CHAPTER 31

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The Opening Statement

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Checklist of issues in particular cases, § 11.10
Double jeopardy, ch. 21
Subject matter of cross-examination, §§ 32.4A
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Although it is often stated that the opening statement is "not evidence"[1] and cannot be argument, the opening should be viewed as an unparalled opportunity to persuade the jury that the defendant is innocent. Counsel's focus on evidence that undercuts or contradicts the Commonwealth's presentation can influence how the jury receives and interprets the subsequent testimony. This chapter addresses (1) the governing procedural rules, (2) permissible and impermissible statements in an opening, (3) remedies for objectionable material in an opening, and (4) elements of effective advocacy in an opening.

§ 31.1 PROCEDURE

§ 31.1A. ORDER AND TIMING

The opening statement is governed by Mass. R. Crim. P. 24, which mandates that the Commonwealth shall give the initial opening statement at trial.[2] The defendant has the option of either making an opening statement immediately following that of the prosecutor or deferring it until after the Commonwealth has presented its evidence and rested, and the decision is solely that of the defendant provided that the proposed content of the opening is appropriate.[3] The failure of defense counsel to make an opening statement, either before the presentation of evidence or before a jury view, does not necessarily constitute ineffective assistance.[4]

Rule 24 provides that the opening statement shall be limited to fifteen minutes, although the judge has the discretion to reduce or extend the time.[5] Counsel should not hesitate to request additional time in a complex case, and in general, the court will allow defense counsel at least an amount of time equal to that used by the prosecutor.

§ 31.1B. REQUIRED FINDING AFTER COMMONWEALTH'S OPENING STATEMENT

The trial judge has the authority to enter a required finding of not guilty following the Commonwealth's opening statement if "it clearly appears from the opening statement that the defendant cannot be lawfully convicted."[6] The two

[1] Commonwealth v. LePage, 352 Mass. 403, 409 (1967).

[2] Mass. R. Crim. P. 24(a)(1). The theory is that the party with the burden of proof is the first to make an opening statement, and is the last to make a closing argument. Commonwealth v. Guisti, 434 Mass. 245, 254 (2001).

[3] Commonwealth v. Dupree, 16 Mass. App. Ct. 600, 601–04 (1983) (reversible error when judge refused to let defense counsel open until after prosecution had rested). *Cf.* Commonwealth v. McJunkin, 11 Mass. App. Ct. 609, 615–16 (1981) (if content impermissible, opening statement can be precluded).

[4] Commonwealth v. Cohen, 412 Mass. 375, 390–91 (1992). *See also* Commonwealth v. Scott, 430 Mass. 351, 357 (1999) (it was a "reasonable tactical decision" for the defense counsel not to make an opening statement where he did not plan on presenting any witnesses and intended to put defense case in through cross-examination).

[5] Mass. R. Crim. P. 24(a)(2); Super. Ct. R.7. *See also* Commonwealth v. Myers, 51 Mass. App. Ct. 627, 636 (2001)("brief opening statements tend to be the rule rather than the exception in criminal cases").

[6] Commonwealth v. Lowder, 432 Mass. 92, 100 (2000).

circumstances in which entry of a required finding might be warranted are when the opening statement "clearly and deliberately" admits a fact which precludes a conviction and requires an acquittal, and when the opening statement contains all of the facts to be proven at trial and they are insufficient to justify a conviction under any legal theory.[6.3]

The judge must give the prosecutor a full opportunity to be heard, and must weigh alternatives, such as the declaration of a mistrial.[6.5] If the question of whether to grant a required finding of not guilty is a close one, the judge should refrain from doing so. Double jeopardy principles may preclude a retrial after a court of competent jurisdiction enters a required finding of not guilty if jeopardy has attached.[6.7]

§ 31.1C. SEEKING A PRECHARGE

Prior to the opening statements, the judge may provide an overview of the case, including a preview of the instructions on the governing law. For example, where eyewitness identification or criminal responsibility will be at issue, jurors can benefit from hearing the model *Rodriguez*[7] or *McHoul*[8] instructions, respectively, prior to the presentation of testimony. Defense counsel should prepare written requests for instructions if it is likely that the judge will give such instructions sua sponte or if it would bolster counsel's opening statement.

