

III

OPENING STATEMENTS

§3.1. Introduction	41
§3.2. Opening statements from the jury's perspective	41
§3.3. Strategic and evidentiary considerations	45
§3.4. Content of effective opening statements	50
§3.5. Examples of opening statements	61

§3.1. Introduction

The opening statement will be your first opportunity to tell the jury what the case on trial is all about. As such, it is a critical part of the trial that must be carefully planned, developed, and delivered, yet is probably the most overlooked part of the jury trial process.

Trial lawyers agree that opening statements often make the difference in the outcome of a case. Studies have shown that jury verdicts are, in the substantial majority of cases, consistent with the initial impressions made by the jury during the opening statements. As in life generally, the psychological phenomenon of primacy applies, and initial impressions become lasting impressions. Accordingly, make sure your case gets off on the right footing. This can be achieved only when you forcefully deliver a logical opening statement that clearly demonstrates the facts that entitle your party to a favorable verdict.

This chapter will discuss the elements and structure of effective opening statements and will present illustrative opening statements in representative civil and criminal cases.

§3.2. Opening statements from the jury's perspective

Jury selection has just been completed, and the jurors are sitting in the jury box waiting. The following ritual usually occurs next:

Judge: Are both sides ready?

Plaintiff's lawyer: Ready, your Honor.

Defendant's lawyer: Ready, your Honor.

Judge: Members of the jury, we are now going to hear the opening statements from the lawyers. The opening statements should give you an overview of what the lawyers expect to show through the witnesses and other evidence that will be introduced during the trial. This should help you understand the actual evidence when you receive it. Plaintiff, please proceed.

What are the jurors thinking and feeling at this point? First, they are anxious and worried about courtroom procedure and their role in it. Second, they are wondering what the case is all about. Third, they want to know whom, other than the judge, they can trust and rely on for help. Fourth, they are more receptive to information than at any other stage of the trial process. Experienced lawyers understand what the jurors are thinking and feeling and use this knowledge to organize and deliver their opening statements.

What does all this say about opening statements? Effective opening statements, from the jury's perspective, have several basic characteristics.

1. The first minute

The first minute or two of your opening statement should communicate three things to the jurors; your theme, your summary of the facts, and your enthusiasm about trying the case.

Themes are the anchors around which the jurors picture the case. All cases can be organized around a theme summarizing your position on the evidence. The themes are the universal truths about people and events we learn about during our lives. Most judges today will permit themes (unless excessively argumentative) in the opening statements.

Examples:

"This is a case about cheating."

"This is a case about promises. The defendant made a promise and now doesn't want to live up to it."

"This is a case about police brutality."

"Revenge. That's what this case is all about."

"Everything you will learn about during this trial is based on greed."

"Pain, pain, and more pain. Mr. Johnson's only companion today is constant pain."

"This is a case about taking responsibility for your own conduct."

First impressions are lasting impressions. The jurors, in a matter of minutes, have already made preliminary impressions about you, your client, and your case. Hence, the first minute of the case should include a summary of your case, cast in a positive, interesting, human way.

Example (personal injury):

On May 8, 1991, defendant, while drunk, ran his car through a red light, crashed into Jane Smith's car, and crushed her behind the steering wheel of her car. Mrs. Smith and her family have never been the same.

Your opening statement must be delivered in a forceful, energetic way that lets the jurors know that you are eager to get the trial underway, enthusiastic about your case, and confident that the jurors will do the right thing at the end.

2. Storytelling

Effective opening statements are usually based on good storytelling. After all, a trial is essentially a contest to see which side's version of a disputed event or events the jury will ultimately accept as true.

Several ingredients collectively create good storytelling. First, the story should focus on the people, not the problem. Most jurors view the world through emotional eyes. They are interested in people and what makes them do the things they do. This means that you must personalize your client or key witness. It also means that your storytelling must emphasize the parties and witnesses and the events they were a part of, not the legal issues involved.

Personalizing your client or key witness is important because jurors want to help people they like. Hence, if your client or key witness is likable and the jurors identify with her, they will necessarily be more likely to return a verdict in her favor. That's simply human nature.

Example (rape prosecution):

This case is the story of Mary Martin, who was a lifetime resident of this city. She had completed college, and had just started her job as a buyer at the Smith Department Store. She had her own apartment for the first time. Life was exciting for her. It was around 2:00 A.M. the nightmare started. She was sleeping, alone in her apartment. Suddenly she was startled by a noise. At first she thought it was outside. But when she heard it a second time she knew what it was: the creak of the wooden floor in her living room. It was then that Mary Martin knew that a stranger was in her house.

Second, your storytelling must be vivid and recreate for the jury's benefit the events and things that happened to your party. Where appropriate, your storytelling should be emotional and dramatic, since you want to draw the jurors into your story and create empathy for your party. Vivid, dramatic, emotional storytelling is engaging and keeps the jury's attention.

Example (personal injury):

On April 25, 1991, at around 4:00 P.M., John Smith was walking along Spring Street. Suddenly, a car came from behind, failed to stop at the stop sign, and crashed into John's back. The impact crushed his ribs, broke his spine in three places, and threw him into the ditch. That was the last day John Smith ever walked. He will never walk again.

Third, storytelling must be organized in a simple, logical way. Most of the time the best way to organize is chronological, since jurors are used to hearing stories that move from beginning to end in chronological sequence. A chronology is simple, easy to follow and understand. If, however, the case allows for a different approach, consider it. For instance, you might present your storytelling by describing the last event, then loop back and describe earlier events that led up to the last event. The important point to remember is that your organization must be simple, clear, and easy to follow.

Example (assault prosecution):

There had been problems between the defendant and Bobby Short before. Just the week before the two had been in the tavern and had gotten into an argument. The defendant again tried to push Mr. Short around, but Mr. Short refused to get involved. Instead, he simply left the tavern and went home.

One week later, on April 10, the same thing happened. The defendant and Mr. Short were again at the tavern. Again the defendant tried to pick a fight with Mr. Short. As usual, Mr. Short tried to get away. This time, however, he was not as lucky, because the defendant stood in the doorway and refused to let Mr. Short out.

Fourth, the opening statement should alert the jurors to coming attractions. Giving the jurors a preview of important testimony heightens their anticipation and keeps their attention during the trial. This is particularly important for the defendant, who presents evidence only after plaintiff has rested.

Example:

Listen when Dr. Johnson tells you what happens to a rib cage when it is struck by a two-ton car, and you will know why Mary Johnson can no longer work and support her family.

When Officer Thomas tells you what he found when he searched the defendant's car, you will know why the defendant was immediately arrested.

3. Efficiency

Jurors have limited attention spans. They have limited capacities to retain information. Hence, your opening statement must be efficient. Efficiency in opening statements — as in the other stages of a trial — means two things. First, research shows that the longest time period that most persons can maintain a high level of concentration is 15 to 20 minutes. Even during that time, minds regularly wander away and return. Second, research also shows that memory decays rapidly. Within a short time most persons have forgotten most of what they heard. Within a few hours they have forgotten the great majority of what they heard. Research also

shows that repetition is a key ingredient in improving memory and that repetition of information three or four times significantly aids memory.

