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## 28.2 Purpose and Scope

### A. In General

"The purpose of an opening statement is to permit the parties to present to the judge and jury the issues involved in the case and to allow them to give a general forecast of what the evidence will be." *See State v. Gladden*, 315 N.C. 398, 417 (1986); *see also State v. Elliott*, 69 N.C. App. 89, 93 (1984) ("[T]he proper function of an opening statement is to allow the party to inform the court and jury of the nature of his case and the evidence he plans to offer in support of it."). Counsel is permitted "something more than just a limited preview" of his or her evidence and should be allowed to state his or her legal claim or defense in basic terms. *State v. Freeman*, 93 N.C. App. 380, 389 (1989). The purpose of an opening statement is not, however, to argue the case, instruct on the law, or contradict the other party's witnesses. *State v. Mash*, 328 N.C. 61 (1991).

Whether to limit the scope of an opening statement rests largely within the trial judge's discretion. *State v. Paige*, 316 N.C. 630 (1986); *see also* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 9 ("Opening statements shall be subject to such time and scope limitations as may be imposed by the court."). Generally, however, counsel is "'afforded wide latitude in the scope of the opening statement.'" *Freeman*, 93 N.C. App. 380, 389 (quoting *Gladden*, 315 N.C. 398, 417).

### B. Permissible Content

During opening statement, the defendant is allowed to:

- Preview the evidence he or she intends to present. *State v. Gladden*, 315 N.C. 398 (1986).
- Set forth the grounds for his or her defense, i.e., state the evidence on which the claim or defense is based. *State v. Paige*, 316 N.C. 630 (1986).
- Point out facts that the defendant reasonably expects to bring out in cross-examination even if the defendant does not intend to present evidence. *Id.*

Defense counsel also may make the following general observations in an opening statement, although as a practical matter such observations do little to articulate the defendant's theory of defense to the jury. Counsel may:

- Tell the jury that it should give attention to all of the witnesses. *State v. Mash*, 328 N.C. 61 (1991).
- Ask the jury to consider each piece of evidence carefully. *State v. Freeman*, 93 N.C. App. 380 (1989).
- Inform the jury that the defendant intends to rely on the presumption of innocence and that the State has the burden of proof beyond a reasonable doubt. *Paige*, 316 N.C. 630, 648.

For additional considerations and objectives in making an opening statement, see *infra* Appendix 28-1, Guideline 7.4 Opening Statement from N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL (Nov. 2004). For the complete guidelines, see *infra* Appendix A of this manual.

### C. Impermissible Content

Counsel is generally given wide latitude in opening statements, but it is improper for counsel to engage in argument. The line between a permissible opening statement and an impermissible argument is not always easy to apply. *See State v. Freeman*, 93 N.C. App. 380, 389 (1989) ("The scope and extent of an opening statement are admittedly vague.").

Relying on a treatise on trial practice, the court in *Freeman* observed that counsel should not:

- refer to inadmissible evidence;
- exaggerate or overstate the evidence; or
- discuss evidence he or she expects the other party to introduce.

*Id.* at 389. These principles do not appear to preclude the defense from responding to assertions made by the prosecutor in his or her opening statement, including promises of proof made by the prosecutor.

*Freeman* also observed that it is improper to ask the jurors to resolve disputes, make inferences, or interpret facts favorable to the speaker—in other words, to argue the evidence as opposed to describing or highlighting it in a way that supports the defendant's theory of defense. *Id.* at 389; *see also* STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 394–95 (5th ed. 2015) (discussing the rule against argument and the techniques counsel may nonetheless use in an opening statement).

### D. Time Limits

The length of opening statements is a matter within the sound discretion of the trial judge. *See State v. Call*, 349 N.C. 382 (1998); N.C. GEN. R. PRAC. SUPER. & DIST. CT. 9. The N.C. Supreme Court has upheld a trial judge's decision limiting the defendant's opening statement to five minutes. *See Call*, 349 N.C. 382; *see also State v. Fie*, 80 N.C. App. 577 (1986) (finding that trial judge acted within his discretion in limiting each defense

counsel's opening statement to fifteen minutes), *rev'd on other grounds*, 320 N.C. 626 (1987). Trial judges are generally not so restrictive, however.

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***Practice note:*** Regardless of whether the trial judge sets a time limit, counsel will want to focus the opening statement on the aspects of the case most important to the defendant's theory of defense. If, however, the judge intends to set a time limit that does not allow you to apprise the jury adequately of the pertinent evidence to be presented in the case, be prepared to object and to explain to the judge why the circumstances of the case require additional time.

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