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The Ethics of Opening Statements and Closing Arguments

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Primary Forensic Misconduct in Opening Statements and Closing Arguments

The trial lawyer's challenge is to present the client's case with persuasive force. That force is often softened and occasionally controlled by the Ethical Rules. Opening statements are concise statements of facts and issues. Closing arguments are reasoned appeals to the jury to persuade them in your favor. The ethical rules define the following primary forensic misconduct in statements or arguments:

1. It is improper to go beyond the scope of the pleadings.
2. It is improper to appeal to the passion or prejudice of the fact finder.
3. It is improper to disparage the opposing lawyer or party.
4. It is improper to assert personal knowledge of any fact.
5. It is improper to express a personal opinion as to:
   - (a) The justness of your cause.
   - (b) The credibility of a witness.
   - (c) The culpability of a civil litigant.
   - (d) The guilt or innocence of an accused.
6. It is improper to allude to any fact that will not (or was not) supported by admissible evidence.
7. It is improper to allude to any matter that trial counsel does not "reasonably" believe is relevant.

The Unfulfilled Promise to Produce Evidence

One of the most common examples of forensic misconduct in an opening statement is the deliberate/accidental promise to produce evidence that somehow never materializes. The fact finder often forgets whether "it" came from the podium during the opening, or from the witness stand during the trial. Juries and judges rely on opposing counsel to remember these things.

If you fail to produce evidence that you mentioned in your opening statement, your opponent will point to your failure as a breach of promise emblematic of a weak case. He or she is also entitled to a jury instruction to disregard that portion of opening statement. Last, but not least, he or she may be entitled to a mistrial.

Mistrials based on unfilled promises to produce evidence are granted or denied by examining two things. What was the context of the over-promising lawyer's statement, and what effect did the statements have on the jury?

The ethical rules and the applicable case law prohibit reference to evidence, which the

lawyer does not "reasonably" believe will be admissible. This requires an objective assessment by the trial judge regarding the availability of the evidence.

Stating Inadmissible Evidence

Although an accurate count is impossible, most trial lawyers will agree the second most pervasive ethical problem faced in the opening statement is the opponent's statement of inadmissible evidence. This problem is ethically different that promising to deliver evidence that never materializes. It is more insidious and more difficult to spot. It is even more difficult to remedy.

The judicial standard on discussing "inadmissible evidence" is quite strict. You should not discuss anything that is of "doubtful" admissibility. Either save it for the trial or bring it up at sidebar before blurting out something of "doubtful" admissibility.

When challenged by the other side, the court's ruling on this kind of forensic misconduct invariably is resolved by asking two questions. Did the lawyer act in good faith when she mentioned something in opening that turned out to be inadmissible? Was there undue prejudice to the opposing party? If the answers are yes and no, then the court usually admits the evidence. If the answers are no and yes, the court strikes the comments from the record and invites the offending lawyer to his chambers for tea.

"Good faith" means a legitimate argument for admissibility. It will help you to say "thought" it would come in. You must be able to articulate an evidentiary predicate that is legitimate and supportable. The test of good faith is entirely subjective This is to be contrasted with the test for breaching a promise to bring evidence forth during the trial. You either bring the evidence forward or you do not—the test is objective. The subjective test for good faith is, guess what—good faith. By its very nature it must be subjective.

The trial court has an absolute right to assume that trial advocates know the rules of evidence. It is rare for a trial judge to accept ignorance as an excuse for stating inadmissible evidence in the opening statement.

Argument in the Opening Statement

The "sin" of argument in the opening stems from the misunderstanding by trial lawyers of what judges believe is the purpose of making an opening statement to the jury. They (the judges) believe that the purpose of an opening statement is to advise the jury of the facts of the case and the questions and issues involved in the case. Judges believe that opening statements should give the jury a general picture of the factual situations so they will be understand the evidence you put forward in the case. Judges believe that you should not relate the testimony at length. Last and most importantly they believe you should save your argument to the end of the case.

Judges believe these things because they think trial lawyers waste everyone's time by arguing both at the beginning and at the end of the case. I belabor the point of what judges believe in order to establish the ethical issue. There is NO ethical issue. It is widely thought by experienced trial lawyers that one should not "argue" in the opening statement. It is widely accepted by trial judges that you must not “argue” in the opening statement. However, it is NOT unethical to argue in the opening statement unless the argument violates a standing order of the tribunal.

Because there is no bright line between “previewing” the evidence and “arguing” the evidence, the trial advocate may ethically press onward until halted by the court. The basis for the so-called rule against argument in the opening is two-fold: judicial economy and jury confusion.

Defining Argument in Opening Statement

Like beauty, argument is often in the eye of the beholder. Defining it is sometimes impossible. The rest of the time it is merely difficult. Would the witness who is being discussed in the opening be permitted to testify in the words used by the trial lawyer? If so, the words used are usually accepted by the trial judge as permissible. If not, the advocate is improperly arguing the case. That means he or she is often admonished by the trial judge.

