Opening Statements and Closing Arguments

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Opening Statements and Closing Arguments in Civil Jury Trials

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Opening statements and closing arguments are often trial counsel’s first, last and only opportunities to speak directly to the jury. Detailed preparation and skillful use of these presentations are critical to a successful outcome at trial.
Opening statements and closing arguments are typically the most impactful phases of a civil jury trial, and are often the only times during trial that counsel is permitted to address the jurors directly. Although these presentations are not themselves evidence, they allow counsel to set out the core theories, facts and disputes in the case for the jury.

The opening statement is counsel’s opportunity to introduce the case to the jury, highlight the main evidentiary disputes and provide a roadmap of how counsel expects the evidence to unfold at trial in support of his client’s claims, defenses and theories of recovery. Although the opening statement should frame the anticipated evidence as persuasively as possible, it may not include any arguments or legal assertions.

The closing argument has a different purpose and effect. After the jury has seen and heard the factual evidence presented at trial, counsel uses the closing argument to convince the jury to find in his client’s favor based on the evidence. Unlike in an opening statement, where counsel may describe only what the evidence is expected to show, counsel may argue the conclusions that should be drawn from the evidence in the closing argument.

This article provides guidance on delivering effective opening statements and closing arguments, including:

- Complying with applicable rules.
- Preparing for and drafting the presentations.
- Making and responding to objections during opening and closing.
- The timing and order for counsel to give the presentations.
- Motions relating to opening statements and closing arguments.

OPENING STATEMENTS

The opening statement is a critical part of a jury trial because it is counsel’s first chance to speak to the jurors (with the possible exception of voir dire) and often shapes the way a jury processes the remainder of the trial. The opening statement allows counsel to introduce the case in the best light for the client and persuasively summarize the evidence that is most helpful to the client’s position.

The main purposes of an opening statement are to:

- Provide an overview of the case to the jury and a roadmap to make the trial easier to follow.
- Outline the facts counsel expects to prove in support of the party’s claims or defenses.
- Familiarize the jury with:
  * the nature and themes of the case;
  * the key evidence that is helpful to the party, including principal witnesses and documents; and
  * the party’s theories of recovery.

- Provide the jurors with the proper context so that they can understand the evidence more easily, and know what evidence to look for and why it is important to the case.

(See, for example, Holmes v. McGuigan, 184 F. App’x 149, 152 (3d Cir. 2006); Hill v. Novartis Pharm. Corp., 944 F. Supp. 2d 943, 952 (E.D. Cal. 2013); Chin v. Ciaffa, 42 So.3d 300, 307 (Fla. Dist. Ct. App. 3d 2010); Miller v. Owen, 709 N.Y.S.2d 378, 378 (Sup. Ct. N.Y. Co. 2000).)

Because opening statements must be tailored to the unique circumstances of a case, as well as to the style of the delivering attorney, the best ways to prepare for an opening statement vary from case to case. However, any attorney preparing an opening statement should, at a minimum:

- Review the governing law and rules, as well as any relevant documents in the case file.
- Understand the permissible content of the opening statement and draft an outline of key points.
- Consider the objections opposing counsel may make during the opening statement and potential responses.

APPLICABLE RULES AND CASE DOCUMENTS

Before preparing the opening statement, counsel should review any applicable rules, including:

- The court’s local rules and standing orders.
- The judge’s individual practice rules.
- Case-specific orders that may govern the proceedings, including the court’s previous rulings on any motions in limine (see below Motions in Limine).
The relevant rules may impose restrictions on the length, order, timing, content and use of demonstrative aids for opening statements (see, for example, D. Ariz. L. Civ. R. 39.1(b) (opening statement must be restricted to a concise statement of facts); D. Me. L. Civ. R. 39(a) (opening statement may not be argumentative or exceed 30 minutes); E.D.N.Y., Indiv. Prac. R., Platt, J. at 5, 472 (opening statement may not contain any argument or discussion of the law)).

Counsel also should speak with the presiding judge and other attorneys who have appeared and tried a case before the judge to learn about any preferences the judge may have that the judge's individual rules or case-specific orders do not address. For example, some judges may require counsel to remain at a podium while delivering an opening statement, while others may allow counsel to move around in front of the jury box.

- Deposition transcripts of major witnesses.
- Key documentary evidence for each side.
- Any significant admissions by the adverse party in pleadings, answers to interrogatories or responses to requests for admissions.