For the lawyer the message should be clear. Most opening statements should take 10 to 20 minutes. Using more time is counterproductive: Jurors will be overwhelmed, confused by details, and will respond by refusing to listen. Instead, it is usually more effective to touch on fewer details, select your most important facts and phrases, and repeat them three or four times. This is particularly important with your themes, the anchoring devices for your opening statement.

§3.3. Strategic and evidentiary considerations

Strategic and evidentiary considerations also play a significant role in structuring your opening statement.

1. Do not argue or state personal opinions

Arguments are reserved for closing arguments. They are improper in opening statements. An easy way to keep the distinction in mind is to remember that opening statements state facts. Closing arguments, in addition to stating facts, can also argue characterizations, conclusions, inferences, credibility of witnesses, common sense, common experiences in life, and other matters beyond the evidence itself. A rule of thumb is to ask yourself: Do I have witnesses or other evidence that will prove the facts I am telling the jury about in my opening statement? If so, it is proper to include those facts in your opening statement.

Stating the rule against arguments is easy. Determining where the line is, or when you have crossed it, is not easy, since judges differ widely in their interpretation of what constitutes impermissible argument. Some give considerable leeway; others give the prohibition a strict interpretation. In addition, practices vary between jurisdictions. The only solution is to learn what your particular judge's attitude is and adjust to it. Do this before trial, and then plan your opening statement to eliminate anything potentially objectionable, so that your opening will flow smoothly, without interruption. This is not the place to draw objections from the other side.

Example:

Proper:

He was going 50 mph in a 30-mph zone.

He drove off the road on a clear, dry day on a straight section of the road.

She will say that she took a handgun away from a 250-lb. football player.

Improper:

He was racing his car, scattering everything in his path.

He was a loose cannon, charging down the road.

Common sense tells you that she couldn't have done what she claims she did.

It is also improper to state directly your personal opinions about the facts or the credibility of witnesses. Phrases like "I believe," "I think," "I know," or even "we believe" state personal opinions and are usually objectionable, not only in opening statements but at any stage of the trial. Moreover, they are not persuasive ways to present things to the jury. These phrases should be eliminated from your trial vocabulary before they become a bad habit.

2. Do not overstate the evidence

The only thing a trial lawyer has to sell to the jury is his credibility. Hence, nothing is more damaging than to overstate facts in your opening statement. The jury will remember it, resent your misrepresentation, and no longer trust you. Your opponent during closing arguments will in all likelihood point out each misrepresentation that you failed to deliver on.

Accordingly, if you do err, do so on the side of caution. When in doubt, understatement is the better part of wisdom. The jury will be pleasantly surprised to learn that your case is even better than they had expected.

3. Develop your theory of the case

A theory of the case is your side's version of "what really happened." It should incorporate all the uncontested facts as well as your side's version of the disputed facts. It must be logical, fit the legal requirements of the claims or defenses, be simple to understand, and be consistent with the jurors' common sense and their perception of how life works.

Your opening statement is your first opportunity to tell the jurors your theory of the case — what really happened. A jury trial is essentially a competition to see which party's theory of the case the jury will select as more probably true. Seize the opportunity. Give the jury a coherent overview of your evidence that puts it all together. If you fail to do so, the jury will not understand where you stand. Worse yet, the other side during closing arguments may argue that you never had a theory of the case at all, but were merely waiting to hear all the evidence before committing yourself to one.

4. Choose your labels

Labels are simply the way you will refer to the parties, events, and other important things during the trial. Labels are important because they convey attitudes and messages. There is a difference between calling your party "the plaintiff" or "my client" and "Mr. Smith" or "Bobby," between calling a vehicle a "car" and a "big black Jaguar sports car" and between calling a car crash an "accident" and a "collision."

Before the trial starts, decide how you will label your party, the opposing party, the events, transactions, vehicles, weapons, and other things important to the case. Choose the labels that project the image you want and that support your themes and theory of the case, and use them consistently throughout the trial.

Example (automobile — negligence case):

Plaintiff:	Defendant:
Ms. Smith [pl.] that defendant defendant's 2-ton truck crash/collision shattered arm	Mr. Johnson [def.] the plaintiff our delivery van accident injury

5. Consider using exhibits

Exhibits in opening statements are a mixed blessing. On the one hand, they can be an effective tool to make key facts clear for the jury. On the other hand, exhibits can also distract the jurors' attention from you, and once seen will no longer be new evidence when reused during the trial. Hence, using exhibits during opening statements should be done only after weighing the benefits and costs involved.

If a chart, diagram, or other exhibit is essential for the jurors' understanding of the case, then it must be used. This is commonly true in commercial cases, where the parties, facts, and events can be complex. In those cases a chart showing the parties and their principal witnesses, a chronological chart of a series of related events, or a flow chart showing the sequence of important activity can be effective during opening statements.

If the exhibit you wish to use in your opening statement has already been admitted in evidence through a pretrial order or by stipulation of the parties, there should be no problem with using it in your opening statement. It is always a good idea, however, to inform the judge and opposing lawyer of your plans so that any objections or logistics can be ironed out in advance.

If the exhibit is not in evidence, tell the judge that you wish to use it during your opening statement and that you will establish a proper foundation for the exhibit during the trial. Today almost all judges will allow the use of such exhibits under these circumstances.

6. Anticipate weaknesses

Often a difficult decision in opening statements is whether, and if so how, to volunteer weaknesses. This involves determining your weaknesses and predicting whether your opponent intends to use them at trial. There is

obviously no point in volunteering a weakness that would never be raised at trial. Where, however, that weakness is apparent and known to the opponent, you should volunteer it. If you don't, your opponent will, with twice the impact. How do you volunteer the weaknesses? The key is to mention the weakness without emphasis and to present it in its least damaging light, when it will blend easily into the story.

Example:

Your client is the plaintiff in a personal injury action. He was involved in a collision with another automobile at an intersection. The defense is contributory negligence, based in part on the fact that your client had been drinking.

On April 25, 1985, John Smith went to work as usual. At 4:00 P.M., when his shift got out, he and several of his fellow employees went to Frank's Tavern, as they often did, and he had a couple of beers and talked with the other men there. After about one hour, John left to drive home for dinner. It was on the way home that he was struck by the defendant's car.

Some lawyers believe that volunteering their own weaknesses only puts undue emphasis on those weaknesses. They feel that it is better to let the opponent bring them out. This approach fails to recognize, however, that over the course of the trial the only thing that a lawyer has to sell is his credibility. Once the jurors feel that a lawyer is not being honest and candid with them, that credibility is lost. Credibility is best maintained by always being candid, which includes honestly disclosing weaknesses in opening statements and discussing them frankly in closing arguments. This is best done by making the weaknesses part of your story, giving the jury the message that these "weaknesses" do not affect the overall merit of your case.