Do the words inform the jury as to the nature and extent of the evidence or do the words attempt to persuade the jury to accept or reject the evidence? The former is acceptable and the latter fraught with risk. It is possible for a lawyer to be dismissed as counsel for persistently violating a court order to desist from arguing during the opening statement. United States v. Dintz, 424 U.S. 600, 1976)

Whether or not the “argument” of counsel in the opening statement warrants a mistrial or a reversal on appeal depends on the level of prejudice to the opponent. It is a subjective test but may have some objective elements. Modern trial advocacy has made some advancement over the 1931 standard. The leading treatise at that time was Day in Court, by F. Wellman. In it he said: “Any display of eloquence or attempt at peroration in opening speech is altogether out of place and in extremely bad taste.”

Discussing the Case Against You in Opening Statement

It seems elementary that you should not allude in your opening statement to evidence you do not intend to introduce. This is because you risk the occurrence of one or more of the first three problems just presented. By discussing your opponent's case you risk failing to produce evidence you mentioned. You risk stating inadmissible evidence. And, you risk arguing the evidence (since it won't come from your witnesses).

You can discuss the opposing theory or even the adverse facts in the case but only if your opponent is clearly committed to: 1. calling certain witness (as covered in the pretrial statement or order; 2. offering evidence because it was mentioned in the opening statement that preceded yours.

The evidence will support the principal ethical rule applicable to this problem states that you cannot allude to evidence that you do not "reasonably" believe. Trial judges are well known for admonishing lawyers who "thought" the other side was going to do something that never came about. The safe approach is to avoid discussing the opponent's case. The tactical approach is to avoid embarrassment wherever possible during trial.

Objections During the Opening Statement

Opening statements are difficult enough without the interruption of opposing counsel. But they are also important enough to make those objections that are both necessary and proper. Whether an objection is necessary is always an ad hoc determination. The wise trial advocate carefully considers the jury reaction as well as that of the trial judge before rising to object.

"Tactical" objections are per se unethical. You should resist the teaching of those county class trial lawyers who object when they want to "slow down" the other side or "distract" the jury off the point it seems to be buying. Objections are proper during opening statement if, (a) Your opponent argues the case (although this cannot be asserted on ethical grounds); (b) Your opponent injects irrelevant material; (c) Your opponent asserts inadmissible evidence; (d) Your opponent offers personal opinions or states a personal belief in the facts.

Appellate Review of Misconduct in the Closing Argument

It is axiomatic that there is tension between the law of summation and the art of summation; i.e., ethical rules and case law vs. trial technique. Trial lawyers, by inclination and training, tend to personalize and appeal to the emotions of the jury. While it is rare for lawyers to be disciplined for misconduct during summation, appellate courts are constantly reviewing the propriety of forensic oratory. Appellate courts look at the effect of summation misconduct on the jury in a large percentage of the cases they hear. That is because one of the most common contentions on appeal is that the winning lawyer's summation was improper <u>and</u> unduly prejudicial. There are countless appellate cases digesting untold numbers of specific examples of forensic misconduct in closing argument. Having read several hundred such opinions, I believe the following checklist might be helpful in assessing the likelihood of reversal for forensic misconduct in closing argument.

Appellate Courts sustain or reverse depending on:

(a) Is the record clear as to exactly what was said by the offending lawyer during

argument?

(b) What was the context in which the statements were made?

(c) Was the forensic misconduct a deliberate attempt to distort the process or an inadvertent slip?

(d) Was the argument perceived by the trial judge as having prejudiced the other side? If so, is the record clear on this point?

(e) Was the argument brought on by something the other lawyer did or said in his opposing argument?

(f) What specific objection was made by the other side? Was the objection timely?

(g) What action was taken by the trial judge to the objection? Was a curative instruction given?

Misstating the Trial Evidence in Closing Argument

The ethical test to be applied to misstatements of evidence in closing is different than the legal test. The ethical test is the deliberate misstatement of evidence. You cannot accidentally misstate the evidence from an ethical perspective. The ethical analysis is one of good faith as viewed from a subjective basis.

The legal test is entirely objective. It is simply whether or not the evidence, as admitted, is the same as was argued. When viewed from an ethical perspective, experienced trial judges often rule by reminding both sides that the "recollection of the jury controls." But, when viewed on a purely legal basis, the judge looks only at the cold record. Was the evidence admitted or not?

Errors in summation on this point are almost inevitable. It is rare for a trial lawyer not to have misspoken while giving an argument in at least one case. The remedy and the sanction ought to be based on the good faith of the lawyer. Deliberate misstatements warrant severe remedies. Inadvertent slips ought to be remedied solely based on the harm to the other side.

Arguing Outside the Record During Closing Argument

It is so axiomatic as to need no citation (or even logic) that you must not give an argument for which there is no evidentiary basis. But for some reason, the problem continues to plague trial courts, good lawyers, and losing parties. It may be that there are lawyers who do not know that what they are arguing is in fact outside the record. The usual response is that the argument is a matter of common knowledge. Or, the argument is one the court can take judicial notice of. Or, most often, the argument is only an inference from facts in evidence.