§ 31.1D. JUROR NOTES

It is within the discretion of the trial judge to permit the jurors to take notes during the opening statements, although careful instructions should be given that emphasize that the opening does not constitute evidence.[9]

§ 31.2 CONTENT OF THE OPENING[10]

§ 31.2A. LIMITED TO ANTICIPATED ADMISSIBLE EVIDENCE

It is unprofessional conduct for counsel "to allude in his opening statement to any evidence unless there is a reasonable basis for believing in good faith that such evidence will be tendered and admitted in evidence."[11] The recitation may not include

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[6.3] *Id.* at 101.

[6.5] *Id.* at 103 (judge abused his discretion when he did not give the prosecutor an opportunity to be heard or to correct his opening statement).

[6.7] *Id.* at 103–106 (where jeopardy attached after the jury was empanelled and sworn, double jeopardy precluded a retrial of the defendant even after a required finding of not guilty was entered erroneously).

[7] Commonwealth v. Rodriguez, 378 Mass. 296, 310–11 (1979).

[8] Commonwealth v. McHoul, 352 Mass. 544 (1967).

[9] Commonwealth v. St. Germain, 381 Mass. 256, 265–70 (1980); Commonwealth v. Daley, 55 Mass. App. Ct. 88, 98 n. 3 (2002), f.a.r. granted 437 Mass. 1106 (2002). *See* discussion of juror note taking generally, *infra* § 36.2.

[10] *See also infra* § 35.3, detailing types of argument found improper in a prosecutor's closing argument.

[11] Prosecution *opening:* S.J.C. Rule 3:08 PF 11. *See also* Mass. R. Prof. C. 3.8; former S.J.C. Rule 3:07 DR 7-106(c)(1); Commonwealth v. Hoilett, 430 Mass. 369, 371–372 (1999)

speculation, argument, or appeals to sympathy.[11.5] Thus, although the prosecutor may assert a proposition that is fairly to be inferred from specific evidence,[12] she may not

(prosecutor's reference to a witness who was not on his witness list did not prejudice the defendant where testimony was insignificant); Commonwealth v. Santiago, 425 Mass. 491, 494 (1997) (prosecutor's repeated references, in opening and closing, to the victim's age, pregnancy, and birthday were improper and calculated to influence the jury to render a verdict based on emotion and sympathy for the victim. "Certainly the prosecutor is entitled to tell the jury something of the person whose life had been lost in order to humanize the proceedings. In a case such as this where the victim's character and personal characteristics are not relevant to any material issue, however, the prosecutor is under an obligation to refrain from so emphasizing those characteristics that it risks undermining the rationality and thus the integrity of the jury's verdict"); United States v. Moreno, 991 F.2d 943, 947–49 (1st Cir. 1993) (improper reference to rampant crime in community); Commonwealth v. Burke, 414 Mass. 252, 262 (1993) (mistrial not required because of prosecutor's allusion to evidence that was ultimately excluded at trial); Commonwealth v. Phoenix, 409 Mass. 408, 425 (1991) (improper for prosecutor, without supporting evidence, to invite jury to read racial animosity into situation); Commonwealth v. Ayre, 31 Mass. App. Ct. 17, 22 (1991) (improper for prosecutor to assert in opening that the defendant was uncooperative at the booking when defendant asserted *Miranda* rights); Commonwealth v. Crichlow, 30 Mass. App. Ct. 901 (1991) (same); Commonwealth v. Harris, 28 Mass. App. Ct. 724, 732–33 (1990), *rev'd on other grounds*, 409 Mass. 461 (1991) (nothing indicated bad faith in prosecutor's assertion that stabbing victim had not known a fight was likely); Commonwealth v. Sylvester, 13 Mass. App. Ct. 360, 364 (1982), *rev'd on other grounds*, 388 Mass. 749 (1983) (error, but not requiring mistrial, to allude to other crimes of defendant which were inadmissible); Commonwealth v. Fazio, 375 Mass. 451, 454 (1978) ("The prosecutor in a criminal action in general may state in his opening anything that he expects to be able to prove by evidence"); Commonwealth v. Robinson, 30 Mass. App. Ct. 62, 75–76 (1991) (same).

