

**BEGINNING THE TRIAL WITHOUT BECOMING AN
OUTLAW: THE FORMIDABLE LAW OF OPENING
STATEMENTS**

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INTRODUCTION.....	610
I. BEGINNING THE TRIAL: THE PURPOSE AND LIMITS OF AN OPENING STATEMENT.....	611
A. The Right to Make an Opening Statement and the Judge’s Control	611
B. Is There a Right to Make an Opening Statement?	612
C. Argument in an Opening Statement Is Inappropriate	614
D. What Can Lawyers Write on Charts and Visual Aids?	616
II. JUDGMENT AS A MATTER OF LAW AFTER AN OPENING STATEMENT ..	617
III. OPENING STATEMENTS CONTAINING REFERENCES TO EVIDENCE THAT IS NEVER ADMITTED.....	620
IV. OPENING STATEMENTS CONTAINING INADMISSIBLE EVIDENCE.....	623
A. In the Defendant’s Opening Statement.....	623
B. Prosecutorial Actions in Connection with Opening Statements	624
V. STRUCTURING A PROPER OPENING STATEMENT.....	626
A. An Example, Shaped by the Governing Rules	626
B. How Closely Does This Example Follow the Rules?	629
CONCLUSION.....	630
A. The Right to Make an Opening Statement and the Court’s Control of It.....	630
B. The Proper Content in an Opening Statement	631
C. The Court’s Power to Grant a Motion for Judgment as a Matter of Law After the Opening Statement	631
D. The Opening Statement That Includes Evidence That Never Is Admitted.....	632
E. References to Inadmissible Evidence.....	632

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INTRODUCTION

A powerful, well-organized opening statement can do wonders for one's case. And there is a great deal of scholarship about how to give a good opening statement.¹ One commentary advocates "winning the beginning" and explains, "I mean that it is possible to slant everything that goes on in [a] trial your way."² The author adds that "[m]any advocacy teachers, lawyers and judges have [said] . . . that 'between 30% and 75% of jurors decide a case at the end of the opening statement.'"³

This statement should be qualified, however; it means only that "opening statements provide the framework for the credibility of you, your client, your story"⁴ But an opening statement can be crucial to a trial strategy because of its timing: early in the case, when jurors are most likely to form opinions.⁵ It can describe the battlefield to the jurors on which the trial will be centered. And it can give the jurors the contentions on which the advocate wants them to focus.

The point of this Article, however, is that there also are legal principles that guide, limit, and prohibit tactics in an opening statement. And there is not much written about this formidable body of law. This Article is an effort to fill that gap in the scholarship.

Part I, below, describes what the opening statement is supposed to accomplish and what it may contain. What place does this part of the battle fill in the overall scheme of a trial? Part II covers the possibility that a judgment as a matter of law or directed verdict can follow after an opening statement if it shows that there is no claim under the law. This is a rare occurrence but a dramatic one.

1. See generally George A. Googasian, *Opening Statements*, 92 MICH. BAR. J. 54 (2013) (describing tactics for opening statements); Ron Spears, *Opening Statements: Soup for the Jury's Soul*, 95 ILL. BAR. J. 102 (2007) (same); Andrea Garland, *Book Review: Winning in the Beginning by Winning the Beginning*, 26 UTAH BAR. J. 46 (2013) (reviewing DOMINIC J. GIANNA & LISA A. MARCY, *OPENING STATEMENTS: WINNING IN THE BEGINNING BY WINNING THE BEGINNING* (2011)).

2. DOMINIC J. GIANNA, *OPENING STATEMENTS: WINNING IN THE BEGINNING BY WINNING THE BEGINNING* § 4.2, at 36 (2024).

3. *Id.* (quoting HARRY KALVEN JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966)). [Editor's Note: While this 30% to 75% statistic is widely repeated in trial advocacy lore, its frequent attribution to Kalven and Zeisel's *The American Jury* is a well-documented fabrication. Hans Zeisel explicitly debunked this myth, stating that "we never made such a discovery; we never even asked the question. Nowhere in *The American Jury's* 438 pages can one even find the words 'opening statement.'" Hans Zeisel, *A Jury Hoax: The Superpower of the Opening Statement*, 14 LITIGATION 17, 17 (1987). Zeisel surmised that the legal community confused this hoax with the study's actual finding: that a jury's final decision is almost always determined by the first ballot taken at the beginning of the deliberation process. See *id.* at 17–18.]

4. GIANNA, *supra* note 2, § 4.2, at 37.

5. *Id.* § 4.2, at 36–37 (by providing the framework at the beginning).

Part III deals with an opening statement that introduces evidence that is never admitted. The party in question may attempt to offer its proof to the jury but is unable to supply what that party has promised, leaving the jury exposed to the information from the opening statement, without its inclusion in the evidence. Then, Part IV considers the opening statement that injects inadmissible evidence into the trial. What should happen, for instance, if the plaintiff's statement suggests that the defendant is protected by liability insurance?

Part V offers a hypothetical opening statement, and explores whether it complies with the governing law. Finally, the Conclusion covers the ways in which each of these issues should be resolved.

I. BEGINNING THE TRIAL: THE PURPOSE AND LIMITS OF AN OPENING STATEMENT

A. The Right to Make an Opening Statement and the Judge's Control

*United States v. Ziele*⁶ shows the limited purpose of an opening statement and the judge's control over it. After the government had rested its case against Ziele, the judge asked counsel whether he still wanted to make an opening statement, having reserved it at the beginning of trial.⁷ "Defense counsel advised the court that he would call no witnesses and introduce no evidence. Instead, he explained to the court that he needed an opening statement to explain to the jury the presumption of innocence and other basic points of law."⁸ The trial judge then denied his request and prevented him from making an opening statement.⁹

The court of appeals affirmed. It explained the purpose of an opening statement and the judge's control over it:

The purpose of an opening statement "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." The timing and making of opening statements is within the discretion of the

6. 734 F.2d 1447, 1454 (11th Cir. 1984).

7. *Id.* at 1455.

