8 Standard Pennsylvania Practice 2d § 48:76

Standard Pennsylvania Practice 2d | February 2019 Update

Chapter 48. Conduct of Trial
John Kimpflen, J.D.

VI. Conduct of Counsel During Trial

F. Closing Argument

1. In General

§ 48:76. Generally

Summary | Correlation Table | References

West's Key Number Digest

- West's Key Number Digest, Trial 111, 112

A.L.R. Library

- Order of closing argument in federal civil trials, 53 A.L.R. Fed. 900

Treatises and Practice Aids

- Packel and Poulin, 1 West's Pennsylvania Practice: Evidence § 128 (4th ed.) (Statements and arguments by counsel)
- Ionelli and Ionelli, 11 West's Pennsylvania Practice: Trial Handbook §§ 34:1 to 34:13 (3d ed.) (Closing arguments)

Final arguments by counsel are subject to the trial court's general supervision, control, and discretion respecting the range of discussion; the manner and method of presentation; and the language employed by, and the temper and tone of, the speaker.[1] Counsel are required to stay within the reasonable bounds of legitimate argument in making their partisan pleas to a jury.[2]

Illustration:

The trial court did not abuse its discretion in allowing a statement during the plaintiff's closing argument that counsel rather than the plaintiff made a mistake regarding the location of the accident, over objection that counsel testified improperly where the

plaintiff testified about the error, circumstances surrounding it included counsel's mistake, and plaintiff identified the correct location of the accident; testimony became a credibility issue which counsel for both parties properly argued and which was evaluated by the jury, and the plaintiff's counsel merely addressed the evidence during closing argument which had been testified to and placed into evidence at trial by her client.[3]

CUMULATIVE SUPPLEMENT

Cases:

Counsel is generally afforded considerable latitude in making closing arguments. Ferguson v. Morton, 2013 PA Super 329, 2013 WL 6834763 (2013).

A court may not properly base an adjudication on matters stated in oral argument that do not appear of record. Smith v. City of Philadelphia, 147 A.3d 25 (Pa. Commw. Ct. 2016).

[END OF SUPPLEMENT]

Footnotes

1 Clark v. Philadelphia College of Osteopathic Medicine, 693 A.2d 202 (Pa. Super. Ct. 1997).
As to the regulation of opening and closing arguments, generally, see Goodrich-Amram § 223:5 (2d ed.).

2 Piwoz v. Iannacone, 406 Pa. 588, 178 A.2d 707 (1962).

3 Aiello v. Southeastern Pennsylvania Transp. Authority, 687 A.2d 399 (Pa. Commw. Ct. 1996).

8 Standard Pennsylvania Practice 2d § 48:77

Standard Pennsylvania Practice 2d | February 2019 Update

Chapter 48. Conduct of Trial
John Kimpflen, J.D.

VI. Conduct of Counsel During Trial

F. Closing Argument

1. In General

§ 48:77. Nature of permissible argument

Summary | Correlation Table | References

West's Key Number Digest

- West's Key Number Digest, Trial 111, 112

A.L.R. Library

- Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein, 15 A.L.R.3d 1101
- Propriety and prejudicial effect of reference by plaintiff's counsel, in jury trial of personal injuries or death action, to amount of damages claimed or expected by his client, 14 A.L.R.3d 541
- Prejudicial effect of counsel's addressing individually or by name particular juror during argument, 55 A.L.R.2d 1198

Treatises and Practice Aids

- Packel and Poulin, 1 West's Pennsylvania Practice: Evidence § 132 (4th ed.) (Counsel presenting evidence during closing argument and opening statement)
- Ionelli and Ionelli, 11 West's Pennsylvania Practice: Trial Handbook §§ 34:1 to 34:13 (3d ed.) (Closing arguments)

Trial Strategy

- Premises Liability—Trip and Fall, 79 Am. Jur. Trials 285§§ 68 to 70 (Plaintiff's opening and closing arguments and defendant's closing argument)
- Litigation Under the Federal Employers' Liability Act, 11 Am. Jur. Trials 397§§ 165 to 178 (Propriety of counsel's summation to jury)
- Representation of Survivors in Death Actions, 11 Am. Jur. Trials 1§ 46 (Closing argument in wrongful-death trial)
- Sample Summations in Personal Injury and Death Cases, 6 Am. Jur. Trials 807 (Propriety of counsel's summation. Propriety of counsel's summation)
- Making and Preserving the Record—Objections, 6 Am. Jur. Trials 605§ 33 (Opening statements and closing arguments)

Generally, an attorney for a party has the right to make any legitimate argument which, in his or her judgment, will advance the interests of a client, but he or she must not misstate the law or the facts or make statements based upon unwarranted inferences from the evidence.[1] Counsel should be accorded the fullest freedom of speech compatible with the duty of the profession provided he or she does not abuse the privilege.[2] An argument is improper which appeals to passion or prejudice,[3] and it is improper for counsel to state a personal belief as to the evidence admitted at trial.[4]

The requirement that counsel stay within reasonable bounds in making their partisan pleas to a jury does not mean that their speeches may not be spirited, stirring, and accusatory if the material of the trial supplies them with relevant oratorical ammunition.[5] The adversarial trial system does not anticipate that emotions must be completely stifled and that their expression in appropriate language be curbed, provided counsel acts with decorum, does not misquote testimony or take liberties with the evidence, and does not unfairly treat witnesses or opposing counsel.[6] While counsel, in summing up their cases to a jury, must observe decorum, good taste, and, above all, faithful adherence to the facts adduced at trial, counsel need not abandon all appeal to the heart as well as the head of the juror; impassioned speech, if based on the facts and within the bounds of reason, can rarely work an injustice because the opposing side may respond with equally passionate speech.[7]

Arguments which offend in their floridity, rather than in any capacity to influence or prejudice the minds of the jury, do not result in prejudicial error.[8] An attorney arguing his or her client's case to the jury may employ whatever language he or she believes will best advance a client's case, and if he or she brings into play a stock legal phrase which in itself is descriptive, the phrase should not be ruled out of bounds simply because it might have a specific legal meaning to a judge or lawyer, distinct from the meaning of the phrase in common parlance.[9] Quotations from the Bible have been held a legitimate source of argumentation.[10]

In a personal injuries case, it was improper for counsel, in his or her closing address, to say that the suit was brought for a certain sum.[11] In reviewing objectionable remarks by trial counsel during closing argument, remarks must not be viewed in isolation but rather in the context of opposing counsel's closing argument.[12]

Footnotes

1 Smith v. Evans, 421 Pa. 247, 219 A.2d 310 (1966); Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 191 A.2d 662 (1963); Millen v. Miller, 224 Pa. Super. 569, 308 A.2d 115 (1973); Kriner v. McDonald, 223 Pa. Super. 531, 302 A.2d 392 (1973).

2 Rondinelli v. City of Pittsburgh, 407 Pa. 89, 180 A.2d 74 (1962).

3 Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 191 A.2d 662 (1963); Narciso v. Mauch Chunk Tp., 369 Pa. 549, 87 A.2d 233, 33 A.L.R.2d 438 (1952); Stassun v. Chapin, 324 Pa. 125, 188 A. 111 (1936).

4 Millen v. Miller, 224 Pa. Super. 569, 308 A.2d 115 (1973).

5 Papa v. Pittsburgh Penn-Center Corp., 421 Pa. 228, 218 A.2d 783 (1966); Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 191 A.2d 662 (1963); Contractors Lumber & Supply Co. v. Quinette, 386 Pa. 517, 126 A.2d 442 (1956).

6 Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 191 A.2d 662 (1963).

7 Smith v. Evans, 421 Pa. 247, 219 A.2d 310 (1966).

8 Libengood v. Pennsylvania R. Co., 358 Pa. 7, 55 A.2d 756 (1947).

9 Atene v. Lawrence, 428 Pa. 424, 239 A.2d 346 (1968).

10 Auerbach v. Philadelphia Transp. Co., 421 Pa. 594, 221 A.2d 163 (1966).

11 Carothers v. Pittsburg Rys. Co., 229 Pa. 558, 79 A. 134 (1911); Quinn v. Philadelphia Rapid Transit Co., 224 Pa. 162, 73 A. 319 (1909).

12 Alexander v. Carlisle Corp., 449 Pa. Super. 416, 674 A.2d 268 (1996).

End of Document

27 Standard Pennsylvania Practice 2d § 135:143

Standard Pennsylvania Practice 2d | February 2019 Update

Chapter 135. Conduct of Criminal Trial

Paul M. Coltoff, J.D.; Russell J. Davis, J.D., M.A.; Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Judith Nichter Morris, J.D.; Kimberly C. Simmons, J.D. and Mary Ellen West, J.D.

III. Remarks by Attorneys; Opening Statements and Closing Arguments

A. In General

§ 135:143. Remarks of prosecutor

Summary | Correlation Table | References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2060 to 2210

A.L.R. Library

- Disciplinary action against attorney for misconduct related to performance of official duties as prosecuting attorney, 10 A.L.R.4th 605
- Former jeopardy: Propriety of trial court's declaration of mistrial or discharge of jury, without accused's consent, on ground of prosecution's disclosure of prejudicial matter to, or making prejudicial remarks in presence of, jury, 77 A.L.R.3d 1143

A prosecutor is permitted to employ a certain oratorical flair in presenting a case to the jury.[1] A prosecutor must be free to present his or her arguments with logical force and vigor[2] and is allowed to argue vigorously so long as his or her comments are supported by the evidence or constitute legitimate inferences arising from that evidence.[3] In addition, a prosecutor must be permitted to respond to defense counsel's arguments.[4] Thus, a prosecutor is permitted wide latitude to advocate the Commonwealth's case.[5] A prosecutor, however, is prohibited from indirectly conveying his or her personal belief concerning critical issues at trial,[6] and it is improper to express his or her personal opinion or beliefs on issues that are within the province of the jury when such opinions are not based on fair arguments from the evidence presented.[7] Likewise, the prosecutor is not permitted to express a personal opinion or belief as to the defendant's guilt or innocence or as to the defendant's or other witness' credibility[8] and must refrain from making remarks that are vindictive or attempt to arouse the jury's prejudices[9] or that could inflame the passions of the jurors in a manner which may impede their ability to determine objectively the guilt or innocence of the defendant.[10]

A prosecutor's statements to a jury do not occur in a vacuum,[11] and any challenge to a prosecutor's comment must be

evaluated not in isolation but in the context in which the comment was made.[12] Thus, in order to determine whether allegedly prejudicial remarks are indeed prejudicial, they must be evaluated in the context and atmosphere of the entire trial,[13] with a particular view to the evidence presented and reasonable inferences drawn therefrom.[14]

While at the guilt phase, statements made to the jury are not improper unless their unavoidable effect is to prejudice the jury so that a true verdict cannot be rendered because the existence of bias and hostility makes it impossible to weigh the evidence in a neutral manner; the presumption of innocence is no longer applicable at the penalty phase, and the prosecutor may employ oratorical license and impassioned argument.[15]

For purposes of fair response to defense argumentation, admissibility of a prosecutor's remarks as to a defendant's silence is subject primarily to the trial court's assessment of probative value versus prejudicial effect on appropriate objection as is the case with all other evidence adduced at trial.[16]

Illustration:

The Commonwealth's elicitation of a state trooper's testimony that the defendant asserted his right to remain silent prior to his arrest constituted a fair response to defense argumentation, and thus did not violate the defendant's Fifth Amendment right to remain silent, in a prosecution for aggravated indecent assault on a person less than 16 years old, and other offenses, where the defense counsel's strategy was to question the government's preparation of its case, particularly in terms of the trooper's pursuit of potentially exculpatory evidence, and since the trooper's investigation was obviously limited by the defendant's decision to reject a request for an interview, the Commonwealth's elicitation of the trooper's testimony regarding this fact constituted a fair response.[17]

CUMULATIVE SUPPLEMENT

Cases:

Statements by prosecutor during closing arguments of murder trial, either alone or collectively, did not prejudice jury unavoidably or form in jurors' minds a fixed bias or hostility that would prevent them from properly weighing the evidence and rendering an objective verdict, so as to warrant mistrial; prosecutor's characterization of the case as a "search for truth" was a fair response to the defense's summation, which highlighted 27 points of doubt, prosecutor's use of a picture of the victim and statements regarding his family life were appropriate to establish the victim as a life in being, and when the prosecutor's statements did raise the specter of prejudice, the trial court formulated clear and specific jury instructions to alleviate the harm. Commonwealth v. Powell, 2017 PA Super 303, 171 A.3d 294 (2017).

