28.3 Reserving or Waiving Opening Statement

A. Reserving

If the defendant will be offering evidence, he or she has the right to reserve opening statement and give it after the State's case-in-chief. G.S. 15A-1221(a)(6). It is the rare case, however, in which it is beneficial to the defense to reserve opening until after the jury has heard the State's entire case.

Opening statements afford counsel an opportunity at the outset to draw the jury's attention to evidence that the parties expect to be introduced as well as to gaps in the evidence. By reserving opening statement, the defense allows the State's evidence to be viewed without direction from defense counsel and without benefit of a forecast of the defense's theory of the case. Some behavioral scientists have reached the conclusion that up to "80 to 90 percent of all jurors come to a decision during or immediately after the opening statements." Dr. Donald E. Vinson, *Excerpts from National Institute on Litigating "Rule of Reason" Cases: Jury Psychology and Antitrust Trial Strategy*, 55 ANTITRUST L.J. 591, 591 (1986).

The supposed advantages of reserving opening statement—such as waiting to hear the State's evidence before revealing the defendant's theory of defense—are generally outweighed by the advantages of communicating to the jury early in the case. Ordinarily, counsel should have sufficient information through discovery, particularly under the broader discovery rules now in effect in North Carolina, to know the evidence that the State will present and to develop the theory of defense that the defendant will advance. There may be strategic reasons not to reveal particular information in an opening statement—for example, problems with the anticipated testimony of a State's witness, which you hope to draw out on cross-examination, or evidence that you aren't certain will be admissible. Even a brief opening statement, however, will communicate to the jury the broad outlines of your theory of defense and convey an alternative way to view the evidence.

B. Waiving

Either party may elect to waive opening statements. N.C. GEN. R. PRAC. SUPER. & DIST. CT. 9. Waiver can be express or implied. A defendant's failure to request the opportunity to make an opening statement amounts to a waiver of this right. *State v. McDowell*, 301 N.C. 279 (1980).

As with the reservation of opening statement, above, it is the rare case in which defense counsel should consider waiving opening statement. By waiving opening statement, the defense allows the State's evidence to be viewed without direction from defense counsel and without benefit of a forecast of the defense's theory of the case. Accordingly, waiver of opening statement is generally ill-advised.

C. Giving an Opening Statement in District Court Cases

Defense counsel often do not request the opportunity to make an opening statement in cases tried in district court, thus waiving the right. Although district court judges may be resistant to taking up court time for opening statements, the same reasons for giving an opening statement in jury trials apply to bench trials—to give the fact finder an alternative view of the case at the outset. To alleviate the judge's concerns about moving the docket along, counsel may want to give a summary opening statement rather than a detailed review of the evidence—for example, in an assault case, counsel may limit the opening to alerting the judge that the case involves self-defense. Such a statement may help the judge keep that perspective in mind during the State's presentation of its case.