8. *Id.*

9. *Id.* at 1453-55.

trial judge. He can exclude irrelevant facts and stop argument if it occurs.¹⁰

The court went on to add: “The Constitution requires that trials be fairly conducted and that ‘guaranteed rights of defendants be scrupulously respected.’ However, an opening statement by the defendant is not such a guaranteed right.”¹¹ This was so, said the court, because “[t]he making and timing of opening statements can be left constitutionally to the informed discretion of the trial judge.”¹² Although failure to afford a defendant the opportunity to make an opening statement can constitute error, said the court, “this is not such a case.”¹³

The court concluded by addressing defense counsel’s desire to cover basic points of law. “[T]his is not the purpose of an opening statement. An opening statement gives counsel the opportunity to explain the case to the jury and to outline the proof. ‘[I]t is not an occasion for argument.’”¹⁴

B. Is There a Right to Make an Opening Statement?

On the other hand, denial of a proper opening statement at the proper time can be error. For example, in *United States v. Breedlove*, counsel reserved his opening statement until after the government’s case.¹⁵ The trial judge later disallowed this (common) procedure and apparently ambushed the unfortunate lawyer and his client.¹⁶ In addition, the judge made several unnecessary and critical remarks in front of the jury, including:

You see, we don’t allow lawyers to come down here from some other state and tell us how to run this Court. I’ve been running this court for over sixteen years and I’m going to keep on running it for sixteen more years, and I’m not going to ask somebody up in your state, whatever that is, how to run this court.¹⁷

10. *Id.* at 1455 (first quoting *United States v. Dinitz*, 424 U.S. 600, 612 (1976); then citing *United States v. Salovitz*, 701 F.2d 17, 21 (2nd Cir. 1983); then citing *United States v. Hershenow*, 680 F.2d 847, 858 (1st Cir.1982); and then citing *United States v. Freeman*, 514 F.2d 1184, 1192 (10th Cir. 1975)).

11. *Id.* (quoting *McGautha v. California*, 402 U.S. 183, 221 (1971)).

12. *Id.*

13. *Id.*

14. *Id.* (quoting *Dinitz*, 424 U.S. at 612).

15. 576 F.2d 57, 60 (5th Cir. 1978).

16. *Id.*

17. *Id.* at 60 n.4.

The court of appeals disapproved of these remarks: “We do not sanction the unnecessarily harsh manner in which the opening was denied.”¹⁸ And the denial of an opening statement was error.¹⁹ But in light of all the circumstances, said the court, it was harmless error.²⁰ The defense had only one witness,²¹ and the defensive theory was simple. But “if the defense had been long or complicated, we might be faced with a different situation.”²²

The right to make an opening statement is denied by some courts but recognized in others. In *United States v. Hershenow*, the court said, “We believe it was error not to permit the defendant to make an opening statement. ‘The function of the defendant’s opening statement is to enable him to inform the court and jury what he expects to prove’”²³ The court added: “The importance of this function is not diminished by the fact that the defendant expects to prove his defense theory through cross-examination of the government’s witnesses”²⁴ But the court held that the denial of an opening statement in this case was harmless error.²⁵

In *United States v. Salovitz*, however, the court flatly disagreed with the assertion of a right to make an opening statement, saying:

Rule 12(e) of the Rules of Civil Procedure of the United States District Court for the District of Connecticut . . . provides that opening statements by counsel are not allowed except on application to the presiding judge. Appellant [claims] . . . that a criminal defendant has a constitutional right to have his attorney make an opening statement. We disagree.²⁶

This approach seems clumsy and unfair. It requires submission of one’s case to a judge who may be unfamiliar with the proceedings. It is an unusual rule that is often a trap for the unwary. The courts should decide, once and for all, whether there is a right to give an opening statement.

18. *Id.* at 60.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. 680 F. 2d 847, 858 (1st Cir. 1982) (quoting *United States v. Freeman*, 514 F.2d 1184, 1192 (10th Cir. 1975)).

24. *Id.*

25. *Id.* at 858–59.

26. 701 F.2d 17, 18 (2d Cir. 1983).

C. Argument in an Opening Statement Is Inappropriate

In *Arizona v. Washington*, the Supreme Court described the “narrow purpose” of an opening statement: “It 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; it is not an occasion for argument.”²⁷

In that case, the defense lawyer injected into his opening statement evidence that had been excluded in a previous trial.²⁸ The trial court then granted a mistrial.²⁹ The Supreme Court held that this was proper procedure.³⁰ The beginning of trial is supposed to be limited to “what evidence will be presented.”³¹

The lower courts’ implementation of this “narrow purpose” has been uneven. For example, in *Lawrence v. Superintendent Dallas SCI*, the court appears to have taken the “narrow purpose” idea too far.³² During his opening statement, an attorney for the Commonwealth referred to the defendant as a “cold-blooded murderer.”³³ The defendant complained of his attorney’s failure to object to this single remark as the basis for a federal habeas corpus petition alleging incompetence of counsel.³⁴

Given the low standard for attorney competence,³⁵ the defendant’s petition seems quixotic. Nevertheless, the court of appeals took pains to disapprove an argumentative term such as “cold-blooded murderer” at the beginning of trial:

[W]e emphasize that the fact that we must affirm the District Court’s denial of Lawrence’s habeas petition in no way suggests that the prosecutor’s opening statement here was appropriate or proper. On the contrary, the prosecutor’s opening was the kind of argument that should be reserved for summation, where such argument is allowed so long as it is based on the trial record. Given the zeal of the Commonwealth’s opening statement here, it is apparently

27. 434 U.S. 497, 513 n.32 (1978) (quoting *United States v. Dinitz*, 424 U.S. 600, 612 (1976)).

28. *See id.* at 498.

29. *Id.* at 500–01.

30. *Id.* at 516–17.

31. *Id.* at 513 n.32 (quoting *Dinitz*, 424 U.S. at 612).

32. 849 F. App’x 386, 388 (3d Cir. 2021).

33. *Id.* at 387.

