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Opening Statement

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> *We must put ourselves in the place of those who are to hear us, and make trial on our own heart of the turn which we give to our discourse in order to see whether one is made for the other, and whether we can assure ourselves that the hearer will be, as it were, forced to surrender. We ought to restrict ourselves, so far as possible, to the simple and natural, and not to magnify that which is little, or belittle that which is great. It is not enough that a thing be beautiful; it must be suitable to the subject, and there must be in it nothing of excess or defect.*
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> *-Blaise Pascal, Pensees (1660)*

I have always struggled with opening statement far more than closing argument. One is trying to state evidence that has not yet come in, and persuade a jury based on witnesses that they have not yet seen or heard. You are doing this cold, without the warm-up of a week or two of trial behind you. You are told that you cannot "argue." You don't know exactly where to begin, nor where to end. By the time of closing argument, your blood is up, there's so much to say, so much to remind the jury of, and at least for me that part just flows. But opening statements are much more difficult.

Opening statement is important, though not as important as some would have you believe. You've probably heard the old saw about studies showing that jurors make up their minds by the end of opening statement. That's a myth. The authors of the study themselves have disclaimed any such conclusion. I seriously doubt that juries decide the case based on the opening statements, and I seriously doubt that all the evidence they hear is unerringly shaped by the views they held after the opening statements were concluded. I have learned as an arbitrator myself that this is not so. More importantly, studies done by the trial lawyers using mock juries

show that it simply isn't true that minds are made up by the end of opening statements. Not that opening statements are unimportant – focus groups also show that an opening statement can persuade certain jurors to view the evidence in *a light more favorable* to the case that sounded more persuasive in the opening remarks. But they are not, as we lawyers say, "dispositive."

Understand that there are as many claims to the "right" way to opening statement as there are lawyers or "experts" in trial advocacy. I have a shelf of books and articles on opening statements, and I am sorry to tell you that there is vast disagreement about the "right" way to do it. For example, some authors suggest that the opening should start with an explanation of the trial and the players, sometimes known as "the windup."[1] Others consider this to be silly and wasteful of the most valuable moments of the opening.[2] Some authors go to great lengths to distinguish improper "argument" from permissible "statement," the distinction having something to do with whether you're stating facts or drawing inferences and conclusions, and many others dismiss distinction as untenable[3] And while I generally agree with the literate (if acerbic) Judge Stern, he recommends that the lawyer stand behind the "podium" (lectern) while addressing the jury, which nearly all other recent writers discourage.

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[1]See, e.g., Sonya Hamlin, *What Makes Juries Listen,* p. 114 (1985), Thomas Mauet, *Fundamentals of Trial Technique,* p. 51 (2d ed. 1988), and Fredric G. Levin, *Effective Opening Statements- The Attorney's Master Key to Courtroom Victory*, p. 503 (Executive Reports Corporation, 3d Ed. 1984)

[2]See, e.g., Judge Herbert Stern's savage comments on this approach in Volume One, Chapter 8 of his classic Trying Cases to Win, p. 191 (Wiley & Sons, 1991), Judge Ralph Adam Fine's *The "How-to-Win" Trial Manual,* p.18 (Juris Publishing, Rev. 2d Ed. 2001), and David Ball's *Theater Tips and Strategies for Jury Trials*, p. 147 (NITA, 3d Ed. 2003).

[3]See, e.g., Stern, Id., pp. 139- 142.

The bottom line is if you're looking for a certain answer from this seminar on the one "right" way to do opening statements, you're not going to get it. I've heard advice from dozens of trial advocacy "experts," I own all the books, I read all the articles, I've given and been on the receiving end of many opening statements, I've heard dozens more of them while sitting as a judge-arbitrator, and what lawyers seem to think is "best" is as much a matter of dispute as one's politics. I don't know what that one "right" way is, although I have some definite opinions on what definitely doesn't work, and some suggestions on what might work better. Above all, I am convinced that you must be honest and forthright in all respects, solid in your belief of the strength of your case, and be a truth-giver ton the jury, not just another lawyer. Whatever you do to diminish that role as the giver of truth diminishes your *ethos* and your ability to persuade. With that in mind, here are my thoughts:

