

# Opening and Closing Statements

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Opening and closing statements are key aspects of any trial and the importance of the effectiveness of a lawyer's presentation cannot be overstated. However, it is important for any lawyer to be well-versed in what conduct and statements are permissible, because improper conduct or statements can result in a mistrial or adverse verdict. This article will discuss various tips and pointers for opening and closing statements as well as some common pitfalls to avoid.

## Opening Statement Tips

It is important to make a favorable first impression and present a theme that a jury can relate to and understand. The theme should allow for the jury to become emotionally invested in your case. The attorney should make the story interesting and engage the jury by using imagery or analogies.

The opening statement is made before the introduction of any evidence, but must state fairly the facts the attorney expects to prove. Attorneys should state the facts that will be proven during trial so that the jury's first understanding of the facts is in the context of the light most favorable to their case. The attorney should present a clear chronology of the case, including the important events, key characters/witnesses involved, what is being disputed and what your contentions are. Nevertheless, an attorney must be careful not to overstate the facts. An opening is a promise and you should not promise what you cannot deliver. If you are unable to prove a fact that you state in your opening, your adversary will attack the credibility of your case.

During openings, the attorney should also seek to personalize his/her client. This can be done by providing background information regarding your client that is relevant to the case and that tends to make a jury more sympathetic to your client.

Arguing is not permitted during openings. Argument includes urging, comparing, and voicing opinions, characterizations, and inferences. It is important to be careful that the attorney's tone does not sound like argument. However, the attorney should confront significant weaknesses at the outset to minimize the impact of the other side's presentation.

During opening statements, an attorney should avoid telling the jury that the opening is not evidence as this will lessen the impact of the opening statement. Lastly, the opening should empower the jury. It should conclude with a call to action. For example, explain to jurors that their role is to do justice or to investigate the truth or to hold those responsible for their actions.

## Closing Statement Tips

The closing argument occurs after the evidence is in and is intended explicitly as argument. In closing, the attorney should refer back to the theme introduced in opening and reiterate it. You should reiterate your theory of the case and why it most sufficiently and reasonably incorporates the evidence. For example, remind the jury of the witness testimony that was helpful to your case and explain how this testimony makes the most sense in the context of the facts presented.

Once again, similar to opening statements, you want to engage the jury. However, an attorney is permitted more leeway to use passionate language and tone in his/her closing. You should consider using analogies and anecdotes to keep the jury engaged.

Furthermore, in closing, an attorney should force his/her adversary to argue their weaknesses. You should point out the various inconsistencies in his/her witnesses' testimony and/or other deficiencies in the case. You should also know the elements of the cause of action (what you have to prove), comment on testimony of key witnesses, confront damaging evidence/testimony, highlight the other side's inconsistencies, hold the other side accountable for their promises, and argue why your theory is "better," or "makes more sense."

In closing, you should confront your adversary's position and refute it. For example: "The defendant told you that my client did not suffer any additional harm by the delay in diagnosis of her fractured ankle and that she would have needed to undergo surgery for it regardless of when it was diagnosed. However, my client's treating physician, Dr. Bones, testified that over the course of a year, my client was forced to endure excruciating pain, and that the surgery she ultimately did need was far more extensive and complicated than what would have been needed had the defendant diagnosed her at the first visit."

## Does the Plaintiff Have to State a Prima Facie Case During Opening?

The CPLR does not specifically provide for the dismissal of a complaint based upon the plaintiff's opening statement. However, if after the opening statement, "it becomes obvious that the suit cannot be maintained because it lacks a legal basis or, when taken in its strongest light, cannot succeed, the court has the power to dismiss...." *De Vito v. Katsch*, 157 A.D.2d 413, 556 N.Y.S.2d 649 (2d Dept. 1990); see also *Warme v. City of New York*, 89 A.D.3d 548, 932 N.Y.S.2d 690 (1st Dept. 2011) (proper to dismiss complaint where plaintiff's opening statement and offer

of proof thereafter failed to set forth prima facie case of negligence against defendant).

When making its determination as to whether to dismiss a cause of action after the opening statement, a court must take all the allegations made in the complaint and the statements of plaintiff's counsel to be true.