**PREPARING THE OPENING STATEMENT**

An opening statement should be presented as a compelling, easy-to-understand story to the jury. It should follow a logical sequence, whether based on themes or chronology, or some combination of the two, and should address key pieces of evidence at relevant points. The length of an opening statement varies based on the complexity of the case, but it is important for counsel not to overwhelm the jury with unnecessarily long factual recitations.

Counsel should consider addressing any damaging evidence or other weaknesses in his client's case during the opening statement, rather than waiting for opposing counsel to address them first.
TIPS FOR EFFECTIVE DELIVERY

The importance of rehearsing the opening statement and closing argument cannot be overstated. Counsel should practice his delivery as much as possible before trial, in front of colleagues or on videotape, with the understanding that the closing argument will necessarily be adjusted based on the evidence elicited at trial.

Counsel should rehearse on a timed basis to ensure that he complies with any applicable time limits. Even if counsel writes a script, he should memorize as much as possible before trial to reduce reliance on notes. Additionally, counsel should practice with any visual aids or demonstrative exhibits he intends to use (see Box, Visual Aids and Demonstrative Exhibits).

To help make the presentations more effective, counsel delivering an opening statement or a closing argument should:

■ Begin the opening statement by addressing the court, the jury and opposing counsel. For example, many attorneys start their opening with “May it please the court, the members of the jury and [Mr./Ms. Last Name of Opposing Counsel].” Additionally, counsel should state which party he represents and introduce or acknowledge each of the parties in the case at the beginning of the opening statement.

■ Begin and end both presentations by thanking the jury for their service and acknowledge the time away from their families, jobs and lives.

■ Use a conversational but respectful tone with the jury.

■ Avoid speaking too fast.

■ Make eye contact with each juror.

■ Avoid reading from a script or an outline, and minimize the use of papers and notes.

■ Use plain English wherever possible, particularly when describing anticipated expert testimony.

■ Limit the use of the phrase “the evidence will show” in the opening statement to emphasize only the most important pieces of evidence, prevent interruptions in counsel’s narrative and avoid sounding repetitive.

■ Address all of the salient points as briefly as possible and comply with any time limitations set by the court.

■ Reiterate the party’s themes of the case in the closing argument.

On the other hand, it is generally improper for counsel to include in an opening statement:

■ Inadmissible evidence already ruled on by the court or prohibited by statute, such as a reference to settlement discussions or a defendant’s subsequent remedial action (for more on evidence at trial, search Evidence in Federal Court: Basic Principles on our website).

■ Counsel’s personal opinion, knowledge or belief about the merits of the client’s case or the facts at issue.

■ Comments on the credibility of witnesses.

■ Legal argument.

■ Instructions on the law.

■ Irrelevant facts or issues.

■ Attacks against or disparaging comments about a party, opposing counsel or a witness.

■ Prejudicial or inflammatory statements, such as remarks about the wealth or poverty of a party.

■ Frivolous, non-meritorious claims and contentions or assertions of fact unsupported by admissible evidence.

■ Statements made for the purpose of delay.

■ Misleading statements.

■ A request that the jurors place themselves in the position of a party (commonly referred to as a Golden Rule statement).


Counsel should avoid including legal jargon in the opening statement, which may confuse or offend the jury. Counsel also should be wary of including any statements which may open the door for the other side to bring in certain evidence that would otherwise be inadmissible.

Further, counsel should carefully weigh whether to make representations to the jury about evidence or testimony that ultimately might be excluded at trial. If counsel represents to the jury that the evidence will show certain things, and the evidence at trial ultimately does not support counsel’s representations, opposing counsel can highlight those deficiencies in his closing argument and severely undermine counsel’s credibility. Conversely, if counsel is able to prove each of his representations at trial, counsel can reiterate this during his closing argument and bolster his credibility with the jury.

Drafting the Opening Statement

Because the opening statement is one of the most critical parts of trial, counsel should not wait until the eve of trial to begin preparing an outline. Instead, counsel should begin drafting an outline several weeks or more before trial, once the trial themes of the case are developed, and continue to revise the outline.
as key evidence is organized during active trial preparation. Modifying the outline after witnesses are prepared, for example, helps ensure that counsel can accurately represent what a witness will testify to at trial.

Some attorneys may prefer to write out a script for the opening statement before trial. However, counsel should minimize reliance on a script or an outline during the opening statement to maintain eye contact with the jury and keep the jurors engaged, and to avoid distracting the jury or appearing unprepared by shuffling or reading from papers. Counsel should thoroughly know the content of the opening statement before trial and use any notes during the presentation only to ensure that all of the key points are covered.

