CHAPTER 8
OPENING STATEMENT
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I. PRACTICE TIPS

This chapter summarizes Indiana's black letter law on opening statements. It also contains excerpts from other publications on the strategy of objecting to the prosecutor as well as suggestions on being more persuasive in front of a jury.

A. DOS AND DON'TS

1. Never waive – cannot reserve opening statement

Defense counsel may, but is not required to, give opening statement. Indiana does not permit counsel to reserve opening statement until the beginning of the defense case. Ind. Code § 35-37-2-2. See IPDC Trial Manual, Chapter 8 § IV.B. *below*.

The better practice is to NEVER WAIVE opening. It is the only time in the trial when the prosecutor has no opportunity to rebut.

2. Do not "Open the Door"

Opening statement can have significant evidentiary impact. Your remarks may bind the client. Whitehair v. State, 654 N.E.2d 296, 302 (Ind. Ct. App. 1995).

(1) judicial admissions (see page 8-13)

(2) prior conduct evidence (see page 8-14).

3. General dos

- Dress neatly
- Organize – being unprepared will hamper your credibility
- Speak clearly
- Maintain eye contact
- Acknowledge jurors as group at beginning of opening
- Set trial context in perspective for jury
- End opening with plea that jurors keep open mind until they have heard all evidence
- Be yourself
- Keep it simple

4. General do nots

- Argue (drawing inferences from expected facts)
- Read your opening statement
- Use legalese (confuses jury)
- Make reference to fact for which there will be no admissible evidence
- Put on an opening argument that you know is false. See Atkins v. Zenk, 667 F.3d 939 (7th Cir. 2012); Myers v. Neal, 975 F.3d 611 (7th Cir. 2020).
- Use technical terms without defining them in terms lay people understand
- Make mistakes on names, dates, or places of significance
- Express personal opinion or belief
- Speak in a monotone voice
- Pace in front of jury box

See Ken Sinclair, *Trial Handbook* 2nd. Ed., Practicing Law Institute (June 1990).

B. COMMON ABUSES BY PROSECUTOR

Prosecutors frequently abuse opening statements. The types of common abuses are addressed in IPDC Trial Manual, Chapter 8 § II.A., *below*.

1. Prevent abuses by filing motions in limine

To prevent abuses during opening, obtain clear rulings on admissibility by filing motions in limine.

(1) obtain transcripts of prosecutor's other opening statements; and

(2) file a motion in limine to prevent improper references and attach transcripts.

2. Timely objection

To preserve error, an objection must be made at the time of the transgression. Waiting to object until the end of the State's opening waives the error. Gasaway v. State, 547 N.E.2d 898 (Ind. 1989).

Caveat: If you object during the prosecutor's opening, expect her to object to during your opening.

If you object to an improper statement and are sustained: (1) move for mistrial (see IPDC Trial Manual, Chapter 8 § III.B., *below*); and (2) if a mistrial is denied, request curative instructions (see IPDC Trial Manual, Chapter 8 § I.C., *below*).

3. Prepare your client

So that there will be no improper reaction in front of the jury if the prosecutor is acting inappropriately.

4. Consider filing pre-trial motion notifying court of your defense

If you are committed to a particular defense, consider filing a pre-trial motion notifying the court of the defense and then request preliminary instruction concerning the defense.

C. SAMPLE CURATIVE INSTRUCTION

"As I told you at the beginning of this trial, sometimes you will hear statements or testimony that I tell you to disregard. You have just heard [*describe briefly without emphasizing content for jury*]. It was improper for the prosecutor to say that. You must totally disregard what was said. It is your duty to put that out of your mind and not consider it in any way when reaching your verdict in this case."

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II. OBJECTIONS TO PROSECUTOR'S OPENING STATEMENTS

A. GROUNDS FOR OBJECTION

Generally, right to fair trial prevents prosecutor from urging jury to decide upon improper or irrelevant reasons. Lowery v. State, 640 N.E.2d 1031, 1038 (Ind. 1994). The following include general impermissible behavior:

(1) asking jurors to place themselves in victim's shoes;

(2) referring to evidence ruled inadmissible by prior motion;

(3) referring to evidence still under advisement;

(4) referring to polygraph test;

(5) referring to prior crimes, wrongs, or bad acts;

(6) referring to unprovable evidence;

(7) referring to missing co-defendants or co-conspirators

(8) misstating facts;

(9) stating personal beliefs or opinions;

(10) making inflammatory remarks/pleas to passion;

(11) attacking character of accused;

(12) attacking character of defense counsel;

(13) making argumentative statements;

(14) discussing prosecutor's personal dealings with witnesses;

(15) making statements that presume defendant's guilt; and

(16) instructing jurors about the law.

1. Putting jurors in place of victim

Telling jurors to put themselves in place of victim not appropriate, as trier of fact is to base decision on evidence and not to substitute their personal experience. Instructing jurors to put selves in party's shoes "is universally recognized as improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." Ivy v. Security Barge Lines, Inc., 585 F.2d 732, 741 (5th Cir. 1978) (addressing improper closing argument and *citing* numerous supporting cases).

