

EFFECTIVE OPENINGS AND CLOSINGS

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GOALS OF OPENING STATEMENTS

- Introduce Yourself, Your Client, And Your Claims/Defenses
- Explain What You Hope The Evidence Will Be And How It Supports Those Claims/Defenses
- Acknowledge Countervailing Evidence/Claims/Defenses
- Begin To Persuade Jury Without Arguing

GOALS OF OPENING STATEMENTS

- Build Rapport And Credibility With Jury
 - It Is A Performance Of A Sort
 - Important Not To Find “A Voice” But To Find “Your Voice”
 - Find What Works For You
- Humanize Your Client

OPENINGS ADVICE – BEFORE TRIAL BEGINS

- Discuss With Court The Amount Of Time Needed
 - If You Anticipate Using Exhibits In The Opening, Discuss With Counsel And Raise With Court If Necessary.
- Remember, Nothing has Been Admitted Yet.

OPENINGS ADVICE – BEFORE TRIAL BEGINS

- If You Anticipate Using Visual Aids/Projections, Etc., Make Sure The Tech Will Work In The Courtroom Where Trial Will Be Held.
- Come In The Week Before To Test It.
- Discuss With Opposing Counsel And The Court Where Screens Can Be Placed.
- Have A Plan B If Tech Fails.
- Courts/Juries Hate Waiting For Tech To Boot Up, Reboot, Or To Work At All.

OPENINGS ADVICE – BEFORE TRIAL BEGINS

- If You Have Concerns About What Issues Or Facts You Or Your Opponent Can Raise In Openings, File Or Make A Motion To Define The Scope Of Openings. Better Yet, Come To An Agreement.

OPENINGS: THE LAW

- Statements Of Counsel Are Never Evidence
- Improper To “Argue” The Facts Or The Law
 - Typical Format Is To Say: “The Evidence Will Show... X”
 - Or: “You Will Hear Evidence That...”
- Defendant Can Also Defer Opening To End Of Plaintiff’s/State’s Case
 - Perhaps Appropriate If Key Issue Is Affirmative Defense

OPENINGS: THE LAW

- Objections
 - Make Them If Needed
 - Seek Curative Instruction Or Mistrial If Needed
- Most Common Opening Objections
 - Arguing Facts Or Law
 - Relying On Evidence That May Be Inadmissible

ADVICE FOR EFFECTIVE OPENINGS

- Think About It In Advance. Outline The Presentation
- Make Sure To Introduce Yourself And Your Client, Address The Claims, Key Facts And The Burden Of Proof
- Do Not Exaggerate or Oversell The Strength Of Your Case.
You Can Lose Credibility And It Gives Your Opponent Ammunition
- Acknowledge/Address Negative/Conflicting Evidence And Arguments Of Opponent

ADVICE FOR EFFECTIVE OPENINGS

- Visual Aids/Projections

Very Important To Use Them

Juries Used To CSI And Expect To Be Visually Stimulated

Plus, Studies Show The More Senses Are Involved
The More Likely People Are To Remember

ADVICE FOR EFFECTIVE OPENINGS

- Themes Of The Case
 - Very Beneficial To Have A Theme (Or Themes) For Case/Opening Into Which The Evidence Can Neatly (Or Grudgingly) Fit.
 - You Must Be Thinking About The Closing In Crafting The Opening.
 - The Two Should Connect Directly.
 - Like Overture To Broadway Show.

ADVICE FOR EFFECTIVE OPENINGS

- Connecting Openings To Closings
- One Way To Link Them Is To Set The Jury's Expectations. For Example, "I Expect You Will Hear Evidence Showing That Three Important Things Occurred: Defendant Did X, Y And Z. And Then Return To Those Same Points In The Closing. That Also Focuses Jury On Your Side's Key Facts.
- Other Techniques To Get The Jury To Focus On Certain Aspects Of The Case:
 - Challenge Jurors To Ask Themselves Whether X Or Y Would Make Sense or Why Someone Would Do A Certain Thing
 - Ask Them To "Keep An Eye Out" For Certain Evidence Or The Lack Of Certain Evidence

ADVICE FOR EFFECTIVE OPENINGS

- As A Criminal Defense Attorney, You Need To Consider Whether To Tell The Jury Your Client Will Testify Or May Not Testify
- At Some Point Thank The Jury.
In An Unexpected Place Is Refreshing.

GOALS OF CLOSING ARGUMENTS

- Marshall The Material Evidence Presented At Trial, Describe Why It Supports A Favorable Result For Your Client, And Convince The Jury That Any Contrary Evidence Either Should Not Be Believed Or Does Not Change The Outcome.

CLOSINGS ADVICE – BEFORE THEY BEGIN

- Discuss With The Court The Amount Of Time Needed
 - Vt. R. Civ. P. 51: Presumptively No More Than One Hour
- Make Request For Sur-Rebuttal
 - Vt. R. Crim. P. 29.1 Allows It If Defendant Has BOP
 - Could Argue For It In Civil Cases

CLOSINGS ADVICE – BEFORE THEY BEGIN

- Make Sure Tech Will Work For Visual Aids/Projections, Etc.
- If You Have Concerns About What Arguments You Or Your Opponent Can Raise, File Or Make A Motion To Set The Scope Of Closings

CLOSINGS: THE LAW

- Objections:
 - Ok to Make Them During Closings
 - Seek Curative Instructions
 - Seek Mistrial
 - Otherwise, No Or Only Plain Error Review.

