CORE
Metadata, citation and similar papers at core.ac.uk
Provided by UND Scholarly Commons (University of North Dakota)

North Dakota Law Review

Volume 71 | Number 3 Article 3

1995

Opening Statements in Jury Trials: What Are the Legal Limits

Michael J. Ahlen

Follow this and additional works at: https://commons.und.edu/ndlr

Part of the Law Commons

Recommended Citation

Ahlen, Michael J. (1995) "Opening Statements in Jury Trials: What Are the Legal Limits," *North Dakota Law Review*: Vol. 71 : No. 3 , Article 3.
Available at: https://commons.und.edu/ndlr/vol71/iss3/3

This Viewpoint is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.commons@library.und.edu.

OPENING STATEMENTS IN JURY TRIALS: WHAT ARE THE LEGAL LIMITS?

MICHAEL J. AHLEN*

I. INTRODUCTION

All good trial attorneys realize the importance of opening statements. At very least, opening statements are an opportunity to give the jury an idea of what the case is about,[1] and to outline the evidence which will be presented.[2] Opening comments also give the jury the opportunity to study the attorneys and determine who can be trusted to help them reach a just verdict.[3] Most litigators would agree that an effective opening statement can be a great advantage in ultimately persuading the jury.[4] Some go as far as to say that trials are won or lost in openings.[5] It seems beyond dispute that lawyers are paying increased attention to the importance of opening statements.[6]

Attorneys are being urged to be more aggressive in opening remarks. One litigator advises attorneys to be dramatic and "cast a spell" during opening statements,[7] while another suggests a theme for the defense in criminal cases to be "Attack! Attack! Attack!"[8] A nationally prominent civil counsel suggests that attorneys use emotion-packed language[9] and emphasize to jurors in opening that they can control the destiny of more than just the plaintiff, but also that of the defendant and "all truck drivers and haulage companies" in the community.[10] Some

---

* Professor of Law, University of North Dakota School of Law; J.D., 1968,Vanderbilt University; B.A., 1965, Denison University; Private practice,1968-1970, Marion, Indiana; Deputy Prosecuting Attorney, 1969-1970, Grant County, Indiana; Trial Attorney, 1970-1979, United States Department of Justice; Assistant Chief, Criminal Section, Tax Division, 1979-1981, United States Department of Justice. Professor Ahlen has served as an instructor in trial advocacy seminars for the United States Attorney General's Advocacy Institute, The National Institute For Trial Advocacy, The National Judicial College, the North Dakota Supreme Court, the North Dakota Association of State's Attorneys, and the State Bar Association of North Dakota.

1. LEONARD DECOF, ART OF ADVOCACY—OPENING STATEMENT § 1.01[2] (1995).

2. State v. Marmon, 154 N.W.2d 55, 62 (N.D. 1967).

3. *See* 1 FRED LANE, GOLDSTEIN TRIAL TECHNIQUE § 10.01 (Scott D. Lane ed., 1994 Supp.) (3d ed. 1984 & 1994 Supp.) (noting that opening statements can help build the jury's confidence in the attorney's theory of the case); DECOF, *supra* note 1, §1.01[2] (stating that establishing trust in the attorney can motivate the jury to find an adequate remedy).

4. *See* Weyman I. Lundquist, *Advocacy in Opening Statements, in* THE LITIGATION MANUAL 425, 425 (John G. Koeltl ed., 2d ed. 1989) (noting the particular importance of first impressions in litigation).

5. ALFRED S. JULIEN, OPENING STATEMENTS § 1.01 (1980 & 1993 Supp.).

6. DECOF, *supra* note 1, § 1.01.

7. Rikki J. Klieman, *Opening Statements: How To Deliver a Convincing Opening in a Criminal Defense Case*, TRIAL, Sept. 1987, at 41, 42.

8. JULIEN, *supra* note 5, § 5.01.

9. Peter Perlman, *The Compelling Opening Statement*, TRIAL, May 1994, at 64, 64.

10. *Id.* at 67.

courthouse veterans may question whether these techniques are really all that new.

Judges seek to insure that juries reach verdicts based on the evidence, not on the basis of nonevidentiary prejudicial information.[11] The tension between attorneys and judges as to the proper scope of opening statements seems to be long-standing,[12] but the controversy has intensified. There are accusations that attorneys turn opening statements into opening arguments,[13] filled with prejudicial comments and references to inadmissible evidence.[14] Some judges have severely restricted attorneys' opening statements.[15] Federal trial courts in Connecticut already have the judge, rather than attorneys, deliver opening statements.[16] A federal judge in the District of Columbia has announced that he will follow the Connecticut example in most of the trials in his court.[17]

Uncertainty about the proper content of opening statements is a significant problem for trial lawyers. The threat of causing reversible error[18] or a mistrial[19] due to improper opening comments, cannot be ignored. The threat of being stopped in the middle of opening by a sustained objection is bothersome. Not only does the court's ruling break up the flow of one's presentation, but it can make the attorney

---

11. State v. Brooks, 520 N.W.2d 796, 799 (N.D. 1994) (involving alleged juror misconduct by consideration of extraneous prejudicial information during deliberations).

12. *See* Foster v. United States, 308 F.2d 751, 753 (8th Cir. 1962) (concluding that trial court did not err in disallowing defendant from mentioning prior acquittal for witness intimidation); Hilliard v. United States, 121 F.2d 992, 995-96 (4th Cir. 1941), *cert. denied*, 314 U.S. 627 (1941) (determining it was not error to allow reference to some inadmissible evidence which attorney attempted to offer and judge gave a cautionary instruction).

13. United States v. Smyth, 842 F. Supp. 20, 21 n.3 (D. D.C. 1994) (denying defendant's proposed individual theories of defense).