The Basic Points of Certainty

1. Never reserve or waive opening statement in a jury trial

Some of the older texts recommended that a defendant consider reserving opening statement until the beginning of your case in chief, or waiving it entirely, on the theory that the plaintiff or prosecutor would be left in the dark as to what you were going to prove. I don't think this holds much water anymore, at least in civil cases, with the exhaustive discovery that is usually undertaken. Even more important, I don't think a jury should be left to halfway through the trial to hear the defense side of the case. In non-jury trials, many judges want trial briefs that more or less serve as opening statements. Those judges may strongly "encourage" you to waive an opening, and I see no harm in it in that situation. Otherwise, don't waive and don't reserve it until your case opens.

2. **Don't waste the start of the opening statement with a civics lesson**

You will actually find lawyers who start an opening statement with this sort of stuff:

Thank you for being here today, members of the jury. I know you've all taken a lot of time out of your lives to do this, and I and my client 'preciate-cha. [Shut up already– they are in court because they were ordered to be there, and all of them have better things to do.]

You know, this is one of the highest civic duties a citizen can perform, along with voting and paying your taxes. Our ancestors fought for the right for trial by jury, and they are still fighting for this right in places like Iraq. [I actually heard this line in a trial a few years ago] *Way back in the time of knights and kings, our ancestors brought arbitrary power to account through the use of the jury. Our society has decided it's much better to do it this way, than to fight it out in open combat, as they used to do.* [Jury's thinking, "I bet watching open combat would be lots more fun than having to listen to this."]

Now, let me explain a little of how this trial works. First, there's the judge up there, and he is like an umpire, controlling the courtroom and telling you what the law is. Then there's the lawyers for each side. They represent each party's position, and do their best to convince you of the merits of their respective cases. [The judge has already explained this to them, and I bet one or two of them has even watched television, and might even have seen a lawyer show.]

Now, keep in mind that what I say or the other lawyer says is not evidence, evidence only comes from the witnesses and the exhibits. [Moron– why would you diminish your minuscule credibility even further– David Ball's line is "does a stand-up comic say, 'nothing I say will be funny'"?]. *An opening statement is like a roadmap. It will be guide to what expect we expect to come in, and in what order. Now, once the evidence is finished, then the lawyers get to argue the case to you. Then, what you'll all been waiting for, you will get to go off together and deliberate....* [At this point, I can take it no longer and leap over counsel table and strangle this moronic clown].

Never, never, never do this. These are your first moments to speak to the jury. Do not waste them on insincere pap, even though people like Professors Jeans and Mauet recommend it. The jury should already have been given preliminary instructions that explained all of this to them. They don't need to hear it again, if they needed to hear it at all.[4] Primacy matters– your first words are important and this is a waste of them.

[4]MUJI 2d- Civil, Instructions CV101- 111. http://www.utcourts.gov/resources/muji/

As to the ritual "thankings": my reaction as an arbitrator (and the reaction of my colleagues) when we are told by a lawyer in opening statement that "*we would like to thank you for taking the time to serve as a arbitrators on this matter, and we know that we have a good panel who will carefully consider the evidence and render the correct decision*" is to want to roll my eyes, tell them that I'm being *paid* to do a job, that I *know* I will carefully consider the evidence, and that I *don't need* to be buttered up or pandered to. (So shut up and get on with it.) I would not be surprised if jurors think along the same lines.

3. **Give up talking like a lawyer**

This is really basic, but most of us forgot how to speak like human beings in law school. Use plain English and plain words. Here's a test-- would Paris say this to Britney? If not, don't use it. Just because you know words like "plaintiff," "aforesaid," "said," "validate," "exit" (for leave), etc. doesn't mean you need to use them: the highest of all art lies in concealing art. When possible, save the shop-talk for cops ("the perpetrator then exited the vehicle") or flight attendants ("please watch your step when you *deplane*.")[5]

4. **Forget the overblown orator- be conversational in your speech**

The days of bloviating oratory in the courtroom are long gone. You don't want to be making a speech *to* the jury; you want to be having a conversation *with* these people. (Even though they can't talk back.) This means not raising your voice except when necessary, not using

[5]And please don't use "connectives": "Ms. Jones, what, *if anything*, happened next?" The theory behind connectives was that otherwise the question might be objectionable or leading. (Like what, "Objection! The question assumes that something happened next."). Let them foolishly object. Think about it, what is Ms. Jones going to say? "Well, Mr. Carney, now that you ask, *nothing happened next*. The universe ceased and time ended."

exaggerated gestures, and not doing anything that would make you appear like a politician giving a stump speech. It doesn't mean you have to be timid and meek; just don't speechify.