Defense opening: Mass. R. Prof. C. 3.4(e) ("a lawyer shall not . . . in trial, allude to any matter . . . that will not be supported by admissible evidence"); S.J.C. Rule 3:08, DF 12: Commonwealth v. Murray, 22 Mass. App. Ct. 984, 985 (1986).

[11.5] *See, e.g.*, Commonwealth v. Eneh, 76 Mass. App. Ct. 672, 679-682 (2010) (prosecutor's opening statement which described the defendant as a penniless, homeless, heroin addict, who worked "sporadic jobs, nothing to brag about," and "would borrow money off friends and family for lots of reasons," was prejudicial to the defendant in contributing to the jury's decision, and was therefore improper); Commonwealth v. Simpson, 434 Mass. 570, 583-584 (2001) (improper for the prosecutor to state in his opening that the evidence would show how different the victim and the defendant were, with the former a family man devoted to the protection of others as a police officer and the latter a person who had a complete disregard for human life; even if true, it is not relevant that the victim is a "good" person and the defendant is a "bad" person; instructions and strength of case made error harmless); Commonwealth v. Riberio, 49 Mass. App. Ct. 7, 8–11 (2000) (improper to refer to defendant's motive as "sick," to argue "why would [child victim] lie?," or to assert that the verdict would be guilty); Commonwealth v. Griffith, 45 Mass. App. Ct. 784 (1998) (improper to characterize defendant as a "drug dealer" based on a single sale). As the Appeals Court has noted, "The 'puzzling disparity' between the rule against argumentative statements and the practice of lawyers under the rule, and its basis for seeking appellate review, has been thoughtfully analyzed and criticized." Commonwealth v. Riberio, 49 Mass. App. Ct. 7, 9 n.2 (2000). *Contrast* Commonwealth v. Siny Van Tran, 460 Mass. 535, 554-556 (2011) (prosecutor's inclusion of witness's characterization of murder as a "mass execution" and one of the worst and most violent days in the history of Boston and later remark that "(f)ive men were executed like animals" considered excusable hyperbole and not improper); Commonwealth v. Oliveira, 74 Mass. App. Ct. 49, 55-56 (2009) (assertions in prosecutor's opening that "[y]ou don't put your hands on a woman," "[y]ou don't put your hands on her throat," and similar remarks regarding victim not improper as they were a fair reference to anticipated evidence that the assault and

speculate as to the defendant's state of mind in the absence of testimony on that point.[13] Similarly, it has been held improper for defense counsel to state in an opening that the defendant wanted to testify but on counsel's advice would not do so and was fortunate that another witness was available to dispute the police version of the incident.[14] Neither counsel may refer to the testimony of a witness she expects will claim the Fifth Amendment.[15] However, the admissibility or availability of the anticipated evidence need not be beyond all doubt.[16] The court has cautioned "prosecutors in particular, because they deal with subject matter that tends to be emotional, to proceed with caution that their opening statements do not slip into emotionally provocative argument."[16.5]

Unlike the prosecution, the defense opening is not restricted to evidence that will be introduced through its own witnesses but may include evidence to be elicited through cross-examination of the Commonwealth's witnesses.[17] The evidence must be grounded in counsel's representation that it is admissible and available and cannot be based simply on "intuitive sense that the evidence may be smoked out of a prosecution witness."[18]

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battery was without justification; however, the court noted that the comments had an "unnecessarily argumentative flavor"); Commonwealth v. Johnson, 429 Mass. 745, 748 (1999) (reference to defendant's four-month old baby in swing near whimpering mother was relevant to whether murder was with extreme atrocity); Commonwealth v. Thomas, 429 Mass. 146, 155–158 (1999) (reference to victim's family "in the front row" was not improper when one was to be called as a witness).

[12] Commonwealth v. Sylvia, 456 Mass 182, 183-189 (2010) (prosecutor's statements during opening argument of murder trial that speculated reasons for murder, and also presented the scenarios, were advanced in good faith and therefore did not create a substantial likelihood of a miscarriage of justice); Commonwealth v. Snow, 34 Mass. App. Ct. 27, 34 (1993) (prosecutor can offer underlying motive which is expected to be proved as long as expectancy reasonable and grounded in good faith); Commonwealth v. Doherty, 23 Mass. App. Ct. 633, 636 (1987) (statement that two shots fired inferred from bullets found in door jamb); Commonwealth v. Tuitt, 393 Mass. 801, 810–12 (1985) (search for defendant characterized as a "manhunt").

