

28.4 Variance between Opening Statement and Proof

- A. Importance of Keeping Promises
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A. Importance of Keeping Promises

Counsel should not promise to present witnesses or evidence unless he or she is able to follow through with that promise. The failure to keep a promise to the jury made during opening statement may impair personal credibility, and the jury may view unsupported claims as a misrepresentation. *See* 2 PATRICK L. MCCLOSKEY & RONALD L. SCHOENBERG, CRIMINAL LAW DESK BOOK § 15.06[3], at 15–18 (2008).

As the N.C. Supreme Court has noted, “[a] cardinal tenet of successful advocacy is that the advocate be unquestionably credible. If the fact finder loses confidence in the credibility of the advocate, it loses confidence in the credibility of the advocate’s cause.” *State v. Moorman*, 320 N.C. 387, 400, 401 (1987) (defense counsel’s failure to present evidence of a complete defense to rape as promised in his opening statement “severely undercut the credibility of the actual evidence offered at trial, including defendant’s own testimony”).

B. Failure to Keep Promises and Ineffective Assistance of Counsel

It is not improper for the prosecutor, during closing argument, to highlight the defendant’s failure to introduce evidence that was promised during opening statement. *State v. Harris*, 338 N.C. 211 (1994); *State v. Anderson*, 200 N.C. App. 216 (2009). Defense counsel likewise may take advantage of the prosecutor’s failure to follow through on promised proof.

Counsel may render ineffective assistance of counsel if he or she fails to keep promises made during opening statement about central aspects of the case. *See, e.g., State v. Campbell*, 359 N.C. 644 (2005) (defense counsel was possibly ineffective by promising that the jury would hear evidence and instructions on self-defense and intoxication when he knew that the State might not introduce the defendant’s confession supporting these claims and the confession was subsequently not introduced); *State v. Moorman*, 320 N.C. 387 (1987) (defense counsel was ineffective because, among other things, he failed to present promised evidence of a complete defense to rape); *State v. Duncan*, 188 N.C. App. 508, 515–16 (2008) (ineffective assistance found where, among other things, defense counsel promised in his opening statement to “offer evidence as to Defendant’s state of mind, but he failed to do so, undercutting any possible defense that Defendant

could offer to the serious charges against him”), *rev’d on other grounds*, 362 N.C. 665 (2008).

Practice note: If you are unsure of the admissibility of evidence you intend to offer during trial, ask the trial judge for a pretrial ruling on the record so that you will know whether you can deliver the evidence before describing it in your opening statement. When the course of a trial leads you to decide not to present evidence or call witnesses promised during your opening statement, you should acknowledge the change during your closing argument and explain to the jury the reasons for your deviation.