5. **Don't say "my client," but don't be overly familiar either**

Don't distance yourself from your client by referring to him/her/it as "my client." It makes it sound like you have no direct connection, no real concern, and are just doing another job. On the other hand, don't patronize the jury or your client by referring to them by their first name or by otherwise appearing too involved to be a believable giver of truth.. I can recall a trial where the plaintiff's attorney apparently had been to a seminar where he was advised to always call his client by the first name, and the defendant by that title. While I agree with calling the opponent "the defendant" or "the plaintiff," he exercise in "intimacy" fell very flat, very quickly. When these people aren't stupid and their highly attuned to– indeed, *expecting*-- attempts at manipulation like this.

6. **Don't condescend or patronize the jury**

This is a tough one. Many confident, self-centered types who become trial lawyers have very little idea of the impression they make on others. For this sort of person, feedback does not exist. They speak, but they do not listen. This confidence can give a powerful drive to a trial lawyer, but it can also plug the ears to unintentional offense. Too often we hear lawyers talking down to jurors as if they were children or idiots. In fact, that is probably the most common complaint jurors make about lawyers, other than that we repeat ourselves too much. So don't, in your opening statement (or anytime else) project an attitude of this interior being conveying the important, complex information to a lesser form of life. This can be subtle, and you may need to have someone else watch you for it.

7. **Don't say "what I say is not evidence"**

I can't imagine why any lawyer would volunteer this bit of self-destructive useless information. Your are there to tell them the truth, even though you can't testify. Your credibility IS on trial– why diminish it gratuitously?

8. **If you are allowed to do so, get out from behind the lectern**

Not all judges will allow you to give an opening statement without standing behind a lectern. If you are able to do so, grab the opportunity. Any public speaker knows that he is much more powerful when not hiding behind a piece of furniture.[6] This *doesn't* mean you should hover over the jury or invade their space: stand a comfortable and respectful distance back to deliver your remarks. And please don't pace– it's distracting and annoying. Courtroom movement according to the principles of "anchoring" theory can be effective, but that's very much different than nervous and unplanned pacing back and forth.

9. **Don't read or memorize your opening statement**

Nothing kills the persuasiveness or spontaneity of a speech than reading it. This is why politicians and news professionals spend many thousands for systems that allow them to read a speech without looking like they are doing so. Almost as ineffective is a memorized opening statement. While I do recommend you memorize the first and last paragraphs of your talk, memorization is difficult and dangerous. If you mess up, or encounter an objection, you'll flail about for your next line. Leave memorization of lines to professional actors. I have a separate paper in the materials for this seminar on speaking without extensive notes. My recommendation

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[6] As I mentioned above, even an authority like Judge Stern disagrees with me on this. He thinks it's unprofessional not to use the lectern, and preaches the rules of familiarity with the jury in the courtroom. (See Volume 1 of his book at p. 232.)

is that you distill your opening statement down to key points in a one or two page outline, nothing more. If you know your case, the words will flow.

10. **Maintain eye contact**.

Eye contact is critical for persuasion. We don't want to believe people who won't look at us. It's one of the reasons that I now use PowerPoint only sparingly when speaking to smaller groups, like juries. The eyes are indeed the mirror of our souls, and the jury needs to see yours. I know, it's difficult when you're nervous: I struggled with this for years, being a naturally somewhat shy person. But it has to be overcome, and there are psychological devices too numerous to mention all here that can help you. A good one is seeing the jurors as charming children or as your friends. (Indeed, it is closer to truth than you realize- these people really do not want to see you fail.) Visualize this in your mind, and practice it– it helps. Another technique from public speaking is to speak one phrase or one sentence while looking at one juror, and then move on to the next with the next sentence or phrase. It will prevent discomfiting any particular juror by looking at them more than the others, which is the natural tendency.