A prosecutor must have reasonable latitude in fairly presenting a case to the jury and must be free to present his arguments with logical force and vigor; prosecutor is also permitted to respond to defense arguments. Commonwealth v. Proctor, 2017 PA Super 30, 156 A.3d 261 (2017).

Within reasonable bounds, the prosecutor may employ oratorical flair and impassioned argument when commenting on the evidence during summation. Com. v. Riggle, 2015 PA Super 147, 119 A.3d 1058 (2015).

Closing argument must be based upon matters in evidence, or upon the legitimate inferences that can be drawn from that evidence. Commonwealth v. Brown, 196 A.3d 130 (Pa. 2018).

Under the prosecutor's responsibility to be a minister of justice and not simply an advocate, prosecutors may fairly respond to

defense arguments with force and vigor, provided they are not injecting their own personal opinion. Commonwealth v. Brown, 196 A.3d 130 (Pa. 2018).

Prosecutor's remarks in closing argument that referred to defendant as "cold blooded killer" and a "dangerous man" were permissible oratorical flair in defendant's first-degree murder trial, where prosecutor had to prove specific intent to kill, defendant claimed that he accidentally shot victim in heat of passion after losing fight with victim, and evidence indicated that defendant shot at victim's vital organs while missing bystanders and engaged in polite conversation after fleeing. Commonwealth v. Clancy, 192 A.3d 44 (Pa. 2018).

Prosecutorial remarks do not constitute permissible oratorical flair simply because they are based upon the underlying facts of the case or because they relate to an underlying element of the crime; both requirements must be met. Commonwealth v. Clancy, 192 A.3d 44 (Pa. 2018).

Merely derogatory, ad hominem characterizations of the defendant or defense counsel are beyond the bounds of permissible advocacy by the prosecutor in closing argument. Commonwealth v. Clancy, 192 A.3d 44 (Pa. 2018).

A prosecutor enjoys reasonable latitude during closing arguments, and may advocate with force, vigor, and oratorical flair; nonetheless, this latitude is not unrestrained, and argument must be based upon matters in evidence, or upon the legitimate inferences that can be drawn from that evidence. Com. v. Johnson, 139 A.3d 1257 (Pa. 2016).

Prosecutorial comments based on the evidence or reasonable inferences therefrom are not objectionable, nor are comments that merely constitute oratorical flair. Com. v. Cash, 137 A.3d 1262 (Pa. 2016).

Courts will allow vigorous prosecutorial advocacy if there is a reasonable basis in the record for the prosecutor's comments during closing argument. Com. v. Cash, 137 A.3d 1262 (Pa. 2016).

A prosecutor is free to present his argument with logical force and vigor so long as there is a reasonable basis in the record for the prosecutor's remarks. Com. v. Staton, 120 A.3d 277 (Pa. 2015), petition for certiorari filed (U.S. Oct. 21, 2015).

Prosecuting attorneys have leeway to present their closing arguments with logical force and vigor, and they are permitted a degree of oratorical flair in advocating the Commonwealth's case. Com. v. Laird, 119 A.3d 972 (Pa. 2015).

Any challenge to a prosecutor's comment must be evaluated in the context in which the comment was made. Com. v. Watkins, 108 A.3d 692 (Pa. 2014).

[END OF SUPPLEMENT]

Footnotes

1 Com. v. Henkel, 2014 PA Super 75, 90 A.3d 16 (2014); Com. v. Thomas, 618 Pa. 70, 54 A.3d 332 (2012), cert. denied, 134 S. Ct. 173, 187 L. Ed. 2d 119 (2013); Com. v. Sneed, 616 Pa. 1, 45 A.3d 1096 (2012); Com. v. Chmiel, 612 Pa. 333, 30 A.3d 1111 (2011); Com. v. Hutchinson, 611 Pa. 280, 25 A.3d 277 (2011), cert. denied, 132 S. Ct. 2711, 183 L. Ed. 2d 70 (2012).

2 Com. v. Thomas, 618 Pa. 70, 54 A.3d 332 (2012), cert. denied, 134 S. Ct. 173, 187 L. Ed. 2d 119 (2013).

3 Com. v. Sneed, 616 Pa. 1, 45 A.3d 1096 (2012); Com. v. Chmiel, 612 Pa. 333, 30 A.3d 1111 (2011); Com. v. Hutchinson, 611 Pa. 280, 25 A.3d 277 (2011), cert. denied, 132 S. Ct. 2711, 183 L. Ed. 2d 70 (2012); Com. v. Montalvo, 604 Pa. 386, 986 A.2d 84 (2009); Com. v. Patton, 604 Pa. 307, 985 A.2d 1283 (2009);

598 Pa. 621, 959 A.2d 916 (2008).

4 Com. v. Bryant, 620 Pa. 218, 67 A.3d 716 (2013); Com. v. Thomas, 618 Pa. 70, 54 A.3d 332 (2012), cert. denied, 134 S. Ct. 173, 187 L. Ed. 2d 119 (2013); Com. v. Sneed, 616 Pa. 1, 45 A.3d 1096 (2012); Com. v. Chmiel, 612 Pa. 333, 30 A.3d 1111 (2011); Com. v. Hutchinson, 611 Pa. 280, 25 A.3d 277 (2011), cert. denied, 132 S. Ct. 2711, 183 L. Ed. 2d 70 (2012).

5 Com. v. Szakal, 2012 PA Super 159, 50 A.3d 210 (2012); Com. v. Keaton, 556 Pa. 442, 729 A.2d 529 (1999); Com. v. Beasley, 544 Pa. 554, 678 A.2d 773 (1996).

6 Com. v. Boone, 286 Pa. Super. 384, 428 A.2d 1382 (1981).

7 Com. v. Russell, 456 Pa. 559, 322 A.2d 127 (1974).

8 Com. v. Chmiel, 612 Pa. 333, 30 A.3d 1111 (2011); Com. v. Bricker, 506 Pa. 571, 487 A.2d 346 (1985).

9 Com. v. Branch, 292 Pa. Super. 425, 437 A.2d 748 (1981); Com. v. Blatstein, 231 Pa. Super. 306, 332 A.2d 510 (1974).

10 Com. v. Starks, 479 Pa. 51, 387 A.2d 829 (1978).

11 Com. v. Helsel, 2012 PA Super 198, 53 A.3d 906 (2012), appeal denied, 619 Pa. 700, 63 A.3d 1244 (2013).

12 Com. v. Helsel, 2012 PA Super 198, 53 A.3d 906 (2012), appeal denied, 619 Pa. 700, 63 A.3d 1244 (2013); Com. v. Bryant, 620 Pa. 218, 67 A.3d 716 (2013); Com. v. Sanchez, 82 A.3d 943 (Pa. 2013); Com. v. Elliott, 80 A.3d 415 (Pa. 2013); Com. v. Thomas, 618 Pa. 70, 54 A.3d 332 (2012), cert. denied, 134 S. Ct. 173, 187 L. Ed. 2d 119 (2013); Com. v. Spotz, 616 Pa. 164, 47 A.3d 63 (2012).

13 Com. v. Sanchez, 82 A.3d 943 (Pa. 2013); Com. v. Martin, 307 Pa. Super. 118, 452 A.2d 1066 (1982); Com. v. Raffensberger, 291 Pa. Super. 193, 435 A.2d 864 (1981).

14 Com. v. Martin, 307 Pa. Super. 118, 452 A.2d 1066 (1982); Com. v. Raffensberger, 291 Pa. Super. 193, 435 A.2d 864 (1981).

15 Com. v. Baker, 531 Pa. 541, 614 A.2d 663 (1992).

16 Com. v. DiNicola, 581 Pa. 550, 866 A.2d 329 (2005).

17 Com. v. DiNicola, 581 Pa. 550, 866 A.2d 329 (2005).

End of Document

27 Standard Pennsylvania Practice 2d § 135:155

Standard Pennsylvania Practice 2d | February 2019 Update

Chapter 135. Conduct of Criminal Trial

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III. Remarks by Attorneys; Opening Statements and Closing Arguments

C. Closing Arguments

2. Content of Closing Arguments

§ 135:155. Generally

Summary | Correlation Table | References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2071 to 2074, 2087 to 2128

Both the prosecution and the defense alike are afforded wide[1] or reasonable[2] latitude in presenting their cases to the jury and may employ oratorical flair in arguing to the jury.[3] Generally, however, a counsel's closing arguments in a criminal case should consist of a restatement of the evidence.[4] Furthermore, the arguments advanced must be based upon matters in evidence or upon any legitimate inferences that may be drawn from the evidence.[5]

Illustrations:

Defense counsel was properly precluded from commenting on the psychiatric records of the defendant since even though the records were admitted as an exhibit, they were admitted solely as a source for the opinion of the defense psychiatrist and therefore not independently admissible.[6] In another case, the trial court did not err in refusing to permit defense counsel to argue the voluntariness of certain statements that the defendant was alleged to have made to the police following his arrest where, during the trial, the defendant had testified on his own behalf and had denied making such statements.[7]

In addition, any representation of fact that is made by counsel in the argument must be based solely upon facts in evidence and reasonable or legitimate inferences that may be derived from the evidence.[8]

During closing arguments to the jury, counsel need not discuss the facts in a vacuum but may consider them in light of the

applicable rules of law.[9]

Observation:

In defining what constitutes impermissible conduct by a prosecutor during closing argument, Pennsylvania follows the section of the American Bar Association (ABA) standards that concerns argument to the jury.[10]

Footnotes

1 Com. v. Keaton, 615 Pa. 675, 45 A.3d 1050 (2012); Com. v. Smith, 606 Pa. 127, 995 A.2d 1143 (2010); Com. v. Abu-Jamal, 553 Pa. 485, 720 A.2d 79 (1998).