2. Referring to evidence ruled inadmissible by prior motion

Failure to specifically reference earlier motion when making objection precludes any alleged error for appellate review. Wells v. State, 441 N.E.2d 458, 463 (Ind. 1982).

(a) Objection must be specific

Johnson v. State, 472 N.E.2d 892 (Ind. 1985) (not sufficiently specific to present any alleged error for appellate review where defendant said, "I'm going to object to this as being something that we discussed under our motion").

3. Referring to evidence where admissibility still under advisement

Improper for prosecutor to refer to evidence whose admissibility is under advisement but may not lead to reversal. Chatman v. State, 263 Ind. 531, 334 N.E.2d 673 (1975).

Gasaway v. State, 249 Ind. 241, 231 N.E.2d 513, 516 (1967) (court should have *sua sponte* instructed jury to disregard prosecutor's statements in opening referring to items found in the car; court suppressed evidence during trial but *overruled* pretrial motion to suppress. Failure to instruct jury warranted reversal).

4. Mistrial where reference to polygraph

Absent valid stipulation by the parties, reference to polygraph examination during opening statement is objectionable.

Wright v. State, 593 N.E.2d 1192 (Ind. 1992) (mistrial required where defense counsel deliberately made statements and showed exhibits referring to polygraph test of State's witness). See also Domangue v. State, 654 N.E.2d 1, 3 (Ind. Ct. App. 1995).

5. Reference to prior crimes, wrongs, or bad acts

Cannot mention evidence of criminal activity other than that charged. Thompson v. State, 690 N.E.2d 224 (Ind. 1997); Cary v. State, 469 N.E.2d 459 (Ind. 1984).

Wickizer v. State, 626 N.E.2d 795 (Ind. 1993) (conviction reversed where prosecutor emphasized morally repugnant nature of defendant's alleged prior sexual misconduct in opening statement, in presentation of prior conduct evidence, and re-emphasized it during closing argument; appellate court could not conclude jury verdict was not influenced by the improper use of the evidence).

Suding v. State, 945 N.E.2d 731 (Ind. Ct. App. 2011) (although prosecutor said in opening statement that there had been a prior allegation about the defendant involving a kid but that they would not be going into that matter, the statement did not necessarily indicate that a prior criminal act had been committed and therefore was not sufficient to require a mistrial for prosecutorial misconduct).

(a) Exception if non-charged crimes inseparable from charged crime

Admission of evidence of non-charged crimes proper where each of crimes part of uninterrupted transaction. See, e.g., Thomas v. State, 263 Ind. 198, 328 N.E.2d 212 (1975).

Clay v. State, 264 Ind. 495, 346 N.E.2d 574 (1976) (mention of Johnson County rape and robbery of victim during opening of Marion County kidnapping trial was not improper, as Johnson County acts were part of an uninterrupted transaction and were established during presentation of evidence).

6. Referring to unprovable evidence

Indiana Rules of Professional Conduct, Rule 3.4(e) maintains that a lawyer shall not in trial allude to any matter that will not be supported by admissible evidence. See also 16 ALR 4th 810 and ABA Prosecution Standard 3-5.5.

Improper for prosecutor to make statements or refer to evidence he knows will not be supported by evidence at trial. However, not reversible error unless conduct places defendant in position of grave peril. Draper v. State, 556 N.E.2d 1380 (Ind. Ct. App. 1990).

McGowan v. State, 599 N.E.2d 589 (Ind. 1992) (improper for prosecutor to inform jury that they would be viewing videotape of alleged scam inside sandwich shop and that they would hear testimony from witness to scam; error harmless because prosecutor, not defendant, had potential of looking bad as far as jury was concerned, and evidence against defendant overwhelming).

U.S. v. Brodie, 268 F.Supp. 2d 420 (E.D. Pa. 2003) (retrial granted in part because prosecutor recited "facts" in opening statement that were never put into evidence during trial). See also U.S. v. Novak, 918 F.2d 107 (10th Cir. 1990).

Simpson v. State, 442 Md. 446, 112 A.3d 941 (2015) (prosecutor struck "foul blow" by suggesting that defendant would "himself tell the jury about his involvement in the charged crimes").

(a) Object and request limiting instruction

If State fails to produce evidence to support its claim, defendant entitled to forcefully bring that to jury's attention in final argument along with court's admonition that statements and arguments of prosecutor not evidence in case. Goldsworthy v. State, 582 N.E.2d 921 (Ind. Ct. App. 1991).

Practice Pointer: Argue objections to highly prejudicial matters at the bench or otherwise out of the presence of the jury to avoid drawing the jury's attention to the very matters that are sought to be excluded. Ind. Evid. R. 103(c).

7. Referring to missing codefendants or co-conspirators

Error for prosecutor to refer in opening statement to guilty pleas or convictions of co-defendants or co-conspirators who may not testify. The concern is that the jury will conclude that because the other person pled or was convicted, your client must also be guilty. The admission of guilty pleas or convictions of codefendants or coconspirators not subject to cross-examination is generally considered plain error.