7. Waiving or reserving opening statements

Experienced trial lawyers look forward to opening statements since this is their first real opportunity to communicate directly with the jurors and tell them about the case. In some jurisdictions the party with the burden of proof, normally the plaintiff, must make an opening statement that demonstrates a *prima facie* case. In others, there is no legal requirement that either party make an opening statement. Moreover, some jurisdictions permit the defendant to reserve an opening statement until he begins the defense's case in chief.

It is difficult to imagine a situation where a party, either plaintiff or defendant, would find it advantageous to waive making an opening statement. Remember that trials are conducted to see which viewpoint of a disputed set of facts the jury will accept as true. Making an effective opening statement gives you a head start over your opponent. Take advantage of the opportunity.

The defendant, however, has a more realistic decision to make: if permissible, should he make an opening statement immediately after the plaintiff or should he reserve it for the defense case in chief? Most defendants open immediately after the plaintiff. Reserving the opening statement means that plaintiff's version of the facts will go unchallenged. Coupled with a strong case in chief, the plaintiff may well have convinced the jury before you get a chance to tell your side of the case. Some defense lawyers prefer to reserve opening statements because they will have the benefit of hearing the plaintiff's evidence before deciding exactly what to say. However, reserving the defendant's opening statement necessarily creates the impression that you did not have a defense, so you waited to see what the plaintiff's case looked like before devising one.

Nonetheless, the defendant should at least consider reserving his opening statement where he has a strong case and there are significant strategic advantages in that approach. This situation exists most commonly in criminal cases where a strong affirmative defense exists and, because of limited discovery, the prosecution does not know what the defense evidence will be. Reserving the opening statement in such a situation will prevent the prosecution from altering its case in chief to blunt the anticipated defense. The defendant might also reserve his opening statement when he has more than one defense to raise, and cannot make up his mind which one to raise until he has heard the prosecution's case in chief. For example, in a murder case where the prosecution's evidence is weak on identification, the defense could be based on that issue. If the identification evidence is strong, the defense of self-defense could be asserted.

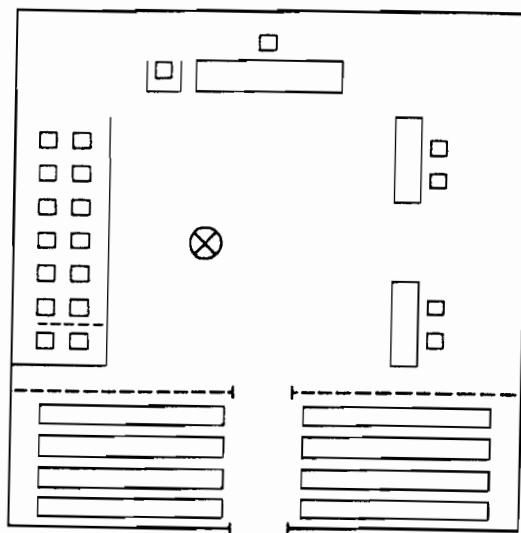
8. Lawyer's position and delivery

During opening statements, unless required to use a fixed lectern, you should position yourself in the courtroom to maximize your presence before the jury. Although this is partly a matter of personal style, the most advantageous position is usually directly in front of the jury, a few feet away, where you can comfortably maintain eye contact with each of the jurors. Standing at either end of the jury box gives the impression of favoring some jurors and ignoring others. Standing too far away reduces your presence, while too close makes jurors uncomfortable by invading their personal zone.

Example:

In this schematic diagram of a courtroom, the lawyer should usually stand near the position "X."

Regardless where you make your opening statement, guard against mannerisms that detract from your delivery. Keep your hands out of pants or coat pockets, avoid playing with coins, pencils, or papers, and restrict constant or aimless wandering about the courtroom. Use upper



body gestures, those involving your hands, arms, shoulders, head, and face, since these usually strengthen your speech. Remember that your physical and verbal mannerisms should always reinforce your speech.

A trial lawyer should know his case well enough and have prepared his opening so that extensive notes are unnecessary. If possible, avoid notes altogether. This permits you to exude confidence, use your hands and arms for effective gestures, and maintain continuous eye contact with each of the jurors. Lawyers who can give an opening statement without notes have a decided advantage over their opponents.

§3.4. Content of effective opening statements

The following checklist should be useful in organizing your opening statements. While no checklist should be religiously adhered to under all circumstances, following an outline will force you to prepare, organize, and deliver an opening statement that will present your evidence in a logical and clear progression that the jury can follow and remember.

1. introduction
2. parties
3. scene
4. instrumentalities

5. date, time, and weather
6. issue
7. what happened
8. basis of liability/nonliability or guilt/nonguilt
9. anticipating and refuting defenses (plaintiff only)
10. damages (civil cases only)
11. conclusions

While this type of checklist should be useful, it is by no means the only way an opening statement can be organized. Like most aspects of trial work, nothing is etched in stone. It can and should be modified to meet the unique facts of each case, your personality and style as well as that of your opponent. Only time and experience will determine what approaches work best for you.

Although the checklist is advisory, the requirement of preparation and organization is not. Like any other phase of the trial, the opening must be carefully organized, planned, and delivered. Giving an opening statement "off the top" usually leads to disaster.

1. Introduction

The beginning of your opening statement is your first opportunity to speak directly with the jury. It is your first chance to impress them with the merits of your case and your abilities as an advocate. First impressions are usually lasting impressions. Within the first minute or so you should be able to achieve three purposes:

- a. present your themes
- b. present a short overview of your case
- c. demonstrate your abilities, confidence, and integrity through your delivery and demeanor

Example (plaintiff):

May it please the Court, counsel, members of the jury. This is a case about carelessness and how it ruined another person's life. That's because on April 25, 1991, John Smith had his leg crushed when, at the intersection of North and Clark Streets in this city, he was walking across North Street with the walk light, and the defendant, running the red light, crashed into Mr. Smith's leg. The force of the crash crushed his leg, shattered it in several places, and Mr. Smith's leg, and his life, have never been the same.

Example (defendant):

This is a case about taking responsibility for your own conduct. That's because on April 25, 1991 the plaintiff, who was in a hurry, took a chance, anticipated

that the light would change, and stepped off the curb before the light had changed. Because he was injured, the plaintiff now wants to blame someone else for his own carelessness.

Is a theme improper in an opening statement because it constitutes argument? While some courts still adhere to the traditional test — only if a witness will testify to it can you say it in opening statements — most courts today allow reasonable latitude and recognize that themes and other devices that grab attention, while technically perhaps “argument,” should be allowed because they help the jurors understand the positions of the opposing parties. Themes, if direct inferences from the evidence to be introduced at trial, are usually allowed. Since the propriety of an opening statement is, like so many things, within the discretion of the trial judge, obviously you need to know your judge.