2 Com. v. Chmiel, 585 Pa. 547, 889 A.2d 501 (2005); Com. v. Robinson, 583 Pa. 358, 877 A.2d 433 (2005); Com. v. Jones, 546 Pa. 161, 683 A.2d 1181 (1996).

3 § 135:143.

4 Com. v. Bishop, 489 Pa. 96, 413 A.2d 1031 (1980).

5 Com. v. Culver, 2012 PA Super 172, 51 A.3d 866 (2012); Com. v. Keaton, 615 Pa. 675, 45 A.3d 1050 (2012); Com. v. Abu-Jamal, 553 Pa. 485, 720 A.2d 79 (1998); Com. v. Jones, 546 Pa. 161, 683 A.2d 1181 (1996); Com. v. Beasley, 544 Pa. 554, 678 A.2d 773 (1996).

6 Com. v. Jermyn, 516 Pa. 460, 533 A.2d 74 (1987).

7 Com. v. Jones, 507 Pa. 580, 493 A.2d 662 (1985).

8 Com. v. Rios, 591 Pa. 583, 920 A.2d 790 (2007); Com. v. McNair, 529 Pa. 368, 603 A.2d 1014 (1992); Com. v. Chambers, 528 Pa. 558, 599 A.2d 630 (1991); Com. v. Jermyn, 516 Pa. 460, 533 A.2d 74 (1987).

9 Com. v. Gwaltney, 479 Pa. 88, 387 A.2d 848 (1978); Com. v. Benson, 280 Pa. Super. 20, 421 A.2d 383 (1980).

10 Com. v. Sampson, 2006 PA Super 119, 900 A.2d 887 (2006).

End of Document

27 Standard Pennsylvania Practice 2d § 135:156

Standard Pennsylvania Practice 2d | February 2019 Update

Chapter 135. Conduct of Criminal Trial

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III. Remarks by Attorneys; Opening Statements and Closing Arguments

C. Closing Arguments

2. Content of Closing Arguments

§ 135:156. Discussion of law

Summary | Correlation Table | References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2071 to 2074, 2084 to 2086

There is no prohibition against the prosecutor discussing the applicable law in the closing argument as long as he or she states the law clearly and accurately.[1] It is not proper, however, for counsel to argue to the jury that one rule of law rather than another should apply,[2] or to discuss legal questions not germane to the case being tried, or to argue novel theories of law to the jury.[3] It is also improper for counsel to misstate the law or to state it in a manner calculated to confuse the jury.[4]

When counsel refers to rules of law during the summation to the jury, he or she should normally tell the jury that they will receive their authoritative instruction on the law from the court, whose version must prevail.[5]

Even where closing remarks are considered improper, a new trial is not required for every improper remark.[6] The closing remarks do not constitute reversible error unless the unavoidable effect would be to prejudice the jurors so that they could not weigh the evidence objectively and render an impartial verdict.[7]

Footnotes

1 Com. v. Rios, 546 Pa. 271, 684 A.2d 1025 (1996).

2 Com. v. Gwaltney, 479 Pa. 88, 387 A.2d 848 (1978); Com. v. Benson, 280 Pa. Super. 20, 421 A.2d 383 (1980).

3 Com. v. Gwaltney, 479 Pa. 88, 387 A.2d 848 (1978).

4 Com. v. Jones, 546 Pa. 161, 683 A.2d 1181 (1996); Com. v. Gwaltney, 479 Pa. 88, 387 A.2d 848 (1978); Com. v. Benson, 280 Pa. Super. 20, 421 A.2d 383 (1980).

5 Com. v. Gwaltney, 479 Pa. 88, 387 A.2d 848 (1978).

6 Com. v. Baker, 531 Pa. 541, 614 A.2d 663 (1992).

7 Com. v. Pelzer, 531 Pa. 235, 612 A.2d 407 (1992).

End of Document

27 Standard Pennsylvania Practice 2d § 135:157

Standard Pennsylvania Practice 2d | February 2019 Update

Chapter 135. Conduct of Criminal Trial

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III. Remarks by Attorneys; Opening Statements and Closing Arguments

C. Closing Arguments

2. Content of Closing Arguments

§ 135:157. Statements regarding penalty for offense

Summary | Correlation Table | References

West's Key Number Digest

- West's Key Number Digest, Criminal Law 2071 to 2074, 2158 to 2160

It is improper for counsel to discuss penalties for the charged offenses in the closing argument,[1] since punishment is a matter solely for the court, and the jury's function is to consider guilt or innocence without regard to the possible sentence.[2] Furthermore, the fact that the sentence is mandatory in a particular case is of no consequence.[3] In the closing argument, however, the prosecutor may comment on the deterrent effect of a penalty such as the death penalty.[4]

Footnotes

1 Com. v. Carbaugh, 423 Pa. Super. 178, 620 A.2d 1169 (1993); Com. v. Waters, 334 Pa. Super. 513, 483 A.2d 855 (1984).

2 Com. v. Waters, 334 Pa. Super. 513, 483 A.2d 855 (1984).

3 Com. v. Carbaugh, 423 Pa. Super. 178, 620 A.2d 1169 (1993).

4 Com. v. Beasley, 544 Pa. 554, 678 A.2d 773 (1996).

Opening and Closing Statements in New York State Supreme Court

by Practical Law Litigation

Maintained • New York

A Practice Note discussing key issues surrounding opening statements and closing arguments in a civil trial in New York State Supreme Court. Specifically, this Note discusses applicable law and rules, the main purposes of opening statements and closing arguments, guidance on how to prepare, draft, and deliver effective opening statements and closing arguments, making and responding to objections, and the use of visual aids and ***demonstratives****.*

Contents

Opening statements and closing arguments are crucial phases of a civil jury trial. They are generally the only times when counsel may address the jury directly. Counsel can lay out the client's case and discuss the **evidence** with the jury.

In opening statements, counsel presents its theory of the case, previews the anticipated **evidence**, and provides a roadmap for the jury to follow during the trial. The opening statement, however, **is** not argument.

The closing argument has a different purpose. Counsel can and should argue why the **evidence** presented warrants a verdict in the client's favor. In closing argument, counsel may argue for conclusions to be drawn from the **evidence** presented.

Applicable Rules

CPLR 4016 gives parties the right to make opening statements and closing arguments (CPLR 4016(a)). The right to make opening and closing statements **is** particularly important in jury trials. Its denial **is** error and may lead to the right to a new trial (see *De Vito v. Katsch,* 556 N.Y.S.2d 649, 651 (1990)). The same right exists in non-jury trials, but denial of the right to make an opening statement in a non-jury trial **is** not as prejudicial as in a jury trial and **is** less likely to result in a new trial, particularly where the court **is** familiar with the issues in the case (*Saggese v. Steinmetz*, 921 N.Y.S.2d 360, 361 (2011) (in non-jury trial, denial of right to opening statement did not warrant reversal because the court was familiar with the facts based on prior proceedings with the parties); *Lohmiller v. Lohmiller*, 528 N.Y.S.2d 586, 588 (2d Dep't 1988) (though it was error to deny defendant's attorney the right to an opening statement in non-jury trial, reversal was not warranted because the court was familiar with the parties contentions)).

The CPLR, however, does not provide much guidance regarding what **is** permissible and what **is** not permissible in opening or closing statements. Those limitations mainly arise from ethical rules and case law (see Content of Opening Statement and Content of Closing Argument).

Timing and Order of Presentations

The party bearing the burden of proof, usually the plaintiff, generally opens first (*De Vito v. Katsch*, 556 N.Y.S.2d 649, 651 (1990)). As a result, that party also has the last word and delivers the closing argument last (CPLR 4016(a) (closing arguments are "in inverse order to opening statements")). If there **is** a disagreement, the court determines which party bears the burden of proof. Usually this **is** determined before the start of the trial, but in some cases, such as where the burden of proof has shifted during the trial, the court can change the order of closing arguments.

In multiparty cases, the order of the parties in the caption usually governs the order of openings and closings, with the parties bearing the burden of proof going first and last. In cases that have been consolidated, the plaintiff in the first filed case generally has priority in opening and closing (*Grimm & Davis v. Goldberg*, 422 N.Y.S.2d 319, 321 (Kings Co. Civ. Ct. 1979)).

Opening Statements

Although counsel interacts with the jurors during *voir dire*, the opening statement **is** counsel's first real opportunity to speak to the jury about the client's case and to develop a rapport with its members. Opening statements can frame how jurors view the **evidence** at trial and, ultimately, how the jury decides the case. It **is** an opportunity to summarize the case for the jury and to develop a framework for jurors to interpret the **evidence** they are about to see and hear. It **is** also the last opportunity before closing statements for counsel to address the jury directly.

Main Purposes of the Opening Statement

The main purposes of opening statements are to:

- Build rapport and credibility with the jury.
- Personalize the client for the jury.
- Familiarize the jury with:
    - the nature and themes of the case;
    - the key **evidence** that **is** helpful to the party, including principal witnesses and documents; and
    - the party's theories of recovery and defense.
- Outline the facts that counsel expects to prove and weave them into a compelling story so that the jury views the **evidence** in the light most favorable to the client.
- Provide a roadmap of the case so that the jury can follow the **evidence** and understand its meaning.
- Leave the jury feeling empowered by concluding with a call to action, such as evaluating and weighing the **evidence** or rendering justice.

The opening statement **is** an opportunity for counsel to build credibility with the jury and to convey counsel's belief in the client's case from counsel's demeanor and actions, though counsel may not convey counsel's personal opinion. Therefore, it **is** crucial not to make promises during the opening that counsel may not be able to keep during the trial. Similarly, counsel should personalize the client so that the jury can relate to the client. If the client **is** a corporation, in most cases, it **is** important to have a human corporate representative in the courtroom.

The themes of a case are crucial to provide a framework for the **evidence**. Counsel should introduce and develop those themes in the opening statement.

Counsel also should preview for the jury the important facts and **evidence** of the case. Merely reciting the facts, however, **is** not enough. People, jurors included, remember and understand facts better if they are conveyed in a compelling narrative that appeals to their common sense and everyday experience. Analogies and stories are helpful in this regard. The narrative developed in the opening statement can provide the roadmap the jury needs to find its way through the documents and testimony presented throughout the trial. If counsel provides the jurors with a preview of what **is** to come, the jury **is** more likely to follow the **evidence** easily and in the way counsel wants them to see the **evidence**.

The jurors have the last word. They did not ask to be at the trial. They want to be doing other things. Their task becomes more appealing if you leave them empowered by asking them to:

- Complete an important task.
- Do justice.
- Right a wrong.
- Be dispassionate and fair.