U.S. v. Jozwiak, 954 F.2d 458 (7th Cir. 1992) (court granted mistrial after a prosecutor told jury during opening statement that five of the original defendants were cooperating with the government and would appear as witnesses and that four others had also pleaded guilty).

Waldon v. State, 825 N.E.2d 168 (Ind. Ct. App. 2005) (prosecutor did not act improperly by relating the expected testimony of a witness during his opening statement even though the witness thereafter refused to testify even after being granted use immunity; although prosecutor was aware prior to trial that the witness had indicated he might refuse to testify, there was no evidence that the prosecutor knew with any certainty that the witness would refuse after being given immunity).

8. Misstating facts

Error for prosecutor to misstate facts in opening; however, error waived without timely objections. Steelman v. State, 602 N.E.2d 152, 157 (Ind. Ct. App. 1992).

Ratliff v. State, 741 N.E.2d 424 (Ind. Ct. App. 2000) (prosecutor improperly speculated that the defense would come up with a mystery man who was allegedly driving the vehicle involved then disappeared, but the defendant failed to show prejudice).

9. Stating personal beliefs or opinions

Expression of personal beliefs on the merits violates Indiana Rules of Professional Conduct, Rule 3.4(e).

However, prosecutor may state his conclusions based on evidence. For example, not an improper personal opinion of defendant's guilt for prosecutor to say, "I wouldn't be before you if I didn't believe the State could prove its case." Roller v. State, 602 N.E.2d 165 (Ind. Ct. App. 1992).

For more information on the propriety and prejudicial effect of comments by counsel vouching for credibility of witness, see 45 ALR 4th 602.

Timberlake v. State, 690 N.E.2d 243, 254 (Ind. 1997) (no misconduct where prosecutor stated during opening argument that the shooting was a "mean, senseless, intentional act, the act of a man who hated authority, who hated the uniform and everything it stood for"; in each alleged situation, the prosecutor made accurate and true statements based upon

the evidence and the situation. The prosecutor never implied that he had knowledge which the jury did not, nor did he stray from the evidence and reasonable interpretations derived therefrom).

10. Prejudicial or inflammatory remarks/pleas to passion

Right to fair trial prevents prosecutor from urging jury to decide upon improper or irrelevant reasons. Lowery v. State, 640 N.E.2d 1031, 1038 (Ind. 1994).

U.S. v. Moreno, 991 F.2d 943 (1st Cir. 1993) (prosecutor's opening statement improperly played to jury's emotional reaction to neighborhood violence).

11. Attacking character of accused

Reversible error to permit prosecutor, over objection, in his opening statement to attack character of accused by charging commission of other crimes. Bolden v. State, 199 Ind. 160, 155 N.E. 824, 825 (1927); see also Greer v. State, 245 N.E.2d 158 (Ind. 1969).

12. Attacking character of defense counsel

Improper to attack character of opposing counsel.

Splunge v. State, 641 N.E.2d 628 (Ind. 1994) (improper, but not reversible error, for prosecutor to say that defense counsel does not want jury to know the truth; evidence against defendant was overwhelming).

Alexander v. State, 509 S.E.2d 56 (Ga. 1998) (reference to defendant's gang membership).

13. Argument is not permitted during opening

See Buise v. State, 258 Ind. 321, 281 N.E.2d 93, 96 (1972).

But see

Kalady v. State, 462 N.E.2d 1299, 1307 (Ind. 1984) (remarks not so improper as to unduly prejudice defendant—even though prosecutor went beyond bounds of telling jury what he thought evidence would prove—where prosecutor told jury to focus upon aspect of intent and recited evidence that would be admitted that would tend to prove the case).

14. Prosecutor's personal dealings with witnesses

Prosecutor's comments during opening statement as to his personal dealings with the witnesses and that they were "burglars and thieves," "courtroom regulars," and they "have been witnesses prior in Circuit Court" were totally irrelevant comments in violation of DR 7-107(C)(1). Hossman v. State, 473 N.E.2d 1059 (Ind. Ct. App. 1985).

See Indiana Rules of Professional Conduct, Rule 3.4(e) (lawyer shall not in trial state personal opinion as to credibility of witness).

15. Statements that presume defendant's guilt

Goffe v. State, 176 Ind. App. 124, 374 N.E.2d 560 (1978) (State repeatedly told jury, "You didn't make him do it. I didn't make him do it." Such statements presumed defendant's guilt before any evidence was presented).

See also Indiana Rules of Professional Conduct, Rule 3.4(e) (lawyer shall not in trial state personal opinion as to guilt or innocence of accused).

16. Instructing jurors about the law

Allowed to make brief references about law but should not explain details of law or give instructions to jury.

U.S. v. Conrad, 320 F.3d 851 (8th Cir. 2003) (improper for prosecution to explain purpose of gun control statute in opening statement).

B. PRACTICE POINTERS

1. Before trial

(a) Prepare client

As with all aspects of trial, prepare your client for what to expect in the State's opening statement to avoid inappropriate reactions or outbursts.

