Strategy is Key for Opening Statements and Closing Arguments

Attorneys Must Take Care to Remain Inbounds

By John L. Slimm and Jeremy J. Zacharias

During trial, strategic and tactical judgments are made by attorneys on behalf of their clients. This is fully apparent during opening statements and closing arguments, which are used to provide a roadmap for the jury to understand and comprehend the case at hand. This article addresses the importance of forming a sound litigation strategy in preparing opening statements and closing arguments; explains what can and cannot be said; and discusses objections that can be made.

Strategy for Opening Statements

On a basic level, opening statements offer an opportunity for trial attorneys to set the scene for jurors, introduce key disputes in the case, and provide the important road map on how the trial is expected to unfold over the next few hours, days, or weeks. During an opening, counsel should lay out for the jurors the proposed witnesses for their case in chief, how they relate to the parties in dispute, and what they are expected to say.[1]

The fundamental purpose of opening statements is to do no more than inform the jury of the nature of the action and the basic factual hypothesis projected, so the jury may be better prepared to understand the evidence.[2] Counsel must be succinct and nothing must be said during the opening which counsel knows cannot in fact be proved or is legally inadmissible.[3]

Litigation strategy is fully present during counsel's opening statements.[4] Opening statements offer a preliminary chance to frame your client's case in a way you want the jury to hear it.[5] The opening plays a vital role as to what impression is left with the jury, so various considerations should be remembered.

Credibility of your client and counsel's advocacy is also key during opening statements. This is counsel's first opportunity to demonstrate a mastery of the facts of the case and is counsel's opportunity to demonstrate confidence in the client's position. Therefore, the key strategy is to overprepare for this first impression.[6]

In addition, as is inevitable in litigation, bad facts exist. Good litigation practice is to address bad facts early.[7] The same is true when delivering an opening statement. With opening statements, it is best to address bad facts early to lessen the effect of your adversary's arrow in their quiver. If the jury hears about damaging facts or circumstances prior to those facts being used against your client, the strength is lessened and the damage is alleviated.[8]

The opening statement also provides needed organization for the jury to follow a road map of your case in chief.[9] Commentators have noted that with even the most straight forward cases, the jury can get lost in the minutia of the facts.[10] Presenting an effective road map, starting with the opening statement, will keep the jury engaged because they will understand how certain facts control the case.

In sum, an effective opening argument is a key to aid jurors in understanding the evidence.[11] With complex cases, such as a complicated professional malpractice trial, evidence can seem daunting for the average juror. Helping the jury understand what evidence they will be presented with during the case can convince the jury early on of the merits of your argument and may ultimately decide the case in your client's favor.

Strategy for Closing Argument

During closing arguments, trial counsel has an opportunity to further advocate on behalf of the client by reminding the jurors how certain witnesses testified and how certain key evidence should be interpreted in favor of your client. Counsel is afforded more liberties during closing arguments, including using inferences to further a point and comment on the credibility of the adverse party as well as both fact and expert witnesses.[12] The liberties that are granted to counsel, however, are certainly not absolute.

The closing argument presents an opportunity for a litigator to be creative with the established evidence and to emphasize certain facts favorable to your client's position.[13] Closings are only as good as the preparation afforded to it. It must draw on certain inferences elicited from the evidence, it should capitalize of the strengths of your client's case, and it should downplay the weaknesses that are inevitably present and which were brought out during trial testimony.[14] The closing should also appeal to the common sense of the jury to reach a verdict in favor of your client.[15]

During the closing argument, favorable evidence should be front and center. Without providing a complete recitation of the trial testimony, counsel should present the testimony in a way that the jury will clearly see how beneficial certain facts are for your client.[16] As important as highlighting favorable evidence is, however, the closing argument also provides an opportunity for

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counsel to highlight the weaknesses in your opponent's case.[17]

By the time the case goes to trial, discovery is complete, depositions of the parties and witnesses are taken and liability and damages expert reports are exchanged. A prepared litigator can forecast the testimony that will be given during trial by the witnesses.[18] Therefore, prepare a draft closing by using the evidence that will be presented at trial and the testimony already elicited from the witnesses. This draft closing, of course, will be edited and tailored as the trial proceeds, but this will solidify your client's theory of the case presentation before the case enters trial.[19]

An effective closing argument is concise. Counsel should focus on the most important evidence to fully engage the jury. An effective closing should begin strong and end strong as primacy and recency is key .[20]