14. *Compare* Sutton v. Overcash, 623 N.E.2d 820, 835-38 (Ill. App. Ct. 1993) (involving opening statements and commentary throughout trial by defense which made unsupported attacks on the plaintiff in a sexual harassment suit that took plaintiff 31 pages to outline on appeal); *with* Tucker v. State, 646 N.E.2d 972, 976-77 (Ind. Ct. App. 1995) (alleging misconduct when prosecutor informed the jury during opening statements in a fraud case that the defendant was a convicted child molester and falsely pictured victim as an 82-year old great-grandmotherly widow).

15. *See* United States v. Thomas, 1994 U. S. App. LEXIS 32669 at *11 (6th Cir. November 15, 1992) (per curium) (determining that the defense was prohibited from significant discussion in opening statements about prosecution witness' questionable credibility when entire defense rested on attacking that witness' credibility); State v. Flaaen, 863 S.W.2d 658, 660 (Mo. Ct. App. 1993) (refusing to allow the defendant to attack the credibility of a key government witness in opening).

16. United States v. Young and Rubicam, Inc., 741 F. Supp 334, 352-53 (D. Conn. 1990).

17. United States v. Smyth, 842 F. Supp. 20, 21 n.3 (D. D.C. 1994). The judge in *Smyth*, stated that he would "deny oral opening statements to both sides in most cases, receiving instead written statements from counsel to be edited and then read by the Court to the jury along with preliminary instructions at the start of trial." *Id.*

18. United States v. Roberts, 618 F.2d 530, 534 (9th Cir. 1980), *cert. denied*, 452 U.S. 942 (1981) (reversing conviction for improper comments in prosecutor's opening statement).

19. State v. Levison, 510 N.W.2d 495, 500 (Neb. 1993) (granting mistrial because of defense counsel's opening remark that a case on the same charge had earlier been dismissed).

look incompetent, or even unethical, in the eyes of jurors at the very time that attorneys are hoping to create the best impression.[20] If the sustained objection is followed by an admonition or forced retraction, the impact is even worse.[21] On the other hand, if the attorney goes too far in an effort to avoid objections, the opening statement may be dull and ineffective. It is therefore imperative to strike some kind of balance.

Improper opening remarks pose a serious problem for the party against whom they are directed. Some North Dakota judges do not like objections to opening statements.[22] If the victim objects and loses, then the objector may appear incompetent, or worse, as someone who is trying to keep the jury from hearing the facts. The mere act of objecting may also highlight the improper remark for the jury. On the other hand, if the objection is sustained, a quick assessment of damage needs to be made, as well as a determination as to whether to seek a curative instruction, and in the case of serious injury, a motion for mistrial made. Preserving the issue of improper argument for appeal often requires not only a timely objection, but a request for a curative instruction, and sometimes a motion for mistrial or other post-objection procedures.[23]

With the national controversy over the proper scope and content of openings, a review of North Dakota law seems in order. This viewpoint will consider what the legal limits of opening statements are, and the remedies available when improper comments are made. It will also offer some suggestions about how attorneys can use existing procedures to better cope with the problems of opening statements.

II. NORTH DAKOTA LAW OF OPENING STATEMENTS

A. THE PURPOSE OF OPENING STATEMENTS

1. *Background*

Rule 6.2 of the North Dakota Rules of Court provides:

---

20. *See generally* DECOF, *supra* note 1, § 1.15 (noting that promising not to mislead the jury and recording opening statements leads to better litigating because attorneys want to maintain a good impression in the jurors' eyes).

21. *See* South v. National R.R. Passenger Corp., 290 N.W.2d 819, 834-35 (N.D. 1980) (forcing attorney to admit to the jury that his prior statement was improper by demanding a retraction).

22. Over the past 14 years, the majority of North Dakota's district judges have been to University of North Dakota School of Law to help with student mock trials. Most encourage students to raise objections to improper argument during opening statements, but a few actively discourage objections during openings.

23. For further discussion of preserving and avoiding improper argument in opening statements, see *infra* part III.

> After the jury is impaneled and sworn and the trial is ready to proceed, counsel for the plaintiff may make an opening statement to the jury. Counsel for the defendant may immediately follow with an opening statement to the jury or defer it until the plaintiff has rested.

Rule 6.2[24] is silent as to the purpose and content of opening statements. Such guidance, as is available, is found in the common law.

Rather surprisingly, North Dakota decisions do not set forth a specific statement of the purpose of opening statements for parties in a civil action, or defendants in criminal cases. The only clear holding regarding the purpose of opening statements is with regard to the prosecutor's opening in criminal cases, as first set out in *State v. Marmon*.[25]

> The purpose of an opening statement is to inform the jury what the case is all about and to outline to it the proof which the State expects to present, so that the jurors may more intelligently follow the testimony as it is presented. In such statement, counsel for the State should outline what he intends to prove, and it is not necessary that he name the witnesses who will present each bit of evidence. In outlining his proposed case, counsel should be allowed considerable latitude. Only where the prosecutor deliberately attempts to misstate the evidence will such opening statement be ground for reversible error. [26]

By defining the purpose of a prosecuting attorney's opening statement, but not defining the purpose of openings for criminal defendants or either party to a civil suit, we are left with the question, should the purpose of opening statement be the same for all parties in all types of cases?

2. *Jurors' Understanding*

The first element of the *Marmon* standard–that opening statement is to inform the jury what the case is all about–[27] is nationally accepted and applied to opening statements of all parties.[28] The whole purpose of opening statements is to give the jury some background of the case so that they can better understand the evidence which they are about to see

24. N.D. R. CT. 6.2.
25. 154 N.W.2d 55 (N.D. 1967).
26. State v. Marmon, 154 N.W.2d 55, 62 (N.D. 1967).
27. *Id.*
28. *See* DECOF, *supra* note 1, § 2.01; LANE, *supra* note 3, § 10.04; JULIEN *supra* note 5, § 1A.01.

and hear.[29] Real injustice can result if jurors do not have any background for evaluating what they are seeing and hearing.