(b) Get evidentiary rulings before opening

Evidentiary rulings made before opening let you know exactly what evidence will be admissible. Remarks made during discussions with judge or during jury selection indicate what should and should not be mentioned in opening statement. Try to get as specific a ruling as possible on such admissibility questions. Better to clarify beforehand, even if it means "showing your hand" to the State, than to prepare an opening statement emphasizing inadmissible themes or references.

(c) Anticipate references to inadmissible evidence

If you think prosecution may refer to objectionable or inadmissible evidence in opening statement, raise evidentiary issue in motion in limine.

Practice Pointer: Attach prior arguments by same prosecutor in other cases where he violated admissibility rules.

(d) Exclude witnesses

Move to exclude State's witnesses before opening statement begins. Better practice to move to exclude witnesses prior to voir dire.

2. Before prosecutor gives opening statement

(a) Insist on preliminary instructions

Before opening statements given, judge should provide jurors with summary of charge and procedural and substantive law. Pretrial instructions help jurors understand what they are looking for, assimilate evidence and link it to relevant legal issues, and apply correct criteria when evaluating credibility or nature of reasonable inferences. Hastie, *An Empirical Evaluation of Five Methods of Instructing the Jury*, Report Prepared for the National Institute of Justice (1983) at 7-8.

Harrington v. State, 584 N.E.2d 558 (Ind. 1992) (failure of defense counsel to object if court deviates from this procedure waives error).

Criminal Rule 8(F) provides:

"When the jury has been sworn the court shall instruct in writing as to the issues for trial, the burden of proof, the credibility of witnesses, and the manner of weighing the testimony to be received. Each party shall have reasonable opportunity to examine such instructions and state his specific objections thereto out of the presence of the jury and before any party has stated his case."

In addition, Jury Rule 20 provides, in part:

"The court shall instruct the jury before opening statements by reading the appropriate instructions which shall include at least the following:

(1) that each juror may take notes during the trial and paper shall be provided, but not taking shall not interfere with the attention to the testimony;

(2) the personal knowledge procedure under [Jury] Rule 24;

(3) the order in which the case will proceed;

(4) that jurors, including alternates, may seek to ask questions of the witnesses by submission of questions in writing.

(5) that jurors, including alternates, are permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. The court shall admonish jurors not to discuss the case with anyone other than fellow jurors during the trial."

(1) Instruction on theory of defense

Specific defenses should not be anticipated by court. However, it id appropriate to give a preliminary instruction if: (1) requested; and (2) defendant has committed to such defense by pleading or pre-trial order. Everly v. State, 395 N.E.2d 254, 257 (Ind. 1979).

(2) Instruction prohibiting use of electronic communication devices

See IPDC Trial Manual, Chapter 13, Juror Misconduct.

3. Listen for "promises of proof"

Make note of any and all promises of proof made by prosecution. During final argument, remind jury of state's failure to produce evidence to support its claim.

4. Object sparingly

Objections only appropriate: (1) when reasonably certain your objection will be sustained; or (2) for extremely important and prejudicial matters.

Overly technical objections anger jury and could destroy your credibility if not sustained.

5. Avoid waiver on highly prejudicial remarks

Failure to object waives claim of error on appeal. Suggs v. State, 428 N.E.2d 226 (Ind. 1981) and Klaggis v. State, 585 N.E.2d 674, 680 (Ind. Ct. App. 1992).

(a) Cannot wait until close of opening statement

Waiting until conclusion of State's opening statement to object constitutes waiver. Gasaway v. State, 547 N.E.2d 898 (Ind. 1989) and Sutton v. State, 495 N.E.2d 253 (Ind. Ct. App. 1986).

Steelman v. State, 602 N.E.2d 152 (Ind. Ct. App. 1992) (defendant made motion for mistrial at end of State's opening, based upon alleged misstatements of fact, but because no objections were posed to the misstatements as they were made, error waived).

But see,

Pavey v. State, 764 N.E.2d 692 (Ind. Ct. App. 2002) (appellate court upheld trial court's granting of mistrial even though State did not make prompt objection or

request an admonishment; motion for mistrial at close of defendant's opening statement was found to be timely).

Practice Pointer: Argue that what is good enough for the State must be good enough for the defense. Because Pavey v. State found that a motion for mistrial at the end of the defendant's opening statement was timely, defense counsel's objection or motion for mistrial at the end of the State's opening statement must also be found timely. Pavey contravenes Gasaway and is in conflict with Sutton and Steelman.

(b) For failure to specify grounds

Failure to specify proper grounds waives any claim of error. Hobbs v. State, 548 N.E.2d 164 (Ind. 1990); Nasser v. State, 646 N.E.2d 673, 676 (Ind. Ct. App. 1995).

Bellmore v. State, 602 N.E.2d 111, 120 (Ind. 1992) (claim of error waived where prosecutor commented about defendant's lack of remorse and defendant objected on grounds of relevancy; defendant did not claim improper comment on right to remain silent or prosecutorial misconduct).