[13] Commonwealth v. Roberts, 378 Mass. 116, 122–23 (1979). *See also* Commonwealth v. Gruning, 46 Mass. App. Ct. 842, 844–846 (1999) (prosecutor's use of rhetorical question, "Why?," was a prelude to discussion of motive, and not a shift of the burden of proof).

[14] Lovett v. Commonwealth, 393 Mass. 444 (1984). The attorney's advice to his client clearly was inadmissible, and the reference to the witness implied that he would corroborate what the defendant would have said had he been called.

[15] Commonwealth v. Fazio, 375 Mass. 451 (1978).

[16] Commonwealth v. Fazio, 375 Mass. 451 (1978). *See also* Commonwealth v. Cheek, 374 Mass. 613, 617 (1978).

[16.5] Commonwealth v. Degro, 432 Mass. 319, 322 n. 4 (2000).

[17] Commonwealth v. Dupree, 16 Mass. App. Ct. 600, 602–03 (1983); Commonwealth v. Medeiros, 15 Mass. App. Ct. 913 (1983) ("If defense counsel reasonably expects on cross-examination to elicit specific evidence, e.g. that a prosecution eyewitness had deficiency in vision rendering impossible the observations to which the witness is expected to testify, a defense opening stating such a fact would be proper"); United States v. Hershenow, 680 F.2d 847, 858 (1st Cir. 1982) (cited in *Dupree*).

[18] Commonwealth v. Murray, 22 Mass. App. Ct. 984 (1986).

[19] [reserved]

In order to ensure that the proposed opening statement is not successfully challenged by the court or prosecution, counsel should be prepared to relate specific points in his opening to the source of the information (such as a witness or document) and the basis for believing that the evidence will be available through that source (such as statements of the witness contained in a probable-cause hearing transcript).[20] The prosecutor is not bound by the legal theory he espoused in his opening statement, and if the evidence supports a different theory of guilt, e.g., joint venture as opposed to the defendant's being the sole actor, the judge may instruct on it.[20.5]

§ 31.2B. PERSONAL OPINION

It is error for counsel to express personal knowledge of the facts of the case or his personal opinion regarding the credibility of a key witness, such as for a prosecutor to note that a witness had always cooperated and told the truth to the police.[21]

§ 31.2C. IMPLICATION OF COMMON INTEREST BETWEEN PROSECUTOR AND JURY

The court has disapproved an opening statement in which the prosecutor stated that he was "representing you, the people of the Commonwealth of Massachusetts," and noted that the defense counsel represented the defendant and compared his opening to "a friend telling you what a book is about before you have had the opportunity to read it," as this implies a special commonality of interest with the jury.[22]

§ 31.2D. APPEALS TO RACIAL, RELIGIOUS, OR ETHNIC PREJUDICE

The Supreme Judicial Court has held that appeal to racial, religious, or ethnic prejudices in opening statements is especially incompatible with the concept of a fair trial, because of the likelihood that such references will "sweep jurors beyond a fair and calm consideration of the evidence."[23]

§ 31.3 REMEDIES FOR AN OBJECTIONABLE OPENING

[20] *See, e.g.*, Commonwealth v. McJunkin, 11 Mass. App. Ct. 609, 615 n.6 (1981), in which the court implied that such a presentation to the trial judge might have resulted in reversal of the conviction.

[20.5] Commonwealth v. Silanskas, 433 Mass. 678, 691-692 (2001).

[21] Commonwealth v. Trigones, 397 Mass. 633, 642 (1986). This action is also a violation of the prosecutor's ethical obligation under S.J.C. Rule 3:07, DR 7-106(c)(4). *Contrast* Commonwealth v. Deloney, 59 Mass. App. Ct. 47, 51 (2003) (noting that permissible to use a narrative style in the opening statement where it did not suggest that the prosecutor had personal knowledge of the facts of the case or constitute improper vouching of the credibility of the witnesses; there is nothing wrong with a narrative as long as it remains clear to the jury that the narrative is a prediction of what will be established by the evidence).

