GROUP #6 PROUDLY PRESENTS:

OPENING STATEMENTS & CLOSING ARGUMENTS

DO'S AND DON'TS

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WHAT IS AN OPENING STATEMENT?

The opening statement is simply an outline of anticipated proofs in respect to one or more of the issues.

HOW MUCH TIME DO I HAVE TO MAKE MY OPENING STATEMENT?

The rule that it is an abuse of discretion for the trial court to arbitrarily limit counsel's closing argument in a civil case is equally applicable to counsel's opening argument. Thus, it has been held to be an abuse of discretion to impose a limit of 5 or 10 minutes for an opening statement although *a limit of 20 minutes has been upheld where any diminution of the 20 minutes was not the fault of the trial court but of counsel.*

AT LEAST 20 MINUTES

WHAT IS THE PURPOSE OF AN OPENING STATEMENT?

To outline the facts expected to be proven at trial. Opening statements are not an appropriate place for argument.

BUT remember, Jurors will likely decide which side they align with during the opening statements…

As stated by Professor Thomas Mauet:

Juror uncertainty remains high during opening statements. At this time, jurors are highly receptive to information, because they have a need to understand what the case is all about. However, because conflict and uncertainty cause stress, they need to figure out quickly what most likely happened.

Jurors look for validation of their stories during the plaintiff's and defendant's cases, when the actual evidence is presented. Jurors test to see if the evidence validates the stories they have constructed mentally. If the evidence is consistent with their stories, they accept it; if it is inconsistent, they usually distort or reject it.

Studies conducted on the issue have indicated that facts conveyed to jurors in opening statements may actually be the ones that have the most influence on the jury's ultimate verdict.

SINCE OPENING STATEMENTS ARE SO IMPORTANT & IMPACTFUL I CAN ARGUE DURING IT, RIGHT?

The most basic rule of opening statements is that "argument" is prohibited.

The rule is easy to state, but it is hard to precisely define what is "argument" and what is not.

With respect to statements of fact, there are two rules of thumb: if it is something you intend to prove, it is not argument. If you make a statement that is not susceptible of proof, it is argument.

IS IT A GUARANTEED RIGHT OR A DISCRETIONARY ALLOWANCE TO PERFORM?

There is no Florida Rule of Civil Procedure, statute, or recent case law directly addressing whether an attorney has an absolute right to make an opening statement.

Most court decisions in Florida and other jurisdictions "indicate that this is a matter which rests in the sound discretion of the trial court and the right to pursue such course must be determined upon a fair consideration of the circumstances of the case under consideration." See Juhasz v. Barton, 1 So.2d 476, 478 (Fla. 1941), and cases cited therein.

The giving of an opening statement is so well established as part of the adversary system that it probably rises to the level of a "right." *United States v. Stanfield,* 521 F.2d 1122 (9th Cir. 1975).

WHAT SHOULD I DO DURING AN OPENING STATEMENT?

- Display Control
- Greet the Court and Jury
- Grab the Jury's Attention
- Present a Narrative
- Present Events Chronologically
- Personalize the Client
- Establish expectations of witnesses
- Choose Logical Versus Emotional Statement
- Convey Proper Attitude
- Express Sincerity
- Choose where to Make Strongest Points
- Use Layperson's Terms and Mental Images
- Use Analogies
- Use Rhetorical Questions
- Use Visual Aids
- Use Humor
- Address Potential Problem Issues
- Convey Importance of Jury Decision
- Determine Whether to Waive or Defer Opening Statement

CLOSING ARGUMENTS

https://youtu.be/e-Reemd6FzM

WHAT IS A CLOSING ARGUMENT?

A speech made at trial after all the evidence has been presented by each party. The closing argument reviews and summarizes the evidence, and forcefully explains why the verdict should be granted in favor of the arguing party.

HOW MUCH TIME DO I HAVE TO MAKE MY OPENING STATEMENT?

Limitations on time for argument are within the sound discretion of the trial court. But the time for argument cannot be unreasonably limited. May v. State, 89 Fla. 78, 103 So. 115 (1925); Cooper v. State, 106 Fla. 254, 143 So. 217 (1932); cases cited in *Adams v. State*, 585 So. 2d 1092 (Fla. 3d DCA 1991).