34. *Id.*

35. “In determining whether trial counsel’s performance was deficient, we must be ‘highly deferential’ and ‘indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

necessary for us to remind counsel of a fundamental principle of trial advocacy: “[t]he purpose of an opening [statement] is to give the broad outlines of the case to enable the jury to comprehend it. *It is not to poison the jury’s mind against the defendant . . .*”³⁶

The court went on to offer the by-now-familiar refrain: “Neither the emotion of the courtroom nor adversarial zeal should blind attorneys to the fact that ‘[a]n opening statement has a narrow purpose and scope.’”³⁷ The purpose, then, “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; is not an occasion for argument.”³⁸

But the *Lawrence* court was probably too restrictive. *Wright v. Barr* is a case that shows more sympathy with characterizations of the evidence in plain language.³⁹ There, in a medical malpractice case, counsel stated that you “don’t play Russian roulette” with a patient’s health.⁴⁰ The court of appeals regarded this colloquialism as proper. It explained:

We review the trial court’s ruling in opening statement for abuse of discretion. Counsel’s statement was not improper. Mr. and Mrs. Wright alleged that Dr. Barr was negligent in treating Mrs. Wright One of the purposes of opening statement is to outline for the court and the jury the anticipated evidence so that they can better understand the case. Counsel is permitted great latitude in making an opening statement. . . . Counsel’s Russian roulette remark in opening statement was not improper because it placed before the jury and the defense the theory of their case.⁴¹

Thus, the courts have held that accusing one’s opponent of playing “Russian roulette” is proper but accusing one’s opponent of being a “cold-blooded murderer” is not.⁴² Unfortunately, the answers appear inconsistent. It seems that the “cold-blooded murderer” remark should be as permissible as the “Russian roulette” statement. If an attorney has evidence showing a callous

36. *Id.* at 387–88 (alterations in original) (quoting *Gov’t of Virgin Islands v. Turner*, 409 F.2d 102, 103 (3d Cir. 1968)).

37. *Id.* at 388 (quoting *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring)).

38. *Id.* (quoting *Dinitz*, 424 U.S. at 612).

39. 62 S.W.3d 509 (Mo. App. W.D. 2001) (per curiam).

40. *Id.* at 532 (emphasis omitted).

41. *Id.* at 532–33 (citations omitted).

42. *Id.*; *Lawrence v. Superintendent Dallas SCI*, 849 F. App’x 386, 387 (3d Cir. 2021).

and inexcusable homicide, he or she should be able to tell the jury what the evidence will prove.

D. What Can Lawyers Write on Charts and Visual Aids?

In *United States v. Taylor*, the court of appeals described the conditions in which visual aids such as charts may be used in opening statements.⁴³ The chart in question diagrammed the trading hierarchy in a drug smuggling ring.⁴⁴ The court described the applicable law as follows:

[A]llowing the use of charts as “‘pedagogical’ devices intended to present the government’s version of the case” is within the bounds of the trial court’s discretion . . . under Rule 611(a). Such demonstrative aids typically are permissible to assist the jury in evaluating the evidence, provided the jury is forewarned that the charts are not independent evidence. . . . [W]e have permitted such use in conspiracy cases to aid the jury “[in] put[ting] the myriad of complex and intricate pieces of testimonial and documentary evidence comprising the puzzle together”⁴⁵

But the defendant objected to the chart in this case on the ground that it was inaccurate.⁴⁶ The court of appeals agreed:

A necessary precondition to the admission of summary charts is that they accurately reflect the underlying records or testimony In this case, the organizational chart did not accurately reflect the underlying testimony. For example, the government never alleged and there was no evidence to support the assertion that Taylor supplied cocaine base to Hilliard Goodley. The lines of the chart would show that she did. The chart also reflects that Taylor supplied crack cocaine directly to Patricia Miller and Clarence Blaylock, both of whom testified that they never received such.⁴⁷

43. 210 F.3d 311, 315 (5th Cir. 2000).

44. *Id.* at 314.

45. *Id.* at 315 (alterations in original) (footnotes omitted) (first quoting *United States v. Posada-Rios*, 158 F.3d 832, 869 (5th Cir. 1995); then citing *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 431 (5th Cir. 1985); and then quoting *United States v. Winn*, 948 F.2d 145, 157 (5th Cir. 1991)).

46. *Id.* at 314.

47. *Id.* at 315–16 (footnote omitted).

The court decided that the error was not harmless, meaning that the conviction had to be reversed.⁴⁸

United States v. Ciampa also shows the trial judge's control over visual aids.⁴⁹ The judge there ruled that the defense lawyer could not use a chart that he intended to present to the jury in his opening statement.⁵⁰ The judge actually interrupted the opening statement.⁵¹ The court of appeals found no error:

It is true that the judge . . . interrupted defense counsel's opening statement, but, we think, justifiably so. The first interruption occurred when counsel started to use a chart to illustrate where defendant was when he allegedly seized the cocaine and drug paraphernalia subsequently found in his apartment. . . . Clearly, it was a waste of time It was not the location of the automobile that was important, but whether the jury believed defendant's story as to when and how he obtained the incriminating material.⁵²

There are, of course, many cases in which the courts have permitted the use of visual aids in opening statements and in which no error was found.⁵³

II. JUDGMENT AS A MATTER OF LAW AFTER AN OPENING STATEMENT

Imagine the following scenario: the plaintiff's lawyer gives an opening statement in a medical malpractice case against his client's doctor, who performed a complex operation on the client. He tells the court and jury that he intends to call only one witness, his client, who is a layperson and is not knowledgeable about the medical profession.

The judge warns the plaintiff's lawyer that under the law, in the absence of an expert to set the standard of care, a judgment as a matter of law will follow.⁵⁴ The lawyer stands by his opening statement. Does the judge have the power to enter a judgment as a matter of law?

The answer is yes, but it is a qualified yes.

48. *Id.* at 316.

49. 793 F.2d 19, 25 (1st Cir. 1986).

50. *Id.*

51. *Id.*

52. *Id.*

53. *See, e.g., United States v. De Peri*, 778 F.2d 963, 978–79 (3d Cir. 1985) (overruling defendant's objection to chart used in opening statement; no error).

54. *See Wright v. Barr*, 62 S.W.3d 509, 524–25 (Mo. App. W.D. 2001) (per curiam).

