

**ESSENTIAL TRIAL SKILLS:  
OPENING STATEMENTS AND  
CLOSING ARGUMENTS**

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**Opening Statements**

- I. The Purpose of the Opening Statement.
  - A. The purpose of the opening statement is simply to introduce the parties, summarize the facts that the evidence will show, state the issues, make it easier for the jurors to understand what is to follow, outline the harm the plaintiff claims he/she suffered, and relate parts of the evidence and testimony to the whole.
    1. It is not an occasion to argue the case or give personal opinions.
    2. Counsel is not required to set forth all of the relevant evidence.
  - B. Key purposes of the opening statement:
    1. To educate the jury as to important issues of fact, key witnesses, and (as permitted by the court) the applicable legal principles.
    2. To alert the jury as to credibility issues concerning certain evidence.
    3. To introduce and explain complicated issues or evidence.
      - a. In some cases, this might mean providing a primer to the jurors on basic legal principles, such as “standard of care” or “alter ego.”
      - b. In other cases, this might involve educating the jury on the basics of an unfamiliar industry, or financial transaction, or medical procedure.
    4. To confront weaknesses in your case and explain them reasonably.
      - a. Addressing the weaknesses up-front may minimize their impact.
      - b. Being up-front about the weaknesses may also help to enhance your credibility as an advocate.
    5. To establish a relationship with the jury and to build in the jurors a sense of confidence in you, your integrity, and your knowledge of the case.

II. The Procedures Associated with the Opening Statement.

- A. The law varies from jurisdiction to jurisdiction on the question of whether an opening statement may be given as of right. Most federal cases characterize the opportunity to give an opening statement as merely a privilege, which may be granted or withheld depending upon the circumstances of a case. For instance, courts have held that where the issues are simple and clearly explained by the court during voir dire, it is not an abuse of discretion to deny counsel's requests to make an opening statement.
- B. There is general agreement on the rule that what is said by counsel during opening statements is not evidence. It is important to note, however, that the trial court is empowered to grant judgment as a matter of law (a directed verdict) immediately after the opening statement if it plainly appears that no cause of action exists.
- C. A party is not required to set forth all of the facts and theories in support of its case during the opening statement. The decision not to reference certain facts that are expected or intended to be proven at trial does not justify the later exclusion of these facts at trial provided that they are properly put in issue by the pleadings.
- D. The trial judge has broad supervisory powers over opening statements, including the power to interrupt the presentation of opening statements and the authority to limit the admission of testimony because of representations made by counsel in the opening statement. These powers are subject to review under an abuse of discretion standard.
- E. As a general matter, the sequence of the opening statements depends on which party bears the burden of proof. In civil cases, the plaintiff ordinarily opens the case. In criminal cases, the prosecutor opens the case. The court may adjust the sequence in either case, however, if there are substantial issues upon which the defense bears the burden of proof, *e.g.*, an insanity defense, or a counterclaim that is more significant in the context of the litigation than the plaintiff's claim.
  - 1. The defense may deliver an opening statement immediately following the plaintiff's opening statement or at the beginning of the defendant's case in chief.
- F. The opening statement is not a proper occasion to give personal opinions or to present argument. As a general rule, opening statement ends and argument begins when counsel attempts to tell the jury how they should reach their decision, instead of what the evidence will be.
  - 1. So long as the opening statement is comprised only of a description of the evidence, the rule against argument does not present much of an issue.
  - 2. Difficulties arise, however, when the advocates engage in interpretation or exhortation during the opening statement.

3. Counsel may not urge the jury to draw inferences from facts or to reach certain conclusions based on the evidence.
4. Counsel may not attempt to explain the importance of certain items of evidence or suggest how evidence should be weighed.
5. Counsel may not comment directly on the credibility of witnesses during the opening statement.
6. Counsel may not, in an opening statement, attempt to appeal overtly to the jury's sense of mercy or justice.

III. Preparing for the Opening Statement.

- A. The case theme is a critical aspect of an opening statement (and trial strategy more generally). A theme is a psychological anchor that jurors instinctively adopt to distill and summarize what the case is about. That is because information during the trial becomes complicated and potentially overwhelming. Case themes become tools that jurors use to organize a large amount of information into something more manageable and to summarize their attitudes about the information in easily-remembered words and phrases.
- B. Essential steps for preparing the opening statement:
  1. Assemble the facts. Organize all of the facts, even the most remote, according to a useful organizing principle.
    - a. The most common organizing principle will be chronological.
    - b. Other organizing principles may include topical, by witness, or by element of the claims and/or defenses.
  2. Review the jury instructions. The court's ruling on instructions typically occurs after the close of the evidence at trial, but pattern jury instructions and legal research often provide clear indications of the more likely jury instructions that will be used with respect to the basic issues in the case.
  3. Review and refine your case theme. Based on the facts adduced in discovery and the jury instructions that are likely to guide the jurors' deliberations, assess whether your case theme is both persuasive and consistent with the record facts and applicable law.
  4. Review and refine the facts that are relevant to your case theory. As you further develop your understanding of the facts and law in the context of your case theme, begin to simplify. Determine which facts should be de-emphasized or discarded because they are not essential to your theory of the case, and determine which issues should be de-emphasized as clutter

(e.g. too collateral, confusing, or likely to divert attention from the real issues.)