Preparing the Opening Statement

Although each case is different, there are some basic steps to take in preparing the opening statement. Start with a structural outline of the opening statement. Like any presentation, it should have a beginning, a middle, and an end. After introducing yourself and your client, the beginning or introduction should present the themes of the case and an overview of what is to come in the main body of the opening statement. The middle or the body of the opening statement should have some more detail about the specific parts of the case: liability, damages, causation, and key pieces of evidence or anticipated testimony. The conclusion should reinforce the trial themes, summarize the facts woven together into your client's story, and leave the jury eager to hear the evidence.

Once the structure is laid out, then the opening can be written out and the language crafted to tell a compelling story that highlights the trial themes. The actual drafting is guided in part by how much time the court has permitted for opening statements, if the court has limited them. If the court has not limited the duration, the opening statement should still be compact. Longer is not better. Even in a complex case, an opening statement of one hour is long. In most cases, a much shorter opening statement is likely to be more effective.

Content of Opening Statement

CPLR 4016 does not address the permissible scope of opening statements. However, the New York courts have long held that it is customary and proper for counsel to tell the jury what the issues are and what they expect to prove (*Tisdale v. Delaware and Hudson Canal Co.*, 116 N.Y. 416, 419 (1889)).

In the opening, counsel can and should:

- State the issues.
- Present the facts to be proved.
- Generally set the framework for trial.

(*De Vito v. Katsch*, 556 N.Y.S.2d 649, 651 n.1 (2d Dep't 1990).)

Counsel also may refer to the pleadings because they are before the court not as evidence, but as stating what the parties must prove (*Braun v. Ahmed*, 515 N.Y.S.2d 473, 475 (2d Dep't 1987)).

The content of an opening statement depends on the facts, claims, and defenses in the case, as well as counsel's strategy. An opening statement generally should include:

- The theory of the case.
- A summary of the core disputes.
- A roadmap of the trial.
- What the party expects to prove at trial.
- A review of the important facts and expert witnesses anticipated to testify for the party, including:
    - the identity of the witnesses;
    - how the witnesses relate to the parties and to each other; and
    - what each witness is expected to say at trial (particularly for key expert witnesses).

- A summary of key documents or **evidence** in the case.
- An explanation of issues relating to claims, cross-claims, counterclaims, and defenses, including non-controversial statements on the applicable elements of the claims and burdens of proof.

Although it **is** a strategic decision, counsel also should consider addressing any damaging **evidence** or other weaknesses in counsel's client's case during the opening statement, rather than waiting for opposing counsel to address them first. By acknowledging problems in the case head on, counsel has the opportunity to put counsel's own spin on the damaging **evidence** or weaknesses and may prevent or reduce any negative impression on the jury.

The scope of the opening statement may be better understood by what **is** **not** permissible. At a minimum, counsel's opening statement **is** limited by:

- The Code of Professional Responsibility.
- What **is** unfairly prejudicial.

(*Carasquillo v. City of New York*, 866 N.Y.S.2d 509, 511-12 (Sup.Ct. Kings Co. 2008).)

In New York, the Code of Professional Responsibility has been replaced by the Rules of Professional Conduct. Under Rule 3.4 of the Rules of Professional Conduct, a lawyer appearing in court may not:

- Make statements about matters that:
  - the lawyer believes are irrelevant; or
  - are not supported by admissible **evidence**.
- Assert personal knowledge of facts in issue except when testifying as a witness.
- Assert a personal opinion regarding:
  - the justness of a cause;
  - the credibility of a witness; or
  - the culpability of a civil litigant.

(NY ST RPC Rule 3.4(d).)

Therefore, counsel may not refer to facts unless they have a good faith belief that they will prove the facts at trial with admissible **evidence** (*People v. Bonne*, 653 N.Y.S.2d 648, 649 (2d Dep't 1997) (reversible error for prosecutor to refer to an additional shooting victim in the prosecutor's opening statement when "he had no idea" where the victim was)). It **is** also reversible error for counsel to refer to facts supported only by **evidence** that the court has excluded from trial (*O'Connell v. Jacobs*, 583 N.Y.S.2d 61, 63 (4th Dep't 1992)). It **is** likewise improper to misstate the facts to be proven at trial or to make misleading statements (see *Cohn v. Meyers*, 509 N.Y.S.2d 603, 606 (1986); *Humiston v. Rochester Inst. of Tech.*, 601 N.Y.S.2d 751, 753 (4th Dep't 1993)).

It **is** unclear whether counsel properly may address damages in the opening statement. Courts have long held, however, that counsel may refer to and comment on the pleadings in opening statements (*Tisdale v. Delaware and Hudson Canal Co.*, 116 N.Y. 416, 419 (1889); *Braun v. Ahmed*, 127 A.D.2d 418, 422, 515 N.Y.S.2d 473, 475 (2d Dep't 1987)). Therefore, though case

law is scant, to the extent that the pleadings address damages, counsel may address damages in the opening statement by reference to the pleadings.

Unlike in opening statements, it is proper to address evidence and damages in closing arguments (CPLR 4016(b); *Braun v. Ahmed*, 127 A.D.2d 418, 430, 515 N.Y.S.2d 473, 481 (1987) and see Content of the Closing Argument).

Other matters that constitute prejudicial error if included in opening statements are:

- Insurance coverage for the claim asserted in the action (*Estes v. Town of Big Flats*, 340 N.Y.S.2d 950, 951 (3d Dep't 1973)).
- Counsel giving expert medical testimony (*Rhoden v. Montalbo*, 511 N.Y.S.2d 875, 877 (2d Dep't 1987)).
- The defendant's pre-trial efforts to obtain a release from the plaintiff (*Raplee v. City of Corning*, 176 N.Y.S.2d 162, 166 (4th Dep't 1958)).
- Falsely accusing opposing counsel of asking a party to sign a false and collusive statement (*Kojala v. Horner*, 338 N.Y.S.2d 921, 922 (2d Dep't 1972)).

It is also generally improper for counsel to include in an opening statement:

- Reference to evidence already ruled inadmissible by the court or prohibited by statute, such as a reference to settlement discussions or a defendant's later remedial action (*O'Connell v. Jacobs,* 583 N.Y.S.2d 61, 63 (1992), aff'd, 611 N.E.2d 289 (1993); NY ST RPC Rule 3.4(d)).
- Counsel's personal opinion, knowledge, or belief about the merits of the client's case, or the facts at issue (NY ST RPC Rule 3.4(d)).
- Comments on the credibility of witnesses (*Valenzuela v. City of New York*, 869 N.Y.S.2d 49, 52 (1st Dep't 2008)).
- Legal argument.
- Instructions on the law.
- Irrelevant facts or issues (NY ST RPC Rule 3.4(d)).
- Attacks against or disparaging comments about a party, opposing counsel, or a witness (*Avila v. Robani Energy Inc.*, 784 N.Y.S.2d 526 (1st Dept. 2004)).
- Prejudicial or inflammatory statements, such as remarks about the wealth or poverty of a party (see *Berkowitz v. Marriott Corp.*, 558 N.Y.S.2d 511 (1st Dept. 1990)).
- Frivolous, non-meritorious claims and contentions, or assertions of fact unsupported by admissible evidence (NY ST RPC Rule 3.4(d)).
- A request that the jurors place themselves in the position of a party (commonly referred to as a Golden Rule statement) (*Young v. Tops Mkts., Inc.*, 725 N.Y.S.2d 489 (4th Dept. 2001)).

Counsel must take care not to raise issues that allow opposing counsel to introduce rebuttal evidence that is otherwise inadmissible. This is known as "opening the door." This can occur if, in the opening statement, counsel refers to issues not already in the case, such as unpleaded claims or defenses or a party's character (see, for example, *Baumis v. Gen. Motors Corp.*, 484 N.Y.S.2d 185, 187 (3d Dep't 1984) (after the defendant presented evidence on its unpleaded defense of arson, the plaintiff was precluded from offering rebuttal evidence because the plaintiff's counsel mentioned the defense in plaintiff's counsel's opening showing that plaintiff's counsel was previously aware of the defense); *Sanchez v. City of New York*, 949 N.Y.S.2d 368, 372 (1st

Dep't 2012) (the court permitted the defense to offer **evidence** of the plaintiff's character, including **evidence** of prior convictions, after the plaintiff's counsel told the jury in the opening statement that plaintiff's counsel intended to present character **evidence**)).

Drafting the Opening Statement

The opening statement **is** a crucial element of the trial. Focusing on the themes of the trial and the **evidence** to be presented assists in trial preparation. So counsel should start drafting it early and continue to work on it during trial preparation to reflect the refinement of the trial themes and **evidence** to be presented. This insures that the opening statement accurately reflects what **is** to be presented at trial.

Counsel should not merely recite the facts but should weave the facts that the **evidence** **is** expected to show into a compelling story so that the jury views the **evidence** in the light most favorable to the client's case.

Depending on the preference of counsel, the opening statement can be written out as a script to be delivered or can be written as an outline of key issues. Regardless of the approach, the opening statement **is** a direct conversation with the jury. Counsel should talk to the jurors, not at them. Counsel's full attention should be on the jury and not on a script, notes, or anything else. Maintaining eye contact with the jury and speaking directly to the jury are essential. Notes or scripts should only be used to ensure all the relevant points have been covered. Counsel should never read the opening statement. Counsel should practice the opening statement before delivering both to become comfortable with the content and to ensure it complies with any time limits.

Objections During Opening Statements

Counsel may object if opposing counsel makes an improper statement during opening. The objection **is** waived unless timely made. (*Healey v. Greco*, 571 N.Y.S.2d 164, 166 (3d Dep't 1991); *Vavallo v. Consol. Edison Co. of New York*, 541 N.Y.S.2d 837, 840 (2d Dep't 1989).) Counsel has the right to interrupt the opening statement to place the objection on the record (*Schwartz v. Maimonides Hosp. Ctr.*, 368 N.Y.S.2d 258, 261 (2d Dep't 1975) (counsel should not be precluded from interrupting opening or closing statements to lodge an objection)).

Although counsel must object to preserve the issue for appeal, the timing of the objection should be considered. Judges and juries tend to disfavor interruptions of counsel, particularly during opening and closing statements, and it may be viewed as a tactic to disrupt counsel. Accordingly, it may be advisable to seek permission from the court in advance to place his or her objection on the record after the conclusion of opposing counsel's statement, while preserving the right to interrupt for an egregious statement.

If the court requires a contemporaneous objection, counsel should consider whether to refrain from objecting to matters of minimal importance. This **is** because frivolous and frequent objections may:

- Prompt an admonishment from the court.
- Annoy the jury or damage objecting counsel's credibility by having counsel's objection overruled.
- Call the jury's attention to opposing counsel's improper statement or conduct by objecting to it.