The complaint is only to be dismissed if it can be demonstrated that (1) the complaint did not state cause of action, (2) the cause of action is conclusively defeated by admitted defense, or (3) admissions or statements of fact made by plaintiff's counsel in opening statement absolutely precludes recovery. See *Hoffman House v. Foote*, 172 N.Y. 348 (1902).

Such motions are strongly disfavored and "should not be granted 'unless it is obvious that under no circumstances, and under no view of the testimony to be adduced, can plaintiff prevail.'" *Benz v. Burrows*, 191 A.D.2d 1021, 594 N.Y.S.2d 929 (4th Dept. 1993).

When an opening statement has been challenged as inadequate, counsel should be offered the opportunity to correct or enhance the opening statement by making an offer of proof. *De Vito v. Katsch, supra*.

### Case Law Concerning What Is Permitted During Opening and Closing Statements

What can a lawyer do in opening and closing? Can a lawyer argue the case or just state the facts? The Rules of Professional Conduct (Rule 3.4) state as follows: A lawyer shall not...in appearing before a tribunal on behalf of a client:

- (1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;
- (2) assert personal knowledge of facts in issue except when testifying as a witness;
- (3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

It is improper to allude to evidence unless a good faith and reasonable basis exists for believing the evidence will be tendered and admitted in evidence. Common questions regarding permissible conduct and statements during openings and closings are discussed below:

- Should a lawyer utilize props? In certain situations a lawyer can and should utilize props.

However, a lawyer may not use props or visual aids that have nothing to do with the issues in the

case. See *Raney v. Suffolk Obstetrical & Gynecological Assocs., P.C.*, 200 A.D.2d 612, 606 N.Y.S.2d 729 (2d Dept. 1994) (it is within the trial court's discretion to refuse to allow the plaintiff's attorney to display a chart to the jury during summation).

- Should a lawyer suggest an amount to the jury? During summation in a personal injury action, plaintiff's counsel may ask for a specific amount for pain and suffering. See *Tate v. Colabello*, 58 N.Y.2d 84, 459 N.Y.S.2d 422 (1983); *Braun v. Ahmed*, 127 A.D.2d 418, 515 N.Y.S.2d 473 (2d Dept. 1987).

However, it is improper for a counsel to raise a per diem argument, otherwise known as a "unit of time" measure of damages, by referring to plaintiff's life in terms of days, months, or years in asking the jury to determine past and future pain and suffering awards in reaching a verdict (*De Cicco v. Methodist Hospital of Brooklyn*, 74 A.D.2d 593, 424 N.Y.S.2d 524 (2d Dept. 1980)). In *De Cicco*, the appellate court noted: "In view of the fact that there is no mechanical method by which pain and suffering may be translated into dollars and cents, the time-unit technique injects an element of false simplicity into the determination by holding out a mathematical formula by which damages may be neatly calculated. To that extent the technique tends to deflect the jury from the essential task of exercising its own sound discretion in determining the appropriate award." Furthermore, a lawyer cannot ask the jury to imagine themselves in the position of the plaintiff and to award the damages accordingly. *Young v. Tops Mkts., Inc.*, 283 A.D.2d 923, 725 N.Y.S.2d 489 (4th Dept. 2001) (court erred by allowing plaintiffs' counsel to argue that plaintiffs' damage claim "may seem like a lot of money, but I don't know of anybody [who] would take that money and say give me what \* \* \* [plaintiff] has gone through and will go through"); cf. *Wilson v. City of New York*, 65 A.D.3d 906 (1st Dept. 2009) (plaintiff's counsel's suggestion that jury put itself in plaintiff's shoes to determine appropriate damages, although improper, was not egregious as to warrant setting aside the verdict).

- Can a lawyer mention witnesses that were not called to testify? The rule is well established that counsel may comment on the failure of the adverse party to call a witness who is under his control and whose testimony he could be expected to produce if it were favorable to him. This rule is applied, for example, where a plaintiff fails to call his own physician as a witness. See *Brotherton v. Barber Asphalt Paving Co.*, 117 A.D. 791, 102 N.Y.S.2d 1089 (2d Dept. 1907); *Seligson, Morris & Neuburger v. Fairbanks Whitney Corp.*, 22 A.D.2d 625, 257 N.Y.S.2d 706 (1st Dept. 1965). But see *Huff v. Rodriguez*, 64 A.D.3d 1221, 882 N.Y.S.2d 628 (4th Dept. 2009) (comments

by defendant's attorney that plaintiff had failed to call expert at trial because his testimony would not support plaintiff's claim that defendant had caused accident, despite having received expert's report stating actions of defendant to be sole proximate cause of accident, warranted reversal).