If your trial judge is a traditionalist, you will need to modify or even drop your themes from your opening statement. Adding the time-honored phrases, “We expect the evidence to show,” and “We will prove to you,” incanted at the beginning and repeated once or twice during the opening statement, will usually satisfy the judge.

2. Parties

You should introduce the essential people, both parties and critical witnesses, to the extent appropriate. As plaintiff, your description of the plaintiff in a personal injury case should include his activities at work, home, and play. Tell a story about your client. Build him up and make him a human being the jury can relate to and sympathize with. In addition, remember that the credibility of your important witnesses is determined not only by what they say and how they say it, but by who the witnesses are. As defendant, discuss the important parties and witnesses the plaintiff either did not mention or glossed over.

As always, make sure that whatever you do bring out about any parties or witnesses will be supported by testimony at trial. Since a witness’ background will usually only be brought out through that witness’ testimony, discussing the background in the opening statement may commit you to calling the witness at trial. For this reason, defense lawyers in criminal cases will rarely discuss the defendant’s or other defense witnesses’ backgrounds in their opening statements, unless they are certain these persons will testify. In this way they remain flexible in deciding to present a defense at all.

Example (plaintiff):

Folks, meet John Smith. John is an accountant. He had worked steadily as an accountant at the XYZ Company for 15 years, supporting himself and his three children. He has lived in our community all his life.

Before April 25, 1991, John Smith was a completely healthy man. He was physically active. He did all the work around the house, including building an addition a few years ago. He enjoyed playing tennis, hiking and camping with the family, and other athletic activities. Never did he have any problems with his back or legs.

Example (defendant):

To understand this case you need to understand Bob Jones. Bob’s a professional driver. He drives all kinds of trucks for ABC Construction. He’s done that for more than eight years now. Bob was so professional in his work that two years ago he was promoted to head driver, a responsibility that involves hiring, firing, training, and scheduling all the other drivers.

3. Scene

In most personal injury and criminal cases, the scene of an occurrence is usually important. In these cases you should describe the scene so that the jury can visualize it. Remember that the key to describing scenes is to develop verbal pictures such that if you close your eyes and listen to the description you should actually be able to form a mental picture of the scene described. Here clarity is critical. If the jury cannot visualize what you are describing, the rest of your opening will make little sense.

Juries, like lay people, often have difficulty in understanding compass directions. Instead, it is usually more effective to ask the jury to assume that they are facing a given direction, then “walk” the jury through the scene involved. Give one fact at a time, slowly enough to be absorbed and make a mental picture of it. It’s generally best to give the jury the minimum amount of detail necessary to accurately picture the scene. Too much detail at this time runs the danger of confusing the jury.

Example (plaintiff):

This collision occurred at the intersection of Clark Street and Division Street. Picture yourself in a car traveling south on Clark Street toward the intersection of Division Street. Clark Street is a two-lane street. There are parking lanes on both sides, which are always filled. Both sides of Clark Street near the intersection have commercial buildings approximately three stories high. Division Street is a four-lane street which intersects at right angles with Clark Street. It has no parking lanes and is also lined with commercial buildings. Consequently, as you drive down Clark Street you can’t see the traffic coming down Division Street until you are in the intersection itself.

Defendant, speaking after the plaintiff, should describe those details of the scene plaintiff left out, or with which you disagree.

Examples (defendant):

Counsel has described part of the scene to you but he failed to mention that . . .

It is important to keep in mind that . . .

A diagram, enlarged photograph, or other exhibit can be an effective aid in your opening statement, but several considerations must be kept in mind in deciding whether to use them. First, find out if the judge will allow you to use the exhibit during your opening statement. If you represent to the court that you can establish a foundation for the exhibit, or your opponent has no objection to its admission, the judge will ordinarily permit use of the exhibit during your opening statement. Second, keep in mind that the exhibit can be both an attraction and a distraction. It is attractive because the exhibit, in an appropriate case, can help the jury understand the case. On the other hand, the exhibit is distracting, because jurors will find it much more interesting than listening to you talk. The standard way of dealing with this problem is to use the exhibit only when necessary, then move it out of sight when done. Third, using the exhibit during opening statements will mean that the exhibit is no longer new when it is formally introduced in evidence later. Where the exhibit will help spice up a tedious but necessary examination, consider saving it to use for the first time during that examination.

4. Instrumentality

In many cases, particularly personal injury and products liability, the instrumentality is an important part of the case. These would commonly involve vehicles, machinery, equipment and other products. In such cases the instrumentality should be described fully. Use the same picturization technique used to describe scenes.

Example:

This bus was 40 feet long and had front and rear exits on its right side. Each exit had three steps. There were handrails on both sides of the exits.

Example:

The scaffolding used on this construction site consisted of a platform 20 feet long and two feet wide, which was suspended from the roof by two steel cables. An electric winch was attached to each cable.

Example:

These life insurance policies had a face value of \$50,000. They also had a double indemnity clause, a clause which said that in the event of an accidental death, the insurance company would pay twice as much.

5. Date, time, and weather

In cases where the date and precise time of an event are important, or the weather conditions are significant, describe these in detail.

Example:

This collision occurred on April 25, 1991, just before 3:00 P.M. It had been a sunny day. Although showers were expected, the streets were still clear and dry.

Example:

This robbery occurred at 11:30 P.M. on April 25, 1991. Although it was nighttime, this intersection was well lighted. There was a streetlight directly over the spot where Mr. Smith was robbed. There were other streetlights farther down the street in each direction, on both sides of the street. There was additional lighting from the storefronts that lined the street on both sides.

6. Issue

As defendant, your picture of what happened should be preceded by a denial of the plaintiff's version of the disputed facts of the case that the jury has just heard. How you make your denial is critical. It must be done directly and with conviction. You must force the jury to get away from plaintiff's version of the facts and keep an open mind about your evidence.

Plaintiff, of course, can also state what the issues in the case will be. However, it is usually preferable for him to proceed directly into the "how it happened" phase, since plaintiff will not usually want to tell the jury that the defense disagrees with his version immediately before he tells it.

Example (defendant):

Counsel for the plaintiff has told you that he expects to prove that this accident was caused by Mr. Johnson's negligence. But that's not what the evidence will show here!

What really happened on that day? We will prove that we were not negligent, and that if anyone caused this accident, it was the plaintiff himself who was negligent and at fault.

7. What happened

You have now established the necessary foundations for your picture of the occurrence involved. You have set the stage: The parties, scene, instrumentality, weather, date, and time have all been described. A com-

plete background has been created. The jury has a mental picture against which you can describe the action. You are now able to make an uninterrupted description of the actual event involved, with the kind of force and pace that will recreate the event and make it come alive. Action can only come alive if you present it in an uninterrupted way.