Raise grounds under both Indiana and U.S. Constitutions.

6. Make objection at bench or out of presence of jury

Whenever possible, argue objections to highly prejudicial matters at the bench or otherwise out of the presence of the jury to avoid drawing the jury's attention to the already prejudicial matters sought to be excluded. See Ind. Evid. R. 103(c).

III. REVERSAL AND MISTRIAL

Ruling on opening statement is largely within the discretion of the trial court. McGowan v. State, 599 N.E.2d 589, 593 (Ind. 1993).

A. TEST FOR REVERSAL

Conviction will not be reversed because of irregularity in opening unless: (1) clear abuse of discretion; and (2) resulting in some prejudice to accused. Kalady v. State, 462 N.E.2d 1299, 1307 (Ind. 1984).

1. If misled or surprised by prosecutor

Object based upon violation of discovery order, due process, and right to notice.

(a) Failure to apprise defendant of evidence to support State's case

May claim reversible error only by showing defendant was surprised or misled by prosecutor's statements. Woodford v. State, 273 Ind. 487, 405 N.E.2d 522 (1980).

Alderson v. State, 262 Ind. 345, 316 N.E.2d 367, 370 (1974) (defendant not harmed unless State made misstatement or false statements which prejudicially misled defendant).

(b) Disclosure after defense committed to strategy

Where mid-trial disclosure made after defense has committed itself to strategy to be pursued, mistrial may be only adequate remedy. Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1989).

B. MISTRIAL

The trial court is in the best position to determine necessity for mistrial. Determination will be reversed only where abuse of discretion can be established. Thomas v. State, 510 N.E.2d 651 (Ind. 1987).

Practice Pointer: Objections to prosecutorial misconduct may not always provide grounds for mistrial. Always argue for mistrial and settle for nothing less than strong curative instruction.

1. Argue for mistrial outside presence of jury

Move for mistrial outside presence of jury, by informing court you have "a matter for the court."

2. Test

Looking at totality of circumstances, court determines whether: (1) there was misconduct; and (2) misconduct placed defendant in position of grave peril. McGowan v. State, 599 N.E.2d 589, 594 (Ind. 1992); White v. State, 257 Ind. 64, 272 N.E.2d 31 (1971).

(a) Grave peril

Measured by: (1) probable persuasive effect of any misconduct on jury's decision; and (2) whether there were repeated instances of misconduct that would evidence deliberate attempt to improperly prejudice defendant. Wisehart v. State, 693 N.E.2d 23 (Ind. 1998).

White v. State, 257 Ind. 64, 272 N.E.2d 312 (1971) (grave peril does not require court to find that misconduct determined outcome of trial);

Swope v. State, 263 Ind. 148, 325 N.E.2d 193 (1975) (whether misconduct subjected defendant to grave peril determined by probable persuasive effect of misconduct on jury's decision, not by degree of impropriety of conduct);

Garrett v. State, 157 Ind. App. 426, 300 N.E.2d 696 (1973) (reversal may result if repeated instances of misconduct evidences deliberate attempt to improperly prejudice defendant).

3. Procedure

(a) Make timely objection

(b) Request curative instruction

If objection sustained, ask for instruction to disregard improper comment and any other curative instructions suitable under circumstances.

(1) Admonition presumed to cure error

No reversible error ordinarily arises from opening statement if:

(1) jury admonished to disregard what has occurred; or

(2) other reasonable curative measures taken.

Vanyo v. State, 450 N.E.2d 524 (Ind. 1983) (court's admonition cured any possible error arising out of prosecutor's opening statement, which defendant contends was longer than usual and raised inference of his participation in other illegal activity).

But see,

Pavey v. State, 764 N.E.2d 692 (Ind. Ct. App. 2002) (where defense counsel deliberately gave jury inaccurate description of witness' plea agreement, trial court did not abuse discretion in granting State's motion for mistrial).

(2) Sample curative instruction

"As I told you at the beginning of this trial, sometimes you will hear statements or testimony that I tell you to disregard. You have just heard [*describe briefly without emphasizing content for jury*]. It was improper for the prosecutor to say that. You must totally disregard what was said. It is your duty to put that out of your mind and not consider it in any way when reaching your verdict in this case."

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(c) If instruction insufficient

Object to admonishment and request any other curative action to preserve error.

Johnson v. State, 472 N.E.2d 892, 904 (Ind. 1985) (issue not preserved where defendants failed to object to court's admonishment and failed to request any other curative action).

IV. DEFENDANT'S OPENING STATEMENT

A. PURPOSE

Counsel's objective in making an opening statement may include the following:

(1) to frame the issues and provide an overview of the theory of the defense case (see McWherter v. State, 569 N.E.2d 958 (Ind. 1991));

(2) to identify the weaknesses of the prosecution's case while disclosing and minimizing the weaknesses of the defense case;

(3) to emphasize the prosecutor's burden of proof;

(4) to summarize the testimony of witnesses, and the role of each in relationship to the entire case;

(5) to describe the exhibits which will be introduced and the role of each in relationship to the entire case;

(6) to clarify the jurors' responsibilities;

(7) to personalize the client and counsel to the jury; and

(8) to state the ultimate inferences which counsel wishes the jury to draw.