What Cannot Be Said During Opening Statements and Closing Arguments

Shifting from what can be said during opening statements and closing arguments, we must now address what cannot be said. During opening statements, counsel should not argue the case in chief.[21] This should be saved for closing argument. If counsel attempts to present argument during the opening statement, this should be met with a swift objection from your adversary that will be sustained by the trial judge. Counsel will lose the credibility of the jury early, and the panel will see this as counsel's attempt to gain an unfair advantage before the crux of the trial even begins.[22]

During opening and closing statements, counsel should refrain from attacking opposing counsel.[23] Not only is this highly objectionable, but counsel will immediately lose credibility with the jury for this tactic.[24] For example, counsel should not comment on an adversary's motive or character and should not comment on an adversary's litigation tactics.[25] To this end, New Jersey Courts have repeatedly held that trial counsel is not free to indulge in unjustified aspersions of opposing counsel and shall not accuse opposing counsel of "poisoning the minds of the jurors."[26]

Counsel's arguments during closing arguments are expected to be passionate. At the same time, however, arguments should be fair and courteous, grounded in the evidence, and free from any potential to cause injustice, such as unfair and prejudicial appeals to emotion.[27]

During closing arguments, counsel also should not focus on a party's financial or insurance status.[28] For example, counsel should refrain from suggesting to the jury that an adverse verdict may lead to financial ruin of your client or would adversely affect your client's reputation.[29] Doing so would be prejudicial to the other party, and even if successful, would likely constitute reversible error before the Appellate Division.[30]

In claims for punitive damages, counsel should not argue to the jury that a punitive damages award presents an opportunity to send a message to deter the defendant and others from this type of conduct.[31] Counsel cannot urge a jury to increase a punitive damages award in order to enhance the general deterrence of others.[32]

Counsel's failure to observe the rules of the road pertaining to openings and closings can make an otherwise winnable case fodder for a mistrial, a successful motion for a new trial, or lead to an appellate reversal. For openings and closings, counsel should keep it simple: address any potential weaknesses and present a roadmap for the jury to easily follow. Do not risk weakening your client's case by saying something that is clearly objectionable or will result in a mistrial, appeal or curative instruction.

Objections Made During Opening Statements and Closing Arguments

Litigation strategy is fully in play with regards to objections made during opening statements and closing arguments.[33] The timeliness of an objection is crucial to a case, and if trial counsel waits until their adversary is finished with an objectionable statement to lodge an objection, the judge may determine that the objection is too little, too late. Therefore, for strategic purposes, if there are potential violations of the rules of opening statements or closing arguments, such as deliberate character assassinations of the parties or fact witnesses or arguing facts clearly not in evidence, it is best to object and allow the trial judge to determine whether a curative instruction or a mistrial will be necessary.[34]

With regard to comments made by counsel during summation, questions have arisen regarding whether objections must be made every time an adversary makes a statement about the evidence. The Appellate Division has recently held that if a party does not object to the challenged statements at trial, the Appellate Division had to review for plain error the trial court's decision allowing the statement to be

made to the jury.[35] In reviewing a challenge to counsel's summations, the Appellate Division will presume that opposing counsel will object to summation comments which unfairly characterize the evidence, and consider the failure to do so "as 'speaking volumes about the accuracy of what was said.'"[36]

The Appellate Division has held that the "[f]ailure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made," and it "also deprives the court of the opportunity to take curative action."[37] Thus, where defense counsel has not objected to an adversary's summation comments, the Appellate Division will not reverse unless plain error is shown.[38]

The Supreme Court has recently reviewed the well-settled parameters of permissible comments that can be made during a summation.[39] The Supreme Court stated the following:

[C]ounsel is allowed broad latitude in summation. That latitude is not without its limits, and counsel's comments must be confined to the facts shown or reasonably suggested by the evidence introduced during the course of the trial. Further, counsel should not misstate the evidence nor distort the factual picture. Within those limits, however, [c]ounsel may argue from the evidence any conclusion which a jury is free to reach. Indeed, counsel may draw conclusions even if the inferences that the jury is asked to make are improbable....[40]

Accordingly, although attorneys are given broad latitude in summation, they may not use disparaging language to discredit the opposing party or witness, or accuse an opposing party's attorney of wanting the jury to evaluate the evidence unfairly, trying to deceive the jury, or deliberately distorting the evidence.[41] If counsel deviates from the parameters of permissible content during summation, this will be met with an appropriate objection.

