

OPENING STATEMENT

Scope: This Chapter covers the following topics:

- The opportunity to make an opening statement (§6:10 ff.);
- The purpose of opening statement (§6:25 ff.);
- The order of presentation (§6:40 ff.);
- Reserving opening statement (§6:45 ff.);
- Improper conduct during opening statement (§6:60 ff.);
- Objecting to improper opening statement (§6:115 ff.);
- Remedies for misconduct during opening statements (§6:140 ff.);
- Challenging legally-deficient opening statement (§6:160 ff.);
- Preparing opening statement (§6:175 ff.); and
- Presentation of opening statement (§6:240 ff.).

TACTICAL CONSIDERATIONS

[6:1] **Importance:** The opening statement is that stage at the beginning of trial when each side tells the jury what it intends to prove. Its importance cannot be overstated for several reasons:

- [6:2] *Juror attentiveness:* Because the facts and areas of dispute are new, jurors are usually quite attentive during opening statements. They want to know what the case is all about and are therefore receptive to counsel's presentation.
- [6:3] *First opportunity to establish credibility:* The jurors are looking for someone to assist them in arriving at the correct decision. They are likely to place their trust in a trial lawyer who is straightforward and well-organized.
- [6:4] *First opportunity for persuasion:* Opening statement is the first time the jury will hear your client's story. True, the judge may have given the jurors a preliminary "neutral" description of the case and the jurors may also have learned about certain aspects of the case on voir dire. But opening statement allows you to present the case *from your client's perspective* in a narrative and cohesive manner.
- [6:5] *"Roadmap" to help jurors see "big picture":* Presentation of evidence is a step-by-step process; one piece of information builds upon another. The flow is often interrupted because it is necessary to present extensive foundational evidence or to hear witness testimony out of order. The result may be to leave the jurors confused as to how the evidence relates to the controversy they are supposed to decide. Opening statement allows you to draw a "roadmap" showing what evidence will come from which witnesses and, most importantly,

TACTICAL CONSIDERATIONS (Cont'd)

how it all fits together. This will enable the jurors to understand the importance of each item of evidence as it comes in; and they will listen with greater care and appreciation for testimony that you have highlighted.

- [6:6] *“Blueprint” for closing argument:* During opening statement, you will usually make certain promises or representations to the jury about what the evidence will show. During closing argument, you will remind the jury of these promises and of the evidence received, and show that you have “delivered” (see *Ch. 14, Closing Argument*).
- [6:7] *Grounds to attack opponent’s credibility:* Conversely, promises made by your opponent’s opening statement may provide you with grounds for attacking your adversary’s credibility during closing. You can remind the jurors of your opponent’s promises and point out each matter on which your opponent failed to “deliver.” (Various techniques for doing so are discussed in *Ch. 14, Closing Argument*.)

Of course, this same technique can be used *against* you. Take care not to overstate your case to the jury in your own opening statement.

[6:8-9] *Reserved.*


A. GENERAL CONSIDERATIONS

1. [6:10] **Opening Statement Traditionally Permitted:** Although no rule or statute expressly confers the right to make an opening statement, it is traditionally allowed in jury trials. [See *United States v. Stanfield* (9th Cir. 1975) 521 F2d 1122, 1125 (per curiam)—“permitting attorneys to make opening statements is a practice long accepted as established and traditional in jury trials”]

Supervision of oral argument is primarily entrusted to the trial court’s discretion. [*Carlin v. Stringer* (10th Cir. 1966) 365 F2d 597, 599; *United States v. Salovitz* (2nd Cir. 1983) 701 F2d 17, 21]

- [6:11] **Local rules:** Local rules may govern whether opening statements are permitted and their length. Look for a local rule numbered to correspond with FRCP 39 or 83.


- a. [6:12] **Compare—nonjury trials:** Judges often do not want opening statements in a bench trial. Having reviewed the pleadings, pretrial statements, trial briefs and proposed findings of fact/conclusions of law, judges often feel they are sufficiently acquainted with the evidence and that opening statements by the attorneys are a waste of time.