In *Morfeld v. Kehm*, the court of appeals recognized the power of a trial court to grant a judgment as a matter of law or directed verdict immediately after a party has given its opening statement.⁵⁵ But the court also counseled against such a ruling:

A directed verdict after opening statements is proper only if the plaintiff's opening statement embraces all operative facts expected to be proven at trial and then only when such facts under any legal theory are insufficient to sustain a claim for relief. Despite the power to direct a verdict at this point in a trial, the district court should exercise "great restraint," and if there is any doubt as to the propriety of a directed verdict, the court should not "jump the gun but should wait until both sides have presented their evidence before ruling on motions for directed verdict."⁵⁶

With this, the court reversed the trial court's dismissal of the plaintiff's case.⁵⁷

The *Morfeld* court also considered whether a judgment as a matter of law was the appropriate procedure to dispose of a case in the circumstances.⁵⁸ The defendant had included both the pleadings and the opening statement in his motion to dismiss.⁵⁹ The court suggested, then, that a judgment on the pleadings might instead be proper.⁶⁰

And the court also suggested that a judgment as a matter of law would not be appropriate because the plaintiff had not offered any evidence, and the governing rule is written so as to be applied after evidence.⁶¹ But then the court recognized its power to grant a directed verdict, which is not authorized by the Federal Rules of Civil Procedure but has the same effect as a judgment as a matter of law in those jurisdictions that use it.⁶²

In any event, the courts' authority to dispose of a case after an opening statement appears to be solidly established, whether by judgment on the

55. 803 F.2d 1452, 1454 (8th Cir. 1986).

56. *Id.* (first citing *Knapp v. Wabash R.R. Co.*, 375 F.2d 983 (8th Cir. 1967); and then quoting *United States v. Vahlco Corp.*, 720 F.2d 885, 889 (5th Cir. 1983) (citing C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2533 (1971)) (stating that it is "better practice to defer ruling on motion for directed verdict until both sides have rested").

57. *Id.* at 1456.

58. *Id.* at 1454.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*; *See Carman v. Carroll*, 749 F.3d 192, 196 n.4 (3d Cir. 2014) (explaining the equivalence between judgment as a matter of law and a directed verdict per Rule 50(a)).

pleadings, directed verdict, dismissal, or judgment as a matter of law. The Supreme Court has said so, albeit in a case decided before the Federal Rules were adopted.⁶³ In *Best v. District of Columbia*, the Court said, “[t]here is no question as to the power of the trial court to direct a verdict for the defendant upon the opening statement of plaintiff’s counsel” if the statement shows that there is no right to recover.⁶⁴ The Court added, “The exercise of this power in a proper case is not only not objectionable, but is convenient in saving time and expense by shortening trials.”⁶⁵

In *Best*, however, the Court reversed the directed verdict because the plaintiff’s statement did not eliminate the possibility of recovery.⁶⁶ The theory of liability was essentially that the plaintiff’s son had died as a result of an attractive nuisance,⁶⁷ although the Court did not use that term.⁶⁸ The plaintiff’s opening statement cited facts implying negligence on the part of the defendant, and thus the statement did not eliminate the possibility of a verdict for the plaintiff.⁶⁹ Thus, *Best* typifies the line of cases endorsing the power to dispose of a claim after an opening statement but holding that the disposition in the particular case was error.

Then, too, there are cases in which denial of a motion for judgment after opening statement has set in motion lengthy trials and complex appeals that could have been avoided. *Kusens v. Pascal Company* is an example.⁷⁰ The plaintiff argued that his opening statement had properly described a public policy exception to his at-will employment that gave him a claim for wrongful discharge.⁷¹ The defendant disagreed, saying that he had not shown his at-will status.⁷²

The case proceeded through trial and verdict.⁷³ The jury awarded the plaintiff nearly \$1 million,⁷⁴ only to have the trial court then grant a post-

63. *Best v. Dist. of Columbia*, 291 U.S. 411, 415 (1934).

64. *Id.*

65. *Id.*

66. *Id.* at 419–20.

67. *See Smith v. Crown-Zellerbach, Inc.*, 638 F.2d 883, 885 (5th Cir. 1981) (“[T]he fundamental concept of the attractive nuisance doctrine is that the offending condition . . . although apparently dangerous to adults of discretion, is nevertheless so enticing and alluring as to be calculated to excite the curiosity of children of tender years to the extent of inducing them to utilize the instrumentality in some childish endeavor, the inherent danger of which the child is incapable of comprehending.” (quoting *Patterson v. Recreation & Park Com.*, 226 So. 2d 211, 214 (La. Ct. App. 1969)).

68. *Best*, 291 U.S. at 419–20.

69. *Id.*

70. 448 F.3d 349 (6th Cir. 2006).

71. *See generally id.*

72. *Id.*

73. *Id.*

74. The verdict awarded \$950,000. *Id.*

verdict motion for judgment for defendant as a matter of law because the plaintiff had not proved the at-will element.⁷⁵ Appeal, then, produced a lengthy opinion and an affirmance.⁷⁶ The trial court probably could have disposed of several other cases had it granted the motion for judgment at the end of the opening statement. And that is an important goal, in these times when we have too few trials.

III. OPENING STATEMENTS CONTAINING REFERENCES TO EVIDENCE THAT IS NEVER ADMITTED

Imagine that an attorney giving an opening statement asserts that “we will show you that the plaintiff bribed his key witness.” But the attorney never offers any evidence of a bribe. What should the court or opposing counsel do in response to a situation involving such an explosive, but unfulfilled, promise?

One possible consequence is simply that during final arguments, opposing counsel may lambaste the lawyer whose opening statement announced the evidence that was not admitted. Another possibility is that a lawyer faced with this situation can move for a mistrial. One can infer that judges are reluctant to grant this request for several reasons: the loss of testimony up to this point,⁷⁷ the appearance of partisanship on the part of the judge, the difficulty of making such a decision on the fly, the possibility of ambiguity in the law, and the possibility that the jury might decide the question the right way and moot the issue. And therefore, the standard for a mistrial is relatively high: the existence of “manifest necessity.”⁷⁸

In *Frazier v. Cupp*, for example, the prosecutor’s opening statement referred to incriminating testimony that would be given by a coconspirator.⁷⁹ As it turned out, however, the coconspirator claimed his right under the Fifth Amendment to remain silent.⁸⁰ The defendant then moved for a mistrial.⁸¹ The defendant argued that this series of events placed the substance of the codefendant’s statement before the jury in a way that “may well have been the equivalent in the jury’s mind of testimony.”⁸² He concluded that “the statement ‘added substantial, perhaps even critical, weight to the

75. *Id.* at 354–55.