Remember that you are competing with your opponent to create the more plausible description of how the event actually occurred. If you can make the jury visualize the event *your way*, you are well on the road to a favorable verdict. To do this successfully, your description must be a logical progression, simply yet forcefully stated; it must be paced so that the jury can follow easily; and it must be given from the perspective most advantageous to you.

As defendant, your primary problem is to persuade the jury to see the event *your way*, the way your evidence shows it really happened. You should directly deny that the event occurred in the way plaintiff has claimed, if you have evidence that will contradict the other side's version. If you have such evidence, you can in good faith deny their version and tell the jury what your side's proof is. However, what do you do if you have no contradictory evidence? Ethical considerations may keep you from directly denying your opponent's version or stating it's not true. You can, however, state that your opponent's evidence will be unpersuasive, will fail to convince, or will not meet his burden of proof. There is nothing improper in challenging your opponent's ability to prove what he is required to prove.

Example (plaintiff — civil):

Ladies and gentlemen, what happened the day this tragedy occurred? John Smith was driving south on Clark Street. He was driving at about 25 mph, and was looking out for other cars and pedestrians. He could see the intersection of North Avenue ahead. The light was green for the Clark Street traffic. There were no cars in the intersection. Mr. Smith slowed down as he approached the intersection and could see no traffic or pedestrians. When he was halfway through in the intersection, without warning another car came from his left, ran the red light, and rammed Mr. Smith's car in the left rear.

Example (defendant — civil):

What really happened at the intersection of Clark and North? Frank Jones was driving westbound on North Avenue. As he approached the intersection of Clark and North, the light was red. Mr. Jones let his foot off the accelerator and began to slow down. Just before he reached the intersection, the light turned green. Mr. Jones accelerated and entered the intersection. Suddenly, another car shot through the intersection late, directly in front of Mr. Jones' car. Mr. Jones, although he had the green light, slammed on his brakes, but it was too late. The front of his car struck the other car on the rear driver's side.

Example (plaintiff — criminal):

Suddenly, at 9:05 A.M., three men with guns and masks burst through the front door of the bank. One man, armed with a shotgun, stood by the front door. The other two men ran to the tellers' area. One leaped over the counter and herded the tellers into a corner. The man standing before the counter announced, "This is a stickup. Don't do anything stupid."

Example (defendant — criminal):

At 11:30 P.M., while somebody else was robbing the unfortunate victim, my client, Frank Jones, was three blocks away, walking home from a movie. Suddenly, a police car with lights flashing came around the corner and pulled up next to Frank. Both officers, with guns drawn, ordered Frank to stand against a wall; Frank kept asking, "What's this all about?" One of the officers said, "You are under arrest for robbery." That, ladies and gentlemen, was the first time Frank Jones ever knew that a robbery had occurred.

8. Basis of liability/nonliability or guilt/nonguilt

As plaintiff, this should be a high point in your opening statement. You want to make a summary of the facts and conclude that your client is entitled to win. This should be done in a suitably indignant and forceful manner. State the basis of liability immediately after your narration of your version of the facts.

As defendant, it is usually safer not to directly challenge the plaintiff's ability to prove certain facts. Assume that plaintiff will introduce some evidence to support his version. The safer approach is to suggest that plaintiff's picture of the disputed events will not be persuasive or convincing, then emphasize your own picture and conclusion.

Keep in mind that an opening statement cannot be argumentative, and that judges differ on what constitutes improper argument.

Example (plaintiff — civil):

Members of the jury, this evidence will show that the defendant did not keep a proper lookout for other cars, did not look out for pedestrians, did not slow down, and did not stop at the red light.

Example (defendant — civil):

The evidence will show that Mr. Jones was at all times driving carefully, and obeyed all the traffic signals on the streets. This accident was caused because the plaintiff ran the red light and drove his car into that intersection.

Example (plaintiff — criminal):

The evidence, in short, will prove that on April 25, 1991, this defendant, while armed with a loaded revolver, took \$60 in United States currency and personal papers from the victim, Robert Smith.

Example (defendant — criminal):

We will prove, then, that Robert Smith, far from robbing anyone on April 25, 1991, was, at the time this robbery occurred, working as usual at his job as a dockworker at ABC Trucking Co.

Example (defendant in criminal case not intending to present a defense):

This evidence, which the state is required to present, will prove one thing. It will show that the state failed to prove, beyond a reasonable doubt, that my client was the robber. If it convinces you of anything, it is that the police arrested the wrong man.

Of course, there are situations where you may want to challenge the other side's facts with a direct denial. Where you do, however, make sure that you can prevail on the disputed facts. Nothing will damage your credibility faster than to directly claim that the other side's version is incorrect, then fail to prove it. Save such denials for safe situations.

9. Anticipating and refuting defenses (plaintiff only)

As plaintiff, you should consider a short statement that will anticipate the probable defense and deny it. Remember that the plaintiff has no right of rebuttal in opening statements. Hence, anything resembling rebuttal must be contained in your opening.

However, keep in mind that anticipating defenses can be tricky, particularly in criminal cases. The defendant, not having the burden of proof, is not required to present evidence. In criminal cases this right reaches constitutional dimensions. Accordingly, you cannot directly allude to evidence you expect the defense to produce. (Doing this in a criminal case is probably reversible error.) You can, however, refer to the evidence you will produce and state indirectly yet positively that it will not show that a defense to your case exists.

Example (plaintiff — civil):

Mr. Smith was driving his car at a speed of 20 mph in a 25-mph zone. He did everything the ordinarily prudent man would have done under the circumstances.

This rebuts the anticipated defense of contributory negligence.

Example (plaintiff — criminal):

This evidence will show that at no time was the victim, Mr. Smith, armed in any way, nor did he do anything to provoke the defendant's assault.

This rebuts the anticipated defense of self-defense.

10. Damages (civil cases only)

As plaintiff, you should describe what happened to the plaintiff, particularly where the injuries are extensive. In some injury cases, liability will not be seriously contested, so the only remaining issue is the extent of damages. Your organization of damages should therefore include symptoms, diagnosis, immediate treatment, prognosis, and conclusion. Your approach to damages should be in a resigned, somber fashion. Many plaintiffs' lawyers do not tell the jury the precise dollar amount plaintiff will request, allowing flexibility in modifying the request based on how well the evidence was received.

As defendant, you should express your regret that the plaintiff was injured, but firmly state that it was the plaintiff's fault, or certainly not your client's, particularly if you are defending solely on the issue of liability.

Example (plaintiff):

a. Symptoms.

What happened to Mr. Smith? The truck struck his hip and Mr. Smith fell to the pavement. He felt a sharp, stabbing pain in his hip. (Demonstrate on your own body where these injuries were.)

b. Diagnosis.

Several persons came to Mr. Smith's help and they tried to make him comfortable. Finally, an ambulance came, attendants put Mr. Smith on a stretcher, placed him in an ambulance, and drove him to the Mercy Hospital Emergency room. Shortly afterwards, Dr. Franklin arrived, examined him and ordered X rays and other tests. The examination, X rays, and lab tests all showed that Mr. Smith had sustained multiple fractures of his left leg and hip.

c. Immediate treatment.