**OBJECTIONS DURING OPENING STATEMENTS**
Counsel may object to any type of improper statement or conduct during an opening statement (see above Content of the Opening Statement). Objecting counsel should briefly state the ground for the objection on the record to properly frame the issue for the court and preserve the issue for appeal. The most common types of objections to opening statements include that counsel’s assertions are:
- Argumentative (for example, because they offer inferences from the evidence to be presented at trial or because counsel makes assertions relating to the credibility of trial witnesses).
- Based on personal beliefs, because these statements cannot be proven with evidence and inject the attorney’s credibility into the trial.
- Based on inadmissible evidence.

Generally, courts require any objections to be made during the opening statement contemporaneously with the objectionable assertion to timely preserve issues for appeal (see, for example, Claudio v. Mattituck-Cutchogue Union Free Sch. Dist., 955 F. Supp. 2d 118, 146 (E.D.N.Y. 2013); O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc., 420 F. Supp. 2d 1070, 1085-86 (N.D. Cal. 2006), aff’d, 221 F. App’x 996 (Fed. Cir. 2007)). However, some courts may allow objections only at the end of opening statements to prevent opposing counsel from intentionally disrupting the flow of counsel’s opening statement and distracting the jury. Counsel should consult the individual judge’s rules to determine the court’s practices. In either case, a timely objection may be followed by a more elaborate motion to strike improper statements or other type of appropriate motion, such as a motion for mistrial (see below Motions for Mistrial).

Objections during an opening statement raise several strategic concerns. Where the court permits objections to be made contemporaneously, attorneys nonetheless may refrain from objecting to matters of minimal importance or solely to disrupt an opponent’s flow. This is because frivolous and frequent objections may:
- Prompt an admonishment from the court.
- Annoy the jury or damage objecting counsel’s credibility if his objection is overruled.
- Call the jury’s attention to opposing counsel’s improper statement or conduct.

However, where objections do occur, counsel delivering an opening statement:
- Should avoid arguing with objecting counsel in front of the jury.
- May wish to repeat the assertion or remind the jury what was being said before the objection occurred when the objection is overruled.
- Should attempt to withdraw the objectionable assertion or rephrase before the judge rules on the objection and move on as quickly and smoothly as possible, when an objection appears valid or occurs on a matter of minimal importance.

**CLOSING ARGUMENTS**
A closing argument (or summation) is counsel’s final presentation to the jury. It typically involves a description of the evidence presented at trial and, like an opening statement, is delivered in a narrative format. As discussed above, the most important difference between an opening statement and a closing argument is, as the name suggests, that argument is permitted during closing.

The main purposes of a closing argument are to:
- Assist the jury in analyzing the evidence by applying the relevant law to the evidence.
- Based on personal beliefs, because these statements cannot be proven with evidence and inject the attorney’s credibility into the trial.
- Based on inadmissible evidence.
Remind the jury of the key issues and facts in the case.
Highlight the claims, defenses and burdens of proof, and explain why those burdens have or have not been met.
Suggest any reasonable inferences the jurors may draw from the evidence and how they should decide.

(See, for example, Burchfield v. CSX Transp., Inc., 636 F.3d 1330, 1335 (11th Cir. 2011); Cordis Corp. v. Boston Scientific Corp., 431 F. Supp. 2d 442, 460 (D. Del. 2006); Maytag Corp. v. Clarkson, 875 F. Supp. 324, 328 (D.S.C. 1995).)

Similar to an opening statement, a successful closing argument requires counsel to:

Understand the permissible content of the closing argument and draft an outline of key points, including significant evidence and exhibits and how that evidence supports counsel's theory of the case.
Consider the objections opposing counsel may make during the closing argument and potential responses.

PREPARING THE CLOSING ARGUMENT
The closing argument should follow a logical sequence, with an introduction, a body and a strong conclusion. It must incorporate and summarize the evidence elicited at trial and distill the evidence into a coherent and convincing story. Counsel may tell this story in an argumentative way and suggest to the jurors the conclusions they should reach.

Content of the Closing Argument
It is generally proper for counsel during a closing argument to:
Argue the merits of the case.
Suggest reasonable inferences that the jury should draw from the evidence.
Refer to applicable law, so long as counsel does not invade the province of the court by instructing the jury on the law.
Refer to jury instructions and, if the court permits, the verdict form, so long as counsel's representations regarding them are accurate.
Explain how certain facts do or do not support the legal elements of particular claims or defenses.
Comment on the credibility of witnesses based on evidence in the record.
Reiterate representations that counsel made to the jury during the opening statement and explain how the evidence at trial supported those representations.