76. *Id.* at 369.

77. In particular, a prosecutor who may face a double jeopardy claim in a retrial after the mistrial.

78. See *Arizona v. Washington*, 434 U.S. 497, 505 (1978) (setting this standard).

79. 394 U.S. 731, 733 (1969).

80. *Id.* at 734.

81. *Id.*

82. *Id.* (quoting *Douglas v. Alabama*, 380 U.S. 415, 419 (1965)).

Government's case in a form not subject to cross-examination’ In this way,”⁸³ the defendant claimed, “he was denied his constitutional right of confrontation, guaranteed by the Sixth [Amendment]”⁸⁴

The trial judge declined to grant a mistrial and instead instructed the jury that they “must not regard any statement made by counsel in your presence during the proceedings concerning the facts of this case as evidence.”⁸⁵ The Supreme Court ultimately found that the trial judge’s limiting instructions were sufficient to protect the defendant’s constitutional rights.⁸⁶ The Court observed:

Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance. Certainly not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given.⁸⁷

The Court added, however, that the question was “not an easy one.”⁸⁸

On the other hand, there are cases when mistrials in this situation have been granted and approved on appeal. For example, in *United States v. Shaw*, the defense lawyer’s opening statement referred to a potential government witness who later refused to testify.⁸⁹ “The refusal occurred despite a grant of immunity from prosecution. After the mistrial, Shaw moved to dismiss the indictment, contending that retrial would violate the double jeopardy clause of the Fifth Amendment. The district court denied the dismissal motion”⁹⁰ The case proceeded to retrial and defendant was found guilty.⁹¹

The court of appeals affirmed.⁹² It held that defense counsel’s statements had the potential to prejudice the jury against the government’s case.⁹³ Even if “some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions,”⁹⁴ said the court, “we must accord the

83. *Id.* (quoting *Bruton v. United States*, 391 U.S. 123, 128 (1968)).

84. *Id.*

85. *Id.*

86. *Id.* at 736–37.

87. *Id.* at 736.

88. *Id.* at 734–35.

89. 829 F.2d 714, 716 (9th Cir. 1987).

90. *Id.*

91. *Id.*

92. *Id.* at 720.

93. *Id.*

94. *Id.* (quoting *Arizona v. Washington*, 434 U.S. 497, 511 (1978)).

highest degree of respect to the trial judge's evaluation of the likelihood of juror bias."⁹⁵

The court held that the district judge's discretionary decision about juror bias justified a mistrial under the manifest necessity standard⁹⁶ and that retrial did not violate the double jeopardy clause:

First, the trial judge's decision that jury instructions could not cure the prejudice to the government's case is entitled to great deference, and we decline to substitute our judgment for his. Second, it is clear from the record that defense counsel's most prejudicial statements could not have been supported at trial without [the uncooperative witness's] testimony⁹⁷

The court also reasoned that the prosecutor had shown appropriate diligence and had not abused the opening statement:

[T]here is no evidence of undue delay or negligence in the government's failure to obtain immunity for [the witness] before trial. The prosecutor acted to obtain immunity . . . as soon as he learned that she would refuse to testify. Finally, a careful reading of the prosecutor's opening statement shows that he obeyed the judge's warning to refrain from references to [the] expected testimony and did not in any way invite defense counsel's prejudicial remarks.⁹⁸

It must be rare, if it has ever happened, that an appellate court has found reversible error only on the basis that the opening statement has mentioned evidence that was not later admitted. The cases tend to find that the treatment by the trial judge was within the court's discretion or otherwise was not reversible error. Thus, a query by this author to Westlaw that requested cases by the address "'opening statement' /p 'not admitted'" found 33 cases. None of them resulted in reversible error.⁹⁹

95. *Id.*

96. In other words, that a mistrial was a "manifest necessity." *Arizona*, 434 U.S. at 505; *see supra* text accompanying note 78.

97. *Shaw*, 829 F.2d at 720.

98. *Id.*

99. *See, e.g., State v. Joyner*, 197 So.3d 724, 737 (La. Ct. App. 2016) ("Under these circumstances [which included good faith on the part of the prosecutor], we conclude that the reference to the excluded evidence does not present reversible error.").

IV. OPENING STATEMENTS CONTAINING INADMISSIBLE EVIDENCE

In the preceding Part of this Article, we considered opening statements that mentioned evidence that was not later admitted.¹⁰⁰ But what about an opening statement that injects evidence that is not only not admitted but that is actually inadmissible? And what if this action is flagrant?

A. In the Defendant's Opening Statement

The opening statement, of course, can invoke the open-door doctrine, which allows a litigant to address a misleading impression created by the opponent by using otherwise inadmissible evidence, if necessary.¹⁰¹ Thus, in *Lang v. Kohl's Food Stores*,¹⁰² the plaintiff's opening statement and the evidence in an equal pay case raised issues about an EEOC report that would not normally have been admissible in evidence.¹⁰³ The trial judge ultimately informed the jury that the EEOC report had favored the defendant rather than the plaintiff.¹⁰⁴ The court of appeals held that this action was a proper exercise of the trial judge's discretion:

[I]t was plaintiffs who injected this subject into the case and entitled Kohl's to supply an answer. Plaintiffs did not argue to the district judge that the scope of the answer was too prejudicial and never suggested any possible response that was less prejudicial. The district judge protected plaintiffs' substantial rights by excluding the EEOC's actual language and reminding the jury that the conclusion had been rescinded.¹⁰⁵

The jury actually asked to see the EEOC result.¹⁰⁶ The trial judge declined:

In response to the jury's question, the judge reread the instruction and added that the only issue properly under consideration was "whether the jobs are equal" rather than why Kohl's and the union changed the pay scales in 1998.