5. Review the admissibility of evidence for the opening statement. The facts introduced in the opening statement should be based on admissible evidence, and it is improper to refer to facts that cannot be admitted into evidence at trial.
  - a. Confirm the basis for each fact included in the opening, with a citation to an exhibit, transcript, or other evidence.
  - b. Confirm the sponsor for each fact included in the opening — *i.e.*, the witness whose testimony will introduce the fact into evidence.
6. Decide on demonstratives. Come to a decision on whether to use demonstrative exhibits or other non-verbal elements of presentation during the opening statement.
  - a. Obtain the court's approval in advance if there is any question as to the propriety of using any particular demonstrative.
  - b. Plan precisely how you will present the demonstrative — *e.g.*, Powerpoint presentation? Handout for the jury?
7. Resolve any introductory statements by the court. Confer with opposing counsel and resolve during the pre-trial conference whether any stipulated description of the parties, the case, or the issues will be read to the venire or the jury before the presentation of opening statements.
  - a. Adopt and repeat the court's language wherever possible.
8. Evaluate and incorporate in the opening statement information you learn about individual jurors during jury selection. Monitor carefully the information you gain during the voir dire process, as the selection of individual jurors may affect the facts and themes that you present during the opening statement.
9. Continue to review and refine your case theory. With the understanding of the individuals who are serving on the jury and the introductory matters that the court has or will convey, continue to review and refine your case theory. Most importantly, continue to simplify to the essential facts.
10. Outline the opening statement. Be sure to include all of the elements of a successful opening statement, but be mindful of the running time.
  - a. According to some seasoned trial lawyers, 75 minutes is the ideal length of an opening statement in a complex civil case.

- b. Many experts observe that only exceptional cases should take longer than 60 minutes to open.
  - c. As a general matter, do not test the patience of the judge or the jury by taking longer than necessary during the opening statement.
11. Practice the opening statement and solicit feedback. There is no substitute for dedicated practice. First, practice with an eye toward further refinement; then practice with an eye toward committing to memory.
- a. Consider conscripting a non-lawyer to provide feedback.
    - (1) It is useful to have a layperson's view on whether or not your opening statement is intelligible to a non-lawyer.
    - (2) It is also useful to have a layperson's view on whether or not you are telling a compelling and believable story.
  - b. Stage "full dress" rehearsals in front of a video camera, making full use of the demonstratives you intend to use.
12. Sleep is preparation. Be sure to get a proper amount of rest and critical distance from the opening statement as the day approaches.

#### IV. The Structure of the Opening Statement.

##### A. Various approaches to structuring the opening statement.

1. The traditional approach. This approach includes a recognizable beginning that introduces the main elements of the case, a substantive discussion in the middle that discusses the facts, witnesses, and issues, and a conclusion requesting or anticipating a particular result.
  - a. The advantages of the traditional structure is that it is logical and easy to follow, especially in cases where the chronology of events is straightforward but significant.
  - b. The disadvantage is that the traditional structure does not necessarily provide the greatest dramatic impact in presentation and may not be consistent with non-chronological themes.
2. Non-traditional approaches. There is nothing that ties an advocate to the beginning-middle-end structure of the traditional approach to an opening statement. Other structures may provide a more persuasive narrative or a more dramatic introduction to case themes, such as:
  - a. The "flashback" approach starts in the middle of a story, focusing on a particularly relevant day in the narrative of the case. This

approach is particularly useful for drawing the jurors' attention to a life-changing event, like an accident or a crime.

- b. The "convergence" approach describes the parallel storylines of two or more parties as they converge on a critical event in the case. The storylines may be as simple as the approach to an intersection or as complicated as the development and/or use of an invention.

B. The elements of the opening statement.

1. Prefatory remarks. The preface to the opening statement may be as basic as introducing oneself and one's client, along with a sentence or two that summarizes a case theme.
  - a. Traditionally, the prefatory remarks use an oft-repeated analogy to explain the role of the opening statement in the context of the trial — *e.g.*, describing the case as a jigsaw puzzle, with pieces of evidence representing its constituent parts, or the opening statement as a road map, with each piece of evidence being a step along the way to a particular destination.
    - (1) The advantage of this approach is that it is familiar and easy to recall, which may encourage a confident delivery and meet the expectations of jurors who expect trials to proceed according to rituals they have seen in pop culture.
    - (2) The disadvantage of this approach is that it spends valuable time on housekeeping matters that are not directly relevant to the specific case at hand.
  - b. An alternative approach is to provide a "cold open": a one or two minute description of the case theme, or a description of key events that builds interest in the relevant facts of the case.
2. Introduction of parties, witnesses, and evidence. Identify the key witnesses and explain their roles in the case. Describe the important times, locations, and other circumstances relating to important events.
  - a. Use the opening statement as an opportunity to personalize your client. If your client is an individual, portray him or her as a unique person with a contextual history, admirable personal qualities, and understandable weaknesses.
  - b. If your client is a corporation, then explain the nature of the client to the jurors in familiar terms. Remind the jurors of the components and features of a corporate client:

- (1) The corporation is a business that is organized by individuals who are no different from the jurors. It employs individuals like the jurors, who cooperate and work toward a shared goal. The key point is that the corporation is made of people, not glass and concrete.
  - (2) If it is consistent with your theme, explain to the jurors that corporations have many legal rights and obligations that are no different from those of natural persons.
  - (3) Consider describing the corporation by what it produces, using the corporation's products as demonstrative exhibits if appropriate. Emphasize the corporation's contributions to society, both in its for-profit activities and in its charitable contributions of time and energy.
- c. Do not put your client on a pedestal. Do not overstate your client's virtues. To do so risks generating resentment from the jurors.
3. Summary of facts. The most important part of the opening statement is a summary of the evidence that you intend to prove. Most of the opening statement will be devoted to this goal. Consider whether a chronological approach, or a witness-by-witness discussion, or a different approach makes the most sense in the context of your case themes.
  4. Discussion of adverse facts. Acknowledging some adverse facts and providing non-argumentative context for them may help to defuse skepticism about your case and improve your credibility in the eyes of the jury. The amount of time and energy to expend in addressing adverse facts and the decision about when in the opening statement to do so is a case-specific strategic issue. An opening statement that is too responsive may be impermissibly argumentative and send the message to the jurors that you assign an outsized importance to adverse facts.
  5. Description of key issues. Describe the claims and defenses in the case in a non-argumentative way. Use common language to discuss the legal issues, highlighting and explaining any legal terms that will recur throughout the trial. If the judge provides an introductory statement that previews the facts and issues for the venire or the jury, then be sure to use words and phrases that the judge has employed. Your adoption of the judge's terminology will add to your credibility.
  6. Explanation of the burden of proof. The burden of proof is a complicated subject for non-lawyers, and there are advantages to explaining the concept during the opening statement. Defendants will emphasize the responsibility of the plaintiff or the prosecution to produce evidence and persuade the trier-of-fact. The plaintiff will contrast the lesser burden

assigned in civil proceedings (e.g. the scales of justice need only to tip ever so slightly) to the “reasonable doubt” criminal standard.

7. Discussion of anticipated defenses. In most jurisdictions, there is no rebuttal opening statement. Accordingly, if a plaintiff wants to address (and potentially pre-empt) a defense theme in the opening statement, then he or she must raise the issue, ideally in a way that is not argumentative and that does not give the anticipated defense too much credence.
8. Damages. A plaintiff should discuss at least the existence of damages in the opening statement, as causation and injury are probably elements of the substantive claim in the case. Beyond that, the amount of detail about damages that counsel discusses presents a case-specific strategic question.
  - a. If a plaintiff introduces a specific damages amount in the opening statement, it may indicate to the jury that the dispute is important and substantial. At the same time, a large prayer for damages (introduced without the context of detailed evidence of the plaintiff’s injuries) may provide the defendant ammunition for arguing that plaintiffs’ case is actually based on greed.
  - b. Ordinarily, a lawyer will wait to discuss specific damage figures until the parties have adduced evidence relating to injury. But a plaintiff will nevertheless at least mention certain categories of damages, especially if they might involve concepts that are unfamiliar to most jurors, such as intangible harms.
9. Conclusion. The conclusion of the opening statement should be forceful and concise enough to be conducive to a confident delivery. It should include a request that advises the jury of the precise result that you desire or anticipate as a result of the trial.

V. **Objections and Preserving the Record for Appellate Review.**

- A. Be wary of objecting during the opening statement. Jurors rarely appreciate objections at any phase of the trial, and it is particularly likely that jurors will perceive an objection during the opening statement to be an obstructionist tactic.
  1. Regardless for whether it will frustrate jurors, it is necessary to raise a timely objection in order to preserve an issue for appeal.
  2. The preferable strategy is to anticipate potential issues – such as prejudicial inadmissible evidence to which your opponent may refer during the opening statement – and confront them through pretrial motion practice before the trial begins. If you have a concern that your opponent intends to reference evidence during the opening that you believe is inadmissible, ask your opponent in advance of the opening statement so

that you can raise the issue with the court prior to your opponent's delivery of the opening statement.

3. Ask your opponent to show you any demonstrative exhibits or deposition video portions he/she intends to show during opening statement. If you have an objection, raise it with the court prior to the opening.
4. Use objections only sparingly during the opening statement, and do not object unless you are highly confident that the court will sustain your objection. The following issues are typically important enough to warrant an objection:
  - a. Overt improper argument, especially when it is repeated throughout the adversary's opening statement, and buttressed by an argumentative tone of voice, facial expressions, and gestures.
  - b. References to matters that the court has already excluded by pretrial order.
  - c. References to inadmissible or non-existent evidence. On this point, however, be cautious that a court is likely to give an advocate wide latitude in anticipating that it will be able to secure admission of evidence referenced in the opening statement.
  - d. References to a defendant's insurance, unless the issue of insurance coverage is independently relevant to the case.
  - e. References to an inadmissible criminal record.
  - f. Statements by counsel regarding his or her opinions or knowledge.
  - g. Overreaching appeals to the sympathy or prejudice of the jurors.
  - h. Misstatements of the law.
  - i. References to a criminal defendant's failure to testify.
5. If you anticipate that you will need to object during the opening statement, you might try to defuse the jurors' frustration by advising them during voir dire or the opening statement of the need to raise objections in order to preserve the integrity of the trial. A trial judge may also provide an instruction upon request as part of the preliminary remarks to the jury.