Mr. Smith's leg was placed in traction. He was given shots to relieve the radiating pain in his leg. After one week, his leg and pelvis were placed in a cast. The cast extended from his waist to his ankle.

d. Further treatment.

Several weeks later it became apparent that the leg and hip were not healing properly. Dr. Franklin performed another operation to correct this problem.

e. Prognosis.

What is Mr. Smith's condition today? He was examined as recently as last week. The examination revealed that his left leg was almost one inch

shorter than the right. His left thigh and calf were substantially smaller and weaker.

f. Conclusion.

Mr. Smith was in the hospital for four weeks. He incurred substantial hospital and medical bills. He was out of work for four months. Even today he is no longer able to work a full day, play with his children, or do ordinary household chores. To this date, he has a continuous shooting pain which radiates from his left hip to his foot.

Example (defendant — where the defense is primarily on liability):

It is, of course, unfortunate that the plaintiff was injured. In this case, however, plaintiff's injuries were simply not our fault. The evidence will show that he was in a hurry, crossed the street without a walk light, and, without looking, stepped directly in front of a car that had no chance to stop. Because of this, the plaintiff must be responsible for the results of his own negligence.

11. Conclusion

Both plaintiff and defendant should conclude the opening statement by simply and directly telling the jury that the facts of the case will support his side, and ask for a verdict. As plaintiff in a personal injury case, you should make a request for damages a part of your conclusion. Many lawyers generally advise against mentioning the specific monetary amount of damages you are seeking. Simply state that you are going to ask for adequate, lawful compensation and a verdict in the plaintiff's favor. After the jury has seen the plaintiff and understands how seriously he was injured, a large specific damage request will appear reasonable and realistic. On the other hand, other lawyers think it is better to begin conditioning the jury on damages by requesting a certain sum.

Example (plaintiff — civil):

Members of the jury, at the end of the trial, we will ask you to award lawful compensation and damages to Mr. Smith for the losses and injuries he has sustained as a result of this collision. We will ask compensation for his medical expenses, compensation for his past and future loss of earnings, and compensation for his continuing pain and suffering, mental anguish, and inability to enjoy a healthy, normal life.

Example (defendant — civil):

And so at the close of all the evidence, we will request that you return a verdict in favor of Mr. Jones and against the plaintiff.

Example (plaintiff — criminal):

After you have heard the evidence, we are confident that you will find the defendant guilty of each and every count in this indictment.

Example (defendant — criminal):

At the conclusion of this case, you will have grave doubts that my client, Frank Jones, was anywhere near the robbery when it occurred. If anything, you will be convinced that someone else did it. Consequently, Frank Jones is simply not guilty of anything.

§3.5. Examples of opening statements

1. Criminal case (murder): *People v. Sylvester Strong*

(The defendant, Sylvester Strong, has been charged with murdering Shelley Williams on April 25, 1991. The prosecution claims that the shooting was in retaliation for a prior incident. The defense claims the shooting was justifiable self-defense.)

Opening statement — prosecution

Members of the jury, this is a case of murder. You are here because on April 25, 1991, that defendant, Sylvester Strong, took a handgun and intentionally shot and killed an unarmed man, Shelley Williams.

(Introduction)

There are several persons whose names will be mentioned frequently throughout the trial. First, there is the victim, Shelley Williams, who was 23 years old when he was shot to death. His mother, Rosie Garrett, and brother, Clarence Williams, both lifelong residents of Chicago, were both present when the shooting occurred. Of course there is the defendant, Sylvester Strong, who, as we will learn, shot and killed the victim with a handgun. He obtained that gun from George Howard, his brother-in-law. These are some of the names you will constantly hear about during the course of the trial.

(Parties)

In this case the names and backgrounds of the principal witnesses are not significant, so they are mentioned in a cursory way.

This shooting happened on April 25, 1991, at approximately 3:30 P.M. It was a clear and bright day.

(Date, time, weather and lighting)

These issues are not in dispute.

The shooting itself happened in the 2300 block of Bloomingdale Avenue in Chicago. Bloomingdale is a two-lane residential street that runs east and west. One side of this block of Bloomingdale Street has an elevated railroad track, so the entire block on that side consists of a concrete wall about 10 feet high. The other side of the street, the north side, has a typical sidewalk and a mixture of residential buildings and small businesses. Most of what happened that afternoon occurred on the sidewalk near the middle of the 2300 block of Bloomingdale Avenue.

What, then, happened on Bloomingdale around 3:30 during the afternoon of April 25? The evidence you will hear during this trial will show the following:

Earlier that afternoon Rosie Garrett and Shelley Williams had decided to drive to the home of Rosie's sister. They drove in two cars. Rosie had about seven people in her car, while Shelley had his brother and two friends in his. On the way back they decided to drive over to another sister who lived on the 2300 block of Bloomingdale. Shelley drove first, followed by Rosie. They drove down Winnebago until they reached the corner of Bloomingdale.

After turning the corner, the first car, driven by Shelley Williams, stopped a short distance down Bloomingdale when he saw the defendant, Sylvester Strong, riding a bicycle down the street. He stopped his bicycle a few feet from the car. Shelley got out of his car, walked up to the defendant and exchanged some words with him. This quickly escalated into an argument. The argument was based upon an argument the defendant had gotten into with Shelley's mother the previous day.

While this argument was going on, Rosie Garrett, Shelley's mother, arrived at the corner in her car and parked the car a short distance from Shelley's. She saw her son and the defendant having words. Her son motioned to her,

(Scene)

The location of the crime is, as is the case in most criminal cases, an important point. Consequently, it should be described in sufficient detail to give the jury a solid mental impression of the scene, so that the action will make sense to them. In short, set the stage before describing the action.

(What happened)

It is usually advantageous to tell the jury up front that "you believe" the evidence will show certain things. Do this once, then go into the narrative of the events. This allows you to tell what happened without constantly repeating that phrase "we believe the evidence will show that . . ."

Note how the action is described in an active, immediate way, which gives the jury a "feel" of how it really happened.

so she got out of her car and walked to where Shelley and the defendant were standing. Shelley asked her, pointing to the defendant: "Is this the one who cursed you out?" She said: "Yes, it is." Shelley demanded an apology.

At this time George Howard, the defendant's brother-in-law, came to the corner and asked Shelley's brother, Clarence, and one of his friends what was going on. Both said they didn't know what the argument was all about. George Howard then took a gun out of his pocket and fired the gun twice into the air. Nobody was hurt. The defendant walked up to his brother-in-law and said: "You're not trying to hit him, give me the gun." He then took the gun from his brother-in-law.

The defendant immediately aimed that gun at Shelley Williams and shot him once through the arm. When Shelley turned to get away, the defendant fired a second shot in his back. Shelley then fell to the ground, face down. The defendant then walked up to him and fired a third shot into his back.