An example from the case of *United States v. Rubino*[30] is helpful in understanding why the rule is necessary.[31] Rubino was charged with tax evasion for four years.[32] The government intended to prove the amount of Rubino's real income through the net worth and nondeductible expenditures method of proof; an accounting method with which most jurors have no familiarity.[33] In net worth trials, the prosecution brings in many witnesses with hundreds of documents to show how much the taxpayer spent during the four year period.[34] It usually takes weeks, and sometimes months, for the government to put all of these business and personal records in evidence.[35] After weeks of testimony about small and large purchases, on the very last day of its case, the Government puts an expert witness on the stand to testify as to what all those records mean as far as the income of the taxpayer is concerned. Up until that time, juries often have no idea why they were hearing so much boring and apparently meaningless information.

You can imagine what jurors do when going through weeks of testimony about canceled checks and bank ledgers. They get bored, sleep, become angry, and do everything except what jurors are supposed to do—concentrate on the evidence. In *Rubino,* however, the trial judge allowed the prosecutor to use his opening statement to explain the net worth method of proof, and the purpose of all the checks, invoices, and other records that the jurors would be seeing.[36] A chart showing how the net worth method of proof worked was allowed to be used in opening with the explanation that this was only a demonstration for illustrative purposes and not the net worth of the defendant.[37] Now the jury had something to help them understand what they were seeing during those weeks of trial. They could act as jurors were supposed to under the *Marmon*[38] rationale. It also demonstrates *Marmon's* grant of considerable latitude in how its purpose is to be met.

---

29. *Id.*

30. 431 F.2d 284 (6th Cir. 1970), *cert. denied,* 401 U.S. 910 (1971).

31. United States v. Rubino, 431 F.2d 284, 290 (6th Cir. 1970), *cert. denied,* 401 U.S. 910 (1971).

32. *Id.* at 285.

33. *Id.* at 290.

34. *See id.* at 290 (recognizing net worth-expenditures method as a way to prove a taxpayer's income and jurors' difficulty in comprehension).

35. *See id.* at 286 (describing the trial which continued from November 18, 1968 to January 29, 1969, as lengthy).

36. *Rubino,* 431 F.2d at 290.

37. *Id.* at 289-90.

38. State v. Marmon, 154 N.W.2d 55, 62 (N.D. 1967). *See supra* text accompanying note 26 (stating the *Marmon* purpose).

3. *Outlining Evidence*

The second element of the *Marmon* standard, outlining the evidence which the attorney expects to present,[39] is generally well-recognized,[40] but should not be applied to all defendants, especially in criminal cases.

Parties with the burden of proof have little trouble outlining the evidence which they intend to produce.[41] Since they generally must produce their evidence first, they are ready to tell the jury what they will present at the start of trial. Defendants, on the other hand, particularly in criminal cases, may not know what evidence that they will present at the time the other party's opening statement concludes, or whether they will present any evidence at all.[42] They may simply do nothing, or only cross examine the other party's witnesses.[43]

Defendants have a right to reserve opening comments until after the prosecution has presented its case,[44] but waiting is considered risky, as jurors may attach undue weight to the other party's case without first hearing anything from the defense.[45]

If the defense must give some type of opening statement to the jury immediately after the other party's opening, and the defense isn't sure whether it will put on witnesses, the only "safe" opening statement may be to remind the jury of the burden of proof and attack the other party's proposed evidence.[46] If the defense promises to produce evidence or certain witnesses in opening statement, and then fails to deliver, the defense's credibility will greatly suffer by the time the other party reminds the jurors of the defense's broken promises in closing argument.[47] It would seem that the defense should be able to inform the jury of the nature of the defense even if it calls no witnesses.

In some jurisdictions, there have been substantial battles over restrictions placed on a defendant's ability to attack the other party's evidence in opening statement in both criminal[48] and civil cases,[49] but the over-

---

39. *Marmon*, 154 N.W.2d at 62.

40. *See* DECOF, *supra* note 1, § 2.01; LANE, *supra* note 3, § 10.04; JULIEN *supra* note 5, § 1A.01.

41. ROGER HAYDOCK & JOHN SONSTENG, ADVOCACY OPENING AND CLOSING: HOW TO PRESENT A CASE § 2.12 (1994).

42. *Id.* §2.14.

43. *Id.*

44. N.D. R. CT. 6.2.

45. HAYDOCK & SONSTENG, *supra* note 41, § 2.14; *see also* DECOF, *supra* note 1, § 2.02 (noting the greater weight placed on an opening statement if left uncontradicted).

46. *See* JULIEN, *supra* note 5, §§ 5.01, 6A.06 (stating that the opening statement of the defense in a criminal case should be an aggressive reminder of the importance of safeguards, such as the high burden of proof of the prosecution).

47. LANE, *supra* note 3, §10.62.

48. *E.g.*, State v. Harris, 839 S.W.2d 54, 68 (Tenn. 1992), *cert. denied*, 113 S.Ct 1368 (1993) (finding no reversible error by the trial court for refusing the defendant an opportunity to comment on prosecuting attorney's opening statement, although the interruption may have been premature); State

whelming majority of such cases are criminal. If the court imposes a *Marmon*-like restriction on a defendant, allowing the attorney to go only so far as outlining the evidence defendant will produce, then the defendant has no real opening statement.[50]

A Montana attorney may have best illustrated the frustration which some defense counsel have, when he delivered the following complete opening statement after being denied the opportunity to mention the burden of proof, presumption of innocence, or the evidence discussed by the prosecuting attorney:

> Ladies and gentlemen, I have merely a short statement to make to you. I would ask that you listen to the evidence carefully, and that you listen also to not only what you do hear, but also to what you do not hear, because it is the position of the defendant that the State of Montana cannot prove each and every element of this charge. Thank you.[51]

Surely *Marmon* was not intended to prohibit parties from giving juries a basic understanding of their defenses. By refusing to apply such a strict standard against defense openings, North Dakota enables the defense to make a meaningful opening. However, if the defense attempts to abuse its freedom, the judge can impose restrictions.[52] This practice seems to work. It is significant that North Dakota has not experienced well-grounded civil or criminal appeals from any party claiming undue restriction in opening, and there are very few cases holding that a party went too far in opening statement.[53]

There is limited utility in writing a special purpose clause to cover defense openings. States which have adopted rules governing the scope of defense openings have certainly not avoided substantial appeals concerning alleged unfair restrictions on opening statements.[54]

---

v. Mash, 399 S.E.2d 307, 310 (N.C. 1991) (noting that it is not the purpose of opening statement to allow the parties to comment on the other side's evidence).