100. *See supra* Part III.

101. *See* United States v. Amaya, 828 F.3d 518, 527–28 (7th Cir. 2016) (explaining the open-door doctrine and applying it to uphold admittance of apparent hearsay to rebut evidence implying lack of response to pistol brandished in officer's face, used by defense to imply that it never happened).

102. 217 F.3d 919 (7th Cir. 2000).

103. *Id.* at 926.

104. *Id.*

105. *Id.* at 927.

106. *Id.*

The evidence and the instructions as a whole ensured that the jury focused on, and answered, the right questions. Plaintiffs had a fair trial.¹⁰⁷

B. Prosecutorial Actions in Connection with Opening Statements

But the open-door doctrine does not always lead appellate courts to affirmance. In *United States v. Green*, for example, the defendant, in his opening statement, challenged the government to produce any evidence it had as to his knowledge that illegal firearms were present in his home.¹⁰⁸ The district court then enabled the government to introduce evidence that the defendant, at the government's request, while he was under arrest and asking for his lawyer, had opened a locked briefcase and safe in which firearms were found.¹⁰⁹

The court of appeals held that these acts were testimonial and had been obtained in violation of the Fifth Amendment.¹¹⁰ Furthermore, the defendant's challenge implicitly asked only for *admissible* evidence.¹¹¹ The open-door doctrine did not erase the effect of the violation in this case. The court said:

[T]he [prosecution's] contention is that, because defense counsel challenged whether the government had *any* evidence, the door was opened to evidence obtained in violation of Green's Fifth Amendment right to counsel. This argument lacks record support, and we reject it.

It is the admission of improper *evidence*, not just *arguments*, of which Green complains . . . Moreover, this is not a case where defense counsel opened the door by questioning the defendant on a subject relating to inadmissible evidence.¹¹²

The appellate court reacted to this more serious and more prejudicial set of actions by reversing the defendant's conviction and remanding for a new trial.¹¹³

107. *Id.* at 927–28.

108. 272 F.3d 748, 754 (5th Cir. 2001).

109. *Id.* at 750.

110. *Id.* at 753–54.

111. *Id.* at 756.

112. *Id.* at 754.

113. *Id.* at 757.

Watters v. State is a case in which the court reversed and remanded because of inadmissible evidence in the prosecutor's opening statement.¹¹⁴ The defendant was on trial for grand larceny and related offenses.¹¹⁵ The problematic information appeared during a digital slideshow accompanying the opening statement; it included a slide of defendant's booking photograph with "GUILTY" written across the defendant's face.¹¹⁶

The slide, said the state supreme court, diminished the presumption of innocence and was not harmless beyond a reasonable doubt.¹¹⁷ There was no instruction to disregard, and the court considered a general instruction on the presumption of innocence inadequate to remove the prejudice to the defendant¹¹⁸:

The prosecution could not *orally* declare the defendant guilty in opening statement. Doing so would amount to improper argument and the expression of personal opinion on the defendant's guilt, which is forbidden. Making this improper argument "*visually* through use of slides showing [Watters's] battered face and superimposing . . . capital letters" spelling out GUILTY "is even more prejudicial" than doing so orally.¹¹⁹

Watters is the unusual case in which a court found inadmissible material in an opening statement flagrant enough to reverse.

The more likely result is for the appellate court to hold that remarks by the trial judge were sufficient to cure any prejudice. In *United States v. Arnold*, the prosecutor's opening statement paraphrased a confession by the defendant's co-felon.¹²⁰ But in the course of trial, the judge ruled the confession inadmissible.¹²¹ The court of appeals held that the judge's instructions to the jury were sufficient:

[T]he jury heard only a paraphrase of Jones's [the codefendant's] confession . . . in an opening statement . . . [A]s in *Frazier*, the jury was given

114. 313 P.3d 243, 249 (Nev. 2013).

115. *Id.*

116. *Id.* at 246.

117. *Id.* at 247.

118. *Id.* at 249.

119. *Id.* at 248 (alterations in original) (citation omitted) (quoting *In re Glasmann*, 175 Wash. 2d 696, 708, 286 P.3d 673, 680 (2012)).

120. No. 22-10012, 2023 WL 4030777, at *1 (9th Cir. June 15, 2023).

121. *Id.*

cautionary instructions that opening statements should not be considered as evidence. Here, the district court three times instructed the jury that opening statements are not evidence. Moreover, one of those instructions was given shortly after and in direct response to the government's opening statement. Finally, again like in *Frazier*, the confession "was not a vitally important part of the prosecution's case" because there was ample independent evidence of Arnold's guilt. In sum, a mistrial was not warranted here, as "the limiting instructions given were sufficient to protect [Arnold's] constitutional rights."¹²²

The judge's instructions to the jury sound as though they were formulaic,¹²³ and a specific admonition that the jury should disregard remarks about the inadmissible confession might have helped more. But this decision is consistent with others.¹²⁴

V. STRUCTURING A PROPER OPENING STATEMENT

A. *An Example, Shaped by the Governing Rules*

What would a proper opening statement sound like, given the governing law? The following is a mock litigation example, with no claim of universal effectiveness. The situation is taken from a negligent homicide case prosecuted by the author as an assistant district attorney,¹²⁵ but it is transformed into a hypothetical civil case in order to allow insertion of expressions that invoke the issues discussed above.¹²⁶

Good morning, ladies and gentlemen of the jury. I am [Donald Jones], and I represent Meredith and Daniel Smith.

122. *Id.* (alteration in original) (quoting *Frazier v. Cupp*, 394 U.S. 731, 735 (1969)); see *supra* Part III (analyzing *Frazier*).

123. That is, the judge probably only told the jury that opening statements were not evidence, without instructing the jury to disregard references to the alleged confession.

124. See, e.g., *supra* cases cited in Part IV.A (showing cases upholding opening statements).

125. The case was tried more than 50 years ago, did not precipitate any court opinion, and would be virtually impossible to find today.

126. This opening statement is taken from a book by the author. DAVID CRUMP, HOW TO TRY A JURY TRIAL 26–28 (2025) [hereinafter HOW TO TRY A JURY TRIAL].

