased sincerity from not reading will always more than compensate for some loss of organization or something you inevitably leave out because you didn't read it.

Don't try to memorize it. Simply know the points you want to make. Prepare a one page summary of those points in the order in which you wish to make them and have that available at the podium if needed.

CONCLUSION

When you hear those words "will there be an opening for the plaintiff", you should surge with excitement. You finally have the chance to tell the jury what your case is all about. If you do it right, it will be without interruption. When you sit down, a major part of your battle will be won. Your preparation is transformed into confidence. Your personal commitment to this case is transformed into sincerity. Make eye contact with those twelve people and let them know the answer to this simple question: "Why should we rule in favor of your client?"