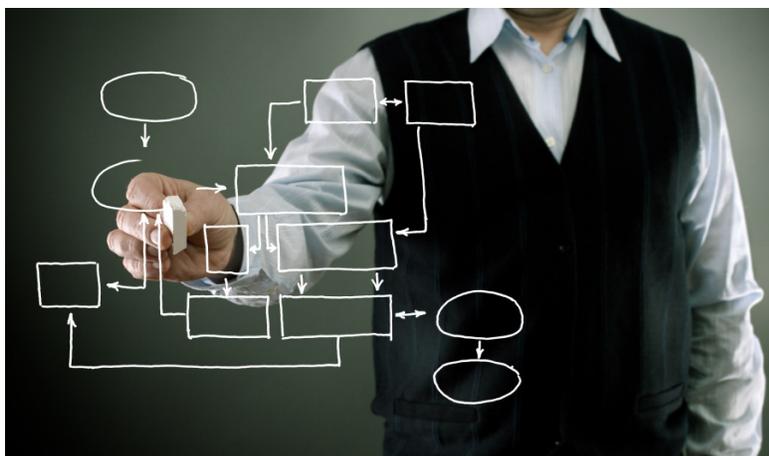


Opening Statement: Persuading Without Argument

by Maureen A. Howard

A basic rule of trial practice is that a lawyer cannot argue in opening statement. A lawyer who breaks this rule runs the risk of drawing an objection from opposing counsel and having it sustained by the judge. Of course, as with most rules of trial practice, a lawyer can get away with *de minimus* violations in most cases and wholesale disregard in cases where opposing counsel — whether as a result of inexperience, inattention or trial strategy — doesn't object. Although simple in concept, lawyers commonly falter in practical application of the “no argument” rule in two ways: 1) failing to understand what “argument” is, and 2) failing to appreciate that argument is not the most persuasive tool in opening statement, even if they can get away with it.



Why Can't I Argue in Opening Statement?

The legitimate purpose of opening statement is to provide jurors an overview of the anticipated evidence to facilitate their understanding of the testimony and exhibits in relation to the larger case. This is particularly useful in trials where evidence is presented out of chronological order. Having heard a “preview” of the evidence, jurors have a conceptual construct in which to place the bits and pieces of evidence as they are presented.

A trial lawyer's goal in opening statement is broader: to convince the jurors of the righteousness of her case and persuade them that her client deserves to win. An advocate can (and should) certainly do this in opening statement, but the arsenal of persuasive tools are limited to those appropriate to the legitimate purpose of opening — to provide the jurors an overview of the evidence, or the facts, of the case.

Exceptions to the “No Argument” Rule

There are three safe harbors during open-

ing statement where a lawyer may argue: 1) at the very beginning when presenting the theme of the case; 2) at the very end when repeating the theme; and 3) when reviewing the elements of and burden of proof on a claim or defense. These exceptions have evolved as part of the “law of trial advocacy.” They are not clearly defined, and interpretation varies across jurisdictions and between judges in a single court.

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How Do I Know “Argument” When I See It?

A general rule of thumb is that argument is anything other than a recitation of evidence, testimonial or exhibit, that the advocate has a good-faith belief will be admitted at trial. A simple test is to examine each sentence in your opening statement and identify which witness (or exhibit) will say what you are saying. If you can't point directly to a witness or exhibit, then you are arguing.

Examples of argument include conclusions, deductions, characterizations, analogies, discussion of witness credibility, and rhetorical questions. Talking about the law (except a perfunctory notation of elements and burden of proof) is also off-limits. Washington case law allows an advocate to include reasonable inferences from the facts, but remember that “reasonableness” lies in the eye of the beholder. An inference helpful to your case may well be perceived as quite unreasonable by your opponent, triggering an objection. While you may survive the challenge, it interrupts the flow and impact of your opening statement.

Argument can occur when a lawyer talks about the other party's intent, motivation, or emotions. For example, if you say “Mr. Smith was jealous and out for revenge,” you are not arguing as long as you can point to the source of the statement and it is admissible at trial. Will Mr. Smith testify to this at trial? Is there an admissible letter written by him that states this motivation? Will another witness report that he made this statement? And, if so, will this evidence survive a hearsay objection? On the other hand, if the statement logically follows from the anticipated evidence, but is not directly stated, you are arguing.