49. *E.g.*, Williams v. Wise, 476 P.2d 145, 146-47 (Ariz. 1970) (refusing to allow one defendant to discuss issues which the other defendant had discussed in opening).

50. *Cf.* United States v. Thomas, 1994 U. S. App. LEXIS 32669 at *11 (6th Cir. November 15, 1992) (per curium) (prohibiting the defense from setting forth facts in opening to attempt to demonstrate that the prosecution witness' credibility was questionable, upon which the entire defense rested).

51. State v. Martinez, 613 P.2d 974, 977 (Mont. 1980) (vacating the conviction on other grounds).

52. *See infra* part II.C.

53. *See infra* parts II.B and II.C.

54. *E.g.*, People v. Childress, 633 N.E.2d 635, 650 (Ill. 1994), *cert. denied*, 115 S. Ct. 215 (1994). Illinois has one of the higher rates of appeal on the issue of improper restriction of opening statements, despite a broader statement of purpose. The *Childress* decision outlined the purpose as: "The purpose of an opening statement is to advise the jury concerning the question of fact involved, to prepare their minds for the evidence to be heard and give them an idea of the nature of the action and defense." *Id.* (quoting the trial court judge's ruling on an objection during opening statements).

B. DISCRETION OF THE TRIAL COURT

The control and scope of opening statements and closing arguments is largely a matter left to the discretion of the trial court.[55] The trial court maintains control over the substance and vigor of opening statements.[56]

Trial courts also have substantial discretion with regard to available remedies when improper comments are made. The trial court's ruling on a motion for mistrial will not be reversed unless a manifest injustice appears.[57] The trial court's determination to grant or deny new trials by reason of misconduct of counsel will not be reversed on appeal absent a clear abuse of discretion.[58] Other sanctions include sustaining objections and issuing curative instructions, forced retraction of improper remarks, and sanctions against the offending attorney.[59]

There are several good reasons for investing the trial court with such discretionary powers. The variety of issues present in trials is infinite, and it would be impossible to design wise rules which would govern all possible combinations of issues likely to arise in openings. The trial court is obviously in a better position to judge the impact of improper remarks on the jury than the appellate court because it can view the jury. Finally, the limited number of appeals based on improper opening statements indicates that in North Dakota, the discretion appears to be wisely used.

C. DEFINING IMPROPER OPENING STATEMENTS

Rather than defining what are proper subjects of opening statements, North Dakota decisions concentrate on what is improper. The following categories of cases stand as a clear warning of the danger areas in opening.

1. *Arguing in Opening Statement*

Courts in North Dakota,[60] and most other jurisdictions,[61] do sustain objections to argumentative opening comments. This objection appears raised more than any other with regard to opening statements,[62] and yet

---

55. State v. Schimmel, 409 N.W.2d 335, 342 (N.D. 1987) (referring to opening statements, although the court spoke of opening *arguments*).

56. *Id.*

57. State v. Kaiser, 417 N.W. 2d 376, 379 (N.D. 1987).

58. *Id.*

59. *See infra* part II.D.

60. *E.g.*, State v. Loyland, 149 N.W.2d 713, 728 (N.D. 1967) (sustaining an objection for argument, but denying motion for mistrial by the trial court; decision upheld).

61. DECOF, *supra* note 1, § 2.03[2][d].

62. This conclusion comes from listening to the many North Dakota judges who work with

American courts have not provided clear guidance on what constitutes improper argument.[63] It appears that the objection for arguing is a catch-all for any improper remark.[64] Such a catch-all is probably necessary because no person has yet been able to set out all of the ways in which attorneys have made improper remarks in opening statements.[65] Clearly, an attempt to give closing argument in opening statement is improper.[66] Parties should go only as far as reasonably necessary to assist the jury in understanding what the case is about so that they can understand the evidence yet to be received.[67]

While objections for arguing are common at the trial level, they have been rare subjects on appeal. North Dakota's only reported decision showing a trial court sustaining an objection for argumentative remarks is not very informative. In *State v. Loyland*,[68] an aggravated reckless driving case, the prosecutor told the jury in opening that "[w]e will further show by competent evidence that the defendant's car, when pulled out of the ditch where it came to rest, contained empty, full and partially full beer cans."[69] Although the trial court sustained the defense objection to the remarks, the State proved the allegations through testimony without getting the cans in evidence.[70] It is not clear just what part of the opening was "argumentative." The appellate decision affirming the conviction found nothing improper in the prosecutor's statements, or the admission of the testimony about the cans.[71] The information which the trial court would not allow to be used in opening statement would appear to qualify under the *Marmon* standard as helpful.[72]

Attorneys opposing improper remarks will be more successful in winning an argument objection if they can prove the evidence does not meet the *Marmon* criteria, and that it might interfere with the jury's work by causing the jury to base its verdict on something other than the evidence.

---

students, as well as personal observation.

63. DECOF, *supra* note 1, § 2.03[2][d] (noting that opening statements are a cross between presentation and argument).

64. *See* Abraham P. Ordover, *Persuasion and the Opening Statement in* THE LITIGATION MANUAL 432 (John G. ed., Koeltl 2d ed. 1989) (providing a short list of statements generally constituting undue argument).