[22] Commonwealth v. Sylvester, 13 Mass. App. Ct. 360, 364 (1982), *rev'd on other grounds*, 388 Mass. 749 (1983).

[23] Commonwealth v. Phoenix, 409 Mass. 408, 425 (1991) (quoting Commonwealth v. Mahdi, 388 Mass. 679, 693 (1983)).

§ 31.3A. BEFORE ARGUMENT: THE MOTION IN LIMINE

In any case where the admissibility of certain evidence will be disputed by the defendant, a motion in limine should be presented to the trial judge prior to the opening statements, seeking an order that the evidence be excluded. The judge usually will not have enough information at that point to make a final ruling, but she may direct the prosecutor to eliminate references to the evidence in the opening statement so that the defendant will not be prejudiced if the evidence is excluded at trial.[24] Because the motion in limine is directed toward particularly unfair evidence, it is a useful tactic to bring the motion even if the evidence is ultimately admitted because it may deny the prosecutor use of it in the opening, when the jury is at its most impressionable stage. The allowance of a motion in limine on an evidentiary point generally will not be reviewed on an interlocutory appeal.[25]

§ 31.3B. DURING ARGUMENT: INSTRUCTIONS, PRECLUSION, MISTRIAL

If an attorney exceeds the bounds of a proper opening statement, the court may:

1. Give curative instructions where sufficient.

2. Require counsel to retract and amend the opening[26] or, presumably, withdraw the statement in closing.[27]

3. Restrict the opening statement if it does not conform to the rules governing content or if it constitutes improper argument on the evidence.[28] A failure to provide the court, on request, with a recitation of the specific admissible evidence to which counsel will refer in opening empowers the judge to preclude it entirely.[29]

4. In a irremedial situation, declare a mistrial.[29.5] A mistrial provoked because of bad-faith prosecutorial action may preclude a retrial on double-jeopardy grounds,

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[24] *Cf.* Commonwealth v. McJunkin, 11 Mass. App. Ct. 609, 614–16 & n.6 (1981) (noting usefulness of motion in limine to alert the court to disputes concerning the proposed content of the opponent's opening statement). *Contrast* Commonwealth v. Geary, 32 Mass. App. Ct. 511, 513–14 (1992) (no error in denial of motion in limine concerning purported testimony of witness unable to be located prior to trial and who had not been served in hand by summons, even though he did not testify). For discussion of limine motions generally, *see infra* § 34.2.

[25] Commonwealth v. Anderson, 401 Mass. 133 (1987); Commonwealth v. Yelle, 390 Mass. 678 (1984). *Contrast* Commonwealth v. Beausoleil, 397 Mass. 206, 208 n.2 (1986) (because issue raised in numerous cases and speedy resolution warranted, interlocutory appeal of limine order appropriate).

[26] Commonwealth v. Riberio, 49 Mass. App. Ct. 7, 10 n.4 (2000). *See also* Commonwealth v. Gagliardi, 21 Mass. App. Ct. 439, 444 (1986).

[27] Commonwealth v. Riberio, 49 Mass. App. Ct. 7, 10 n.4 (2000). *See also* Commonwealth v. Hartford, 346 Mass. 482, 486 (1963) (prosecutor retracted statement in closing).

[28] For example, a judge could exclude the comments of defense counsel, who asked the jury to pay particular attention to the defendant's actions on the Commonwealth's booking procedure videotape and to what the jurors would not see occur on the tape. Commonwealth v. Mahoney, 400 Mass. 524, 530 (1987). *See also* Commonwealth v. Salemme, 3 Mass. App. Ct. 102 (1975); Commonwealth v. Clark, 292 Mass. 409 (1935).

[29] Commonwealth v. McJunkin, 11 Mass. App. Ct. 609, 614–17 (1981).