 [6:13] **PRACTICE POINTER:** Because there is no hard and fast rule, check your local rules and the judge’s courtroom rules sufficiently in advance of trial to determine whether the judge permits opening statements at a bench trial.

[6:14] *Reserved.*

- b. [6:15] **No rebuttal by plaintiff:** Each party is entitled to make only *one* opening statement. Plaintiff normally goes first; then defendant (*see* ¶6:41). Therefore, plaintiff has no opportunity to “rebut” statements made by defendant in its opening (*but see* ¶6:16).
- c. [6:16] **Court’s power to permit “reopening” original statement:** Following opening statement, opposing counsel may move for judgment as a matter of law *challenging the legal sufficiency* of the claims or defenses asserted (*see* ¶6:160 *ff.*). At this point, the party whose statement is challenged may seek leave to enlarge or “reopen” in order to address matters inadvertently omitted or not sufficiently covered in the original statement.
- d. [6:17] **Time allowed:** The amount of time allowed for opening statements rests within the trial judge’s sound discretion. [*Glenn v. Cessna Aircraft Co.* (10th Cir. 1994) 32 F3d 1462, 1464—10 minute limit not plain error; *Grey v. First Nat’l Bank in Dallas* (5th Cir. 1968) 393 F2d 371, 386—30 minute limit not abuse of discretion]


[6:18] **Local rule requirements:** Most federal judges restrict the time for opening statements. In fact, many district courts have local rules limiting the time for opening statements. Look for a local rule numbered to correspond with FRCP 39 or 83.

 [6:19] **PRACTICE POINTER:** Draft your opening statement to be flexible so you can quickly trim it to meet the judge’s particular restriction.

Also, remember that a jury has a limited attention span. Unless the case is extremely complex, most opening statements should be between 10 and 30 minutes.

- e. [6:20] **Waiver:** Opening statement is optional; either party may waive the right to give one. [See *Matter of Yagman* (9th Cir. 1986) 796 F2d 1165, 1171, fn. 3—plaintiff waived opening statement; *Plata v. Eureka Locker, Inc.* (7th Cir. 2017) 856 F3d 496, 498 (same)]

(This waiver is different from defendant’s right to “reserve” its opening statement until after completion of plaintiff’s case-in-chief; *see* ¶6:45.)

 [6:21] **PRACTICE POINTER:** Opening statement is too important to waive. Jurors form tentative conclusions early in the trial and need to hear your side of the case as soon as possible. Allowing your opponent an unanswered “first crack” at the jury arguably may defeat your case.

[6:22-24] *Reserved.*

[6:25 — 6:27.2]

2. [6:25] **Purpose of Opening Statement:** Opening statement allows counsel to outline the facts counsel intends to prove at trial. Its purpose is “to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole.” [*Testa v. Village of Mundelein, Ill.* (7th Cir. 1996) 89 F3d 443, 446; *Morrissey v. Welsh Co.* (8th Cir. 1987) 821 F2d 1294, 1303-1304]

➡ [6:25.1] **PRACTICE POINTER:** If you promise to call witnesses in your opening statement and tell the jury what they would say, it is advisable to keep that promise. Otherwise, you might face an instruction that the failure to call a relevant witness means the jurors can infer that the testimony would have been adverse to your case. [See *4 Pillar Dynasty LLC v. New York & Co., Inc.* (2nd Cir. 2019) 933 F3d 202, 208, 210-211]