Last, it must be kept in mind that an attorney's remarks, made in closing, can constitute binding admissions against a party they represent.[42] The admissions of counsel at trial may limit the demand made or the setoff claim.[43]

Conclusion

Opening statements and closing arguments are a part of the attorney's legal strategy which should be carefully developed in order to achieve the client's objectives.[44] Care should be taken to stay within the bounds of zealous advocacy when making an opening statement or closing argument. Attorneys can argue their client's position, staying within the bounds of what is permissible in opening statements and summation. An attorney needs a good understanding of what is permissible and appreciate the necessity to form a sound ligation strategy in preparation for openings and closings. ⚖

Endnotes

1. Pastor, Sherilyn, "Tips for Developing an Effective Opening Statement", AMERICAN BAR ASSOCIATION, April 20, 2020.
2. *Amaru v. Stratton*, 209 N.J. Super. 1, 15 (App. Div. 1985) (*see also Passaic Valley Sewerage Comm'rs v. Geo. M. Brewster & Son, Inc.*, 32 N.J. 595, 605 (1960) (quoting *Farkas v. Middlesex County Bd. of Chosen Freeholders*, 49 N.J. Super. 363, 367–68 (App. Div. 1958))).
3. *Passaic Valley, supra*, 32 N.J. at 605 (*citing Paxton v. Misiuk*, 54 N.J. Super. 15, 20 (App. Div. 1959), *aff'd*, 34 N.J. 453 (1961); *Shafer v. H.B. Thomas Co.*, 53 N.J. Super. 19, 26 (App. Div. 1958)).
4. Champagne, Farrah, "Five Tips for Engaging Opening Statements", AMERICAN BAR ASSOCIATION, October 30, 2015.
5. *Id.*
6. Pastor, Sherilyn, "Tips for Developing an Effective Opening Statement", AMERICAN BAR ASSOCIATION, April 20, 2020.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. HUGHES, EVIDENCE § 43, at 66 (Supp. 1989) (an inference is properly described as "that relationship which exists between the facts such that proof of a basic fact permits the jury, but does not require it, to find the dependent fact").
13. "10 Tips for Effective Openings and Closing Arguments." AMERICAN BAR ASSOCIATION, July 2017.
14. *Id.*
15. *Id.*
16. *Id.*
17. Seckinger, James H., "Closing Argument", 19 Am. J. Trial Advoc. 51 (1995-1996). Available at: scholarship.law.nd.edu/law_faculty_scholarship/11
18. *Id.*
19. *Id.*
20. "10 Tips for Effective Openings and Closing Arguments." AMERICAN BAR ASSOCIATION, July 2017.
21. Pastor, Sherilyn, "Tips for Developing an Effective Opening Statement", AMERICAN BAR ASSOCIATION, April 20, 2020.
22. *See generally, Geler v. Akawie*, 358 N.J. Super. 437 (App. Div.) *certif. denied*, 177 N.J. 223 (2003).
23. *See, Henker v. Preybylowski*, 216 N.J. Super. 513 (App. Div. 1987); *citing to Tabor v. O'Grady*, 59 N.J. Super. 330 (App. Div. 1960).
24. *Id.*
25. *Tabor v. O'Grady*, 59 N.J. Super. 330 (App. Div. 1960).
26. *Id.*; *see also, Henker v. Preybylowski*, 216 N.J. Super. 513 (App. Div. 1987).

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they want in a few minutes). If that fails, ask the judge for assistance. If the judge allows the expert to amplify his answer (which happens on occasion, usually in bench trials), do not argue with the judge—sometimes you just need to roll with the situation;

v. Do not restate his direct testimony. Unless you are stating a point and then immediately contradicting that point, do not reaffirm the expert's testimony. You will only bolster that testimony by allowing the judge or jury to hear it twice;

vi. Use demonstratives, if applicable. Technology, video and graphics are great. Often though, the economics may not allow it. If they do, consult with a specialist early to explore options and tech support. But, whether the economics permit it or not, you still may want to go old-school. By way of example, take the giant pad on the easel and your marker and enjoy the moment. Break down the expert's damage claim piece by piece, and then reconstruct it. It can be very powerful to use the expert's own numbers and then their testimony on cross to modify or eliminate their position on paper in front of the judge and/or jury. Also, remember to mark the fruits of your labor into evidence;

vii. Use of deposition testimony or documents to cross-examine are effective tools at attacking the expert's credibility if done right. Remember your witness can only say yes or no—this is not a time for the witness to explain their testimony or a document. Rather, it's your time to besmirch their testimony. This is how you do it:

Q. Madam, let me show you the transcript of your deposition from March 1, 2021. You understand that you were under oath when you gave such testimony, correct?