[29.5] Commonwealth v. Hoilett, 430 Mass. 369, 372 (1999) ("A mistrial may be appropriate 'where the force of the prosecutor's opening remarks was overwhelmingly

even though ordered on the defendant's motion.[30] A mistrial based on improper defense argument may be based only on "manifest necessity" and after consideration of various alternatives.[31] Double jeopardy bars a retrial unless the appellate court concludes that there was a manifest necessity for the action taken.[32] It is rare that an error will be considered so irremedial as to require a mistrial.[33]

When the prosecutor exceeds the bounds of a proper opening statement, defense counsel should note her objection, either immediately in midopening if the misstep is egregious or at the conclusion of the opening at the sidebar. Counsel may demand a mistrial, and if that is denied, request the lesser remedies, including that the jury be instructed forcefully that the opening statement does not constitute evidence.[33.5] The court has a duty to take prompt action to prevent counsel from prejudicing the jury with unprovable statements.[34]

§ 31.4 FAILURE TO PRESENT PROMISED EVIDENCE

Counsel should be alert to a particularly dangerous use of the opening statement in which the prosecutor relates in detail evidence that she then fails to present at trial. Because the opening statement is arguably the most powerful weapon in the prosecution's arsenal, the damage has been done and the absence of the evidence during the trial itself may not even be noticed.

Despite the serious prejudice, appellate courts have rarely found reversible error in this situation. Courts have held that the prosecutor may state in her opening anything she expects to prove,[35] noting that her good faith in that regard is to be presumed in the absence of evidence to the contrary,[36] or that the absent evidence was

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prejudicial and likely to leave an indelible imprint on the jurors' minds," quoting Commonwealth v. Fazio, 375 Mass. 451, 455 (1978)).

[30] United States v. Dinitz, 424 U.S. 600, 611 (1976). *See supra* § 21.3.

[31] Lovett v. Commonwealth, 393 Mass. 444, 448–50 (1984); Illinois v. Somerville, 410 U.S. 458, 461 (1973) (if mistrial declared without defendant's consent, retrial permitted only if there was manifest necessity for the mistrial or if end of public justice would otherwise be defeated).

[32] See supra § 21.3. *See also* Commonwealth v. Lowder, 432 Mass. 92, 103–106 (2000).

[33] Commonwealth v. Cunneen, 389 Mass. 216, 223–24 (1983) ("fleeting" improper mention that defendant had made a statement to his probation officer about an incident not considered prejudicial).

[33.5] It has been noted that an admonition that "the opening statements and closing arguments are not evidence," is included in The Trial Juror's Handbook provided to all prospective jurors by the Office of Jury Commissioner for the Commonwealth. Commonwealth v. Daley, 55 Mass. App. Ct. 88, 98 n. 3, further app. rev. granted, 437 Mass. 1106 (2002).

[34] United States v. Dinitz, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring).

[35] Commonwealth v. Fazio, 375 Mass. 451, 455–56 (1978); Commonwealth v. Martin, 372 Mass. 412, 419 (1977).

[36] Commonwealth v. Gomes, 459 Mass. 194, 202-203 (2011) (it was not improper for the prosecutor's opening statement to be based on what he reasonably could expect to prove, when the contradiction in evidence in fact materialized as he predicted, and prosecutor acted in good faith); Commonwealth v. Geary, 32 Mass. App. Ct. 511, 513–14 (1992) (not unreasonable or less than good faith for prosecutor to mention expected testimony of a properly summoned

cumulative of other evidence and therefore not prejudicial to the defendant.[37] The only reversal on this issue concerned an assertion that the defendant had acknowledged to a witness that he had killed his son. This inflammatory, unsupported opening may have tipped the balance in a circumstantial case, and a new trial was ordered.[38]

If the promised, damning evidence does not materialize, defense counsel should move for a mistrial.[39] If this is denied, strong curative instructions should be requested informing the jury that any statements made in the opening that were not supported by evidence at trial should be disregarded as if never having been made. The most effective remedy may be to confront the situation head-on and comment in closing argument that the failure of the Commonwealth to present the evidence that it contended proved guilt injects a reasonable doubt in the case.[40]

A different situation is presented when a witness refuses to testify at trial, claiming the Fifth Amendment privilege against self-incrimination. It is improper for a prosecutor to call a witness who he knows is going to claim the privilege in order to develop an adverse inference against the defendant, and the proposed testimony should be omitted from the opening statement.[41] When a witness *unexpectedly* refuses to testify, the courts have been less helpful.[42] When a judge unexpectedly excludes evidence during a trial, having ruled it admissible in a pre-trial hearing and after the prosecutor has adverted to the evidence in her opening statement, the Commonwealth can petition a single justice in mid-trial for relief.[42.3]

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witness in opening statement, even where defense investigator unable to locate witness and thus believed witness to be unavailable to testify); Commonwealth v. Errington, 390 Mass. 875, 881–83 (1984); Commonwealth v. Fazio, 375 Mass. 451, 454 (1978).