- a. [6:26] **Not evidence:** An opening statement is not evidence and jurors may not accept it as proof of the matters stated. [*Morfeld v. Kehm* (8th Cir. 1986) 803 F2d 1452, 1455, fn. 3; *Jordan v. Binns* (7th Cir. 2013) 712 F3d 1123, 1135; *Knight through Kerr v. Miami-Dade County* (11th Cir. 2017) 856 F3d 795, 818]
 - (1) [6:27] **Jury instruction:** In fact, the judge will almost certainly instruct the jury that counsels’ opening statements are not evidence. [See Federal Judicial Center Benchbook for U.S. District Court Judges, §6.06; *Ch. 7 Appendix*; see also *Jordan v. Binns* (7th Cir. 2013) 712 F3d 1123, 1135—possible harm caused by defense counsel’s opening statement ameliorated by judge’s instruction that counsel’s statements are not evidence; and *Wilson v. Johns-Manville Sales Corp.* (5th Cir. 1987) 810 F2d 1358, 1362]
 - (2) [6:27.1] **CAUTION:** A party’s decision to refer to evidence (not yet admitted) in opening statement leaves little doubt that it will introduce the evidence during trial unless the opposing party does so first. This places the opposing party in a dilemma. If the opposing party introduces the unfavorable evidence in an attempt to remove the “sting,” it waives any objection it may have had to the admission of the evidence. [See *Reinard v. Crown Equip. Corp.* (8th Cir. 2020) 983 F3d 1064, 1067-1069]
 - [6:27.2] In a products liability action, the district court denied Plaintiff’s motion in limine to exclude Defendant’s video simulations evidence. Defendant displayed photos from the filming of the simulations to prospective jurors during its “mini-opening” before voir dire and referenced them in its opening statement. In an attempt to remove their “sting,” Plaintiff introduced the simulations into evidence, thereby waiving objections to their admission. [*Reinard v. Crown Equip. Corp.* (8th Cir. 2020) 983 F3d 1064, 1067-1069]

- b. [6:28] **Not argument:** Opening statements are intended to be an outline of the factual issues and prospective evidence (see ¶6:25). An opening statement may *not* be used to argue the case to the jury (see ¶6:105 ff.).
 - c. [6:29] **Caution—opening statements in bench trials:** A clear and unambiguous admission of fact made by a party’s attorney in an opening statement may be treated as a binding judicial admission in a bench trial. [*Bedrosian v. IRS* (3rd Cir. 2022) 42 F4th 174, 184-185—attorney’s concession in opening statement that client had “about 2 million U.S. dollars” in bank account was binding judicial admission in bench trial in IRS action to collect penalty for not disclosing foreign accounts]
3. [6:30] **Usually Not Ground for Appeal:** Improper opening statements are rarely ground for appeal. This is because the error is generally waived in the absence of timely objection (see ¶6:120). And, if an objection is made, the error may be cured by the judge admonishing the jury to disregard the improper statements (see ¶6:147).
- [6:31] *Reserved.*
4. [6:32] **Exclusion of Witnesses During Opening Statement:** The court has discretion to exclude nonparty witnesses during counsel’s opening statements. [*United States v. Brown* (3rd Cir. 1976) 547 F2d 36, 37]
- Cross-refer:* Motions to exclude nonparty witnesses are discussed further at ¶4:540 ff.
5. [6:33] **Transcription of Opening Statement:** A transcript of opening statements often proves invaluable during closing argument. The opponents’ credibility may be undermined by reminding the jurors of their unkept promises as to what the evidence would show. (“Remember counsel promised you in opening statement the plaintiff would testify that he was wearing a seatbelt. Well, the plaintiff didn’t say that, did he?”) See *adverse inference discussion* at ¶6:25.1.
- [6:34-39] *Reserved.*

B. ORDER OF PRESENTATION OF OPENING STATEMENTS

- 1. [6:40] **Order Discretionary:** No federal statute or court rule mandates the order of opening arguments. Instead, the conduct and order of trial are discretionary with the court. [*Matter of Yagman* (9th Cir. 1986) 796 F2d 1165, 1171—court may order parties to make opening statements to entire prospective jury panel *before* voir dire; compare *Reinard v. Crown Equip. Corp.* (8th Cir. 2020) 983 F3d 1064, 1068-1069—court permitted party to make “mini-opening” to prospective jurors before voir dire and opening statement at trial]
- a. [6:41] **Normal order:** In both jury and nonjury trials, the party with the burden of proof (normally plaintiff) opens first.