This list is not exhaustive. The objectives and content of opening statement will depend on the facts and circumstances of each case. See IPDC *Performance Guidelines for Criminal Defense Representation*, Guideline 7.3 (2012).

B. IMMEDIATELY AFTER STATE'S OPENING OR WAIVER

Defendant must follow prosecution's opening. Ind. Code § 35-37-2-2. See also Jury Rule 21(a).

Election to make no opening statement following prosecutor's, constitutes waiver. Buise v. State, 281 N.E.2d 93 (Ind. 1972).

1. Court must give preliminary instructions prior to any opening

It is error for trial court to require opening statements before judge examines proposed instructions and judge indicates what preliminary instructions will be given. Morrison v. State, 516 N.E.2d 14 (Ind. 1987).

2. Cannot wait until end of State's case-in-chief

Berry v. State, 483 N.E.2d 1369 (Ind. 1985) (pursuant to statute and case law, court refused defendant opportunity to make opening statement at close of State's case-in-chief).

Day v. State, 643 N.E.2d 1, 2 (Ind. Ct. App. 1994) (defendant reserved opening statement until beginning of his case-in-chief).

C. SHOULD YOU WAIVE OPENING STATEMENT?

This section is excerpted from "Opening Statement" in The Rench Book Trial Tactics and Strategy, by Stephen C. Rench. Reprinted with permission.

1. Reasons not to waive

(1) counters prosecutor's argument, allowing defendant to get her side before trier of fact as soon as possible; thereby, raising doubts before jurors initially make up their minds.

(2) primacy – what we hear first is most likely to be remembered and followed.

(3) jury may feel you do not have a defense.

(4) jurors may have made up their minds to the point where it is difficult to change their feelings.

(5) if, on closing, you intend to ask jury to view evidence in certain light, use opening to give jury that point of view, and make note of evidence in opening. As evidence comes in, jurors will evaluate it from your viewpoint.

2. Factors to consider if you want to waive opening

(1) where primary issue is reasonable doubt, you may wish to voir dire on issue and explain that defendant intends to do nothing because of weakness of State's case. Waiver of opening statement serves to emphasize point.

(2) benefits of giving away defenses early in trial may not outweigh costs.

(3) attorney not sufficiently prepared or State may not be sufficiently prepared so as to be sure of evidence and issues.

(4) flexibility – if one offers an opening, his flexibility is drastically reduced because if attorney ultimately takes different position from that set out in opening statement, he will lose credibility with jury.

(5) brief general opening statement (to avoid loss of flexibility) may appear to jury as too noncommittal.

See also *Telling a Story in Opening*, INDIANA DEFENDER (September 1995) page 14; *Telling your Client's Story in a Persuasive Way through Opening: A Primer*, INDIANA DEFENDER (February 2005), page 22; *Opening salvos for opening statements*, INDIANA DEFENDER (October 1998), page 1.

3. Waiver of opening not inadequate assistance of counsel (IAC)

"[Trial counsel's] election to forego making an opening statement…is a matter of trial strategy and is not a basis for a finding of inadequate counsel." Nuckles v. State, 560 N.E.2d 660 (Ind. 1990); Wisehart v. State, 693 N.E.2d 23 (Ind. 1998).

D. "OPENING THE DOOR" IN OPENING STATEMENT

1. Opening statement not evidence

Opening statement is not evidence. Splunge v. State, 526 N.E.2d 977 (Ind. 1988).

However, opening statement can have significant evidentiary impact.

> **Practice Pointer:** Evidentiary rulings made before opening let you know exactly what evidence will be admissible. Remarks made during discussions with judge or during jury selection indicate what should and should not be mentioned in opening statement.

2. Your remarks may bind client

(a) Judicial admissions

An attorney's remarks during opening or closing argument may constitute judicial admissions that are binding on the client. Saylor v. State, 55 N.E.3d 354, 363 (Ind. Ct. App. 2016). The attorney can make an admission during opening statement that binds his client and relieves opposing party of duty to present evidence on that issue. Schuh v. Silcox, 581 N.E.2d 926 (Ind. Ct. App. 1991).

> Tanksley v. State, 144 N.E.3d 824 (Ind. Ct. App. 2020) (during trial for failure to appear, defense counsel unequivocally conceded that defendant was person who State alleged had been released from incarceration and ordered to appear at specific time and place in connection with felony case, but did not appear. Defendant disputed only whether his failure to appear was intentional. Under these circumstances, Defendant made binding judicial admission and may not raise on appeal issue of State's failure to prove identity).

A judicial admission is formal stipulation conceding any element of claim or defense. It determines the issue conclusively and dispenses entirely with need for further evidence on that issue. Lystarczyk v. Smits, 435 N.E.2d 1011, 1014, n.4 (Ind. Ct. App. 1982).