[37] For example, the defendant was not prejudiced in a case where a particular witness did not appear at the trial, Commonwealth v. Cefalo, 381 Mass. 319, 332–333 (1980); when a composite drawing was not admitted into evidence, Commonwealth v. Germain, 396 Mass. 413, 419 (1985); and where a promise that a child witness would testify to anal and oral intercourse was true only in regard to the latter, Commonwealth v. Errington, 390 Mass. 875 (1984). In a particularly egregious instance, a prosecutor stated in his opening that a witness would testify that the defendant had told her, "I killed the prostitute and I'm going to kill the witness, too." The court characterized this as "not overwhelmingly prejudicial and likely to leave an indelible imprint on the jurors' minds." Commonwealth v. Breese, 381 Mass. 13, 15–16 (1980).

[38] Commonwealth v. Bearse, 358 Mass. 481, 486–87 (1970).

[39] Even a good-faith opening statement, which turns out to be unsupported by evidence at trial, may be so prejudicial as to require a mistrial. Commonwealth v. Bearse, 358 Mass. 481, 487 (1970).

[40] *See, e.g.*, Commonwealth v. Jackson, 384 Mass. 572, 580–81 (1981) (comment was made on failure of purported witnesses to testify); Jones v. Commonwealth, 379 Mass. 607, 619 n.23 (1980).

[41] Commonwealth v. Fazio, 375 Mass. 451 (1978).

[42] In one such case, the court found the evidence not critical and the defendant not prejudiced. Commonwealth v. Martin, 372 Mass. 412 (1977). Regrettably, the court reached the same conclusion where the prosecutor was permitted to relate expected testimony in his opening despite the fact that the witness had been held in contempt for refusing to testify at a voir dire conducted prior to the opening statements. Commonwealth v. Fazio, 375 Mass. 451, 455–56 (1978).

[42.3] *See, e.g.*, Commonwealth v. Sicari, 434 Mass. 732, 734 (2001)(single justice reversed trial judge, ruling that a curative instruction could not undo the harm to the Commonwealth and the defendant could raise the issue on appeal if convicted).

Apart from ethical prescription, one court has found that defense counsel's failure to present psychiatric witnesses to testify in a murder trial on the defendant's mental state, as promised in the opening statement, was ineffective assistance of counsel.[42.5] The failure to call the defendant as a witness after informing the jury that he would testify does not, in and of itself, constitute ineffective assistance of counsel.[42.6] When standby counsel has a good faith doubt concerning the defendant's competence to stand trial based on the defendant's opening statement, he has a right if not a duty to bring his concern to the attention of the court.[42.7]

§ 31.5 MAKING THE MOST OF THE OPENING STATEMENT

The opening statement of the defendant may be the most important moment in the trial for him because it is often the last time to reach jurors while they still have some semblance of an open mind. Empirical studies confirm what many lawyers intuitively believe: Most jurors form an initial impression after the opening statements, which remains with them throughout the trial and culminates in their ultimate verdict. It is essential for defense counsel to seize this opportunity to convince the jury that there is a meritorious defense.[43]

A common misstep by defense counsel is an opening statement that is too defensive in approach. The defendant stands accused of a crime, and the prosecutor has just presented a compelling picture of guilt through her opening statement. The jurors expect defense counsel to tell them not only that the defendant is not guilty but also