When a trial judge gets busted by the DCA - his retort to the defense attorney was "May the gods be about you on appeal, but you're getting fifteen minutes a piece, and that's that ..." (Conviction reversed) Adams v. State, 585 So. 2d 1092 (Fla. 3d DCA 1991).

Five minutes held "grossly abusive limitation of counsel". *Theard v. State*, 861 So. 2d 103 (Fla. 3d DCA 2003)

AT LEAST 5 MINUTES!

WHAT IS THE PURPOSE OF A CLOSING ARGUMENT?

The purpose of closing argument is to help the jury understand the issues by applying the evidence to the law applicable to the case. *Haliburton v. State*, 561 So. 2d 248 (Fla. 1990); *Hill v. State*, 515 So. 2d 176 (Fla. 1987).

IS IT A GUARANTEED RIGHT OR A DISCRETIONARY ALLOWANCE TO PERFORM?

Whether in a bench trial or a jury trial, it is an absolute violation of the Sixth Amendment for the court to deny the defendant the right to make closing argument. Herring v. New York, 422 U.S. 853, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975); M.E.F. v. State, 595 So. 2d 86 (Fla. 2d DCA 1992); E.C. v. State, 588 So. 2d 698 (Fla. 3d DCA 1991); T. McD. v. State, 607 So. 2d 513 (Fla. 2d DCA 1992).

Fla.R.Crim.P. 3.250 provides that if defendant offers no testimony on his own behalf other than his own he shall be entitled to a concluding argument before the jury. But if the prosecutor gets up and says "I think I can save time. The evidence speaks for itself. We rest." There is nothing to rebut and defense may not use his last closing. Dean v. State, 478 So. 2d 38 (Fla. 1985).

CAN I, OR SHOULD I, OBJECT DURING CLOSING ARGUMENT?

A motion for a new trial based on an error occurring during the trial generally will not be granted unless the moving party had previously made an objection during trial at the time of the alleged error.

It has been held the defense must object to the improper comments and move for mistrial at least at the end of the state's argument in order to preserve the error for appeal. *Wyatt v. State*, 641 So. 2d 355 (Fla. 1994); *Nixon v. State*, 572 So. 2d 1336 (Fla. 1990); *Shaara v. State*, 581 So. 2d 1339 (Fla. 1st DCA 1991); *Carr v. State*, 561 So. 2d 617 (Fla. 5th DCA 1990); *Duque v. State*, 498 So. 2d 1334 (Fla. 2d DCA 1986); *Ryan v. State*, 457 So. 2d 1084 (Fla. 4th DCA 1984); *Clark v. State*, 363 So. 2d 331 (Fla. 1978) (abrogated on other grounds by, *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986)); *State v. Cumbie*, 380 So. 2d 1031 (Fla. 1980).

WHEN DO I GET A NEW TRIAL?

If the issue has been properly preserved, the legal standard for trial courts to use in deciding motions for a new trial based upon counsel's improper argument is whether the comment was highly prejudicial and inflammatory. Improper comments made to the jury during closing arguments will not serve as a basis for the granting of a new trial unless the improper comments are highly prejudicial and inflammatory.

To determine whether challenged statements and arguments of counsel were, in fact, prejudicial, the statements cannot be evaluated in isolation but must be placed and evaluated in context.

WHAT IF I DID NOT OBJECT TO THE IMPROPER ARGUMENT DURING TRIAL?

Should a complaining party establish that the unobjected-to closing argument being challenged is both improper and harmful, the party must then establish that the argument is incurable.

Specifically, a complaining party must establish that even if the trial court had sustained a timely objection to the improper argument and instructed the jury to disregard the improper argument, such curative measures could not have eliminated the probability that the unobjected-to argument resulted in an improper verdict.

When granting a new trial based on an unobjected-to closing argument, the trial court must specifically identify the improper arguments of counsel and the actions of the jury resulting from those arguments.

WHAT SHOULD I DO DURING CLOSING ARGUMENT

- Use a Chronology
- Play Videotaped Testimony
- Show Pull Quotes
- Incorporate Charts, Graphs, and Diagrams
- Argue With a Theme
- Argue the Evidence/Cite Consequences for Failing to Act
- Argue the Jury Instructions
- Tell the Jury How to Answer the Questions on the Verdict Form
- Ask for Money
- Tell a Story
- Fluctuate Tone of Voice
- Move Around
- Make Eye Contact with the Jury
- PREPARE

FAILING TO PLAN IS PLANNING TO FAIL!