[6:42 — 6:45]

Then, defendant has the opportunity either to make an opening statement or “reserve” opening statement until after the presentation of plaintiff’s case-in-chief (§6:45).

However, where the trial is *limited* to a cross-complaint or an affirmative defense (leaving defendant with the burden of proof), the court may allow defendant to open first.

2. [6:42] **Multi-Party Cases:** Where several plaintiffs or defendants are separately represented, the court will specify the order of opening statements by the parties on each side if they are unable to agree on the matter.
 - a. [6:43] **Factors considered:** Courts usually consider the following factors in setting the order of argument:
 - *Financial interest:* The party with the most at stake should be allowed to open first.
 - *Burden of proof:* The parties with the greatest burden should be allowed to go first.
 - *Avoiding duplication:* Parties with limited claims or defenses should open last where their opening statements would duplicate matters already covered by a coparty.
 - *Order named in pleadings:* Where no other factor applies, the parties should be allowed to address the jury in the same order they are named in the pleadings.

➡ [6:44] **PRACTICE POINTER:** Wherever possible, parties on the same side should agree among themselves to the order in which their opening statements will be presented and advise the court accordingly.

In deciding who goes first, coparties should consider:

- Which coparty’s “theme” or “story” is the strongest and thus casts its side in the most favorable light;
 - The experience and capability of the various lawyers for each coparty;
 - If the parties to a side are going to assume inconsistent positions, which position the jury should hear first;
 - Where the coparties are defendants, whether one should “open” immediately and others should “reserve” opening statement until after the close of plaintiff’s case (see §6:47).
3. [6:45] **Defendant’s Right to “Reserve” Opening:** Generally, defendant has the right to defer its opening statement until plaintiff finishes putting on its entire case.

⇒ [6:46] **PRACTICE POINTERS FOR DEFENDANT:** It rarely makes sense to reserve opening until the defense case. By then, the jury has heard too much from plaintiff and has probably come to tentative opinions regarding the case, so you may be working uphill.

More important, this is the one time during trial plaintiffs usually cannot rebut. This puts plaintiffs at a real disadvantage: They have to start introducing evidence with your opening statement still ringing in the jurors' ears. If plaintiffs' first witnesses are unable to dissipate the "sting" of a strong defense opening, their testimony will be ineffective and it may take plaintiffs a long while to regain their stride.

- a. [6:47] **Compare—multiple defendants:** Where several codefendants are represented separately, one or more may reserve opening as part of a coordinated defense effort: E.g., one defendant may open immediately after plaintiff's opening statement, while others wait until after plaintiff's case-in-chief . . . effectively giving them two chances to advance common defensive arguments.

⇒ [6:48] **PRACTICE POINTER:** This may not always work. Some judges may not permit a two-stage defense opening, or at least will limit the total time for all defendants to that allocated to plaintiff.

4. [6:49] **No Rebuttal:** Generally, plaintiffs do *not* have the right to rebut opposing party's opening statements.

⇒ [6:50] **PRACTICE POINTER FOR PLAINTIFFS:** Anticipate defendant's statement. Since you will not have the opportunity to rebut, be sure to tell the jurors why the defenses that defendant will likely raise are factually inapplicable. (Most defenses will be outlined in discovery and the pretrial order; see ¶4:275.)

Also, confront and explain known weaknesses in your case (e.g., "Defendant may point out in his opening that . . . However, a closer examination of Witness A's testimony will reveal that . . ."). This is important because defense counsel will undoubtedly exploit any failure to mention weaknesses in your case (e.g., "It's interesting to note what Plaintiff's counsel did *not* tell you about this case . . .").