Q. Let me refer you to page 59, lines 3 through 16. [Make sure the witness and judge have that testimony in front of them and then you read the question and answer to the witness]

Q. That's what it says, correct?

By doing this, you effectively cross the witness with their prior testimony without allowing an explanation. You would do the same thing with documents; and

viii. Grand finales can be overrated, but you do not want to end on a "who cares" moment. Therefore, try to end on a significant point you want the judge or jury to take away from the cross.

In sum, cross-examination can be fun and more importantly effective—the devil however is in the detail—preparation, preparation, preparation. ⚖

Strategy is Key

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27. *Jackowitz v. Lang*, 408 N.J. Super. 496 (App. Div. 2009); *citing to Geler v. Akawie*, 358 N.J. Super. 437 (App. Div.) *certif. denied*, 177 N.J. 223 (2003).
28. *Purpura v. Public Service Elec. & Gas Co.*, 53 N.J. Super. 475 (App. Div. 1959), *certif. denied*, 29 N.J. 278.
29. *See generally, Flynn v. Steams*, 52 N.J. Super. 115 (App. Div. 1967).
30. See *Brandimarte v. Green*, 37 N.J. 557, 562–65 (1962); *Krohn v. New Jersey Full Ins. Underwriters Ass'n*, 316 N.J. Super. 477, 481–83, (App. Div. 1998), *certif. denied*, 158 N.J. 74 (1999); *Pickett v. Bevacqua*, 273 N.J. Super. 1, 3–5, (App. Div. 1994); *Amaru v. Stratton*, 209 N.J. Super. 1, 16 (App. Div. 1985).
31. *Tarr v. Bob Ciasulli's Mack Auto Mall, Inc.*, 390 N.J. Super. 557, 569 n. 3 (App. Div. 2007), *aff'd*, 194 N.J. 212 (2008); see also, N.J.S.A. 2A:15–5.9 to –5.17
32. *Id.*
33. Alison, John, "Developing a Litigation Strategy for Your Case", NATIONAL JURIST: SMART LAWYER, September 14, 2018.
34. *Maya Jane Stevens v. 48 Branford Place Associates, LLC*, A-4858-16T2 (App. Div. January 16, 2019).
35. *Id.* (Under the plain error standard, "[a]ny error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result." *Willner v. Vertical Reality, Inc.*, 235 N.J. 65, 79 (2018) (quoting R. 2:10-2). "Relief under the plain error rule... at least in civil cases, is discretionary and should be sparingly employed." *Baker v. Nat'l State Bank*, 161 N.J. 220, 226 (1999) (citation omitted).
36. *Tartaglia v. UBS PaineWebber, Inc.*, 197 N.J. 81, 128 (2008) (quoting *Fertile v. St. Michael's Med. Ctr.*, 169 N.J. 481, 495 (2001)).
37. *State v. Timmendequas*, 161 N.J. 515, 576 (1999).
38. *R.* 2:10–2.
39. *Hayes v. Delamotte*, 231 N.J. 373 (2018).
40. *Hayes*, 231 N.J. at 387-88 (alterations in original) (citations omitted).
41. *Henker v. Preybylowski*, 216 N.J. Super. 513, 518–19 (App. Div. 1987); *Geler v. Akawie*, 358 N.J. Super. 437, 470–71 (App. Div.), *certif. denied*, 177 N.J. 223 (2003).
42. *Dillon v. Wal-Mart Stores, Inc.*, No. 97-20613, 161 F.3d 8 (5th Cir. 1998), 1998 WL 723835, at *2. See also, *King v. Armstrong World, Indus.*, 906 F.2d 1022, 1024-25 (5th Cir. 1990).
43. *Dillon*, 1998 WL 723835 at *2, quoting, *Oscanyan v. Arms, Co.*, 103 U.S. 261, 263 (1880); *Saucier v. Plummer*, 611 F.3d 286 (5th Cir. 2010).
44. Alison, John, "Developing a Litigation Strategy for Your Case", NATIONAL JURIST: SMART LAWYER, September 14, 2018.