Immediately after firing the third shot, the defendant ran down the sidewalk and attempted to escape. The victim's brother, Clarence, having just seen the defendant shoot his brother, jumped into his brother's car, drove it a short distance down Bloomingdale and cut off the defendant as he tried to run away. The defendant ran into the car and knocked himself down to the ground. Clarence got out of the car and kicked the defendant in the head, trying to keep him on the ground and hold him for the police.

The defendant repeatedly tried to get up and Clarence kept trying to subdue him. A relative of the defendant brought a baseball bat from her house and came to the scene, but Rosie took the baseball bat from her. Rosie then took that baseball bat and hit the defendant over his head to keep him down until the police came.

When the police arrived at the scene, they found the defendant being held right by the

The heart of the case can be acted out. Here the prosecutor can act out how the defendant held the gun and fired it.

A weakness in the prosecution case is that the defendant was, in fact, severely beaten by the victim's friends and family following the shooting. This problem is usually best handled by volunteering the unfavorable evidence now, so that its impact will be blunted before the defense can discuss the weakness the way it wants to.

car. He had been beaten up, but was being held for the police. They also recovered the gun, which had been taken to Rosie's house for safekeeping. An ambulance was called, but by the time he could be taken to a nearby hospital, the victim, Shelley Williams, was dead. A later autopsy showed the fatal bullet to be one that entered the victim's back, piercing his lungs and heart.

That, ladies and gentlemen of the jury, is what we expect the evidence to show. It will prove that on April 25, 1991, the defendant, Sylvester Strong, committed the crime of murder when he intentionally took a handgun and fired three shots into an unarmed victim, Shelley Williams. The third shot, the fatal shot, entered the victim's back as he lay helpless on the sidewalk, face down. The evidence will show that the defendant was in no way justified in shooting Shelley Williams.

At the close of all the evidence, we will ask that you find the defendant, Sylvester Strong, guilty of the crime of murder as charged in this indictment.

Opening statement — defense

May it please the Court, counsel, ladies and gentlemen of the jury, good morning. We are here only because on April 25, 1991, Sylvester Strong had to use a gun to keep Shelley Williams from killing him. This is a case of self-defense, nothing more.

In a criminal case, the prosecution, having the burden of proof, presents evidence first. Only after the prosecutors have presented their case will Sylvester Strong have an opportunity to present his case. We ask that each of you waits until you have heard from all the witnesses, ours as well as theirs, before deciding what really happened. However, before I talk to you about what we believe the evidence will show, I want to make one fact perfectly clear to each of you. We do not contest the fact that Sylvester Strong did in fact shoot and kill the deceased, Shelley Williams, on April 25, 1991, on Bloom-

(Basis of guilt)

This summary should be stated emphatically.

Since the defense need not present evidence, the prosecutor cannot comment on the anticipated defense directly.

(Conclusion)

(Introduction)

(Issue)
Framing the issue in a way most advantageous to your position is extremely important.

ingdale Avenue in Chicago. That fact, however, is not the issue in the case.

The *only* issue in this case is whether Sylvester Strong was defending himself when the shooting happened. In other words, ladies and gentlemen, was Sylvester Strong justified in defending himself under the facts and circumstances that unfolded during the afternoon of April 25? Please remember that we, as the defense, don't have to prove anything. It's the *prosecution* that has to prove, beyond a reasonable doubt, that Sylvester Strong was *not* justified in defending himself. The evidence will show that Sylvester Strong was in fact justified in doing what he did and thus is not guilty of any crime. In short, this is simply a case of self-defense.

What really happened before and during the incident? On April 24, the day before, there was an argument involving the family of Shelley Williams with Sylvester Strong. On April 25, the very next day, Sylvester Strong was riding a bicycle on Bloomingdale when he was confronted on the street by Shelley Williams, his family, and other friends of the Williams family.

The evidence will show that Sylvester Strong was first struck in the face by Shelley Williams. Immediately thereafter Williams and his family attacked Sylvester with baseball bats and two-by fours. Sylvester was unarmed and tried to protect himself from the people who were attacking him, but to no avail. He was repeatedly struck on his head and body. In desperation, he grabbed a gun from George Howard, who had arrived at the scene. With blood streaming down his face, he repeatedly fired the weapon, striking Shelley Williams.

The only reason he fired that gun was to get that crowd off of him, a crowd that was attacking him with two-by fours and baseball bats.

When this group of individuals who had been assaulting Sylvester realized that the gun was empty, they continued their assault with base-

After stating the issue, you must then emphatically answer it, then move directly into a review of the facts that support your position on that issue.

(What happened)

Note that the narrative of this action is done this time from the defendant's perspective.

There's nothing wrong with giving the defendant a sympathetic portrayal.

ball bats and two-by-fours. Sylvester's head and face were a mass of blood.

Knowing that his life was in danger, he attempted to flee by running across the street, but was chased and caught by the mob, knocked to the ground, and again beaten until he lost consciousness. The only reason his life was spared was that the police arrived moments later.

In short, ladies and gentlemen, we expect the evidence to show that under these circumstances Sylvester did nothing more than what any other reasonable person would have done under those circumstances. He simply defended himself from an armed mob. Therefore, he is simply not guilty of murder or any other crime.

I ask you, ladies and gentlemen, at this time to withhold any thoughts you may have about this case. Please withhold your judgment until you have heard all the evidence from all of the witnesses, and I am confident that upon hearing all of the evidence you are going to render a verdict in this case that will be fair. We believe that the prosecution will not be able to prove, beyond a reasonable doubt, that Sylvester was *not* justified in defending himself. We expect that after you deliberate and carefully weigh the evidence in this case you will return the only possible verdict, a verdict of not guilty. I thank you.

2. Civil Case (products liability): *Hi-Temp, Inc. v. Lindberg Furnace Company*

(Hi-Temp, a company that treats metal products in furnaces, purchased an industrial vacuum furnace in September 1989 from the defendant manufacturer. On December 31, 1990, the furnace exploded. Hi-Temp had the furnace repaired. Hi-Temp claims that a design defect in the furnace, particularly in a valve, was the cause of the explosion. Lindberg maintains that the furnace was safely designed and manufactured.)

Opening statement—plaintiff

Good afternoon, ladies and gentlemen. As (Introduction)

(Basis of nonguilt)

As with the plaintiff, this is the high point of the opening, and must be stated with emotion and conviction.

(Conclusion)

The jury must be reminded that the prosecution has the burden on the issue of reasonable self-defense, since it's entirely likely that some of the jurors will assume that the defense should have to prove any defense it chooses to raise.

Kaplan, and I'm here for the plaintiff in this case, Hi-Temp, Inc.

(Parties)

Hi-Temp is a company in business in Northlake, Illinois. Hi-Temp treats various metal products using high-temperature vacuum furnaces. The defendant, Lindberg Furnace Company, designs, manufactures, and sells such furnaces. In 1989 Hi-Temp entered into negotiations with the defendant for the purpose of purchasing a vacuum furnace.