## **Closing Arguments**

### VI. The Purpose of the Closing Argument.

- A. The closing argument is the considered by many to be the quintessential, most traditional form of legal advocacy. The lawyer has an opportunity to use nearly all rhetorical tools and devices in support of his or her theory of the case, and closing argument is the only time during trial when the lawyer can hold forth, uninterrupted, on the merits of his or her client's case under the applicable legal standard. It is a lawyer's final call to action to the jury.
- B. The objectives of a closing argument include:
1. To provide a rationale, based on the relevant facts, to support your theme of the case and your theory of the case.
  2. To state your case boldly, in an effort to convince the jury that you have prevailed in proving disputed factual issues.
  3. To review the facts, especially the facts upon which your case relies.
  4. To address gaps in the evidence, including theories raised by your adversary that have been shown to be unsupported by evidence.
  5. To propose conclusions based on the evidence, including reasonable inferences from the evidence.
  6. To refer to exhibits, writings, documents, transcripts, illustrations, and matters of common knowledge in support of your client's case, and to point out your adversary's failure to adduce evidence available to him that might have supported his or her claims and/or defenses.
  7. To anticipate and address facts upon which your adversary may rely, and to try to defuse their impact. (This objective may not apply in a criminal case, where the prosecutor could be unaware of the defendant's case themes prior to rebuttal, and where it may be improper for the prosecutor to comment on the defense's arguments before they are presented.)
  8. To discuss the law. As with the opening statement, it makes sense to use the same language that the court will use to instruct the jury as to the law. Unlike the opening statement, however, the closing argument is the proper vehicle for explaining how the law should be applied to the record evidence before the jury in a particular case.
  9. To discuss damages. This is a plaintiff's opportunity to request a certain amount of damages or to make a less specific request to the jury with the context of the record evidence relating to plaintiff's alleged injuries.

10. To reinforce the points that you made at the beginning of the trial, in your opening statement.
11. To reaffirm the jury's belief in your and your case by describing how you fulfilled every commitment made in your opening and, to the degree possible, by discrediting your adversary's theory of the case.
12. To argue and tell the story. The closing argument is the time and place for using analogies, hypotheticals, rhetorical challenges, and other time-tested persuasive devices in the service of the case theme. This is the advocate's opportunity to motivate the jurors with a bold call to justice.
13. To convey a strong call to action – that the jury can right a wrong, send a strong signal, protect its community, act as the conscientious of the community, etc. and as with a request for punitive damages, deter others from harming anyone else in this manner.

VII. The Procedures Associated with the Closing Argument.

- A. In a typical two-party case, three closing arguments are presented: (1) argument by the plaintiff or prosecution (bearing the burden of proof); (2) argument by the defense; and (3) rebuttal argument on behalf of the plaintiff or prosecution.
  1. Although the plaintiff ordinarily has the right to begin and end the final argument, the defense in a civil case may open and close the closing argument where it has the burden of proof on a central issue, such as a statute-of-limitations defense tried separately.
  2. In criminal trials, the prosecution opens and closes the closing argument. Where the defendant has the burden of proof, the state has the right to open and close the argument. In jurisdictions where separate proceedings are used to determine a criminal penalty, the prosecution generally opens the final argument, but the defendant is given equal time, as neither party bears a burden of proof as to the penalty.
  3. The scope of the plaintiff's rebuttal is generally determined by and limited to the issues raised in the arguments that precede it. Generally, it is improper to raise new issues in rebuttal that could have been raised in the initial closing argument and that were not raised by the defense. The scope of the rebuttal lies at the discretion of the trial court.

VIII. Organizing the Closing Argument.

- A. Although the closing argument is ultimately based on what occurs at trial, it is important to develop a persuasive case theme early on, and then to craft it into a compelling argument, long before the evidence is presented. The best course is to

begin preparing the closing argument at the very outset of the case, and then to refine the closing throughout the pretrial and trial proceedings.

- B. Early development of the closing argument helps to focus the theme, which helps to bring clarity to the entire case. Although the argument and the case theme may change as new facts are developed, the chances that your trial presentation will be internally consistent and logically compelling will be enhanced if you start building the case with the closing argument in mind.
- C. The following steps are essential for organizing the closing argument:
1. Assemble the facts. The facts will change as pretrial discovery and the trial progress, so it is mission-critical that you keep your fact development files current. The theory of the case and the jury instructions you will request will depend on the facts that are proven at trial. Obviously, being able to refer to transcripts helps a great deal.
  2. Determine what law applies. The legal theory supporting your case will be based on the jury instructions determined by the judge at a charge conference, which will probably follow the close of evidence. Your case theme and trial presentation, in turn, will depend on the legal theory that you will need to argue to the jury. It is essential to discuss the law during your closing argument. Your characterization of the facts and structure of the closing will depend on the legal theory that you adopt.
  3. Review the theory of the case. Be prepared to revisit your theory of the case as you are developing the facts and analyzing legal theories. Although the theory of the case will probably change as the trial unfolds, having a basic trial outline based on the theory of the case will allow you to make important strategic decisions about what facts to emphasize and how to sequence your witnesses. The theory need not include every potentially applicable fact and legal theory, but it should be logical and consistent with the key evidence in the case.
  4. Determine the respective burdens of proof. Consider how you will explain the burden of proof to the jurors in your case. The burden of proof is an important legal issue that is subject to characterization by the parties to a case. The closing argument is your last opportunity to impart to the jurors your explanation as to why the burden favors your client.
  5. Confirm the sequence of closing arguments. The plaintiff or prosecution generally enjoys the right to commence and to conclude final argument, but the defense may be allowed to open and close if the defendant carries the burden of proof on a substantial issue. The sequencing of the arguments is crucial for their content, so be sure to resolve (through motions practice or other request of the court, if necessary) which of the parties will open and close the closing arguments.