- a. [6:51] **Exception—counterclaims or cross-claims:** Occasionally, plaintiff is given the opportunity to rebut defendant's opening statement where there is a counterclaim involved. Clearly, the court has discretion to allow such an opportunity (see ¶6:10).

- (1) [6:52] **Comment:** However, even if plaintiff is allowed an opportunity to respond to the counterclaim, the re-

[6:53 — 6:65]

sponse will be strictly limited to that claim; attempts to go beyond will bring a strong rebuke from the judge and a sustained objection from opposing counsel.



[6:53] **PRACTICE POINTER:** Discuss whether plaintiff will be given an opportunity to rebut defendant's counterclaim with the judge in chambers *prior* to the commencement of opening statement.

[6:54-59] *Reserved.*

C. IMPROPER CONDUCT DURING OPENING STATEMENT

[6:60] There are limits on what counsel may say or do during opening statement. The actions discussed below (¶6:61 *ff.*) constitute misconduct that may result in rebuke or sanctions by the court, or even an order granting mistrial; *see* ¶6:140 *ff.*

1. [6:61] **Inflammatory Statements:** Statements intended to arouse the passion and/or prejudice of a jury are inappropriate for opening statement. These statements generally take the following forms:

a. [6:62] **Appeals to jurors' sympathy:** It is improper for counsel to make remarks intended primarily to arouse the jurors' sympathy: "Sympathy for suffering and indignation at wrong are worthy sentiments, but they are not safe visitors in the courtroom, for they may blind the eyes of Justice. They may not enter the jury box, nor be heard on the witness stand, *nor speak too loudly through the voice of counsel.*" [*F.W. Woolworth Co. v. Wilson* (5th Cir. 1934) 74 F2d 439, 443 (emphasis added); *Klotz v. Sears, Roebuck & Co.* (7th Cir. 1959) 267 F2d 53, 55]

- [6:63] In a wrongful death action, the following remarks were *improper* in opening statement: "This Thanksgiving, when a mother of seven sets her table for her family to gather, she has to remind herself not to set a place for her daughter, Jane, because the family of seven is now six . . . This case will be about the loss of a life that was needless. This case will be the story of the indifference of the building owner to the safety of any person who was around his building . . . The Welsh Company will say: Well, it is the young people's own fault, that it's Jane's fault, that it's Steve's fault, and it's Benedict's fault; they're to blame for their injuries because they left a place of safety and presumably went to a place of danger. This is a case about the loss of the heart and soul of a family, the achiever in a family." [*Morrissey v. Welsh Co.* (8th Cir. 1987) 821 F2d 1294, 1303, fn. 4]

[6:64] *Reserved.*

b. [6:65] **Racial prejudice:** Appeals to racial prejudice are particularly inappropriate in opening statement. [*Stanton by Brooks v. Astra Pharmaceutical Products, Inc.* (3rd Cir. 1983)]

718 F2d 553, 579—“Justice must not be based on racial sympathy or animosity”]

- [6:66] In a negligence and products liability action, it was improper for plaintiff’s counsel to state, “[W]e were concerned about the effect of having black people come to an area where there are not many black people and expecting to get justice from a jury which is mostly white people . . . we think that this is an impartial jury and everyone here has sworn that they will try this case not on the basis of passions, or prejudice, or economic basis, but on the basis of the facts and the law.” [*Stanton by Brooks v. Astra Pharmaceutical Products, Inc.* (3rd Cir. 1983) 718 F2d 553, 579-580]

[6:67-69] *Reserved.*

2. [6:70] **“Golden Rule” Argument:** It is improper for counsel to suggest that the jurors place themselves in the “shoes” of a party in order to determine damages. [*Leathers v. General Motors Corp.* (4th Cir. 1976) 546 F2d 1083, 1085]

Rationale: This so-called “golden rule” argument has been universally condemned because it encourages jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. [*Loose v. Offshore Navigation, Inc.* (5th Cir. 1982) 670 F2d 493, 496]