Generally, a fact-based opening statement will keep an advocate out of the murky

The theme concisely embodies the case theory (the true story that takes into account both the admissible evidence and the law and leads to the inevitable and logical conclusion that the client wins) and packages it with an emotional “hook” that has universal appeal to the jurors' sense of justice. There is no rule as to permissible length of a theme in opening statement, but conventional wisdom is that a short paragraph of three to four sentences is acceptable. There is an inverse correlation between the degree of argument and theme length — more fact-based themes can run a bit longer; extremely argumentative themes need to be very brief.

As for including the elements of claims and defenses or the burden of proof in opening statement, Washington courts allow little latitude. Brief coverage of what must be proven to win, a conclusory statement that the evidence will or won't meet these elements, or a pithy statement as to which party has the burden of proof is allowable. An explanation of why the elements will or won't be proven, or an expla-

waters of argument. However, even facts can constitute impermissible argument when repeated multiple times for oratorical effect.

Power-Protecting the “Sounds Like Argument”

Even a carefully crafted, argument-free opening statement may contain statements that could sound like impermissible argument to the opposing counsel (and judge). A lawyer can protect against an objection by prefacing such a statement with the source of the evidence. For example, “Mary Smith *will tell you herself*: her boss made her life at the plant a living hell — she had never before imagined that a boss could make her feel so humiliated — and *it seemed to her* that he enjoyed every minute of her humiliation, which only made it worse.”

A more generic prophylactic preface is the ubiquitous “The evidence will show...,” but this is only effective if the evidence will show what you’re saying, and not just suggest or imply it.

Should I Argue if I Can?

Some lawyers view the rule against argument as a restriction to be endured, worked around, and violated if possible. To the con-

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trary, social-science research suggests that, until the jurors have heard the evidence, facts are far more persuasive.

Empirical studies show that conclusions drawn by the jurors themselves — from facts presented by the lawyers — are far more indelible and color the jurors’ perception of and reception to the evidence during trial. Even if you can get away with it, why would you want to telegraphically argue that “Mr. Smith was drunk out of his mind” when you have facts that he had red, blood-shot, watery eyes; his speech was slurred; he had urinated on himself; he couldn’t remember his birthday or his address; he fell getting out of the car; and he staggered to his house?

Jurors have only a baseline impression

of the attorneys when they hear opening statements, limiting their ability to assess credibility. They understand the trial is an adversarial proceeding and that the lawyers are “selling” their case. Conclusions and characterizations are viewed as “claims,” and jurors look for facts that support or refute them. The advocate who relies on a colorful conclusion or a sweeping generalization will lose the battle of first impression in opening statement if her opponent presents specific contradictory facts.

Certainly an advocate who argues in opening statement can bounce back during trial with supporting facts (after all, research confirms that verdicts are closely tied to the weight of the evidence). But why not use your time during opening statement to effectively marshal and sequence your most compelling facts into a story that brings the jurors to their own conclusion that your client should win? ◇

“Off the Record” is a regular column on various aspects of trial practice by Professor Maureen Howard, director of trial advocacy at the University of Washington. She can be contacted at mahoward@u.washington.edu.

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Would you like to be part of one of the nation’s highest ranked high-school mock trial programs? Do you enjoy sharing your knowledge of the law with young people? Are you interested in raising the standard for ethics and professionalism in the legal profession overall? If you answered “yes,” the YMCA Mock Trial program is the place for you! Legal professionals are needed around Washington to help coach high-school Mock Trial teams and volunteer at state and local competitions. Don’t think you have the time? Don’t worry. There is a volunteer opportunity that can fit into even the busiest of schedules.

- **Team coaches** work with teachers and fellow attorneys throughout the year to help students prepare their case for competition.
- **District raters** score student performances during local competitions throughout the month of February.
- **State raters** score student performances at the state competition March 26–27 in Olympia.

In addition to donating your time and talents, your treasures are also needed to help YMCA Youth & Government continue offering quality programs to all young people who wish to participate. Finally, you can help spread the word about Mock Trial by letting your colleagues and friends know about this amazing opportunity to support the democratic education of our state’s young people.

For the past 23 years, YMCA Mock Trial has been giving members of the legal community the opportunity to become civically engaged in something that gives them inspiration and hope for the future of our state and the legal profession as a whole. This year, your support is needed more than ever. Ten new Mock Trial programs are starting up in schools around Washington. In order for them to succeed, it is critical that the legal community steps up to meet the challenge. For more information on how to get involved in the YMCA Mock Trial program, contact the YMCA Youth & Government office at 360-357-3475 or e-mail youthandgovpdir@qwestoffice.net. Donations may be sent to YMCA Youth & Government, PO Box 193, Olympia, WA 98507.