6. Determine how damages will be assessed. For the plaintiff, decide what standards and categories of damages you will request, and settle on how you will request from and justify the damages to the jury. For the defendant, compile your arguments that the damages requested are overstated or speculative.
7. Confirm the evidence that will be addressed. It is not only improper to rely upon facts that are not part of the evidence in the closing argument, but it may be considered by the jurors (prodded by your adversary) to be a broken commitment that harms your credibility. As you get closer to a final version of your closing argument, be sure to continuously confirm that the facts upon which you rely can be traced to admissible evidence.
8. Decide on demonstratives and other materials. Having confirmed the evidence that is available for reference in the closing argument, determine what demonstratives or other materials will be part of the argument. Keep in mind that charts, deposition clips, excerpts of testimony, and other presentation materials require logistical preparation and might also require approval from the court. If there is no substantial question that you will be able to use the exhibit or evidence, however, it may be the best strategic course to avoid alerting your adversary as to what you plan to use.
9. Continually reassess the case theme. This aspect of preparation requires greater attention than might have been the case with respect to the opening statement. Avoid slavish adherence to a theme or theory when there is a risk that its factual predicates have not been borne out by the evidence.
10. Prepare a strong conclusion. Begin and end the argument with impact.
  - a. Many well-known trial lawyers deliver a stock story that they think stirs the emotions of the jury and that can be easily adapted to the particular facts of the case they are litigating. The point of this approach is to have a standard, well-practiced monologue with which the attorney is sufficiently comfortable to deliver flawlessly and confidently. This, however, may sound canned and thus disingenuous.
  - b. Regardless for whether you decide to use a stock ending, make sure that you can deliver the conclusion to your closing argument without referring to notes and while maintaining eye contact with the jurors. Be sure to speak to each individual juror. Try to motivate them into action on behalf of your client.
  - c. If you are a plaintiff with a right of rebuttal, plan a strong ending for your rebuttal, based on the arguments that you anticipate the defense will make. Keep in mind that the defense will have no

opportunity to respond to your rebuttal argument, so make the most of the advantage of recency.

11. Practice the closing argument and solicit feedback. As with the opening statement, there is no substitute for practicing the closing argument. Do not expect that you can extemporize effectively. Over the course of the trial, there will be too much information and too many variables to organize on the fly. Practicing your argument to the extent that you can – given the time constraints – will help you ensure that you are not neglecting important points or muddling through a disorganized argument.

IX. Preparing for the Closing Argument.

- A. The closing argument generally follows a straightforward structure: briefly review the evidence; list the key issues to be resolved; review the burden of proof; describe the damages suffered; and then argue in detail, by reference to the evidence, why the evidence requires favorable resolution of the issues.
  1. There is less time to prepare a closing argument than there is to prepare an opening statement, owing to the fluid and unpredictable nature of trial. For that reason, it may be helpful to develop template structures to use as an organizing principle for the closing argument. It may be more important to focus on presenting the evidence and argument from your case and less importance to devise creative structures for presentation.
- B. The following are key elements of a closing argument:
  1. Prefatory remarks. The standard preface of a closing argument begins with recognition of the jury's patient participation and with an explanation of the procedures relating to closing argument. This discussion includes an explanation of the role of jurors as triers-of-fact, as contrasted with the judge's role as instructor in the law. The standard preface is popular because it is easy to remember and may be presented without reference to notes. It is also useful for building rapport with the jurors.
    - a. A different approach might lead the closing arguments with a return to the case themes or an aggressive recitation of the relevant facts or key issues. It is advisable in any event, however, to offer some words of appreciate to the jurors for their service, lest the advocate run the risk that his or her adversary be alone in thanking the jurors for their time and attention to the case.
  2. Statement of the facts. In the closing argument, it is not necessary to re-introduce parties and events, as the jurors will be familiar with the key elements of the case by this point (and if they are not, then it is unlikely that introductions in the closing argument will help the situation). Rather, counsel should focus on the specific witness testimony and evidence that is necessary for resolving conflicts later in the argument.

3. Applicable law and the burden of proof. Summarize the legal issues based upon the instructions the jury will receive, using the terms that the court will use to instruct the jury. Preview the verdict form for the jury. Outline the causes of action and briefly explain each element.
4. Description of the issues and their resolution. Counsel should define the issues in as much detail as is necessary to make them understandable to the jurors. This may require a detailed explanation in layperson's terms of legal standards and concepts. It makes sense to outline the issues in the order in which the advocate intends to address them, and it is often helpful to use a chart or a whiteboard to keep track of the various issues.
  - a. In the interest of simplifying the case, an advocate should focus the jurors' attention on key issues and identify any uncontested facts.
  - b. Bear in mind, though, that the plaintiffs and prosecutors typically benefit the most from the simplification of the case. For defendants, it may be more strategic to stress the burdens that the plaintiffs and prosecutors bear in order to prevail in their cases.
  - c. Spend most of the argument on resolving how the elements of the claims compare with the evidence presented. Review the evidence on each contested issue in detail so that the jury will focus clearly on the issue.
    - (1) Point out any inconsistencies, discrepancies, or gaps in the proof offered by your adversary.
    - (2) Explain any gaps in the storyline that you have presented to the jury.
    - (3) Draw favorable or neutral inferences from record evidence to fill in the missing pieces in your case.
    - (4) Where there is a conflict in the evidence, argue from consistency with physical evidence, the weight of all evidence presented, the conclusion that is most consistent with common sense, and the support of the most credible witnesses.
5. Damages. The closing argument is the first – and may be the only – opportunity for the plaintiff to discuss damages in the context of what the jury has actually seen and heard from the client about the injuries suffered.
  - a. From the defense point of view, the safest strategy is often to address damages early in the argument and then to focus on liability. Focusing on damages risks lending unwarranted dignity to the plaintiff's position. The defendant should point out that it is