Although more rare, another form of objection **is** moving to dismiss on the basis of the opening statement. The CPLR does not specifically provide for a motion to dismiss after opening statements. However, a party **is** allowed to move to dismiss at any time based on "admissions" (CPLR 4401). In rare circumstances, a court can dismiss an action if, after the opening, it **is** clear that the action cannot succeed under any theory (*De Vito*, 556 N.Y.S.2d at 653-54; see also *Hoffman House v. Foote*, 172 N.Y. 348, 350 (1902)). However, dismissal after openings are disfavored and not to be encouraged. Therefore, if requested, the party against

which dismissal is sought must be given an opportunity to present an offer of proof regarding the evidence that was intended to be introduced at trial to sustain the case (*De Vito*, 556 N.Y.S.2d at 652-54).

For more information on motion for judgment during trial, see Practice Note, Motion for Judgment During Trial in New York State Supreme Court.

Closing Argument

The closing argument (or summation) is counsel's last opportunity to address the jury before deliberations. As the name implies, argument is permitted in the closing. It is counsel's opportunity to weave the evidence presented at trial into a narrative that is likely to lead the jury to rule in favor of the client.

Main Purposes of Closing Argument

The main purposes of the closing argument are to:

- Repeat the theory and themes of the case.
- Remind the jurors of the favorable evidence they heard and saw and the promises from opening statements that counsel made and kept, without obscuring the important points with too much extraneous detail.
- Answer arguments by the other side.
- Challenge weaknesses in the other side's case.
- Give the jury affirmative reasons to resolve conflicts in your client's favor.
- Explain how you have satisfied all the elements that you needed to prove or how the other side failed to do so.
- Do all of this in the context of a compelling and interesting story that the jury can understand easily.

Preparing the Closing Argument

Trial lawyers often prepare the first draft of their closing argument well in advance of trial to use it as a roadmap for trial preparation. The draft of course evolves in the course of trial preparation and the trial itself. Once the evidence is closed, counsel can finalize the closing argument. Like the opening statement, the closing argument should be a narrative with a beginning, middle, and end.

Before anything, thank the jurors for their service. They have just devoted days of their lives to your case; it is important to acknowledge their commitment and service.

The framework of the closing argument should be the theory of the case and trial themes that you developed throughout the trial. They can now be weaved together with the evidence the jury has heard. Counsel must connect the themes that have been introduced during the trial, from *voir dire* and opening statements, through the closing argument. The strongest points should come first or last because those are generally the points jurors remember best.

Counsel should expand on the themes set out in the introduction by highlighting important testimony and evidence. Counsel should collect the evidence and testimony referenced in the closing argument because it is important to show the evidence to the jury.

Closing argument is the time to be persuasive. Counsel may and should argue for counsel's client's case and against the other side's case.

Counsel should conclude the closing argument with a call to action; tell the jury exactly what you are asking of them. If there are jury verdict forms, show them to the jury and tell them exactly what you want them to do with the forms, if the court permits. You are there to ask them to rule in favor of your client and explain to them how to accomplish that.

Content of the Closing Argument

There is much more leeway in closing argument that in opening statements. Counsel generally may and should:

- Argue the merits of the case.
- Suggest inferences that the jury should draw from the evidence.
- Explain how the evidence supports your client's position under the law, without instructing the jury on the law.
- Argue the credibility of the evidence and witnesses.
- Show the jury excerpts of key testimony or evidence.
- Refer to the jury instructions and, if the court permits, the verdict form, and explain how the evidence supports a verdict in your client's favor.

By contrast, during a closing argument, counsel generally should not:

- Make inflammatory comments about opposing counsel, other parties, or a witness (*Maraviglia v. Lokshina*, 939 N.Y.S.2d 534, 535-36 (2d Dep't 2012) (new trial warranted due to inflammatory and improper summation comments by counsel for defendants, including comment that plaintiff and treating physician were "working the system"); *O'Neil v. Klass*, 829 N.Y.S.2d 144, 145 (2d Dep't 2007) (new trial warranted because, among other things, counsel made the statement in summation that "the man is a lie," and argued that the witness was a "self-admitted professional witness.")).
- Overstate the evidence or discuss or argue facts not supported by the evidence (*Bertram v. New York Presbyterian Hosp.*, 2013 WL 6392783, at *3-*4 (Sup. Ct. N.Y. Co. May 6, 2013) (defense counsel improperly argued without evidentiary support that the plaintiff retained a medical expert on the eve of trial after being rejected by numerous other experts and that the expert was disgruntled after being fired from a prior job at the defendant hospital)).
- State personal opinions about the merits of the case or personally vouch for any evidence (*Rodriguez v. New York City Hous. Auth.*, 618 N.Y.S.2d 352, 353 (1994) (counsel improperly stated personal opinion about witnesses); NY ST RPC Rule 3.4(d)).
- Ask the jury to put itself in the position of a party in the case, the so-called "Golden Rule" (see, for example, *Budzanoski v. Pfizer, Inc.*, 1996 WL 808066, at *18 (Sup. Ct. N.Y. Co. Dec. 17, 1996)).

In a personal injury action, counsel may tell the jury counsel's client's contentions regarding the appropriate amount of damages (*Tate by McMahon v. Colabello*, 459 N.Y.S.2d 422, 424 (1983)). This rule has been codified in CPLR 4016(b).

Counsel may argue for any amount of damages that does not exceed the amount demanded in the pleadings (*Acunto v. Conklin*, 687 N.Y.S.2d 779, 781 (3d Dep't 1999)). Counsel may not, however, argue for damages based on units of time, such as $15,000 per year for future pain and suffering (*Miller v. Owen*, 709 N.Y.S.2d 378, 379 (Sup. Ct. N.Y. Co. 2000)).

If counsel comments on damages in summation, opposing counsel has a right to a jury instruction that:

- Counsel's comments on damages are argument, not **evidence**.
- The jury **is** solely responsible for determining damages.

(CPLR 4016(b).)

Drafting the Closing Argument

As with the opening statement and the trial as a whole, counsel should draft the closing argument in the manner that works best for his personal style. Some trial lawyers write out scripts for openings, closings, and direct and cross-examination. Others work better with outlines that identify topics to be covered, but do not write out verbatim scripts for any part of the trial. What **is** important in either case **is** to be familiar and comfortable with the content so that it can be delivered confidently and smoothly.

Even more so than the opening, the closing argument **is** a direct conversation with the jury. It **is** a final summary and synthesis of your client's case, in the most favorable light, supported by the best **evidence** introduced at trial, delivered in a cogent and compelling narrative that the jury **is** likely to remember while it **is** deliberating. Analogies and stories can be effective in conveying the closing argument. They are easier to remember than the myriad documents and snippets of testimony that the jury has heard and they provide a ready reference to tie together the **evidence** in the way that best supports your case.

Closing arguments generally are limited by the **evidence** actually admitted. However, it **is** permissible to point out to the jury **evidence** or witnesses that the other side may have, but did not produce at trial (*DeVaul v. Carvigo Inc.*, 526 N.Y.S.2d 483, 485 (2d Dep't 1988)). Counsel should ensure that the jury understands:

- The facts to be inferred from the **evidence**.
- How the facts apply to the law, as stated in the court's instructions to the jury.
- That the jury should rule in favor of your client.

In closing argument, counsel has more leeway than at any other point in the trial to use passionate language and tone. You want the jurors to be passionate about your case. That **is** unlikely if you are not.

Objections During Closing Arguments

As with opening statements, counsel must object to improper comments made during summation or the objections are waived (*Friedman v. Marcus*, 821 N.Y.S.2d 136, 137 (2d Dep't 2006)). Counsel has the right to make the objection at the time that the improper statement **is** made and it **is** error for the court not to permit counsel to do so (see *Schwartz v. Maimonides Hosp. Ctr.*, 368 N.Y.S.2d 258, 261 (2d Dep't 1975) (counsel should not be precluded from interrupting opening or closing statements to lodge an objection); *Kraus v. Sobel*, 196 N.Y.S. 845, 847 (1st Dep't 1922) (it **is** the duty of counsel to object to improper statements in a closing argument and the court should not have admonished counsel for objecting)). As the court and jurors may not like interruptions and may hold them against the objector, in some cases, it may be better to seek the court's permission to hold the objections until the first opportunity after the conclusion of the closing argument.

Because the permissible scope of closing arguments **is** broader than opening statements, objections during closing arguments are more limited. Some of the main objectionable matters are set out in Content of the Closing Argument.

Visual Aids and Demonstrative Evidence

Demonstrative evidence is evidence in the record that is not testimony and is displayed to the jury. Visual aids are other demonstratives shown to the jury that are not admitted evidence and may not be taken by the jury to the jury room during deliberations. The use of demonstrative evidence, as well as visual and audio aids, are useful in opening statements and closing arguments. In an era of electronic media and shortened attention spans, visual aids engage jurors and keep their attention.

The use of visual aids and demonstrative exhibits is within the discretion of the court (see *Carroll v. Roman Catholic Diocese of Rockville Ctr.*, 271 N.Y.S.2d 7, 10 (2d Dep't 1966) (no abuse of discretion to allow counsel to use charts during summation)). Some judges may require advance permission to use of demonstrative exhibits at trial (see, for example, Rules of Justice Solomon, Sup. Ct. Kings County, Trial Rule 5)).

The best course is to seek agreement from opposing counsel. Because opposing counsel most likely wants to use them as well, both counsel should seek permission from the court. This avoids any interruptions of the opening or closing statements themselves. If the court allows the use of demonstrative exhibits, they should be exchanged with counsel before the opening and, if the court requests, with the court. All of these matters should be addressed at a pretrial conference in advance of trial.

Tips on Delivering Opening Statements and Closing Arguments

Opening statements and closing arguments should be a conversation with the jury, not a lecture or a speech. Always begin by greeting the jury and introducing yourself to the jury and the court. Remember to thank the jurors for their service and their sacrifice to be away from work and other obligations.

Counsel should rehearse opening statements and closing arguments as much as possible, even before the trial begins. It is even more helpful to practice the delivery in front of the mirror, before colleagues, or on videotape. The closing argument necessarily must be adjusted based on the evidence admitted at trial.

It is important to time the opening statement and closing argument, particularly if the court has imposed time limits. Practice also minimizes the need to look at notes, which should be avoided as much as possible. It is also essential to practice with any visual aids or demonstrative evidence to insure the presentation is smooth.

Counsel should:

- Begin by addressing the court, the jury, and opposing counsel. For example, many attorneys start their opening with "May it please the court, the members of the jury, and [[Mr./Ms.][Last Name of Opposing Counsel]]." In opening statements, counsel also should introduce himself and the client.
- Begin and end both presentations by thanking the jurors for their service and acknowledging the sacrifice it entailed.
- Speak in a conversational and respectful tone.
- Make eye contact with each juror.
- Avoid reading the opening or closing statement and minimize the use of papers and notes.
- Avoid technical or complicated jargon. When necessary to use it, explain what it means in plain English.

- In the opening statement, focus on key **evidence** central to the trial themes and avoid repeatedly using the phrase "the **evidence** will show."
- Be direct, focused, and to the point. Avoid repetition.
- In closing argument, tie the **evidence** into the themes of the case identified in the opening statement.