11. **Use exhibits in opening**

Use demonstrative exhibits. Use that flip chart. Use blowups. Let the jury *see*, as well as *hear*. (But don't use Powerpoint as a crutch.) Get approval for exhibits in opening from the court or agreement from counsel on this. The general rule is that if it's likely to come in at trial, the judge will give permission to use it in opening. And you should have the courtesy to stipulate to unobjectionable exhibits by your opponent as well.

12. **Don't attack your opponent**. A snarling, bitter, querulous advocate projects insecurity, not confidence. You are the truth-giver, the Abe Lincoln in the courtroom. Don't

demean yourself or your case with snide attacks on your opposing client or their clients. If they are jerks, all the better for you. As they say in West Virginia, don't mud-wrestle with pigs– you'll get filthy, but the pigs always have a good time. And a word from personal experience– *sarcasm almost never works.*

13. **Avoid humor**

That is, unless you're very, very good. It usually falls flat and comes across as unprofessional and as an obvious attempt to ingratiate. People expect to see professionals, not comics. But if are one of the rare ones that can really pull it off– and they are rare-- more power to you.

14. **Be as brief as you can**

Make your opening as long as needed to explain the case, in accordance with the template I will set out later. But understand that you're probably going to bore the jury after half an hour or 45 minutes, unless you're a naturally compelling speaker. People really do have shorter attention spans nowadays, and seem to be programmed for a commercial interruption every fifteen minutes. Think of the two-minute openings and closings we see on television lawyer shows, and how brief, but effective they seem to be. Not that a two-minute opening or closing is a practical, but it does show you how much can be said in just a few words.

15. **Discuss damages if you represent the plaintiff**

Raise the issue of damages if you represent the plaintiff. You're there to get money, so don't tippy-toe around the issue. (At least not too much.) It's true that some people will be turned off by a demand for what seem to be a huge damage award right at the start of the case, before they've heard the facts and the basis for such an award. For that reason, my own preference is

simply to state that we will be asking for "substantial" damages, and leave the specifics for closing. Others disagree and may discuss damages in more specifics in opening statement. And there are still attorneys on the defense who will object to any mention of damage amounts in opening statements, although I am not aware of any Utah case that gives substance to this objection.

16. **Keep careful notes on your opponent's claims**

Keep track of promises or assertions made by your opponent in opening statement in opening statement. Claims not proved and promises not kept by the other side are wonderfully useful in your closing argument.

17. **Don't assert anything or promise anything you can't prove**

This is simply the flipside of the preceding point. There is a credibility battle going on throughout the trial. You are the Lincoln, the truth-giver. You will quickly lose that mantle if you exaggerate or make claims that you don't prove up.

18. **Address the warts of your case**

It's suicidal to ignore the weak points of your case. Especially as a plaintiff, you have to expect that the defense lawyer is going to address these weaknesses in his opening statement. Why not take the wind out of the sails? The power of the negative points in your case is going to be greater if your opponent brings them out first. So raise them, don't run from them, and address them forthrightly in your opening statement.

19. **Do not give a detailed chronology of events, a lengthy preview of what every witness will say, and maybe not even "the story."**

As Judge Fine points out in his book, lawyers usually structure opening statement in three ways: chronological, witness-by-witness, or "the story."[7] The first two are easy, but not persuasive. Don't use them. The third is better and is now the rage in trial advocacy,[8] and I am told that it can work well, especially with a gifted speaker. I've had trouble with it, seen it fail miserably, and now use a more straightforward technique that is more comfortable with my style.

20. **Do not overstate or exaggerate**

"Clearly, absolutely, you will have no trouble finding..." This is off-putting. If it's so clear, why am I here? As an arbitrator, when I hear those words, I immediately discount them.

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[7]Fine, Id., fn. 2, p. 21.

[8]Refer to anything by David Ball, Jim Perdue, Professor McElhaney, or NITA.

How many times have we heard of some corporate big shot arrested and charged whose lawyer loudly proclaims that the "charges are *absolutely without merit*, and we will *vigorously defend* them," a few months before a guilty plea is entered?