discussing damages only because it is compelled to do so, and even then, only out of an abundance of caution.

6. Conclusion. Deliver a strong, dramatic, and positive reaffirmation of the themes of your case. Consider using a stock conclusion that includes a general appeal to justice or equity, practiced enough times that it can be delivered without hesitation or resort to notes. The principle of recency dictates that you leave the jurors with the best impression possible.
7. Rebuttal. Properly viewed, rebuttal is an opportunity to respond to arguments made by the defense after the plaintiff's initial argument. It is not an opportunity to repeat what was said during the initial closing argument. It is not necessary – and is often strategically a bad idea – to try to answer every point made by the defense.

X. Objections and Preserving the Record for Appellate Review.

- A. As with opening statements, it is necessary to make a timely objection in order to preserve the record on appeal relating to misconduct by an adversary during closing arguments.
  1. In some federal jurisdictions – such as the First Circuit – it is permissible to object at the completion of an argument, instead of interrupting.
  2. When an objection is necessary, an advocate should consider whether it is necessary also to make a motion to strike and, if there is serious unfair prejudice, a motion for a mistrial.
- B. Although jurors do not welcome objections, they ordinarily accept objections more readily during closing arguments, after they have had an opportunity to hear all of the evidence and learn something about the personalities involved in the case. It is nevertheless still a good idea to use objections with restraint.
  1. As with opening statement, do not object during closing arguments unless the issue is serious and the objection is likely to be sustained.
- C. The following are valid grounds for objecting to a closing argument:
  1. Providing improper statements of the law. The law of the case is instructed by the court. The instructions should be used exclusively as the basis for arguing the law to the jury. An incorrect statement of the law may warrant a mistrial.
  2. Attacking the law or the court's rulings. It is improper to attack any court ruling before the jury, including the court's rulings on evidence. The proper avenue for challenging the court's rulings is through the appellate process. It may be reversible error to argue to the jury that the court erred,

and it is also questionable as a matter of strategy for an advocate to pit the lawyer against the credibility of the court.

3. Misstating the evidence. Although counsel may argue regarding inferences from evidence in the record, counsel may not create evidence without factual support.
4. Vouching for witnesses. A lawyer may not personally endorse a witness's credibility during closing argument. By presenting purported first-hand knowledge of a witness's character, a lawyer would effectively become an unsworn witness in the litigation. This rule does not prevent an advocate from arguing based on evidence in the record (as opposed to personal knowledge) that a witness is credible or not credible.
5. Stating personal beliefs. Counsel may not advocate their personal beliefs during the closing statement. The best practice is to avoid phrases such as "I think" or "I believe," even though many courts tend to give counsel significant latitude when the use of the phrase does not appear to be purposeful. At bottom, courts look to whether counsel is providing inferences and interpretations from evidence or arguing from personal knowledge in determining whether or not this rule has been violated.
6. Improperly exciting prejudice, passion, or sympathy. Inflammatory language is improper and may serve as a valid ground for a mistrial. Counsel should avoid making derogatory comments about opposing counsel or the opposing party, or improper stories or descriptions that are designed to provoke sympathy for the client or prejudice against the opponent. The same principle applies to arguments about the relative wealth or poverty about the parties, or any appeal to the "conscience of the community" or other policy objectives that are divorced from the law or the facts of the specific case before the court.

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## **Appendix B - Ethical Issues in Opening Statements and Closing Arguments**

### **I. SELECTED ETHICAL RULES**

- **Rule 1.3 Diligence and Zeal**

(a) A lawyer shall represent a client zealously and diligently within the bounds of the law.

(b) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules; or

(2) Prejudice or damage a client during the course of the professional relationship.

(c) A lawyer shall act with reasonable promptness in representing a client.

- **Rule 3.4 Fairness to Opposing Party and Counsel**

A lawyer shall not:

(d) Obstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding. Unless prohibited by law, a lawyer may receive physical evidence of any kind from the client or from another person. If the evidence received by the lawyer belongs to anyone other than the client, the lawyer shall make a good-faith effort to preserve it and to return it to the owner, subject to Rule 1.6;

(e) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(f) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(g) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(h) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state 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; or

(i) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

- (1) The person is a relative or an employee or other agent of a client; and
- (2) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