Because one of the purposes of opening statements and closing arguments **is** to build credibility with the jury, be yourself, be honest, be sincere. If you try to be someone you are not, the jury **is** likely to know.

The best opening statement or closing argument cannot make any difference if the jury does not hear it or understand it. Speak clearly, loudly enough to be heard, and slow down. When speaking in public, it often feels to the speaker that he or she **is** speaking painfully slowly. That **is** the right pace. If you speak too quickly, soon no one **is** likely to know or care what **is** being said. Keep it simple. Use common everyday language that the jurors can understand easily. Explain any terms of art or technical terms that may come up in the course of the trial. While doing that, do not talk down to the jury. Speak to them as capable, reasonable, and intelligent lay persons, even if they are not experts on the law or the issues in the case.

During your opening statements and closing arguments, nothing other than the jury exists. Your full attention should be on the jurors. Make eye contact with them. Look at your notes as little as possible. Focus on them while you speak and be in their shoes listening to you.

Think of your opening statement and closing argument as your opportunity to be a storyteller. Tell a compelling story the jury wants to hear in an engaging and memorable way. That **is** what your trial themes are about, for these two moments when you tell the jury your client's story. If they remember your story during their deliberations, you stand a good chance of winning.

Final Pretrial Order Under FRCP 16(e): Overview

by Practical Law Litigation

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A Practice Note explaining how to prepare a proposed final pretrial order (or pretrial stipulation) under Federal Rule of Civil Procedure (FRCP) 16(e) for use in a federal civil trial. Specifically, this Note addresses key considerations for counsel, including negotiating, drafting, and filing a proposed final pretrial order. This Note also addresses modifying a final pretrial order once issued.

Contents

The final pretrial order that a court issues under Federal Rule of Civil Procedure (FRCP) 16(e) **is** one of the most important documents in a case headed for trial. The final pretrial order supersedes all prior pleadings and provides the court and counsel with a roadmap for trial (see *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 465 (2007); see also *Friedman & Friedman, Ltd. v. Tim McCandless, Inc.*, 606 F.3d 494, 498 (8th Cir. 2010)).

This Note addresses key considerations for counsel when preparing a proposed final pretrial order, including the basic procedure for negotiating, drafting, and filing it. It also addresses the items that courts typically require counsel to include in a proposed final pretrial order, as well as modifying a final pretrial order once issued.

For a sample final pretrial order under FRCP 16(e) and additional drafting tips, see Standard Document, Final Pretrial Order Under FRCP 16(e). For more information on preparing for a civil trial in federal court, see Practice Note, Preparing for Trial in Federal Court.

Basic Procedure for Pretrial Orders

The basic procedure for preparing a final pretrial order generally **is** similar across federal district courts, although the exact procedure and required contents may vary depending on the district court's and presiding judge's rules (see Applicable Rules). Final pretrial orders typically involve a multi-step process in which the parties submit a proposed final pretrial stipulation that the court then adopts (either as proposed or after further modification) and issues as the final pretrial order.

Confer with Opposing Counsel

Counsel generally must work with opposing counsel to prepare a joint proposed final pretrial order. A district court's local rules or a judge's individual rules usually require counsel to meet and collaborate to prepare a joint proposed final pretrial order before submitting it to the court.

As part of this collaboration, a court also may require counsel to, among other things:

- Premark, exchange, and review all trial exhibits.
- Confer regarding **deposition** designations and any objections to them.
- Discuss settlement.

Draft the Proposed Order

Some courts require counsel to "jointly prepare" a draft of the proposed final pretrial order, while other courts require the plaintiff to prepare an initial draft or appoint one of the attorneys to perform the task. Some courts also are silent on the issue. (See 1983 Advisory Committee Notes to FRCP 16(e).) Where possible, an attorney may wish to volunteer to prepare the initial draft of the proposed final pretrial order, which often enables the attorney to draft the bulk of the document in a light most favorable to the client.

The court's local rules or the judge's individual rules may permit parties to unilaterally file a proposed final pretrial order, particularly if counsel cannot agree on certain items. However, many judges do not and may strike a unilaterally-filed document. Counsel must carefully review the presiding judge's rules and orders and, where appropriate, consult with local counsel to determine the judge's practices and preferences for the final pretrial order. In many cases, courts may permit parties to file a joint proposed order but include separate alternative sections for items about which they disagree.

Submit the Proposed Final Pretrial Order to the Court

Once a draft **is** finalized, counsel generally must submit the proposed final pretrial order to the court. Applicable court rules or the judge's individual rules may require counsel to submit the proposed final pretrial order by a certain deadline before the final pretrial conference. Once prepared and depending on the applicable rules, counsel usually submit the proposed final pretrial order to the court by either:

- Filing it as a proposed document through the court's **case management/electronic case filing** (CM/ECF) system.
- Providing it to the court using another method (for example, by emailing it to a designated email address for chambers).

Attend the Final Pretrial Conference

Courts typically hold a final pretrial conference under FRCP 16(e) after parties have submitted the proposed final pretrial order. At least one attorney who will conduct the trial for each party must attend the conference (FRCP 16(e)). At the conference, the court may, among other things:

- Discuss scheduling for trial.
- Discuss logistics at trial, such as the order of witnesses or how the parties should present exhibits.
- Review the parties' proposals about trial.
- Hear from the parties about any issues or disagreements about the proposals.
- Resolve any outstanding issues about the proposed final pretrial order.
- Hear argument on **motions *in limine*** (see Motions *in Limine*).

Sanctions for Failure to Participate in Good Faith

Counsel should keep in mind that FRCP 16 expressly permits a court to sanction a party or its attorney for, among other things:

- Failing to appear at a final pretrial conference.

- Being substantially unprepared to participate in the final pretrial conference.
- Failing to participate in good faith in the final pretrial conference.

(FRCP 16(f); see also, for example, *Huebner v. Midland Credit Mgmt., Inc.*, 2018 WL 3467916, at *7-8 (2d Cir. July 19, 2018) (affirming sanctions against an attorney under FRCP 16 for intentionally misleading opposing counsel and the court about his theory of the case at the pretrial conference, which then delayed the litigation); *Koehn v. Tobias*, 866 F.3d 750 (7th Cir. 2017) (affirming sanctions award against a party that did not participate in FRCP 16 settlement conference in good faith); 1983 Advisory Committee Notes to FRCP 16(f) (noting the types of sanctions available under the rule).)

These failures also may give rise to sanctions under other sources of authority, depending on the circumstances (for more information on sanctions available in federal court generally, see Practice Note, Sanctions in Federal Civil Litigation).

To avoid sanctions, the trial attorney attending the final pretrial conference on behalf of a client should be fully familiar with the case and prepared to discuss both procedural and substantive issues. Some judges may require the lead trial attorney to attend the final pretrial conference. Even if not required, the lead trial attorney should attend the final pretrial conference where possible.

Finalize the Pretrial Order

Counsel usually must revise and finalize the proposed final pretrial order to comply with rulings that the presiding judge makes at the final pretrial conference. Depending on the extent of any revisions, counsel typically makes revisions during or shortly after the final pretrial conference and submits the revised document to the judge. The judge then signs the finalized version and enters it as the final pretrial order.

Some courts may enter the signed order on the **docket** through CM/ECF, while other courts may require one of the attorneys to file the signed order through CM/ECF instead.

Because of the high burden for modifying a final pretrial order once issued (see Modifying a Final Pretrial Order), before submitting a finalized version to the court for the judge's signature, counsel should:

- Carefully review any revisions to the document to ensure they are accurate.
- Ensure that items are not improperly included in or missing from the document.

Counsel should keep in mind that failure to obey the final pretrial order once issued may also result in sanctions under FRCP 16(f) (FRCP 16(f)(1)(C), (2)).

Applicable Rules

Before preparing a proposed final pretrial order, counsel should review:

- FRCP 16 and particularly FRCP 16(e), which governs the final pretrial conference and order.
- Applicable rules that may supplement the FRCP and address the format, length, deadlines, procedure, and content for a proposed final pretrial order. These rules may include:
    - a district court's local rules;

- a district court's standing, administrative, or general orders;
- a district court's CM/ECF rules;
- the individual practice rules for the presiding judge; and
- any case-specific orders.

District courts typically post:

- Their local rules, standing orders, judges' individual rules, and required or sample forms on their websites.
- Case-specific orders on the electronic docket for a particular case, which counsel may access through CM/ECF.

Counsel should determine whether the applicable district court or judge posts on the court's website any required or sample forms for final pretrial orders. Some district courts and judges require counsel to use a specific form. In the absence of a required form, counsel may draft their own proposed final pretrial order (see Standard Document, Final Pretrial Order Under FRCP 16(e)).

If not familiar with the individual judge's practices on pretrial orders, counsel should, in addition to reviewing the judges' individual rules:

- Confer with local counsel to determine the court's preferences about what to include.
- Carefully review other pretrial orders that the same judge recently entered in similar cases to determine what that judge expects or prefers.

Typical Contents of a Final Pretrial Order

Although the requirements for a final pretrial order vary among district courts and individual judges, counsel typically must include, at a minimum, information about the following items in a proposed final pretrial order:

- The parties and attorneys in the case (see Appearances).
- The case description, including the parties' claims, defenses, and counterclaims (see Nature of the Case).
- The basis for the court's **subject matter jurisdiction**, **personal jurisdiction**, and **venue** (see Jurisdiction and Venue).
- Stipulated and contested facts (see Facts).
- The legal issues for determination at trial (see Issues of Law).
- Damages and any other relief each party seeks (see Damages and Other Relief Each Party Seeks).
- Trial briefs that counsel submitted or intends to submit, if the court permits trial briefs (see Trial Briefs).
- Witnesses to testify live at trial (see Witnesses).
- Deposition designations and objections (see Deposition Designations and Objections).
- Exhibits and objections (see Exhibits).
- Pending motions, including motions *in limine* (see Motions).

- Bifurcation or consolidation of claims or cases (see Bifurcation or Consolidation).
- Whether the case **is** a jury or bench trial and other trial logistics, such as the estimated length of trial (see Type of Trial and Other Trial Logistics).
- Additional trial considerations, such as likelihood of settlement (see Additional Provisions).

As part of or simultaneously with submitting the proposed final pretrial order, a court also may require parties to submit:

- The materials required under FRCP 26(a)(3) (see Witnesses, Deposition Designations and Objections, and Exhibits).
- Notebooks containing pre-marked trial exhibits and copies of **demonstrative** exhibits (see **Demonstrative** Exhibits).
- Proposed jury questionnaires, jury instructions, and verdict forms (see Jury Instructions, Jury Questionnaires, and Verdict Forms).
- Trial briefs (see Trial Briefs).
- Proposed findings of fact and conclusions of law (typically for bench trials).

Appearances

The final pretrial order should include information about the parties and attorneys in the case by:

- Identifying the name and designation of each party.
- Listing the attorneys of record for each party. Some courts may require counsel for each party to identify a particular individual attorney as lead trial counsel.
- Providing attorney contact information so the court may readily communicate with counsel regarding trial issues, such as logistics. Contact information should include:
    - mailing addresses;
    - telephone numbers; and
    - email addresses.