The Importance of *Ethos*

There are no tricks or shortcuts to persuasiveness. As I hope I have already my clear, you need to sell your credibility by being honest, forthright, and brief. This means that you can understate- the facts will speak for themselves and don't need embellishment. To me, the key for any opening– or any part of the trial– is plain speaking and sincerity. No only is it easier (for most of us), it just plain works. The problem is that you, as a lawyer, have *zero* credibility with the jury at the start of the case. We are all cynical about people trying to sell us something and they say we've each been exposed to half a million advertisements by the time we reach adulthood. People also believe, through televisions, jokes, and maybe real-life experiences that a lawyer's job is to obscure the truth, perhaps lie, but surely to win at all costs. We see it every evening on the news, and read about it every day in the paper. Nobody was surprised when the son in the Jim Carey movie, Liar Liar, when asked by the teacher what his father did for a living, replied, "He's a *liar*"– No, no, you mean a *lawyer*." Every survey ever done shows this to be the case– lawyers consistently rate down there with used-car salesmen in terms of trustworthiness. You may see yourself as Abe Lincoln, but they see you as Snidely Whiplash. And you're not going to change that impression in your opening statement. At best, by the end of the trial, your unwavering honesty and fair play will leave the jury with the impression of "Well, *she's* certainly not what I expected, *she's* not like other lawyers."

This doesn't mean you have to be wimpish or soft. You can, and should, aggressively

represent your clients' interests without being a jerk, tricky, or over-the-top. What Judge Stern calls the "ethos of the advocate" is what you are striving for. You probably recall that Aristotle described three components of effective persuasion: *logos* (persuading by appealing to reason), *pathos* (persuading by appealing to emotion), and *ethos* (persuading by the character of the speaker). All things being equal, we tend to believe someone whom we trust and respect.

By engaging in sharp tactics, nit-picking, exaggeration, or unfairness to witnesses, you detract from your own *ethos* and, hence, diminish your persuasiveness. Great convincers often have a way of giving away something to the other. Abe Lincoln was a master of this in the courtroom– gladly granting stipulations or small kindnesses in the courtroom. That sort of good will and good behavior is not only the right way to be, it pays off in increasing your *ethos* quotient and your persuasiveness to the jury.

A Template for Opening Statement

With these principles in mind, I will end this paper with an outline for an opening statement that will work with most cases.

1. <u>First, a plain yet thematic "grabber":</u>

Members of the jury.

Dr. Morgan Marvel sits here charged with medical malpractice. He sits here charged with medical malpractice for not recommending the rabies vaccination to Almira Gulch.

But a doctor cannot force a patient to accept treatment that they themselves are unwilling to accept.

And we will prove to you that's exactly what happened here.

2. <u>Second, in a defense case, some background and humanizing of the defendant</u>:

You are of course going to hear the testimony of Dr. Marvel. He is eager to tell you what happened that day. But before he does, I want to give you some background on this man.

Dr. Marvel has many years of experience in the field of medicine. He was born here. He went to school at the University. He then attended medical school at the University of Kansas, and graduated with high honors. Dr. Marvel will testify that he was then accepted into one of the best family-practice residencies in the country. There, for four years he studied his craft.

In 1985, he opened his practice in Utah. Became board-certified. Has seen over twenty thousand patients.

[Etc. Etc.]

Ladies and gentlemen, it probably won't surprise you to learn that this wasn't the first dog bite that Dr. Marvel had ever seen.

These are common occurrences. It's something a family doctor sees every week. Dr. Marvel will say that he's probably treated nearly three hundred dog bites since being in private practice.

So Almira Gulch's case, on that day in July, was not unusual in that respect.

[Here comes a sub-theme]

*What **was** unusual was the fact that she was infected with rabies.*

I will prove to you that there has never been another case of rabies seen at Dr. Marvel's clinic, ever. I will prove to you that there has never been another case seen in this city in the last fifty years. And I will prove to you that until very recently– and not known to Dr. Marvel at the time– had there ever been another case in the county.

This was highly unusual and unexpected.

[And I would develop this sub-theme some more...]

3. <u>Summary preview of the facts</u>

Now, based on his training and his years of experience, Dr. Marvel did examine Miss Gulch. [I don't need to say "carefully," I can show them.]