[42.5] Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988), S.C., 398 Mass. 838 (1986). *Contrast* Commonwealth v. Ortiz, 78 Mass. App. Ct. 1123 (2011) (defense counsel was not ineffective in failing to produce witnesses or evidence in support of his opening statements to the effect that the shooting in this case evolved from a dispute over drug dealing); Commonwealth v. Ramos, 77 Mass. App. Ct. 1120, 1120-1122 (2010) (reversing the allowance of a Motion for New Trial on grounds that defense counsel was not "inadequately prepared, incompetent or inattentive" by alluding to expert testimony about state of mind evidence in the opening statement of a murder trial and then deciding against presenting that evidence); Commonwealth v. Sleeper, 435 Mass. 581, 602-605 (2002)(counsel's assertion that the defendant was "insane" when he committed a killing was an "unfortunate colloquialism," and not a promise to present a lack of criminal responsibility defense); Commonwealth v. DiCicco, 44 Mass. App. Ct. 111, 121–125 (1998) (failure to call defendant as a witness, after promise to do so in the opening, did not mandate reversal where counsel stated that testimony would track defendant's statement to the police, which was admitted into evidence); Commonwealth v. Carney, 34 Mass. App. Ct. 922 (1993) (defendant not harmed by equivocal, brief, and undramatic reference in opening statement to anticipated alibi evidence ultimately not produced). *See also* Commonwealth v. Nardone, 406 Mass. 123, 127–128 (1989).

[42.6] Commonwealth v. Duran, 435 Mass. 97, 109-111 (2001) (ineffective assistance not shown merely by fact the defense counsel stated in his opening that the defendant "is going to take the stand and he is going to tell you in his own words where he was," and then defendant not called; failure to produce evidence promised in the opening is not, in and of itself, ineffective assistance of counsel; no indication in the record to explain why the promise was made in the first place, or why the defendant did not testify).

[42.7] Commonwealth v. Simpson, 428 Mass. 646, 652 (1999), S.C., 44 Mass. App. Ct. 154 (1998) (defendant's opening statement was "implausible, rambling, considerably incriminatory, largely immaterial, and unquestionably ineffective").

[43] As a technical matter, however, the failure to make an opening statement has not been held to be ineffective assistance. Commonwealth v. Cohen, 412 Mass. 375, 381–82 (1992).

(traditional burdens to the contrary) how he will prove it. If defense counsel simply reminds the jury that the defendant is cloaked with a mantle of innocence until the presumption of innocence is overcome, and that the prosecutor must prove each element beyond a reasonable doubt in order to secure a conviction, all that the jury hears is, “He's guilty.”

Except in rare instances, counsel should immediately follow the prosecutor in opening rather than delaying until the close of the government's case in chief. Boilerplate and platitudes must not dominate the beginning of the statement; instead, there should be a capsule summary of the nature of the defense. Defense counsel should affirmatively state to the jury that this is a case of a person being robbed and the “wrong man” being identified as the criminal, or this is a case of a person acting in self-defense (or a police vendetta, or sloppy investigation, or accident, etc.). The content of the opening should focus as much on the evidence that you will develop on cross-examination as it does on witnesses whom you will call.

Language is very important in the opening statement. Counsel may not overtly argue, nor may she express any type of personal opinion (usually preceded by the phrase “I think,” “I believe,” or “I know”). It is appropriate to state that “the evidence will show . . . , you will hear that . . . , and witness *X* will testify that . . . ,” and it is even more effective to state that “I will show . . . and I will present evidence that . . . .” It is misguided to fixate on the prosecutor's having the burden and therefore shy away from any assertions of evidence that you will present unless the sole defense theory is that the prosecution's case is built on speculation that will remain unproven at the close of the evidence.

The opening statement should not be prepared by counsel until she has put together her summation and an outline of the direct and cross-examinations. The defense theory need not be in stone, but it must be more than a series of options at the outset of the trial from which the ultimate defense will be chosen prior to closing argument. It is useful to write out the entire opening statement and select persuasive phrasing, with the opening later reduced to an outline.

Deliver the opening without notes if at all possible. Counsel should exude sincerity and avoid slick speeches. The defendant should be personalized by referring to him by name and providing a little background about him, whereas the opponent should be depersonalized by noting him as “the prosecutor,” a term with slightly threatening connotations. Standing four or five feet from the jury box, counsel should strive for an almost conversational tone, yet not without dramatic flourishes, and should address the jury by speaking to one juror at a time. Starting the opening strongly and ending with a brief reference to the cause of justice or similar rhetoric will provide the defendant with the best opportunity of grasping the advantage from the outset of the trial.