I'd like to thank you for being here to do your civic duty by serving on a jury. It's a job that only free people can perform.¹²⁷

Now, in this trial, I, on the plaintiffs' side, will represent Meredith and Daniel Smith. Stand up for a moment, Meredith and Daniel. Now, ladies and gentlemen of the jury, these two are the most important people in the courtroom for me.

They have endured a loss that is hard to feel unless someone is in their position, and I hope everyone present never is.¹²⁸ They have lost their beautiful daughter Sarah, just six years old, due to the negligence [pointing] of this man sitting here, John Anton, the defendant.

We will have witnesses to show you three themes about this case. Here they are:

Our first theme is that John Anton drove his motorcycle not just too fast, but way too fast, through a group of children going home from school at 3:15 p.m. in the afternoon in a school zone. He was negligent; in fact, he was grossly negligent. The judge will tell you about negligence, but in essence, here it is: negligence is just 'carelessness.' And John Anton showed a lot of carelessness that awful day.¹²⁹

Second, we will show you that the defendant's effort to claim that Sarah, little Sarah, was contributorily negligent is bogus. They blame her for her own death. Given the evidence, that is a just plain awful argument.

Third, we will show you that it would take more than ten million dollars to compensate for this terrifying loss. You can't bring Sarah back. Our court system can only award money to 'compensate' the survivors. And if someone

127. "Is this comment within the allowed purpose of an opening statement . . . ?" *Id.* at 26 n.26. For analysis, see *infra* Part V.B.

128. See *infra* Part V.B (considering emotional statements).

129. "Is this 'translation' of the law appropriate . . . ?" HOW TO TRY A JURY TRIAL, *supra* note 126, at 26 n.27. For analysis, see *infra* Part V.B.

suffers this kind of loss, what amount in dollars is enough to compensate them?

And we will have some very strong witnesses to prove these facts.

Our first witness will be Deputy Sheriff Milton Hauseshorn. He was the officer who came onto the scene first. He interviewed witnesses, including children. He took measurements. He estimates the speed of John Anton's motorcycle at 55 to 65 miles per hour, when the speed limit was 20 miles per hour. John Anton knocked the body of this poor child a hundred and five feet. There were blood spots at three different places, sort of like a stone skipping over the water. Officer Hauseshorn's conclusion is clear. He is certain that John Anton was negligent, and that John Anton caused this child's death.

Our next witnesses will be two of the children who saw the whole thing. They will tell you that little Sarah was not contributorily negligent. She did not cause her own death. She just did what all the other children did in crossing the street right after school let out. The judge will tell you that negligence of a child is different. Instead of adult carelessness, it's based on what a six-year-old child would do.¹³⁰

Next, Meredith Smith will tell you what she saw. She is Sarah's mother, and she was in her back yard. She saw the motorcycle and her estimate is that it was going over 50 miles per hour. So, you have two independent witnesses giving you similar estimates: that the motorcycle was going more than twice the speed limit. Meredith, whom you see right here, ran out and cradled her own child's bloody body, lying in the street. Sarah died in her arms.

....

Then, we will call Professor James [Davidson]. He is a labor economist. He will tell you about the tremendous cost of hiring a child actor to perform all the little tasks of a child

130. "Again, is this treatment of the law appropriate?" HOW TO TRY A JURY TRIAL, *supra* note 126, at 27 n.28. For analysis, *see infra* Part V.B.

like Sarah, six years old. It's not replacing Sarah, of course. This is a common method of proving what the death of a child can be compensated by, even if it doesn't show the exact thing.

Finally, Daniel and Meredith will tell you about dozens of little events they had with their daughter. Daniel remembers, for example, the excitement he and little Sarah felt when they were decorating the Christmas tree last year—last year, and for the last time. And Meredith will tell you about other events too.

And both of them will tell you their plans and visions of the future with Sarah—her days in school, the next grade, and on to her graduation from college and walking her down the aisle. All of it is lost due to John Anton's negligence. And you will be able to see why I say it would take more than ten million dollars to compensate for such a loss.

Thank you again, ladies and gentlemen. I know you will do the right thing.¹³¹

B. How Closely Does This Example Follow the Rules?

There are several items to point out in this example. Notice that it begins by thanking the jurors. This is a standard beginning, although it is controversial. Some lawyers may think it will sound insincere to jurors. This author disagrees, and there is psychological research that supports this disagreement.¹³²

But the more relevant point here is that this introduction, thanking jurors, is not strictly within rules that would limit the opening statement to issues and witnesses alone. Officially, the “narrow 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; it

131. HOW TO TRY A JURY TRIAL, *supra* note 126, at 26–28 (alteration in original).

132. See DAVID CRUMP, HOW TO REASON 352–53 (2014). The famous experiments of Napolitan and Goethals proved dramatically that people attribute attitudes to the emotional conditions of the individuals involved, rather than to the situations in which the individuals are acting. *Id.* This phenomenon is so powerful that it is referred to as the fundamental attribution error. *Id.* The idea implies that a juror hearing thanks from a lawyer is likely to attribute such thanks to the lawyer's sincere feelings and not to the situation. *Id.*

is not an occasion for argument.”¹³³ But surely, the courts do not intend the opening statement to avoid identifying oneself and making a neutral introduction to the jury.

Likewise, there is rhetoric throughout this example that expresses conclusions in emotional terms. The loss is “terrifying,” for example.¹³⁴ The witnesses are “strong.”¹³⁵ The statement is partisan throughout. This is an adversarial system, and the approach in *Wright*, above, allowing “latitude” for an opening statement,¹³⁶ is more sensible than that in *Lawrence*, which strictly disallows this kind of commentary.¹³⁷ It is difficult to convey the meaning of the opening statement—the degree of defendant’s negligence or the magnitude of the loss—without this kind of latitude.

Furthermore, the statement introduces and briefly explains the governing law: the meaning of negligence as carelessness, for example.¹³⁸ Is the law a permitted subject in an opening statement? This rhetoric should fit into the purpose of “relat[ing] parts of the evidence and testimony to the whole.”¹³⁹ Getting across the concept that the evidence fits the law will be helpful to the jury. Or is it a violation of the law governing opening statements? The answer depends on the amount of latitude¹⁴⁰ the courts are willing to give.