65. United States v. Smyth, 842 F. Supp. 20, 21 & n.3 (D. D.C. 1994) (deeming it argumentative to mention that co-counsel for the defense were married with three children).

66. *See* JULIEN, *supra* note 5, § 1A.01 (stating that the opening is an introductory outline and should not be used as a substitute for other portions of the trial).

67. State v. Marmon, 154 N.W.2d 55, 62 (N.D. 1967).

68. 149 N.W.2d 713, 728 (N.D. 1967).

69. State v. Loyland, 149 N.W.2d 713, 728 (N.D. 1967).

70. *Id.* at 730.

71. *Id.*

72. *See supra* text accompanying note 26 (describing the *Marmon* standard).

North Dakota's law regarding argument in opening statements, however, is not made easier by the fact that some courts use the terms "opening statement" and "opening argument" interchangeably.[73]

The suggestion that attorneys should not argue in openings, regardless of whether termed "opening statement" or "opening argument," is implied in *State v. Houle*.[74] In denying the defendant's claim that he was prejudiced by the trial court's refusal to grant a motion for change of venue due to pretrial publicity, the court noted that the pretrial news accounts were much the same as what the jurors would be given when the complaint was read and the jury was given basic factual accounts.[75] Implied in the court's comments is the conclusion that the attorneys comments in opening statement will be statements of the facts of the case without prejudicial comments by the attorneys.

2. *Reference to Evidence Not Produced*

If a party promises evidence in opening statement, but fails to produce it, there is a potential danger that the jury will reach a decision based on the lawyer's words. Failure to call an important witness who had been referred to in opening statement, however, is not error so long as other evidence supports the matters discussed in the prosecutor's opening, and so long as there is no showing of bad faith, or any deliberate attempt to misstate the facts.[76] In outlining the State's case, the prosecuting attorney should be allowed considerable latitude.[77]

A much more serious matter is when counsel simply does not have the evidence that the attorney claimed to have in opening statement. For example, a claim that evidence would be presented by a witness who would testify that the employees of the defendant had been drinking could not be established through the witness, or apparently by any other witness.[78] The attorney was therefore forced to retract the misleading opening remarks in open court with the jury present.[79]

3. *Reference to Inadmissible Evidence*

It is very dangerous for an attorney to refer to inadmissible evidence in opening statement. Perhaps the most dangerous remarks are

73. South v. National R.R. Passenger Corp., 290 N.W.2d 819, 834 (N.D. 1980).

74. 293 N.W.2d 872, 874 (N.D. 1980).

75. State v. Houle, 293 N.W.2d 872, 874 (N.D. 1980).

76. State v. Marmon, 154 N.W.2d 55, 62-63 (N.D. 1967).

77. *Id.* at 62.

78. *See* South v. National R.R. Passenger Corp., 290 N.W. 819, 834-35 (N.D. 1980) (receiving a sworn signed statement from a key witness denying any knowledge of employees drinking after opening statements had been given).

79. *Id.*

those relating to inadmissible criminal convictions of a party or an associate of a party.

In *State v. Welch*,[80] the prosecutor mentioned in opening that a girlfriend of the defendant had been convicted of being the defendant's accomplice in the crime for which the defendant stood trial.[81] The comment was clearly improper because it suggested guilt by association.[82] The trial court sustained the objection, but did not give a cautionary instruction.[83] The conviction was affirmed although the North Dakota Supreme Court suggested that the better course of action would have been to declare a mistrial.[84] The defendant waived the objection to the statement by failing to request a cautionary instruction.[85] The failure of the trial court to give a cautionary instruction on its own motion was found not to be obvious error.[86]

In *State v. Robideaux*,[87] a defendant complained that the prosecution's opening statement improperly advised jurors of a prior conviction of the defendant.[88] The court compared the fault of both attorneys in opening statement, and found that the complaining party was the most at fault.[89] The defendant was on trial for negligent homicide, and had earlier pleaded guilty to leaving the scene of the accident in the same matter.[90] It was not improper for the prosecuting attorney to make very brief reference to the fact that after the accident, the defendant "left."[91] The prosecution did not tell of the prior conviction, nor did any prosecution witness.[92] The defense counsel's opening did advise the jury of the guilty plea, and therefore the defendant could not complain of prejudice.[93]

Comment on the other party's criminal record is sometimes permissible. In *Clark v. Josephson*,[94] a civil case involving an automobile accident, it was not error for the plaintiff's attorney to include in opening statement a reference to the defendant's conviction for drunken driving in connection with the accident which was the subject of the

80. 426 N.W.2d 550 (N.D. 1988).
81. State v. Welch, 426 N.W.2d 550, 552 (N.D. 1988).
82. *Id.* at 553.
83. *Id.*
84. *Id.* at 555.
85. *Id.* at 553.
86. *Welch,* 426 N.W.2d at 554.
87. 493 N.W.2d 210 (N.D. 1992).
88. State v. Robideaux, 493 N.W.2d 210, 213-14 (N.D. 1992).
89. *Id.*
90. *Id.* at 211.
91. *Id.* at 213-14.
92. *Id.* at 213.
93. *Robideaux,* 493 N.W.2d at 214.
94. 66 N.W.2d 539 (N.D. 1954).

case.[95] The trial court had instructed the jury to disregard remarks by counsel concerning any alleged criminal proceedings.[96] The appellate court also noted earlier in the opinion that the defendant's guilty plea should have been admissible as a statement against interest.[97]

Reference in opening statement to the confession of another defendant in a case completely unrelated to the trial, for the illustrative purpose of explaining the difference between direct and circumstantial evidence, was not highly prejudicial.[98] Any harm to the defendant was cured by the court's admonition to ignore the comments.[99]

In *Lange v. Cusey*,[100] a civil matter involving a vehicle accident, reference to inadmissible evidence in opening statement called for a new trial to be ordered.[101] The defendant's attorney informed the jury in opening that his client had driven trucks over 2,000,000 miles without having an accident, implying that he had the character trait of being a careful driver which violated Rules 404 and 608 of the North Dakota Rules of Evidence.[102] Later in the trial, he violated the same rules by remarking that the plaintiff had the character trait of being a bad driver.[103] On review, the North Dakota Supreme Court declined to second-guess the trial court's determination that the remarks tainted the verdict.[104]