- [6:71] For example, the following remarks in opening statement were held to justify a new trial: “Mr. Leathers is going to live those 26.9 years disabled. We submit the disability was caused by the steering defect in a General Motors car. I don’t know, again, how to put a number on that . . . I don’t know how much you put a dollar value on it, but how much dollars would it be worth to you, \$30 a day, \$20, \$300 a month? The only way he can be compensated is with money. He can’t be compensated with a new leg or having his leg put back in good condition, and I ask you to consider that.” [*Leathers v. General Motors Corp.* (4th Cir. 1976) 546 F2d 1083, 1085]

Cross-refer: “Golden rule” argument is also improper during closing argument; see ¶14:295 *ff.*

[6:72-74] *Reserved.*

3. [6:75] **Discussing Applicable Law:** Opening statements should outline the *factual issues* and *prospective evidence* (see ¶6:25). It is improper to argue the applicable law during opening statement. [*Schwartz v. System Software Assocs., Inc.* (7th Cir. 1994) 32 F3d 284, 288]

- [6:76] In a suit alleging violation of federal securities law, P’s attorney argued that the applicable statute required D to “tell the truth, the whole truth, and nothing but the truth” when countering negative analyst reports. P’s attorney was properly

[6:76.1 — 6:82]

ordered to refrain from making legal arguments in his opening statement. [*Schwartz v. System Software Assocs., Inc.* (7th Cir. 1994) 32 F3d 284, 288]

- [6:76.1] In plaintiff's action against an automobile dealership alleging violation of the Truth in Lending Act (TILA), the district court did not abuse its discretion by preventing plaintiff from explaining the Congressional purpose behind the TILA in his opening statement for purpose of framing his presentation of evidence. Plaintiff failed to prove how not being permitted to argue the TILA's purpose was relevant in deciding whether a violation had occurred (especially since counsel's argument is not evidence). [*Smiley v. Gary Crossley Ford, Inc.* (8th Cir. 2017) 859 F3d 545, 556-557]

➡ [6:77] **PRACTICE POINTERS:** Unless your opponent has obtained leave of court, *be sure to object* to your opponent's reading statutes or discussing legal principles in opening statement. Such statements may give the jurors the impression your opponent is more knowledgeable than you. Also, your objection prevents any misstating or "slanting" of applicable law.

If legal concepts are critical to *your* opening, *ask the judge to preinstruct* the jury (*see* ¶15:238). (This should be raised during the pretrial conference.) The judge's preliminary instruction will enable you to explain to the jurors how these terms apply to the facts of the case. [See *Saffold v. McGraw-Edison Co.* (8th Cir. 1977) 566 F2d 621, 622—rather than permitting counsel to read statutes to jury, proper procedure would have been for trial court to judicially notice statutes and instruct jury as to their applicability]

[6:78-79] *Reserved.*

4. [6:80] **Credibility of Witnesses:** Generally, it is not proper to argue the credibility of witnesses for either side in opening statement. [See *Coursey v. Broadhurst* (5th Cir. 1989) 888 F2d 338, 343—referring to plaintiff during opening statement as "convicted felon" while explaining jurors' obligation to weigh evidence improper]

Cross-refer: Witness impeachment is discussed in *Ch. 12*.

5. **References to Party's Wealth**

- a. [6:81] **Corporate party:** It is improper for plaintiff's counsel in opening statement to refer to the size and wealth of a corporate defendant in an effort to play upon the jurors' sympathies or prejudices. [*City of Cleveland v. Peter Kiewit Sons' Co.* (6th Cir. 1980) 624 F2d 749, 753—"justice is not dependent upon the wealth or poverty of the parties and a jury should not be urged to predicate its verdict on a prejudice against bigness or wealth"]
 - [6:82] In a property damage case, it was improper for plaintiff's counsel to state the following matters which