> Banks v. State, 884 N.E.2d 362 (Ind. Ct. App. 2008) (trial counsel acted improperly by conceding in his opening statement that defendant was guilty of lesser included offense without first obtaining defendant's consent; counsel is required to consult with defendant concerning "important strategic decisions").

(1) Must be clear and unequivocal admission of fact

Admission must be clear and unequivocal in order to be binding. Kerkhof v. Kerkhof, 703 N.E.2d 1108 (Ind. Ct. App. 1998).

> Schuh v. Silcox, 581 N.E.2d 926, 927 (Ind. Ct. App. 1991) (defense attorney's statement during opening admitting liability was binding on defendant: "We bumped her and we hit her in the back end, she went to the emergency room and she had an X-ray of her knee and we hurt her knee on that day, and yes, she deserves compensation for that.").

(2) Ambiguous statement

The presumption is that the attorney did not intend to make an admission. Lystarczyk v. Smits, 435 N.E.2d 1011, 1014 (Ind. Ct. App. 1982) and Schuh v. Silcox, 581 N.E.2d 926, 927 (Ind. Ct. App. 1991).

(3) If outlining anticipated proof, not binding admission

Merely outlining anticipated proof upon any of issues of case is not a binding admission.

Lystarczyk v. Smits, 435 N.E.2d 1011, 1014 (Ind. Ct. App. 1982) (not binding admission, but merely outline of anticipated proof where plaintiff's attorney stated in opening that $500 was spent by defendants to correct defects of house).

(b) Your comments may open door to prior conduct evidence

(1) To show contrary intent

When a defendant alleges in trial a particular contrary intent, whether in opening statement, by cross-examination of State witnesses, or by presentation of his own case-in-chief, the State may respond by offering evidence of prior crimes, wrongs, or bad acts to the extent genuinely relevant to prove the defendant's intent at the time of the charged offense. Wickizer v. State, 626 N.E.2d 795, 799 (Ind. 1993); Hicks v. State, 690 N.E.2d 215 (Ind. 1997).

Butcher v. State, 627 N.E.2d 855, 859 (Ind. Ct. App. 1994), *overruled on other grounds*, 784 N.E.2d 459 (Ind. 2003) (State entitled to present prior misconduct evidence to show intent based on defendant's pretrial statement to police, his counsel's opening remarks, and his own trial testimony; although defendant did not deny touching daughter in molestation trial, counsel attempted to explain defendant's conduct by alleging that (1) he could not resist daughter's advances; or (2) he was forced, against his will, to touch his daughter's breasts).

Christian-Hornaday v. State, 649 N.E.2d 669 (Ind. Ct. App. 1995) (in harassment prosecution, trial court did not abuse its discretion in admitting evidence of prior uncharged telephone calls where defendant made declaration of contrary intent during her opening statement).

(2) To show knowledge

Whitehair v. State, 654 N.E.2d 296, 302 (Ind. Ct. App. 1995) (State entitled to use prior misconduct evidence where defendant voluntarily told police that he purchased alleged stolen vehicle and where defense counsel told jury during opening that State had to prove defendant knowingly retained stolen vehicle).

(3) Juvenile record

Under Ind. Evid. R. 609(d), evidence of juvenile adjudications is not admissible. However, the door may be opened for admissibility.

Terrell v. State, 507 N.E.2d 633 (Ind. Ct. App. 1987) (door opened where defendant's counsel stated in opening, "this man has no record." It would be unconscionable to permit defense counsel to tell jury his client had no record and then prevent disclosure to jury of juvenile adjudication of delinquency for nine acts of burglary). See also Newman v. State, 719 N.E.2d 832 (Ind. Ct. App. 1999).

(4) Self-defense

Emerson v. State, 524 N.E.2d 314 (Ind. 1988) (defendant opened door for prosecutor's comment in closing argument that there had been no self-defense, where in opening statement defense counsel said there would be evidence of self-defense, and during voir dire defense counsel questioned potential jurors at length on their views of self-defense and repeatedly stressed that self-defense would be an issue).

(c) Your comments may support finding of harmless error on appeal

Counsel should be cautious of making admissions during opening statement, because they may be used against defendant on appeal.

Greenboam v. State, 766 N.E.2d 1247, 1256 (Ind. Ct. App. 2002) (although evidence of prior molestations was improperly admitted, error was harmless because defense counsel admitted substance of witness testimony about molestations during opening statement).

E. CONTENT OF OPENING STATEMENT

1. Introduction

Start in interesting and dramatic way. Name attorneys and individuals sitting at your table.

(a) Primacy: "this case is about…"

Stating purpose will help jury understand their role.

(b) Theory or theme of case

Well-stated themes provide focus and structure. Keep them simple and short. Theory must be logical, believable and points out weaknesses in state's case.

2. Body

(a) Law

Don't argue law. May make brief, accurate references to law and blend legal explanations with facts, if necessary, for jury to understand case. May be necessary to describe legal elements of case to bring issues to light.

You may explain defense and discuss "issues":

- Presumption of innocence
- Burden of proof
- Reasonable doubt
- Voir dire promises
- Our system of justice
- The charge
- Objections
- Power and responsibility of jurors

(b) Facts and opinions

May describe direct and circumstantial evidence.