Improper remarks pertaining to inadmissible evidence do not always result in relief from the jury verdict. In *Allen v. Kleven*,[105] a civil personal injury case, the attorney for the defendant and third-party plaintiff advised the jury in opening statement that the plaintiff and third party-defendant were romantically involved, and that this was the reason that the boyfriend had not also been sued.[106] The plaintiff objected and the court sustained the objection and instructed the jury to disregard the remarks.[107] Later, defense counsel cross-examined one of plaintiff's witnesses in an effort to prove that the witness was lying because of a former relationship with the plaintiff.[108] Again the court sustained the

95. Clark v. Josephson, 66 N.W.2d 539, 543-44 (N.D. 1954).

96. *Id.* at 544.

97. *Id.* at 543.

98. State v. Thiel, 515 N.W.2d 186, 189 (N.D. 1994).

99. *Id.*

100. 379 N.W.2d 775 (N.D. 1985).

101. Lange v. Cusey, 379 N.W.2d 775, 776-77 (N.D. 1985).

102. *Id. See also* N.D. R. EVID. 404 & 608 (containing relevant language of the rules regarding character trait evidence).

103. *Lange*, 379 N.W.2d at 777.

104. *Id.*

105. 306 N.W. 2d 629 (N.D. 1981).

106. Allen v. Kleven, 306 N.W. 2d 629, 631-32 (N.D. 1981).

107. *Id.*

108. *Id.*

plaintiff's objection and instructed the jury to disregard the remarks.[109] On appeal, plaintiff argued that the totality of the improper conduct of defense counsel in opening statement and cross-examination was so great as to be prejudicial.[110] Although it found that defendant's counsel had attempted to prejudice the jury, the trial court's reaction in sustaining objections and instructing the jury to disregard the improper comments was found to be reasonable and was all that could have been expected.[111] The plaintiff had not raised the issue of the combined effect of counsel's improper conduct at the trial level, and thus could not raise the issue for the first time on appeal.[112]

Appellate relief has also been withheld when the plaintiff's opening remarks related to evidence which was not held inadmissible until after opening statement was completed.[113] During opening statement, plaintiff's attorney quoted from the deposition of a defendant.[114] A portion of the quoted material included an admission that one of the reasons that the defendant did not cover the injured plaintiff with his jacket following the accident was that the defendant didn't want to get his new fifty-five dollar jacket bloody.[115] After opening statements, the trial court excluded the portion of the testimony with regard to the engineer not wanting to get his jacket bloody, because its prejudicial effect outweighed its probative value.[116] Other admissions concerning his failure to assist were admitted.[117] The court held that in view of the trial court's giving the jury the standard instructions advising that the remarks of attorneys were not evidence and that any comments not supported by the evidence were to be wholly disregarded, plaintiff's opening remarks were not prejudicial error entitling defendant to a new trial.[118]

Of course, an appeal on the ground that opening statement contained references to inadmissible evidence will fail if the court finds that the evidence is in fact admissible.[119]

---

109. *Id.*
110. *Id.* at 633.
111. *Allen*, 306 N.W.2d at 635-36.
112. *Id.*
113. South v. National R.R. Passenger Corp., 290 N.W. 2d 819, 835-36 (N.D. 1980).
114. *Id.* at 835.
115. *Id.*
116. *Id.*
117. *Id.*
118. *South*, 290 N.W.2d at 837.
119. *E.g.*, State v. Loyland, 149 N.W.2d 713, 729 (N.D. 1967) (determining that opening statement reference to beer cans at the scene of the arrest was substantiated by testimony of a witness at trial, thus was not prejudicial).

3. *Inflammatory Remarks*

It is generally held that inflammatory language should not be used in voir dire, opening statements or closing arguments.[120] In *State v. Mehralian*,[121] a case involving highly prejudicial remarks about the defendant's nationality and religion during voir dire and closing at the height of Iranian Hostage crisis, the North Dakota Supreme Court had no hesitation in reversing the conviction.[122] There is no reason to think that the outcome would have been any different if the remarks had occurred in opening statement rather than voir dire.

However, not all potentially prejudicial language will lead to a mistrial or reversal. In *State v. Kaiser*,[123] a prosecution for terrorizing, the prosecuting attorney asked in closing argument if it would be necessary to wait until the victim's body was brought into court before the evidence was sufficient to convict.[124] Although it held that there was no abuse of discretion with regard to the trial court's denial of the motion for mistrial and subsequent denial of a new trial, the reviewing court made clear its disapproval of prejudicial remarks. The remarks would have been just as improper in opening.[125]

The objection to inflammatory remarks will obviously not succeed where the court finds that the alleged inflammatory remarks were actually a fair statement of admissible evidence.[126] In *State v. Bossart*,[127] the prosecutor referred to evidence that the defendants were associated with a gang which had committed a crime not charged in the case on trial.[128] The uncharged crime was found to be so intertwined with the crime at issue that it was necessary to refer to both crimes and hence there was no error in the opening.[129]

4. *Statements of the Law*

In a case involving improper closing argument, the court noted that if statements of the law had been pertinent to the issues, it was within the

---

120. *See* State v. Kaiser, 417 N.W.2d 376, 379-80 (N.D. 1987) (discussing remarks made during closing arguments).

121. 301 N.W.2d 409 (N.D. 1981).

122. State v. Mehralian, 301 N.W.2d 409, 418-19 (N.D. 1981) (discussing prejudicial remarks in voir dire and closing arguments, such as evidence not substantiated).

123. 417 N.W.2d 376 (N.D. 1987).