## II. D.C. VOLUNTARY STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT.

- Preamble: "Civility in professional conduct is the responsibility of every lawyer. While lawyers have an obligation to represent clients zealously, we must also be mindful of our obligations to the administration of justice. Incivility to opposing counsel, adverse parties, judges, court personnel, and other participants in the legal process demeans the legal profession, undermines the administration of justice, and diminishes respect for both the legal process and the results of our system of justice."
- General Principles:
  1. "In carrying out our professional responsibilities, we will treat all participants in the legal process, including counsel and their staff, parties, witnesses, judges, and court personnel, in a civil, professional, and courteous manner, at all times and in all communications, whether oral or written. We will refrain from acting upon or manifesting racial, gender, or other bias or prejudice toward any participant in the legal process. We will treat all participants in the legal process with respect."
  3. "We will not, even if called upon by a client to do so, engage in offensive conduct directed toward other participants in the legal process nor will we abuse other such participants in the legal process. Except within the bounds of fair argument in pleadings or in formal proceedings, we will abstain from disparaging personal remarks or acrimony toward such participants and treat adverse witnesses and parties with fair consideration. We will encourage our clients to act civilly and respectfully to all participants in the legal process."

## **Appendix C – Fact Pattern for Course Demonstrations**

### **Fact Pattern Based Upon Facts of Burlington Northern v. White**

Before June 2007, Ralph Ellis operated a forklift for Atlas Foundry at its foundry in Birmingham, Alabama. In June 2007, Ellis resigned from the forklift position in order to work on a casting furnace. Ellis earned more pay than he would have if he had continued working in the forklift position. Mark Blake, superintendent of the plant, interviewed Donna White for a job with Atlas and expressed interest in White's experience operating a forklift.

On June 23, 2007, Atlas hired White to work in the plaintiff's maintenance department, and following White's hire, Blake assigned her to operate a forklift. White had operated a forklift for other companies and was well aware that the work environment in the foundry would be predominantly if not exclusively male and that she would likely experience resistance among her co-workers to her presence at the workplace. But, White, who is a single mother, prided herself on having a thick skin and was prepared to put up with this type of environment to earn the kind of money such a position paid. She knew what she was in for but felt confident in her ability to handle it.

As White anticipated, she was the only female working in the maintenance department. White's immediate supervisor was foreman Bill Smith. Smith had never supervised a woman before, and he admitted in his deposition that he treated White differently because of her gender but that in fact he tried to go easier on her than he did with his men. He also admitted that he did not believe that the maintenance department was an appropriate place for women to work.

According to White, Smith repeatedly expressed this belief to her while she was working under his supervision. According to Smith, several other Atlas employees also expressed the belief that women should not work in a foundry, much less in the maintenance department. Another Atlas employee agreed in deposition that there was "a general anti-woman feeling" among Atlas employees at the plant but that same employee also testified White never seemed upset by things that happened on the job and that she told him and others that she liked working for Atlas.

Despite concerns about the propriety of a woman working in maintenance, White did not have difficulty performing her job and in fact did a very good job. According to Blake, he never received any complaints about White's performance operating the forklift. Smith testified that White had no problems performing her job. Furthermore, another Atlas foreman testified that no one expressed concern about White's ability to get along well with others in the workplace or about anything specific to White other than her gender and whether she actually fit in at Atlas.

Atlas has a sexual harassment policy that prohibits unwelcome verbal or physical conduct that denigrates or shows hostility toward another person because of his or her gender, where such conduct interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment. The Company's policy requires that employees who believe that they have been subjected to sexual harassment immediately report such concerns to the Company's Human Resources Department. At the time of White's hire, she was given a copy of the policy and signed a statement saying that she had read the policy.

On September 16, 2007, about three months after being assigned to work operating a forklift, White complained to Blake and other company officials about specific incidents of alleged sexual harassment committed by Smith. She complained, for example, that Smith denigrated her for not being feminine enough and allowed her male-coworkers to make sexist comments and

tell off-color jokes in her presence. White admitted that neither Smith nor her co-workers ever touched her or subjected her to sexual advances or demands for sexual contact. Rather, her primary complaint was that Smith repeatedly told her that women should not work in a foundry and that she was taking away a position from a man who was responsible for supporting a family. White told Blake and other Company officials that she did not mind the jokes, but she was bothered by Smith's remarks. She emphasized, however, that she has a thick skin and did not let it affect how she performed her job, but she just wanted Smith to stop the remarks. The Company investigated White's complaints and confirmed that Smith had in fact made the comments she complained about. The Company suspended Smith for ten days and ordered him to attend a training session regarding sexual harassment at his own expense.

On September 26, 2007, Blake met with White to inform her that as a result of her complaint, the Company had disciplined Smith and would require Smith and the entire the maintenance department to undergo sexual harassment training. However, he also told her that the company had learned during the course of the investigation of several complaints about her working in the forklift position. According to Blake, the complaints did not relate to her performance but to the fact that the forklift position was a less arduous and cleaner job than other foundry positions, which required heavy lifting in a hot and dangerous environment. Blake testified that other employees, including Ellis, complained about a junior employee being allowed to work the forklift instead of "a more senior man." Other witnesses testified that the forklift job was generally considered a physically easier and cleaner job than other foundry positions, although it required more qualifications, and that White's co-workers felt that the Company was giving her preferential treatment because she is a woman by giving her this position. Smith testified that other foundry workers complained about White being allowed to hold the position instead of a male employee and that this was creating morale problems in the Department. Smith also testified that White's co-workers did not like working with her because they felt that if they did anything wrong, she would run right to the H.R. Department – a threat she had made to them directly.