### Conduct/Statements That Are Impermissible

It is impermissible to mislead the jury or misstate the evidence. In *Cohn v. Meyers*, 125 A.D.2d 524, 509 N.Y.S.2d 603 (2d Dept. 1986), the plaintiff filed an action for assault and battery; the defendant counterclaimed for assault and battery, false arrest and malicious prosecution. Defense counsel stated, in his opening statement to the jury, that the altercation that resulted in the lawsuit had also resulted in the defendant's being wrongfully arrested and held in jail for three days. However, the arrest actually stemmed from another incident. The trial court denied the plaintiff's motion for mistrial based on the prejudicial opening remarks. The Appellate Division reversed, finding that the defense counsel made the inaccurate remarks with utter disregard for the truth and that the trial court's curative instructions to the jury were insufficient to eliminate the prejudice.

In *McAlister v. Schwartz*, 105 A.D.2d 731, 481 N.Y.S.2d 167 (2d Dept. 1984), a case involving an automobile accident where the plaintiff alleged to have suffered amnesia as a result, the Appellate Division found a new trial was warranted due, in part, to defense counsel's remarks during summation. In summation, the defendant's attorney made this statement regarding the claim of amnesia: "Well, I submit to you, ladies and gentlemen, that you cannot find fault with what you don't remember, and this is a convenient way to avoid being cross-examined on the issues, to be cross-examined on negligence by saying I don't remember, but I submit to you that if there is any credence to that claim that man would have told the doctor in the hospital the day after this occurred that he didn't remember." *Id.*

It is also improper and prejudicial to address a juror by name. See *People v. Creasy*, 236 N.Y. 205 (1923).

It is improper for an attorney to accuse a witness, without evidence, of being willing to testify falsely for a fee or accuse them of being a liar. See *Smolinski v. Smolinski*, 78 A.D.3d 1642, 912 N.Y.S.2d 820 (4th Dept. 2010); *O'Neil v. Klass*, 36 A.D.3d 677, 829 N.Y.S.2d 144 (2d Dept. 2007). However, it is "within the broad bounds of rhetorical comment to point out insufficiency and contradictory nature of plaintiff's proof" and refer to alternative ways evidence could be interpreted. See *Selzer v. New York City Tr. Auth.*, 100 A.D.3d 157, 952 N.Y.S.2d 26 (1st Dept. 2012); and see *Karsdon v. Barringer*, 20 A.D.3d 551, 799 N.Y.S.2d 548 (2d Dept. 2005) (court erred in refusing to allow defense counsel to comment on personal injury plaintiff's consumption of wine at dinner prior to acci-

dent; while testimony did not establish that plaintiff was intoxicated, it was relevant to issue of whether she was fully attentive to surroundings at time of accident).

An attorney should avoid making disparaging comments during his/her opening or closing statements. See *Avila v. Robani Energy Inc.*, 12 A.D.3d 223, 784 N.Y.S.2d 526 (1st Dept. 2004) (comment accusing plaintiffs of fraud in unrelated matter was inappropriate); Also see *Maraviglia v. Lokshina*, 92 A.D.3d 924, 890 N.Y.S.2d 349 (2d Dept. 2012) (new trial warranted due to inappropriate cross-examination and inflammatory and improper summation comments by counsel for defendants, including comment that plaintiff and treating physician were "working the system"); and see *McArdle v. Hurley*, 51 A.D.3d 741, 858 N.Y.S.2d 690 (2d Dept. 2008) (cross-examination of plaintiff and expert with respect to plaintiff's husband's disability pension and summation remarks arguing that her family was trying to "max out in the civil justice system" were so inflammatory as to deny plaintiff a fair trial and require reversal).