(See, for example, Gilster v. Primebank, 747 F.3d 1007, 1011 (8th Cir. 2014); Balsley v. LFP, Inc., 691 F.3d 747, 763 (6th Cir. 2012); Walden v. Ill. Cent. Gulf R.R., 975 F.2d 361, 365-66 (7th Cir. 1992); Volbert v. Pass, 866 F.2d 237, 241-42 (7th Cir. 1989); Stollings v. Werner Enters., Inc., No. 07-1387, 2009 WL 1765387, at *4 (D. Kan. Apr. 28, 2009).)

However, it is generally improper for counsel during a closing argument to:
Discuss evidence that:
• is irrelevant;
• is inadmissible; or

• was excluded or not offered at trial (including references to an absent witness).
• Misstate the evidence presented at trial or the law.
• Personally vouch for his client's or a witness's credibility.
• Provide a personal opinion on the merits of the case.
• Attack or make disparaging comments about a party, opposing counsel or a witness.
• Make statements that are:
  • prejudicial or inflammatory, such as remarks about the wealth or poverty of a party;
  • for the purpose of delay; or
  • considered Golden Rule statements that ask the jurors to place themselves in the position of a party.

(See, for example, Gilster, 747 F.3d at 1011; Granfield v. CSX Transp., Inc., 597 F.3d 474, 491 (1st Cir. 2010); Whittenburg v. Werner Enters., Inc., 561 F.3d 1122, 1128-31 (10th Cir. 2009); Canada Dry Corp. v. Nehi Beverage Co. of Indianapolis, 723 F.2d 512, 526)
The applicable rules for the individual court or jurisdiction may contain additional substantive restrictions on what may be addressed in closing arguments (see, for example, NY CPLR 4016).

**Drafting the Closing Argument**

Because the content of a closing argument often depends on what unfolds during trial, many attorneys do not prepare any part of the closing argument before the close of evidence. However, counsel should draft an outline of important items to emphasize in the closing argument as early as possible and amend the outline as the trial progresses. As with opening statements, counsel should review any applicable rules and orders that may apply to the closing argument before preparing it.

To determine the substance to address in the closing argument, counsel may wish to refer to the script, outline or notes used for the opening statement and create a preliminary outline of topics based on those materials. Once trial begins, and as witnesses testify, counsel should keep track of important testimony and exhibits that establish counsel's claims, defenses or theories of recovery and revise the outline as necessary. Counsel may wish to keep a separate closing argument folder or notebook during trial containing transcript excerpts and key documents to address during closing.

**OBJECTIONS DURING CLOSING ARGUMENTS**

The same considerations applicable to objections during opposing counsel's opening statement extend to closing arguments (see above Objections During Opening Statements). However, because counsel is permitted to make arguments at this point, judges often provide greater leeway and are more likely to overrule objections than during opening statements.

Common objections to closing arguments include that counsel has:
- Mischaracterized the evidence presented at trial.
- Mischaracterized the elements of the law.
- Included impermissible commentary, such as personal opinions on witness credibility, information about a party's wealth or poverty, or Golden Rule statements.

Objections to an attorney's statements or conduct during a closing argument must be made promptly to avoid waiving appellate issues. Most courts require objections to be made at some point before the case is submitted to the jury, either at the time the objectionable statement or conduct occurs or after opposing counsel's closing argument has concluded (see, for example, Lentomynti Oy v. Medivac, Inc., 997 F.2d 364, 374 (7th Cir. 1993); Williams v. Butler, 746 F.2d 431, 443 (8th Cir. 1984), on reh'g, 762 F.2d 73 (8th Cir. 1985), cert. granted, judgment vacated sub nom. City of Little Rock v. Williams, 475 U.S. 1105, 106 S. Ct. 1508 (1986)).

**TIMING AND ORDER OF PRESENTATIONS**

In federal court, opening statements typically occur at the beginning of a case immediately after the jury has been sworn in. The trial judge has broad discretion over matters relating to the conduct of the trial, including opening statements (Glenn v. Cessna Aircraft Co., 32 F.3d 1462, 1464 (10th Cir. 1994)). The order in which counsel present their opening statements may therefore vary from case to case. However, in most civil cases, the plaintiff's counsel delivers his opening statement first, followed immediately by the defendant's counsel. In cases with multiple parties, co-plaintiffs or co-defendants typically stipulate to the order of presentation. Generally, the plaintiff's counsel is not permitted to rebut the defense's opening statement.