If a party has multiple attorneys appearing in the case (for example, trial counsel and local counsel), counsel should consider identifying all attorneys of record and their roles in the case to avoid confusion, unless the court instructs otherwise. Similarly, if a case involves multiple parties represented by the same attorney or if different attorneys represent multiple parties on the same side, counsel should clearly indicate that information in this section.

Nature of the Case

A proposed final pretrial order should include a brief statement describing:

- The nature of the case.
- The parties' claims and defenses.

- The general relief each party seeks.

This section serves as a quick reminder to the court about the claims at issue for trial. For jury trials, the court also may read this section to potential jurors during ***voir dire*** or incorporate it into jury instructions to help introduce the case to the empaneled jury (see Jury Instructions and Verdict Forms).

If the parties cannot agree on a joint statement describing the case, the court may allow each party to provide a separate statement describing the claims and defenses it intends to try.

Some courts limit the parties' case description to a non-argumentative factual summary. Other courts may direct counsel to include a more detailed description of the case, including citations to legal authority and the factual record, or even allow counsel to use this section to explain their clients' positions on the factual and legal issues in lieu of a trial brief (see Trial Briefs).

Jurisdiction and Venue

A final pretrial order typically must support the basis for the court's subject matter jurisdiction with citations to applicable statutes (for example, 28 U.S.C. § 1331 or 28 U.S.C. § 1332).

Some courts also require counsel to include a statement regarding either or both:

- The factual and legal basis for personal jurisdiction.
- Venue, including the applicable statute (for example, 28 U.S.C. § 1391(a) or (b)).

If a party disputes subject matter jurisdiction, personal jurisdiction, or venue, counsel for that party should note the objection in the final pretrial order to avoid waiver and preserve the issue for appeal. Counsel also should briefly explain the factual and legal basis for the challenge.

For more information on jurisdiction and venue, see Practice Note, Commencing a Federal Lawsuit: Initial Considerations.

Facts

The facts section of the final pretrial order typically includes:

- Key facts on which the parties agree (see Stipulated or Uncontested Facts).
- The facts that each party intends to prove at trial (see Contested Facts).

Stipulated or Uncontested Facts

To help save time and streamline the issues for trial, courts commonly require counsel to include a section that lists all uncontested facts that the parties intend to make part of the evidentiary record, including answers to **interrogatories** and **requests for admissions**. At trial, the court (or counsel) may read the stipulated facts into the record.

Contested Facts

A court also may require counsel to state separately the facts that the jury or court must decide. These are facts that each party intends to prove at trial but that the opposing party contests.

Depending on the judge's preferences, counsel should phrase each contested fact as an assertion or as a question for the trier of fact to determine, typically by using a sentence that begins with the term "whether" (for example, "Whether the traffic light was red or green on September 1, 2017"). Alternatively, the court may request that counsel draft the contested facts section in narrative form paragraphs with citations to the record.

For each contested fact, counsel should include as much information as necessary to notify the other parties about what counsel expect to prove at trial. The failure to include or sufficiently describe contested facts in a final pretrial order may preclude a party from seeking relief based on those facts (see Failure to Include Facts, Claims, Issues, Defenses, and Theories).

Issues of Law

The legal issues section of a final pretrial order describes the issues of law the case presents at trial. It is typically separated into subsections for each party. If the court permits, counsel for each party should unilaterally draft these subsections to present the legal issues to the court in a light most favorable to their own client.

Some courts permit counsel to provide a summary paragraph describing the claims and defenses that each party intends to prove at trial. Other courts require each party's counsel either to:

- List each claim, defense, or specific issue of law on which the party bases its claims and defenses.
- Set out each issue of law in its trial brief (see Trial Briefs).

As with contested facts, a judge may sometimes require or prefer that counsel present each legal issue as a question that begins with the term "whether" (for example, "Whether Plaintiff Jane Doe's material breaches and deviations relieved Defendant John Smith from his obligation to perform under the Service Agreement").

Damages and Other Relief Each Party Seeks

Some courts require a statement in the final pretrial order regarding the damages or other relief each party seeks. Counsel may need to include for each party seeking damages or other relief:

- The category for each type of damages the party seeks (for example, compensatory or punitive).
- An itemized calculation of the amount of each type of damages the party seeks.
- The factual basis for the requested amount of each type of damages.
- A description of any other relief the party seeks (for example, declaratory relief) and the factual or legal basis for that relief.

Trial Briefs

In lieu of an extensive description of the case or the legal issues for trial in a final pretrial order, some courts may require or prefer that counsel file trial briefs for each legal claim or argument that a party intends to raise at trial. A trial brief typically is a

short, written summary that explains to the court a party's position on the factual and legal issues in a case. A trial brief typically must contain factual citations to the record and citations to legal authority where appropriate.

If the parties filed or intend to file trial briefs, the court may require counsel to list each of the briefs' titles in the final pretrial order. If counsel intends to file multiple briefs to address different issues, the court also may require counsel to list the issues each brief addresses.

Witnesses

At least 30 days before trial (unless the court imposes a different deadline), parties must disclose a final list of expert and non-expert witnesses expected to testify live at trial. For each witness (other than those whose testimony **is** intended solely for impeachment), counsel must state:

- Either:
  - the witness's name, address, and telephone number; or
  - for any represented witness, counsel's contact information.
- Whether counsel expect to call the witness at trial or only if the need arises.

(FRCP 26(a)(2)(A), (3)(A)(i), (B).)

Courts may require counsel to include the parties' final witness list as part of the final pretrial order, along with additional information about the witnesses, such as:

- A brief description of the witness's role in the case.
- Any objections any party has to an adverse witness.
- Information specific to expert witnesses, such as:
  - the expert's precise subject matter expertise; and
  - how the court should rule on any objections to the expert's testimony.

For more information on expert disclosures, see Experts: Expert Report Checklist.

In a jury trial case, the court may read the witness list to proposed jurors during *voir dire* to determine if any potential juror knows a listed witness and if the court should therefore excuse the juror.

Witness Logistics

A court also may require counsel to include in the final pretrial order certain proposals regarding witness logistics, such as providing for:

- Advance notice of the day counsel expects to call a witness (for example, by 8:00 p.m. two nights before counsel intends to call the witness to testify).

- Identification of the exhibits counsel intends to use on direct examination for each witness.

Deposition Designations and Objections

Before trial, a party must:

- Designate witnesses whose testimony the party expects to present by deposition at trial (for more information on deposition designations, see Practice Note, Preparing for Trial in Federal Court: Prepare Deposition Designations).
- Disclose any objections to the deposition testimony another party intends to present at trial. Absent good cause, the failure to object within the appropriate timeframe under FRCP 26(a)(3) or a court's order generally waives the right to object to the deposition testimony at trial.

(FRCP 26(a)(3)(A)(ii); FRCP 26(a)(3)(B).)

Unless a court orders otherwise, parties generally must exchange deposition designations at least 30 days before trial and then raise any objections to them within 14 days (FRCP 26(a)(3)(B)). Some courts require counsel to file and exchange deposition designations, counter-designations, and objections separately from the final pretrial order. However, other courts require counsel to provide information about deposition designations as part of the final pretrial order.

In addition to listing the witnesses whose deposition testimony a party expects to present at trial and objections to an opponent's deposition designations, a court also may require counsel to submit as part of the final pretrial order (or to separately submit):

- A concise statement of the grounds for any objections or counter-designations to a witness's deposition testimony at trial.
- A proposed procedure for the court to resolve objections to deposition designations.
- A concise statement regarding the admissibility of each witness's deposition testimony at trial.
- The specific testimony designated, which the court may require counsel to indicate by either:
  - listing specific pages and lines of the deposition transcript that counsel propose to read into **evidence** or play by videotape at trial; or
  - attaching copies of the relevant transcript excerpts as an exhibit to the final pretrial order (or otherwise submitting copies of the relevant excerpts to the court).
- For trials at which each party **is** allotted a set amount of time for presenting its case, a proposal for how the court should charge each party for the time it takes to read or play the designated deposition testimony at trial.

Exhibits

Before trial, parties must exchange an exhibit list that, for each exhibit:

- Identifies what the exhibit **is**.
- States whether the party expects to offer the exhibit at trial or may offer it only if the need arises.

(FRCP 26(a)(3)(A)(iii).)

Parties also must state:

- Their objections to the admissibility of any exhibit.
- The grounds for each objection.

(FRCP 26(a)(3)(B).)

Absent good cause, the failure to object and provide the basis for the objection within the appropriate timeframe under FRCP 26(a)(3) or a court's order generally waives the objection to the exhibit at trial. (FRCP 26(a)(3)(B).)

Unless a court orders otherwise, parties must exchange an exhibit list at least 30 days before trial and raise any objections to admissibility within 14 days (FRCP 26(a)(3)(B)). Some courts require counsel to file and exchange exhibit lists and objections separately from the final pretrial order. However, other courts may require this information (and additional information about exhibits) as part of the final pretrial order.

For example, the court may require counsel to include for each exhibit additional information such as:

- A pre-marked exhibit number or letter.
- A brief description of the document or item beyond the document's title.
- Stipulations about exhibits (see Stipulations About Exhibits).

If opposing counsel raises an objection to a proposed exhibit, the court also may require that:

- Counsel for the party seeking to introduce the exhibit state the asserted basis of admissibility for that exhibit in the final pretrial order.
- The parties provide copies of any challenged exhibits to the court before trial as part of the final pretrial order.
- The parties agree in the final pretrial order to a procedure for the court to rule on objections to exhibits during trial.

Demonstrative Exhibits

Some courts may require the parties to identify **demonstrative** exhibits in the final pretrial order, although it **is** more typical for courts to allow the parties to agree to exchange **demonstrative** exhibits within a few days of trial. For more on **demonstrative** exhibits, see Practice Note, Preparing for Trial in Federal Court: **Demonstrative** Aids.

Stipulations About Exhibits

Even if not required, counsel still may wish to include in the pretrial order stipulations (subject to the court's approval) about how they may offer exhibits into **evidence** at trial, such as for allowing:

- Photocopies to be used instead of originals.
- Any party to use any exhibit already admitted into **evidence**.

- A party to object to another party's introduction into **evidence** of an exhibit that **is** already on the objecting party's list of exhibits.

Motions

Most courts require counsel to list in the final pretrial order any pending motions or motions the parties intend to file before trial. This includes any motions *in limine*. Counsel should briefly describe the issues that each motion addresses and whether the court must decide the motion before trial.

Motions *in Limine*

Some courts require counsel to identify in the final pretrial order all *in limine* requests as well as the other side's responses, instead of filing separate motions. Other courts may require counsel to file motions *in limine* at the same time they submit the joint pretrial order.

A court may preclude a party from moving *in limine* if the party does not identify grounds for the motion in the final pretrial order (see, for example, *C.R. Bard, Inc. v. M3 Sys., Inc.*, 866 F. Supp. 362, 364 (N.D. Ill. 1994)).