An attorney may discuss the applicable law by reading from the instructions in certain limited circumstances. For example, in *Williams v. Brooklyn E. R. Co.*, 126 N.Y. 96 (1891), the plaintiff's counsel read case law to the jury during his summation. The Court of Appeals held that a correct statement of law by counsel would not be grounds for reversal: "It may be observed, however, that it is the function of the judge to instruct the jury upon the law, and, where counsel undertakes to read the law to the jury, the judge may properly interpose to prevent it. But if the judge sees fit to permit this to be done, and the law is correctly laid down in the decision or book used by counsel, it would not, we think, constitute legal error or be ground of exception by the other party, although such a practice is not to be encouraged." However, an attorney may not misstate the law. See *Kelly v. Metropolitan Ins. & Annuity Co.*, 82 A.D.3d 16, 918 N.Y.S.2d 50 (1st Dept. 2011).

A lawyer may not suggest from personal knowledge that certain facts exist, inject personal beliefs or vouch for the credibility of a witness. See *Valenzuela v. City of New York*, 59 A.D.3d 40, 869 N.Y.S.2d 49 (1st Dept. 2008) (reversal required where plaintiff's counsel injected personal knowledge and vouched for the credibility of himself and his client); *Smolinski v. Smolinski*, 78 A.D.3d 1642, 912 N.Y.S.2d 820 (4th Dept. 2010) (reversal required where plaintiff's counsel introduced extensive irrelevant evidence and, during summation, implied defendant's expert witnesses testified falsely for a fee and made references to resources defendant had as large corporation).

Nor may an attorney make prejudicial or inflammatory remarks. See *Berkowitz v. Marriott Corp.*, 163 A.D.2d 52, 558 N.Y.S.2d 511 (1st Dept. 1990) (reversal mandated where plaintiff's counsel made numerous prejudicial comments during his summation, including attacking the credibility of the defendant's experts and attorneys

and referring to the experts as “hired guns” who were brought into litigation to “fluff up the case” and stating that defense counsel was merely carrying out “instructions from his principals, and possibly he doesn’t even believe himself some of the things he has said”); *Tehozol v. Anand Realty Corp.*, 41 A.D.3d 151, 838 N.Y.S.2d 32 (1st Dept. 2007) (prejudicial remarks including appealing to jurors’ class, prejudice, or passion were sufficiently prejudicial as to create likelihood that counsel’s misconduct improperly influenced verdict); and see *Johnson v. Lazarowitz*, 4 A.D.3d 334, 771 N.Y.S.2d 534 (2d Dept. 2004) (reversal mandated where the record was “replete with vituperative remarks made by plaintiff’s attorney for the sole purpose of inducing the jury to decide this case on passion rather than on the basis of the evidence”).

Other improper remarks include mentioning settlement discussions, See *Bigelow-Sanford, Inc. v. Specialized Commercial Floors, Inc.*, 77 A.D.2d 464, 433 N.Y.S.2d 931 (4th Dept. 1980); mentioning the wealth or poverty of a party or any insurance coverage (see *Estes v. Town of Big Flats*, 41 A.D.2d 681, 340 N.Y.S.2d 950 (3d Dept. 1973)); and mentioning excluded evidence (See *Zegarelli v. Hughes*, 3 N.Y.3d 64, 781 N.Y.S.2d 488 (2004).

### Preserving Objections

Lastly, it is important to preserve objections to any improper remarks made by opposing counsel during

opening or closing statements. Failure to object to the improper remark may waive the point on appeal see CPLR 4017, 5501; *Coma v. City of New York*, 97 A.D.3d 715, 949 N.Y.S.2d 98 (2d Dept. 2012). On the other hand, continuous objections can inflame the jury or cause them to sympathize with the other side. See *Kennedy v. Children’s Hosp.*, 288 A.D.2d 918, 732 N.Y.S.2d 326 (4th Dept. 2001) (although plaintiff did object to the defense counsel’s summation remarks, in the interests of justice, the Court reversed the judgment where defense counsel interrupted summation of plaintiff’s attorney more than thirty times with groundless objections and referred to counsel’s arguments as “preposterous” and “absolutely objectionable”).

Usually, when an attorney engages in improper conduct during an opening or closing statement, the remedy is for the Judge to admonish counsel and provide a curative instruction. However, if the statements are so prejudicial that they cannot be cured by an instruction to the jury, an immediate motion for mistrial must be made. Failure to move for mistrial in a timely fashion will waive the issue on appeal.

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