CLOSINGS: THE LAW

- Most Common Grounds for Objections:
- Cannot Appeal To Jurors' Emotions, Passions, Prejudice Or Sympathies.
 - Race, Gender, Orientation, Ethnicity, Religion, Nationality, Wealth, Corporate Status, Sectionalism (Flatlanders), Etc.
 - Horrific Accident/Death Details
 - Anything That Encourages Jurors To Decide Based On Passion Or Prejudice Not Evidence

CLOSINGS: THE LAW

- Most Common Grounds for Objections:
- Cite To Facts That Were Not Admitted In Evidence
- Golden Rule – Can't Ask Jurors To Put Themselves In Shoes Of Client And Award Damages They'd Feel Appropriate Or Ask Whether They Would Have Done The Same Thing.
- Personal Opinions – “In My View The Evidence Shows...”
- Vouching For Witness – “Ms. Black Is An Upright Citizen And You Can Trust Her.” “Ms. Black seemed credible to me.”
- Make Personal Attacks Against Or Impugn Integrity Of Opposing Counsel, Parties, Witnesses

CLOSINGS: THE LAW

- Most Common Grounds for Objections:
- Arguments For Jury Nullification May Be Improper
 - *State v. Kebbie*, No. 2018-064, 2018 WL 6173595, at *1 (Vt. Nov. 21, 2018)
- Technically, If Not Raised By Opponent in Closing, You Can't Raise In Rebuttal/Sur-rebuttal

CLOSINGS: THE LAW

- **NB:** Vermont's Decisional Law Limiting Prosecutorial Argument Is Expansive.
- Special Duty On Prosecutors "to refrain from improper methods ... and to guard against conduct unintentionally trespassing the bounds of propriety, *State v. Madigan*, 2015 VT 59, ¶ 30, 199 Vt. 211, 230; and they must not inject their "personal belief that the defendant is guilty," *State v. Ayers*, 148 Vt. 421, 425 (1987).
- As Opposed To Many Federal Courts -- *United States v. Nastri*, 647 F. App'x 51, 53 (2d Cir. 2016) -- Vermont Views As Improper Arguments Suggesting Defense Theory Is A "Red Herring" Or "Smoke Screen," *State v. Webster*, 2017 VT 98, ¶ 27, 206 Vt. 178, 202.

ADVICE FOR EFFECTIVE CLOSINGS

- Try To Take A Step Outside Your Role And See Case And Evidence From The Perspective Of The Jury Box
 - Easy To Be Focused On Trees And Lose Forrest
- Keep It As Short As Possible To Accomplish The Task
- Write Out Or Outline And Run By Someone You Trust
- Be Prepared But Don't Read Or Sound Rehearsed
- Use Visual Aids/Projections Of Exhibits
 - It's Even More Important In Closings

ADVICE FOR EFFECTIVE CLOSINGS

- Connect Back To Opening
 - Important To Link Back To Opening Themes/Points You Asked Jurors To Keep An Eye On During Trial
 - Keeps Jurors Focused On Those Points
 - Increases Your Credibility/Reliability Because You Delivered On What You Said/Promised

ADVICE FOR EFFECTIVE CLOSINGS

- Walk Through Key Evidence And Explain How It Should Be Interpreted And Why It Favors Your Client
- Point Out Weaknesses Of Opponent's Case
- Encourage Jurors To Draw Favorable Inferences From Evidence And Explain What The Inference Are
- Encourage Jurors To Use Their Life Experiences And Common Sense To Draw Favorable Inferences For Your Client

ADVICE FOR EFFECTIVE CLOSINGS

- Other Techniques
- Ask Rhetorical Questions. “You May Be Asking Yourself, Why Did Ms. Jones Go Back Into the Building?” Then, You Can Answer It.
- Don’t Give All Of the Answers To The Jury
- Lead Them To The Conclusion You Want But Don’t Land The Final Blow. Say: In Light Of The Compelling Testimony of Drs. Smith And Jones Does Plaintiff’s Case Hold Water? “The Answer Is Clear.” Or: “I Leave The Answer To Your Good Judgment.”

ADVICE FOR EFFECTIVE CLOSINGS

- Critical To Address Negative Evidence Head On
- Cannot Just Focus On Your Evidence
 - Explain why the evidence is not persuasive: the witness could not observe whole event, is biased, made inconsistent statements, or lacks credibility; the scientific analysis underlying an exhibit is flawed; the evidence is belied by other objectively credible evidence; etc., etc.

ADVICE FOR EFFECTIVE CLOSINGS

- **Use The Jury Instructions**
- You'll Know The Jury Instructions, So Use Them As A Guide. For Example: "The Judge Will Instruct You That You Can Evaluate A Person's Credibility By Seeing Whether They've Made Consistent Statements. Here, Ms. Jones Has Told 3 Different Stories About This Event."
 - Links Your Case Directly To The Instructions.
 - Also Beneficial Because It Allows You To Draw On Some Of The Judge's Credibility.
- Can Go Through Key Special Interrogatories And Verdict Form As Well

ADVICE FOR EFFECTIVE CLOSINGS

- Address Points Made By Opponent In Her Argument
 - Don't Be So Tied To Outline That You Don't Listen To Opponent's Closing
 - The Closings Should Not Just Pass In The Night
 - You Must Be Nimble Enough To Be Dynamic And Say Why Your Opponent's Points Are Wrong Or Irrelevant

ADVICE FOR EFFECTIVE CLOSINGS

- Take Advantage Of Rebuttal/Sur-Rebuttal
- If You Don't Have Rebuttal/Sur-Rebuttal, Ask Jury To Consider Your Arguments And The Evidence After Hearing The Other Side's Final Points.

ADVICE FOR EFFECTIVE CLOSINGS

- On Behalf Of You And Your Client, Remember To Thank The Jury Again.