During the September 26, 2007, meeting regarding the resolution of White's internal sexual harassment complaint, Blake informed White that he was removing her from the forklift position and assigning her to a standard foundry position because of her coworkers' complaints. Her pay and benefits remained the same, but her new job was, by all accounts, more arduous, dirtier, and more dangerous than the forklift position. In the new job, she spent most of her shift lifting 10- to 30-pound molds hot out of a casting oven and "shaking out" the castings. The work environment was extremely noisy, hot, and filled with fumes and dust. Worker injuries were commonplace in this position.

Blake replaced White with Ellis, the only other employee qualified to perform the forklift job. Blake admitted at trial that he had heard complaints about White being allowed to work the forklift before she complained of discrimination but that he did not remove her from the position until after she complained of discrimination.

Blake's trial testimony is inconsistent with Atlas's interrogatory response. In that response, the company stated that it removed White from the forklift position because a more senior employee claimed the job according to the collective bargaining agreement. Blake, however, testified at trial that the forklift job was not governed by the collective bargaining agreement and that he had the discretion to place anyone he chose in that position regardless of seniority. Moreover, neither the union, nor anyone else, initiated a grievance about White's operation of the forklift.

A union official testified that the union's records did not reflect any complaints regarding White's assignment to the forklift position. Only White and Ellis were qualified to perform the forklift position. Ellis, who had voluntarily resigned from the forklift job for a higher-paying job, testified that he did not complain to Blake or anyone else about White operating the forklift and that he did not request that he be returned to the position.

On October 10, 2007, White filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging sex discrimination and retaliation. She filed a second charge with the EEOC on December 4, 2007, alleging retaliation. In her second EEOC charge she alleged that Blake had placed her under surveillance and was checking on her daily activities. Her second EEOC charge was mailed to Blake on December 8, 2007.

On December 11, 2007, White was working in her new position under the supervision of Atlas foreman Percy Steele. At some point during the day when she he assigned her to work for the day on another casting line in a building on the other side of the property, Steele instructed White to ride in a truck to the other building with another foreman, James Key. Steele instructed another worker, Greg Nelson, to ride with him in his vehicle. According to White, when she approached Key he told her that she had to ride with Steele because Key wanted Nelson to ride with him. Against Steele's order, Nelson rode away with Key. White testified that Steele became very upset when she returned and told him that Nelson had ridden away with Key and that she would have to ride with him. Contrary to White's testimony, Steele testified that White refused to ride with Key, claiming that she had seniority over Nelson and insisting upon riding with Steele. According to Steele, White had a bad attitude and this was not the first time she did not follow his directions.

According to Steele, he called Blake to discuss the situation and Blake told him that based on Steele's description of events, White had been insubordinate and should be suspended immediately. On the afternoon of December 11, 2007, Steele informed White that she was suspended. Although Steele had the authority to suspend White himself, Steele testified that Blake made the decision to suspend White. Blake testified that Steele made the decision. White testified that Steele told her at the time that Blake had instructed him to suspend her. In a letter to the EEOC, Atlas stated that Blake made the decision, but Blake testified that this letter was incorrect. Nelson received no discipline, although Steele acknowledged in deposition that Nelson had disobeyed his direct order to ride with him in his vehicle.

White testified that Steele had told her at some point before her suspension that Blake considered White a "troublemaker." Steele denied making this statement and testified instead that White told him that Atlas was trying to "get rid" of her but he disagreed with her about this.

The decision to suspend White occurred seven days after White filed her second EEOC charge and three days after the charge was mailed to Blake. The suspension took effect immediately and was without pay. According to Atlas policy, the suspension without pay would automatically become a termination if White did not file a grievance with her union appealing the decision within fifteen days. White timely filed such a grievance and also filed another EEOC charge on December 15, 2007, alleging retaliation.

While her grievance was pending, White was without a job and without income and she did not know if or when she would be allowed to return to work. During this period, White sought medical treatment for emotional distress and incurred medical expenses. The grievance remained pending through the end of December and the first half of January 2008. After an

investigation and an internal hearing, the hearing officer, who was an Atlas manager, found that White had not been insubordinate and that she should not have been suspended. After being suspended without pay for thirty-seven days, White was reinstated to her standard foundry position with full back pay on January 16, 2008.

Since returning to her position, there have no further incidents. White testified at deposition that following her return to work, her co-workers have ignored and shunned her but “that was not a big problem for [her] since they weren’t friends to begin with.” White’s co-workers testified at deposition that they keep out of her way because, she runs to the H.R. Department if you even look at her funny.

Atlas moved for summary judgment on White’s claim of sexual harassment and retaliation, brought under Title VII of the Civil Rights Act of 1964. The Court ruled that there were disputed issues of fact about whether the alleged sexual harassment was sufficiently severe or pervasive to constitute a sexually hostile work environment and whether the Plaintiff, Ms. White, subjectively found the workplace to be a hostile one. The Court also ruled that while Atlas acted promptly after White reported the alleged sexual harassment, there were disputed issues of fact about whether the Company took effective remedial action triggering application of the Ellereth/Farragher affirmative defense.

With respect to the retaliation claim, the Court ruled that it was ultimately a jury question whether the actions taken by Atlas would have been materially adverse to a reasonable employee. Stated differently, the jury would have to decide whether Atlas’s actions were harmful to the point that they could well dissuade a reasonable worker from making a charge of discrimination.