The most common examples are cases where the offending lawyer becomes emotionally involved with the case or the client. The problem also routinely arises where the offending lawyer has a narcissistic personality or an over-extended ego (which as we all know, is very rare

in trial lawyers).

Arguing Personal Knowledge of Facts or Personal Opinions in Closing Argument

It is widely taught in trial advocacy seminars and workshops that no personal opinions of any kind on any subject are permitted in closing arguments. Perhaps this is good tactical advice, but the ethical rule is slightly different. The ethical rules only prohibit four specific kinds of personal opinions in argument to fact finders:

(1) Personal opinions regarding the justness of the cause of action.
(2) Personal opinions regarding the credibility of a witness.
(3) Personal opinions regarding the culpability of a civil litigant.
(4) Personal opinions regarding the guilt or innocence of a criminal defendant.

The purpose of the rule is to keep the focus of the fact finder on the evidence in the case. The rule also eliminates the need for the other lawyer to meet "opinions" by urging his own contrary opinions. The problem often becomes one of "vouching" by a trial lawyer for the quality or quantum of proof in a case. The most common example can be found in cases where one lawyer (or the other) argued that "we wouldn't be here if the facts weren't true."

Like the problem of spotting argument in the opening statement, there is no bright line between arguing the evidence in a forceful personal way, and crossing over into personal beliefs in the quality or quantity of the evidence. Whenever you hear a trial lawyer start a sentence in closing with "I know that . . . , " your antennae for objection ought to be up. Because inadvertent violations of this rule are relatively common, I suggest beginning statements in closing with:

(a) "The only conclusion is . . ."
(b) "It naturally follows that . . ."
(c) "You may find . . ."

Query? What is "I think . . ." Is this a personal opinion, a hope, a fact, or a prayer? Whatever it is, it will be said by the other side to be a statement of opinion. It is easy to avoid with concentration and practice.

Arguing Matters of Common Knowledge

Almost every jury argument I have ever listened to contained some reference to a matter of common knowledge for which no evidence was actually admitted. Hopefully every jury argument I have ever given contained some wise fact commonly known to all but which was never actually introduced in evidence from the witness box.

Effective advocates argue by analogy. It is ethically permissible to draw examples from:

1. Indisputable physical facts ("You cannot start the engine with the ignition off").
2. Matters of true common knowledge ("If its July it must be hot").
3. Literature ("Shakespeare knew about lawyers and chaos").
4. Speeches of others ("Ask not what your country can do. ."
5. Current events ("We have been through deregulation, tax relief, tax reform, and all it got us was Bush v. Gore.")
6. History ("Rome burned while Leonardo di Caprio . . .")
7. Imagination ("Can you imagine how it would feel to be buried in sand up to your neck, all the time? That is how a quadriplegic feels all the time.")

The ethical tests and the judicial tests cross at the apex of these kinds of arguments. The use of an analogy can become a prohibited assertion of extrajudicial fact. That happens when its materiality is suspect. That happens because what some see as common, others see as debatable. That happens when its truth is dependent on other evidence in the case.

Wigmore's test is: "If it's truth be immaterial, then its force will be merely in symbolizing or illustrating a general truth. That means that you can argue to the judge that the truth of your statement is irrelevant and immaterial. He should allow it anyway."

Do we have a great system or what?

Arguing Inferences from the Evidence

Wigmore states that in drawing inferences from evidence, "Counsel is free from restraint. His desired inferences may be forced, unnatural and untenable; but as to this, the jury are to judge - that is precisely their function." In real life, trial judges are unlikely to be persuaded that your inferences from the evidence can be that unrestrained. A more likely statement from the trial bench is: "Counsel may argue the existence of facts in evidence. They may also argue those reasonable inferences of fact that can be fairly drawn from the evidence. But, be careful."

The ethical issue here is much like stating inadmissible evidence. You cannot argue what you do not reasonably believe was proved by the evidence. For the same reason you cannot argue any inference that is not reasonably and fairly drawn from the evidence.

The Criminal Justice Standards of the ABA note: "Counsel may argue all reasonable inferences from the evidence but it is unprofessional conduct to mislead the jury as to inferences it may draw." Appellate courts often characterize factual inferences as mere conjecture if they are unnatural or untenable. Skilled advocates use inferences sparingly and only when not subject to debate by the other side.

Arguing the Law in Closing

Most states, including Arizona, require the jury to accept the law as set forth in the charge to them by the judge. So the problem occasionally arises regarding the extent to which trial counsel can discuss or "argue" the law. Most reviewing courts consistently hold that trial counsel can use, point out, mention, comment on, or repeat the judges' instruction. But the same courts often hold that advocates cannot further define or explain the instructions.

Trial advocacy teachers often stress the need to emphasize and use the law in argument but caution against "too much reference to the law." The hard-to-apply test is whether the argument is an infringement on the function of the judge. Needless to say, misstating the law is highly improper.

Conclusion

At the end of the day, as the British barristers say, ethical closing argument is largely a matter of:

1. Fairness to opposing counsel.
2. Staying within the record.
3. Abiding by your oath to seek only the truth.
4. Meeting your obligation to the court to conduct the trial in a courteous and dignified manner.