Objections to an attorney's statements or conduct during a closing argument must be made promptly to avoid waiving appellate issues.
Closing arguments in federal court typically occur at the end of the case before the court instructs or charges the jury on the law. However, courts have the discretion to instruct the jury at any time under Federal Rule of Civil Procedure (FRCP) 51(b)(3), and closing arguments may occur after the jury instructions. Additionally, courts may elect to issue substantive instructions (for example, instructions that explain the applicable law to the jury) before closing arguments and procedural instructions (for example, instructions that explain how the jury should deliberate) after closing arguments, or some combination of the two.

The order of presentation of closing arguments among parties is also generally at the court’s discretion, and varies depending on the court and jurisdiction (see, for example, S.D.N.Y. & E.D.N.Y. L. Civ. R. 39.2; E.D.N.Y., Indiv. Proc. R. IV(C)(4), Orenstein, Mag. J.; NY CPLR 4016). Where the plaintiff’s counsel delivers the closing argument first, courts often permit the plaintiff’s counsel to deliver a rebuttal argument following the defense’s closing argument. Some judges may require counsel to reserve time for or request a rebuttal closing argument in advance (see, for example, E.D. Pa., Indiv. Proc. R. III(O), Sánchez, J.).

Counsel should try to anticipate what opposing counsel may say in his opening statement, and consider whether a motion in limine is needed to prevent the other side from addressing any objectionable evidence or issues that counsel believes may be harmful to his client’s case.

Many courts impose deadlines for filing motions in limine before trial (see, for example, S.D. Fla. L. Civ. R. 16.1(j)). To ensure that counsel has enough time to evaluate the need for and file any motions in limine relating to opening statements, counsel should begin preparing (or at least consider the contents of) the opening statement well before any governing deadline.

Although not as common in federal court, some courts may permit counsel to raise evidentiary objections without a formal motion in limine at a pre-trial conference.
MOTIONS FOR MISTRIAL

Generally, objections to improper statements or conduct by counsel are addressed through an instruction by the court to the jury to disregard the statement or conduct and a reminder that counsel’s opening statement or closing argument is not evidence. In rare and egregious cases, however, simple objections may be insufficient to guard against an attorney’s misconduct, such as where a statement made during an opening statement or a closing argument may be “so prejudicial as to require a new trial” (Draper v. Airco, Inc., 580 F.2d 91, 94 (3d Cir. 1978)). Whether the offending statement is sufficiently prejudicial depends on whether, in the court’s discretion, it is reasonably probable that the jury’s verdict will be influenced by the statement (see Draper, 580 F.2d at 97).

Counsel should consider whether to request that the court issue a curative instruction to the jury or declare a mistrial (see, for example, Apple, Inc. v. Samsung Elecs. Co., No. 11-1846, 2014 WL 549324, at *15-16 (N.D. Cal. Feb. 7, 2014) (curative instruction was appropriate after objection to improprieties in closing argument); Manion v. Am. Airlines, Inc., 215 F. Supp. 2d 90, 90-93 (D.D.C. 2002) (granting motion for mistrial based on impropriety in closing argument); Commercial Credit Bus. Loans, Inc., 590 F. Supp. at 332-35 (ordering a new trial where curative instructions could not erase “counsel’s frequent and grave improprieties” during his opening statement and summation)).

MOTIONS FOR JUDGMENT AS A MATTER OF LAW

Counsel may make a pre-verdict motion for judgment as a matter of law (sometimes called a motion for a directed verdict) following either an opening statement or a closing argument. Although these motions are not often granted, counsel commonly moves for a judgment as a matter of law:

- After opposing counsel’s opening statement, if it is clear that no question exists for the jury (see, for example, McSherry v. City of Long Beach, 423 F.3d 1015, 1019-20 (9th Cir. 2005)). In the rare circumstances where these motions are entertained, courts typically treat them as a motion on the pleadings (see, for example, Morfeld v. Kehm, 803 F.2d 1452, 1454 (8th Cir. 1986)).
- At the close of the plaintiff’s case or during the plaintiff’s case in chief, if counsel has presented all of the evidence on a specific legal issue (see, for example, Greene v. Potter, 557 F.3d 765, 768 (7th Cir. 2009); Echeverria v. Chevron USA Inc., 391 F.3d 607, 611-12 (5th Cir. 2004)).
- After closing arguments and before the jury begins deliberations, if there is no legally sufficient evidentiary basis for a reasonable jury to find for the opposing party (see, for example, Vásquez-Valentín v. Santiago-Díaz, 459 F.3d 144, 147 n.1 (1st Cir. 2006)).

Search Motion for Judgment as a Matter of Law: Basic Principles and Motion for Judgment as a Matter of Law under FRCP 50(a): Drafting and Filing for more on pre- and post-verdict motions for judgment as a matter of law in civil jury trials.