CONCLUSION

A. The Right to Make an Opening Statement and the Court’s Control of It

The courts are not clear about the right to make an opening statement. They should be, and they should recognize and protect the right. The *Breedlove* case analyzed above in Part I of this Article implies the right.¹⁴¹ The trial court’s control over the opening statement seems to be firmly

133. *United States v. Dinitz*, 424 U.S. 600, 612 (1976); *see supra* Part I.C (discussing this purpose).

134. *HOW TO TRY A JURY TRIAL*, *supra* note 126, at 27.

135. *Id.*

136. *Wright v. Barr*, 62 S.W.3d 509, 532 (Mo. App. W.D. 2001) (per curiam); *see supra* Part I.C (discussing this case).

137. *Lawrence v. Superintendent Dallas SCI*, 849 F. App’x 386, 388 (3d Cir. 2021); *see supra* Part I.C (discussing this case).

138. *HOW TO TRY A JURY TRIAL*, *supra* note 126, at 26–27.

139. *United States v. Dinitz*, 424 U.S. 600, 612 (1976); *see supra* Part I.C (discussing purpose of opening statement).

140. *See Wright*, 62 S.W.3d at 532.

141. *United States v. Breedlove*, 576 F.2d 57, 60 (5th Cir. 1978); *see supra* Part I.B (discussing cases on point).

established, but control by a judge should not be a *de facto* power, as in *Breedlove*, to eliminate a party's opening statement.

Breedlove shows a situation in which the court sandbagged defense counsel by failing to notify counsel that his only opportunity to present an opening statement was at the beginning of the case.¹⁴² The application of this idiosyncratic "rule" meant that counsel was disallowed from giving his opening before presentation of the defense case, as is commonly allowed.¹⁴³ It is a disappointing precedent.

B. The Proper Content in an Opening Statement

The rule that the opening statement is limited to introducing the theory of the case and the witnesses seems to be firmly established.¹⁴⁴ But the rule that it should not contain any argument is the subject of obvious disagreement. The labeling of the defendant as a "cold-blooded murderer" in the *Lawrence* case conflicts with the approval of an argument that a defendant doctor played "Russian roulette" in the *Wright* case.¹⁴⁵

The approach of the *Lawrence* court is unrealistic in our adversarial system, and it stifles speech in the opening statement that might well be helpful to the jury. A listener might think, "Well, he's going to try to prove that this case involves a murder committed in cold blood. I'll have to watch for that." This is appropriate communication with a jury. The approach of the *Wright* court is closer to the mark in saying that "[c]ounsel is permitted great latitude in making an opening statement," by using language such as "Russian roulette," so long as counsel remains in the process of introducing the case and the witnesses.¹⁴⁶

C. The Court's Power to Grant a Motion for Judgment as a Matter of Law After the Opening Statement

The appellate courts have performed appropriately in supervising trial courts' granting of motions for judgment as a matter of law after the opening statement. In cases demonstrating an inability of counsel to prevail in the particular claim or defense, the trial court should grant a judgment as a matter

142. *Breedlove*, 576 F.2d at 60 n.4.

143. *United States v. Ziele* 734 F.2d 1447 (11th Cir. 1984); *see supra* Part I.A (discussing cases on point).

144. *Arizona v. Washington*, 434 U.S. 497, 513 n.32 (1978); *see supra* Part I.C (discussing these cases).

145. *Lawrence v. Superintendent Dallas SCI*, 849 F. App'x 386, 387 (3d Cir. 2021); *Wright*, 62 S.W.3d at 532–33; *see supra* Part I.C (discussing these cases).

146. *Wright*, 62 S.W.3d at 532; *see supra* Part I.C (discussing these cases).

of law. The Supreme Court, in the *Best* case, has said that there is “no question” that the courts have the power to do so.¹⁴⁷

The problem, however, is not with this principle; rather, it lies in the tendency of trial judges on occasion to be impatient. Thus, the *Best* case itself resulted in reversal because the opening statement showed a possibility of recovery.¹⁴⁸ The principle to remember is that an opening statement that does not dispose of all elements of a claim or defense may not show that there is no claim or defense. The opening statement is an introduction to the case, or a kind of “table of contents”; it is not proof of the case.

D. The Opening Statement That Includes Evidence That Never Is Admitted

In most cases in which an opening statement includes evidence that never is admitted, the courts find that the error is harmless or is cured by the judge’s instructions.¹⁴⁹ As the Supreme Court said in *Frazier v. Cupp*, “Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance.”¹⁵⁰

In other words, this situation is likely to occur often. It would be wasteful to retry every such case. A common situation of this kind occurs if a witness is expected to testify but decides, as a surprise, to refuse to testify.

The fact that the non-admitted evidence is mentioned early in the case probably makes it easier later for the court to remove prejudice to the opposing party. Everyone is familiar with the situation in which a subject that has been mentioned is subject to an admonition that amounts to “never mind.”

E. References to Inadmissible Evidence

The opening statement that injects inadmissible evidence into a trial presents a more serious problem than an opening statement that merely contains evidence that would be admissible but that is never admitted. Inadmissible evidence presumably is marked for exclusion precisely because rulemakers have decided that it should not be placed before the jury.

The cases above show outcomes as serious as reversal in this situation.¹⁵¹ Trial lawyers have colorful ways of explaining the reason: A bell cannot be

147. *Best v. Dist. of Columbia*, 291 U.S. 411, 415 (1934); see *supra* Part II (discussing the *Best* case).

148. *Best*, 291 U.S. at 419–20.

149. *Frazier v. Cupp*, 394 U.S. 731 (1969); see *supra* Part III (discussing these cases).

150. *Frazier*, 394 U.S. at 736; see *supra* Part III (discussing *Frazier*).

151. See *supra* Part IV (discussing cases on point).

unrung, after the thrust of the Sabre it is impossible to forget the wound, and one cannot throw a skunk into the jury box and instruct the jury not to smell it. Thus, the inadmissible evidence cases view the error as more serious. This result is appropriate.