For more on preparing motions *in limine*, see Standard Documents, Motion *in Limine*: Motion or Notice of Motion (Federal) and Motion *in Limine*: Memorandum of Law (Federal).

Other Pretrial Motions

Other types of pending or anticipated motions that the court may require counsel to list or describe in the final pretrial order include motions for **summary judgment** or **Daubert motions** seeking to disqualify expert witness testimony. For more on these types of motions, see Practice Notes, Summary Judgment: Overview (Federal) and Experts: Daubert Motions.

Bifurcation or Consolidation

Counsel generally must include in the final pretrial order a statement about whether the court should bifurcate the trial into separate phases and, if so, the issues the court should bifurcate. For example, courts commonly bifurcate a trial on the issues of liability and damages, so that the issue of damages **is** tried only if liability **is** found.

A party's failure to indicate its desire for a bifurcated trial in the final pretrial order may preclude bifurcation (see, for example, *Sw. Stainless, L.P. v. Sappington*, 2008 WL 1777476, at *6 (N.D. Okla. Apr. 17, 2008)).

Similarly, if a party **is** requesting that the court consolidate the trial with a trial from a related lawsuit, counsel also should include this request in the final pretrial order. If the court has already consolidated the case with one or more other cases for trial, counsel should note this in the final pretrial order as well.

For resources on bifurcation and consolidation under FRCP 42, see Multiple Claims and Cases Toolkit (Federal).

Type of Trial and Other Trial Logistics

A final pretrial order should indicate whether the trial **is** a bench or jury trial. If the parties cannot agree on whether to have a bench or jury trial, the court may require each party to set out its position separately.

A party's failure to object to a final pretrial order setting a bench trial generally waives the right to a jury trial, even if the party timely made a jury demand (see, for example, *Mensah v. Shepard*, 945 F.2d 404 (6th Cir. 1991); see also *Transmatic, Inc. v. Gulton Indus.*, Inc., 835 F. Supp. 1026, 1028 (E.D. Mich. 1993), aff'd, 53 F.3d 1270 (Fed. Cir. 1995)). Additionally, a court may interpret the lack of a request for a jury trial in a final pretrial order to supersede a jury demand in a party's pleadings (see, for example, *Duhn Oil Tool, Inc. v. Cooper Cameron Corp.*, 818 F. Supp. 2d 1193, 1208 (E.D. Cal. 2011)). To avoid waiving the right to a jury trial for any issue, counsel should clearly specify in the final pretrial order each issue for which it requests a jury trial.

Jury Selection

For jury trials, the court may require logistical information about jury selection in the final pretrial order, including:

- The number of jurors for selection during *voir dire*.
- The number of jurors that should hear the case.
- Whether the parties agree to a less than unanimous jury verdict.
- The procedure for *voir dire*, such as whether the court or counsel will question the prospective jurors, and any limit on the amount of time for questioning.
- Desired *voir dire* questions and any limits on the number of questions counsel may ask each juror.
- The desired method of jury selection, including the number of peremptory challenges for each party.

For more on *voir dire* in federal court, see Practice Note, Jury Selection in Federal Court.

Jury Questionnaires, Jury Instructions, and Verdict Forms

A court also may require counsel to submit proposed jury questionnaires, jury instructions, and verdict forms along with or in the final pretrial order. For more on jury questionnaires, see Practice Note, Jury Selection in Federal Court: Using Jury Questionnaires. For more on jury instructions and verdict forms, see Practice Note, Drafting Jury Instructions and Verdict Forms.

Trial Length and Allocation

Courts often require parties to include in the final pretrial order a joint or separate estimate of how long the parties expect trial to last or how long each party requests for its trial presentation. Some courts require a breakdown of each stage of trial (for example, three hours for jury selection, two hours for opening statements, and so on).

Each court has its own procedures for counting time, which counsel should consider before providing an estimate. For example, some courts only charge a party for the time it uses to present its opening and closing statements and case in chief. Other courts charge a party for the time it uses throughout the trial, including for rebuttal witnesses and arguing motions or objections, even if outside the presence of the jury.

In addition to using this information to determine the start date and schedule for trial, courts may use the time estimate for other purposes, such as assessing costs to the prevailing party after trial if one party overestimates the trial's duration.

Although some courts may allow trials to continue past the estimate within reason once trial begins, others may force the parties to adhere to the time estimates they provided in the final pretrial order. For these reasons, counsel should carefully estimate the trial's duration.

In many cases, counsel disagree about how much time the trial is likely to take and how the court should allocate the time. The parties can use this section to explain their proposals.

Other Trial Logistics

A court may require additional information on trial logistics in the final pretrial order, including:

- The order of presentation of evidence.
- How and when the parties intend to make motions for judgment as a matter of law. (For more information on this type of motion, see Practice Note, Motion for Judgment as a Matter of Law: Overview (Federal).)
- Whether any party intends to move to amend its pleadings.
- Whether there is any outstanding fact or expert discovery.
- Whether any party anticipates requesting that the courtroom be closed to the public for any portion of a specified witness's testimony.
- The sequestration of witnesses under Federal Rule of Evidence (FRE) 615.
- Special courtroom technology that counsel may need at trial.

Additional Provisions

Depending on the jurisdiction, counsel may need to include additional information in the final pretrial order, such as the parties' efforts toward settlement and the prospects and likelihood of settling before trial.

Counsel also may wish to include proposals that the applicable rules do not necessarily require, such as:

- A stipulation prohibiting or limiting cross-examination of the opponent's witnesses about their trial preparations. Without this stipulation, some courts may allow cross-examination about a non-party witness's trial preparations.
- Potential evidentiary stipulations, such as an agreement that the parties cannot contest the authenticity of each other's business documents.

Consequences of Failing to Include Required Items

A party's failure to include required items in the final pretrial order once the court issues it may have disastrous consequences, including:

- Waiver of the party's claims or defenses.
- Preclusion of the party's evidence relating to the missing items.
- A ruling barring the party's counsel from making certain arguments at trial or raising issues on appeal.

Failure to Include Facts, Claims, Issues, Defenses, and Theories

If the final pretrial order does not list or describe certain claims, issues, defenses, or theories, the court in its discretion may deem them waived and strike or dismiss them from the case before trial (see, for example, *Zenith Petroleum Corp. v. Steerman,* 656 F. App'x 885, 887 (10th Cir. 2016); *United States v. $84,615 in U.S. Currency*, 379 F.3d 496, 499 (8th Cir. 2004)). A party also may waive its right to appeal an issue the court rejected on summary judgment if the party does not include the issue in a final pretrial order (see, for example, *Lisle Corp. v. A.J. Mfg. Co.*, 398 F.3d 1306, 1317 (Fed. Cir. 2005)).

Similarly, if the final pretrial order omits critical facts on which a party's claim or defense depends, the court may preclude **evidence** of those facts at trial, which may render a party unable to prove the claim or defense (see, for example, *Jones v. Rent-A-Ctr., Inc.*, 2003 WL 365966, at *3 (D. Kan. Jan. 16, 2003); *Fid. & Deposit Co. of Maryland v. Hartford Cas. Ins. Co.*, 189 F. Supp. 2d 1212, 1222 (D. Kan. 2002)).

To minimize the risk of waiving any claims or defenses and the exclusion of related **evidence**, counsel should confirm that the final pretrial order adequately lists or discusses all facts, claims, issues, and defenses at issue for trial. If the court permits or prefers trial briefs (see Trial Briefs), counsel should ensure the trial brief raises and thoroughly discusses all facts, claims, defenses, and issues to avoid waiver (see, for example*, In re Polo Builders, Inc.*, 2010 WL 3810778, at *2 (Bankr. N.D. Ill. Sept. 24, 2010)).

Counsel also should include the factual and legal bases for each type of requested relief, including the factual basis for the amount of each type of monetary damages. A court may preclude a party from introducing a damages theory not included in the final pretrial order (see, for example, *Lucent Techs., Inc. v. Newbridge Networks Corp.*, 168 F. Supp. 2d 269, 273 (D. Del. 2001)).

Counsel should confirm that opposing counsel has not included any improper claims or defenses in the proposed final pretrial order. Counsel should raise with the court any objections or disputes about the claims and defenses at issue before or at the final pretrial conference (see Basic Procedure for Pretrial Orders). The failure to object to another party's inclusion of improper contentions in a pretrial order generally waives the right to later challenges (see, for example, *Friedman*, 606 F.3d at 498 (a previously unpled affirmative defense was preserved where counsel failed to object to the adversary's inclusion of the defense in the final pretrial order)).

Failure to List Witnesses

The failure to list a witness in a final pretrial order may preclude the witness from testifying at trial absent a showing of good cause (see, for example, *Burbach Aquatics, Inc. v. City of Elgin, Ill.*, 2011 WL 148394, at *1 (N.D. Ill. Jan. 18, 2011)).

However, courts generally do not require parties to list witnesses who:

- An attorney intends to call solely for impeachment or rebuttal.
- May not be identifiable until after other trial testimony has occurred.

Failure to Disclose Exhibits

A party's failure to list an exhibit in the final pretrial order may preclude the party from using the exhibit at trial (see, for example, *McDonald v. Cano*, 2013 WL 5183642, at *1-2 (E.D. Cal. Sept. 13, 2013)).

Modifying a Final Pretrial Order

Once a court enters the final pretrial order, the court may only modify it to prevent manifest injustice (FRCP 16(e)). The "manifest injustice" standard is a stringent one (see, for example, *Teran v. GB Int'l, S.p.A.*, 652 F. App'x 660, 673 n.14 (10th Cir. 2016)).

One of the most common scenarios involving modifications to final pretrial orders is a court's denial of a party's request to amend the order to include additional evidence, effectively excluding evidence from trial. When determining whether a district court abused its discretion in denying a request based on no manifest injustice in this scenario, appellate courts typically reverse a district court's denial only if the excluded evidence is highly probative or dispositive of a key issue (see, for example, *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 299 (3d Cir. 2012) (noting that the most important factor in this scenario is the critical nature of the evidence that would be excluded if the court denied permission to amend the pretrial order)).

Because of the high burden that generally applies to the manifest injustice standard, counsel should not rely on being able to modify a final pretrial order once the court enters it. Therefore, before the court enters the final pretrial order, counsel should carefully review the document to determine both what may be missing from it and what may be improperly included in it.

At the same time, if an issue arises after the court has already entered the final pretrial order, counsel should keep in mind that a trial court has broad discretion in managing a trial. Some courts have held that this discretion includes latitude to deviate from the terms of a pretrial order (see, for example, *Ritchie Risk-Linked Strategies Trading (Ireland), Ltd. v. Coventry First LLC*, 673 F. App'x 57, 62 (2d Cir. 2016) (citations omitted); *Monfore v. Phillips*, 778 F.3d 849, 851 (10th Cir. 2015); see also 1983 Advisory Committee Notes to FRCP 16(e) (noting that although courts should not change pretrial orders "lightly," the rule was not meant to impose "total inflexibility")).