May describe admissible lay and expert opinions.

(c) Story line

(d) Names, dates, locations, and weather

(e) Credibility of prosecution witnesses

3. Basis of innocence

4. Conclusion

Request a verdict. Explain decisions that facts will support. Explanation should be clear and distinct so that jury understands what conclusions must be reached.

F. PRACTICE POINTERS

1. Preparation

(a) Opening should be based on closing argument

Everything you do in trial should support your closing argument. If fact, issue, or position not part of final argument, it should not be part of opening statement or rest of case. Opening must be consistent with factual and legal themes, expected evidence, and positions presented to jury in closing argument.

(b) Know your case

Become familiar with every fact, inference, and aspect of case. Knowledge of case necessary to analyze and select proper theories of case, establish overall theme(s), plan trial presentation, and determine which facts need to be proved in the case and presented in opening statement.

(c) Know your intentions

Develop clear and concise issues and central theme of case so your intentions are clear for opening statement. Issues and themes should be carefully chosen and organized before trial begins.

(d) Select issues

After deciding what issues exist, select issues to be given primacy to jury. Presentation of these issues in opening statement may provide framework for trial, focus attention on these issues, and minimize opponent's case.

(e) Themes and theories

Select words that reflect and reinforce themes and theories of case. Theme words should be utilized during opening statement as attorney describes story. It should strike a simple, clear, dramatic tone, summing up the defense theory in a single image - or in a set of short, strongly connected phrases - that the jury will not forget and that will shape its perception and evaluation of the evidence.

(f) Deal with weaknesses and anticipate opposition's position

Review case from State's perspective. Anticipate prosecution's theories, arguments, and positions - then figure out how to minimize their strong points.

Take away element of surprise so jury doesn't first hear unfavorable evidence during prosecution's case-in-chief. This builds credibility with jury. Disclose all weaknesses in State's case that prosecutor has failed to mention.

(g) Motivate jury toward a favorable decision

Offer favorable picture of defendant's case. Attempt to create empathy for your client.

(1) Remember how jurors process information

People attempt to make sense of new information by fitting it into previously acquired systems of belief and rules that define what is appropriate and reliable. E. Loftus, *Eyewitness Testimony* 36-42 (1979).

People bring to court and use subjective and idiosyncratic ideas about legal process.

(h) Keep it simple and short

Opening should be long enough to explain all necessary information but brief enough to maintain attention of jurors. Do not attempt to give every fact every witness will present, or you will bore your jury. If you give too much detail, witnesses may sound rehearsed, or witnesses may say something different than you expect. Generalizing preferable under most circumstances.

(i) Rehearse

Be prepared. As you master content of opening, work on stylistic improvements. Practice presenting opening statement until it can be done without referring to notes.

(j) Don't assume

When you have immersed yourself in the facts and theory of your case, do not forget that the jury starts from a clean slate. Don't assume that the facts as you know them will be clear to jury. Try going through your opening with a person unfamiliar with case to assure that you have not taken important points for granted and are in fact conveying what you intend to convey to the jury.

2. Delivery

Being persuasive involves touching the emotions of judge and jury. Too much logic and information put jurors to sleep. To create rapport with jury, tell a compelling story. Weave facts and arguments into a story and jurors will listen. See generally *Persuading the Jury,* INDIANA DEFENDER (September 1995).

(a) Stand

Stand in front of jury and not behind table or lectern.

(1) Distance between you and jury

Neither so far away that personal contact lost, nor so close that jury feels uncomfortable.

(b) Movement

Movement and stance should be orchestrated so as not to be distracting. Movement useful to maintain interest, develop transitions, and when done well, to demonstrate confidence and authority.

(1) Gestures

Gestures should be natural and must be consistent with content of opening statement.

(c) Look and Listen

To establish credibility, sincerity, and attention look directly at jurors. Maintain eye contact whenever words are being exchanged. Do not read your opening statement.

(d) Monitor and assess jury

Constantly monitor and assess jury. Reactions of jurors tell you what to say next and what to emphasize differently. Keep their attention.

(e) Use clear, concise, plain English

Use simple terms. Showing the extent of your glittering vocabulary may undermine jurors' confidence in your sincerity and integrity.

(1) Conversational tone

Use conversational tone and be yourself. Most jurors want to listen to someone who speaks normally.

(2) Use transitions

Devices to signal transition:

(1) prefatory remarks,

(2) silence,

(3) a louder voice,

(4) a softer voice,

(5) movement and gestures.

(f) Use of visual aids

Makes spatial description easier and keeps jury interest high.

(g) Convey personal conviction

Develop your credibility by conveying sense of personal conviction. Avoid vouching for witnesses.

(1) Have jurors identify with you and your client

Express emotion naturally in a way that complements your personality and facts of case. Avoid histrionics. Acting and phoniness turns jurors off. When you truly believe in something, you speak with a conviction that enables you to lead your audience through your story step by step.