(Instrumentality)

Since this case centers on a mechanical device, it should be described with appropriate detail.

This would be a good place to use a diagram in the opening statement.

The heating elements then go on and heat whatever is in the furnace to the required temperature. This process tempers the metals, making them stronger and harder.

When Hi-Temp negotiated with Lindberg for the vacuum furnace, they told Lindberg the necessary requirements for the furnace. They told Lindberg the kind of heat that would be needed. They told Lindberg the pressures that would be needed. They told Lindberg all the specifications and requirements that the furnace would have to meet.

Lindberg adjusted their design and manufactured a vacuum furnace for Hi-Temp at a cost of \$103,000. This purchase was made with the understanding that the furnace would do what it had been manufactured to do, that is, to heat the materials that Hi-Temp needed.

(Anticipating defenses)

The expected defense is that the explosion was somehow caused by faulty maintenance,

sort, they were immediately dealt with. Often Lindberg itself was called in to consult on how to fix a problem.

On December 31, 1990, the furnace was in operation. During the afternoon this furnace was heating turbine blades and other aircraft parts. The heat was cycled to a temperature of 2,000 degrees and then cooled, and then heated again to a temperature of 1,800 degrees and then cooled. This went on in a series of stages. Everything was routine.

That evening the furnace was loaded with more turbine parts and was set in operation again. All the instruments were set properly. The loading was done properly. There is nothing to indicate that Hi-Temp could have contributed to the explosion.

Around 8:30 that evening there was an explosion that tore off the sides of the furnace and damaged other parts. Immediately after the explosion an investigation was started to try to determine the cause of the explosion. Based upon all the evidence here, you will conclude that there was a defect in the design of the vacuum furnace which was directly responsible for the explosion.

This furnace was designed in such a way that it would pump down from atmospheric pressure to a vacuum. The pressurized portion of the furnace was separated from the vacuum portion by a valve attached to the main vacuum pump, called a foreline valve. The furnace was manufactured and designed in such a way that this foreline valve could open between the atmospheric portion and the vacuum portion without first shutting down the furnace and without being coordinated with other valves on the unit. If the foreline valve somehow opened, atmospheric pressure would rush right into the vacuum portion, under incredible speed and pressure, creating shock waves in the furnace.

operation, or misuse. This statement helps rebut the expected defense.

(Scene)

The anticipated defense is again rebutted forcefully.

(What happened)

In this case the plaintiff's major problem is explaining causation — how the alleged design defect actually caused the explosion that occurred. Hence, this part of the opening is very carefully stated, so that there is no direct claim that the plaintiff, through its experts, will precisely be able to explain why the explosion occurred.

That, ladies and gentlemen, is what happened on December 31, 1990. After the foreline valve improperly opened, atmospheric pressure rushed into the vacuum portion, creating gigantic shock waves, which knocked off the sides of the furnace and did other damage.

You will learn that this explosion was directly caused by Lindberg's design and manufacture of this foreline valve, and that the explosion could have been prevented if Lindberg had simply built a foreline valve that had a locking safety device on it.

After the explosion, Hi-Temp had the vacuum furnace rebuilt. This took several weeks, during which time they could not process any of their customers' orders. The loss to Hi-Temp for the repairs, as well as for the business interruption, was \$55,000.

At the end of all the evidence, I will be asking you to return a verdict in favor of Hi-Temp, Inc. and against Lindberg for the sum of \$55,000.

Opening statement — defendant

May it please the Court, counsel, members of the jury: My name is Mary Jones and I represent the Lindberg Furnace Company.

Lindberg's business is devoted to designing and building what are called vacuum furnaces for purchasers throughout the world. We have been in this business since 1947, and build furnaces based on the individual customer's requirements.

We will show that the design of the furnace Hi-Temp bought was a standard one with proven performance and safety over 20 years. We have built thousands of these furnaces over the past 20 years, without problems. The design is

(Basis of liability)
Plaintiff's theory of the case is simply stated — if the valve had a safety lock, there would have been no explosion.

(Damages)
The real issue in this case is liability, so damages are only mentioned briefly.

(Conclusion)

(Introduction)

(Parties)

(Basis of nonliability)

safe, and we make and test them carefully. Whatever caused the furnace to explode, it had nothing to do with its design or manufacture. If anything caused the explosion, it must have been Hi-Temp's maintenance, operation, or use of the furnace.

Furthermore, we will show that the furnace could have been repaired in about two weeks at a cost far less than \$55,000, and that it could have been put back into service after that time.

Simply put, the plaintiff will not be able to prove, by a preponderance of the evidence, that we did anything wrong here in designing and manufacturing this furnace that produced this so-called explosion. Accordingly, at the close of all the evidence we will ask that you return a verdict against the plaintiff and in favor of the Lindberg Furnace Company.

(Damages)

While the defense is on liability, it is usually desirable to at least touch on damages.

(Conclusion)

This unusually short opening has the advantage of sounding extremely confident. It forcefully states that the plaintiff will be unable to prove either a design defect or causation. In openings, brevity can sometimes be an effective technique.

IV

DIRECT EXAMINATION

§4.1. Introduction	71
§4.2. Elements	72
§4.3. Occurrence witnesses	85
§4.4. Conversations and statements	105
§4.5. Telephone conversations	106
§4.6. Refreshing a witness' recollection	111
§4.7. The records witness	113
§4.8. Preparation of expert witnesses	117
§4.9. Qualifying and examining expert witnesses	121
§4.10. Examples of expert direct examinations	124
§4.11. Opinions of the lay witness	138
§4.12. Hypothetical questions	139
§4.13. Character witnesses	141
§4.14. Adverse witnesses	146
§4.15. Hostile witnesses	147
§4.16. Using deposition transcripts and videotapes	148
§4.17. Judicial notice and stipulations	149
§4.18. Redirect examination	150

§4.1. Introduction

Experienced trial lawyers recognize that most trials are won on the strengths of their case in chief, not on the weaknesses of their opponent's case. Consequently, effective direct examinations that clearly, forcefully, and efficiently present the facts of the case will usually have a decisive effect on the outcome of the trial.

The direct examination should be the jury's opportunity to relive reality from your side's perspective. The witness should show, not tell, the jury what happened so that the event is re-created for the jury's benefit. The examination should involve the jurors in the witness' story. All this must be done while keeping in mind the elements of the claims or defenses and the ever-present requirements of simplicity and efficiency. This is difficult and requires planning and witness preparation. If done well, each of the jurors will understand, accept, and remember the witness' testimony.

Consequently, direct examinations should let the witness be the center of attention. The lawyer should conduct the examination so that he does not detract from his witness. After all, a witness will be believed and remembered because of the manner and content of his testimony, not because the questions asked were so brilliant. Witness credibility is determined by who the witness is (background), what he says (content),