124. State v. Kaiser, 417 N.W.2d 376, 379 (N.D. 1987).

125. *See id.* at 380 (Levine, J., concurring specially) (noting that the remarks were "off-base and created serious error").

126. State v. Bossart, 240 N.W 606, 608 (N.D. 1932).

127. 240 N.W 606, 608 (N.D. 1932).

128. State v. Bossart, 240 N.W. 606, 608 (N.D. 1932).

129. *Id.*

province of the court to state the law, and not the attorney.[130] The same logic could be applied to statements of the law in opening statement, and such holding has been made in other jurisdictions.[131]

Counsel have escaped reversal when a comment on the law was correct. For example, the prosecuting attorney in a securities law case told the jury in opening that there was no dispute that the defendant did not register himself or his promissory notes.[132] The only question was whether he should have registered them.[133] The comments were held not to be prejudicial because the notes were securities as a matter of law.[134]

A strong case can be made for having the trial court give preliminary instructions as to applicable law before opening statements and then allowing attorneys to relate the law to the evidence which will be presented. In many cases, the entire defense is based on the burden of proof, and in criminal cases, on reasonable doubt. A jury simply cannot understand the defense unless they have some preliminary help as to the law. In negligence cases, the jury has a similar need to understand the law of defenses to negligence. It appears that in some North Dakota courts, attorneys are allowed to make some comments on the law as early as voir dire.[135]

5. *References to Defendants Not Testifying in Criminal Cases*

Defendants in criminal cases have often alleged that the prosecutor's opening statement amounts to a comment on the defendant's failure to testify. This violates the United State's Supreme Court holding in *Griffen v. California*.[136] Prosecutors are deemed not to comment on the defendant's failure to take the stand in opening, because comments in opening statement are made before the defendant has an opportunity to take the stand.[137] The prosecuting attorney should take care, however,

130. State v. Gulke, 38 N.W. 2d 653, 726 (N.D. 1949).

131. For additional authority of statement of the law in openings, see cases collected in JULIEN, *supra* note 5, § 1A.06.

132. State v. Goetz, 312 N.W.2d 1, 14 (N.D. 1981).

133. *Id.*

134. *Id.*

135. Personal observation of civil and criminal trials has indicated attorneys often discuss burden of proof during voir dire.

136. 380 U.S. 609, 615 (1965).

137. State v. His Chase, 531 N.W.2d 271, 273 (N.D. 1995) (determining that the comments were made during opening statements, thus not infringing on the defendant's constitutional privilege against self-incrimination); State v. Flohr, 310 N.W. 2d 735, 736-37 (N.D. 1981) (stating the general principle that prosecutors may not comment on defendants' failure to testify on their own behalf as it implicates the privilege against self incrimination).

that opening remarks cannot be construed as a challenge to take the stand.[138]

In *State v. Kroeplin*,[139] the defendant was not prejudiced by her own counsel's comments in opening statement to the effect that she would not testify.[140] Counsel had promised the jury during voir dire that the defendant would testify.[141] When it became apparent that she could not testify, counsel properly informed the jury of that fact during opening statement, and the trial court instructed the jury that no inferences should be drawn from the defendant's choice not to testify.[142]

6. *Combinations of Error*

Reversal due solely to improper opening statements or closing arguments is rare; however, when prejudicial remarks in opening or voir dire are combined with other errors at trial, a finding of prejudicial error is more likely.[143]

D. REMEDIES FOR IMPROPER COMMENTS

Improper remarks may result in an order for a new trial, where counsel's comments have tainted a verdict.[144] The trial court is in a unique position to observe the impact of the remarks, and the appellate court will only reverse for a manifest abuse of discretion.[145]

Dismissal is not a proper remedy for improper opening remarks; the proper motion would be a motion for a mistrial.[146] "The granting of a mistrial is an extreme remedy which should be resorted to only when there is a fundamental defect or occurrence in the proceedings that makes it evident that further proceedings would be productive of manifest injustice."[147]

As extreme as the remedy of a mistrial is, it is sometimes warranted. The North Dakota Supreme Court has suggested that when the prosecuting attorney jeopardized the integrity of the proceedings in opening

---

138. *His Chase*, 531 N.W.2d at 273.

139. 266 N.W.2d 537 (N.D. 1978).

140. State v. Kroeplin, 266 N.W.2d 537, 543 (N.D. 1978).

141. *Id.* at 543.

142. *Id.* at 542-43.

143. *See, e.g.*, Hunder v. Rindlaub, 237 N.W. 915, 924 (N.D. 1931) (determining that error in admitting inadmissible evidence was more harmful because of the prominent reference to the evidence in opening statement); State v. Mehralian, 301 N.W.2d 409, 418-19 (N.D. 1981) (making highly prejudicial remarks about the defendant's religion and nationality may have been more prejudicial because they were raised not only in voir dire, but also in closing argument).

144. Lange v. Cusey, 379 N.W.2d 775, 778 (N.D. 1985).

145. *Id.* at 777.

146. State v. His Chase, 531 N.W.2d 271, 273 (N.D. 1995).

147. State v. Kaiser, 417 N.W.2d 376, 379 (N.D. 1987) (citing State v. Schimmel, 409 N.W.2d 335, 340 (N.D. 1987).

statement by referring to an inadmissible conviction of the defendant's accomplice, it would be better to grant the mistrial than to wait and see if the evidence overcame the injection of prejudice.[148] Nevertheless, upon finding that the defendant received a fair trial, the court found no abuse of discretion in the trial court's action.[149]

Curative instructions are the most commonly-used remedy for improper comments during opening. A jury is presumed to follow the trial court's admonition,[150] although there is a danger that the jury may not be able to disregard some comments.[151] Failure to request curative instructions, however, waives the objection to the statements.[152]

An attorney may also be forced to retract prejudicial remarks made in opening statements for which there is an insufficient basis.[153] The recorded retraction occurs immediately after the conclusion of openings.[154] It is not known if a retraction could be forced later in the trial if it turned out that opening remarks had no basis, but the opponent will certainly point out the failure to prove what was promised when closing argument is made.