Here's the chart note from that day. [Here's where a 4x5 blowup is used.]

The first thing that happened was there here the nurse took the report and vitals [Show]

Then Dr. Marvel comes in. He knows Miss Gulch well from her many prior visits. [jab jab] *He asks her what happened, and how it happened– that's the subjective or "S" part here.*

[And I will go through the entire short note, explaining how he took the time to do this or

do that, and generally what things were significant and which were not.]

You can see here that Dr. Marvel wrote "discussed." You will hear from him that this means he discussed Miss Gulch's options with her, including the rabies vaccination.

I will prove to you that although rabies is a rare disease, it is Dr. Marvel's practice to always discuss it with patients.

And that's exactly what he did here.

And what did Miss Gulch say? Well, that she would think about it and get back to him. She never did, and so we are here today.

You need to be careful in this part not to give too much detail or fall into giving a detailed chronology.

4. Address the claims and the rules by which the case will be decided

Now this is what is called a medical malpractice claim. Judge Hilder will explain the law to you in detail at the end of the case, [I throw that in as judges don't like lawyers telling the jury what the law is] *but in general terms malpractice means that a doctor was negligent and deviated from standard practice.*

Mr. Burbidge has to prove to you that Dr. Marvel did not comply with standard practice when he treated Miss Gulch. If he fails to prove it, then your verdict must be for Dr. Marvel.

They claim that [set forth the claims]

But we will prove to you that Dr. Marvel did not deviate from what standard practice required in any respect.

As Mr. Burbidge mentioned, he will bring in another doctor who disagrees with what Dr. Marvel did. We also have had the case reviewed. And our review, performed by Dr. Michael Honore, chief of the Department of Family Practice at the University here, establishes that Dr. marvel complied with the standard of care in every respect.

You will hear Dr. Honore testify right here in court. Both he and Dr. Marvel are going to testify that:

[rebut claims with some, but not excessive detail]

5. Address the weak points

[I would address the failure to write "rabies" in the chart, for starters. I would try to

reframe it in a positive way, perhaps by pointing out the care is being judged, not the charting, Charting is only for legal self-protection and Dr. Marvel is more interested in providing good care.]

6. Tell them what to watch for

I like to involve them in the process by telling them about things to watch for or giving them questions to see if they are answered:

Members of the jury, I am about finished here, but it occurs to me that you might want to think about a few questions when you hear the witnesses testify.

-Why would Dr. Marvel write down "discussed" in the official chart if he wasn't discussing rabies vaccination?

-How much experience does their own expert, Dr. Grump, have in the area of dog bites as compared with Dr. Marvel's?

-Is Dr. Marvel here today because of poor care, or poor charting?

[Etc.]

7. Wrap it up

Summarize the themes (and the sub-themes) and tell them what you want them to do.

A doctor can only do what the patient allows him to do. At the end of case, I trust that we will have proved to you that Almira Gulch was a strong-willed woman who knew exactly what was best for herself.

She made the decision not to consider the rabies vaccination. It turned out to be the wrong decision, fatally wrong for her, but it was not the decision of Dr. Marvel.

[Etc.]

Therefore, we will ask you to return a verdict finding that Dr. Marvel did not commit medical malpractice.

Conclusion-- and a Final Word About Storytelling

You'll note that in my example opening that I did not use the "story" technique but an "argument" technique. Many excellent lawyers and teachers advocate using stories to tell the

facts from a first-person perspective[9] in the opening statement. I am told that it can be powerful--but be careful, it can also easily sound manipulative. It seems to work well when I have seen it in seminars but when I've seen it used in the courtroom, it has been less than effective. Frankly, it has seemed to me like an too-obvious emotional persuasion device.

I am *not* dismissive of its value– so many "powerhouse" attorneys, especially in the South, swear by it. Perhaps I've just not seen it done correctly. In any event, to learn this technique, I suggest that you read anything by David Ball or Jim Perdue, or attend their seminars.[10] For now, I will stick with the more traditional approach.

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[9]Although some may object to the first-person technique. See my paper on objections to argument.

[10] The basic principles are to tell the story in the present tense, from the first-person perspective, step-by-step. As in any argument, the focus should be on the opponent's conduct.