The North Dakota Supreme Court has indicated that an attorney might be personally sanctioned for misconduct in closing argument,[155] and the same sanctions would seem appropriate if there was severe misconduct in openings.

E. PRACTICAL LIMITATIONS ON OPENING STATEMENTS

Care must be taken that a party's opening statement does not ease the way for admissibility of an opponent's evidence. Attacking the credibility of an opponent's witness by an express or implied charge of recent fabrication, improper influence, or motive in opening statement may open the door to admission of prior consistent statements by that witness.[156] Minimizing the extent of injury to a victim may also open the door to gory photographs showing the true extent of the injury.[157]

---

148. State v. Welch, 426 N.W.2d 550, 555 (N.D. 1988).

149. *Id.*

150. State v. Thiel, 515 N.W.2d 186, 189 (N.D. 1994).

151. *Welch*, 426 N.W.2d at 553.

152. *Id.*

153. South v. National R.R. Passenger Corp., 290 N.W.2d 819, 834-35 (N.D. 1980).

154. *Id.* at 834.

155. Andrews v. O'Hearn, 387 N.W.2d 716, 731 n.21 (N.D. 1986) (noting that sanctions can be used to deter inappropriate conduct).

156. State v. Burgard 458 N.W.2d 274, 279 (N.D. 1990); N.D. R. EVID. 801(d)(1)(ii). *See* State v. Reinart 440 N.W.2d 503, 507 (N.D. 1989) (stating that attorney's reference to prior statements by a witness during counsel's opening statements allowed for the rebuttal).

157. *See* State v. Miller 466 N.W.2d 128, 131 (N.D. 1991) (admitting photos at trial to show extent of injury after attorney referred to a large gash as a "slight graze" in opening statements).

Of course, attorneys lose credibility if they over-promise, and threat of that sanction may be most important of all the limitations on the content of opening statements.

F. PRESERVING THE RIGHT TO APPEAL IMPROPER REMARKS

To assure that the issue of improper opening statement is preserved for appeal, counsel should request the court reporter to record opening,[158] and object to the comments at the time that they were made. Mere failure to record opening statement, absent allegations of error occurring during the opening, is insufficient to afford a criminal defendant post-conviction relief.[159]

The failure to request a cautionary instruction waives the objection to a prosecutor's allegedly prejudicial statement.[160] At the time of the ruling on cautionary instructions, the lawyer should determine whether to request a mistrial. Failure to request a mistrial might be seen as a concession that the curative instruction was sufficient to remove prejudice.

Failure to win on issues of objection, cautionary instruction, or mistrial does not end the need to remain alert to the issue of preserving matters for appeal.

While the improper remarks in opening statement might, not by themselves, be grounds sufficient to require the granting of a mistrial, inappropriate opening comments combined with other improper conduct during the course of the trial might be sufficient grounds for relief. The issue of the effect of combined error must first be raised at the trial court, and cannot initially be raised on appeal.[161]

III. SUGGESTIONS FOR AVOIDING PROBLEMS IN OPENING STATEMENT

Reading through the hundreds of cases concerning allegations of improper opening statements, it becomes obvious that most of the mistakes made in court could have been avoided. Following four steps could prevent most opening statement problems:

1. Attorneys should review their openings before they are delivered. Many of the appellate decisions rest on references to evidence which turned out to be inadmissible. A hard-nosed

158. State v. Rougemont, 340 N.W.2d 47, 51 (N.D. 1983).
159. State v. Jensen, 333 N.W.2d 686, 693 (N.D. 1983).
160. State v. Welch, 426 N.W.2d 550, 553-54 (N.D. 1988).
161. Allen v. Kleven, 306 N.W.2d 629, 635-36 (N.D. 1981).

look at what really is admissible and confining remarks only to those items, will prevent most adverse rulings.

2. Pretrial rulings on questionable matters discussed in opening statements makes a great deal of sense. Consider the position of the trial judge who is asked to rule on an objection during the middle of one party's opening. The court probably had no advance warning of the problem, and time for research is very limited. There is continuing growth in decided cases which could not only have helped the court, but also counsel. There is simply not enough time to adequately consider many objections without so delaying opening that the jury forgets what was said before the objection.

3. Counsel should not assume that just because few trials have ended in mistrial because of opening remarks, that basically "anything goes" in opening. One of the reasons for the low rate of mistrials has been that of the appealed cases in North Dakota, most didn't involve comments that were tremendously prejudicial. Where comments are highly prejudicial, the court has not hesitated to act. When less prejudicial remarks are made, and then combined with other prejudice during the trial, the sum of all the prejudice may cause a court to act.

4. Have opening statements and voir dire recorded. This is not common practice in all North Dakota courts, and may not be appreciated by judges and court reporters. Nevertheless, it is very difficult to appeal improper remarks without a record.

IV. CONCLUSION

An effective opening statement is an essential aid to the jury's understanding of the evidence which will follow. There will always be a tension between the advocate's desire to use openings to help win cases, and the judge's role of assuring that verdicts are based on the evidence, and not solely on the remarks of attorneys.

There will never be a complete list of rules of opening statements which will advise attorneys of what they can do in opening, but there are increasing guidelines of what attorneys may not say in opening statements. The conventional wisdom has been that before delivering opening, attorneys should get to know their trial judge. That is still good advice, but attorneys also need to get to know their appellate courts. If history is any indication, the number of guidelines concerning what cannot be done in opening statements will undoubtedly grow, but there will also have to be considerable latitude for increasingly complex cases.

For all of the problems involved with opening statements, is there any trial attorney who would opt for the Connecticut federal trial procedures that have the judge deliver openings? Is there any client who believes that an impartial judge could adequately allow the jury to know something as personal and as important as what the client's case is really all about? Our clients should hope that attorney-delivered opening statements, even with their problems, will continue for many years to come.