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# The prohibition against argument in openings

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The frequently stated rule is that an opening statement is intended to be only a summary of the facts, and that argument in openings is not permitted. The distinction between "facts" and "argument" is difficult for many lawyers, especially new ones. This is probably because (1) there is no clear boundary between "facts" and "argument," and (2) the prohibition against argument is rarely enforced strictly.

**Distinguishing 'facts' from 'argument'**

Most judges would say that the "facts" are what the evidence is expected to show. "Argument," at least in this context, is the drawing of conclusions from those facts and attempting to persuade the factfinder that those conclusions are correct and compel a particular outcome.

But it is often hard to ascertain the boundary between a mere recitation of the facts and ostensibly forbidden argument.

Consider the following types of statements, all of which may appear in an opening:

1. Statements of fact

*Snow fell that night.*

2. Reasonable inferences from the facts

*There were footprints in the snow, showing that a man had walked across the yard.*

3. Statements concerning the absence of facts

*No witness will testify that Mr. Jones was anywhere near the scene of the robbery.*

4. Factual characterization of people or events

*The meeting was a success.*

5. Statements concerning competing versions of the facts

*Mr. Smith's version of events is contradicted by every other witness who was present.*

6. Statements concerning the credibility of a fact witness

*Mr. Jones is not telling the truth about the accident.*

7. Statements concerning the weight or sufficiency of the facts

*There is overwhelming evidence that he pulled the trigger.*

8. Statements applying facts to reach legal conclusions

*The facts do not add up to premeditated murder.*

9. Pejorative characterizations

*Jane Jones is an admitted perjurer and a thief.*

At the extremes, it is easy to tell what is fact ("snow fell") and what is argument ("Smith is a liar who is going to perjure himself in this court."). Figuring out where the exact boundary lies in between is not so easy.

Whether something is argumentative, or not, often depends on subtle word choices that are not readily susceptible to bright-line rules.

Other types of statements are also common in openings, notwithstanding the purported prohibition:

10. Rhetorical devices and analogies

*They were like two ships passing in the night.*

11. Appeals to universal experience

*All of us have had the experience of being frustrated with our boss.*

12. Descriptions of claims

*Plaintiff alleges that he never signed the contract.*

13. Statements of law

*The law requires everyone to maintain their property in a safe condition.*

14. Appeals to emotion or passion

*Your heart will break as you hear the tragic story of this little girl.*

15. Statements that have nothing to do with the case

*The other night I was watching TV, and I heard that … .*

So if there's a prohibition against argument, what are these types of statements doing in openings? Well, as a practical matter, the jury needs to understand what matters are in dispute in order to understand the evidence. That's pretty hard to do if you can't say anything more argumentative than "snow fell." And, of course, lawyers want to try to persuade the jury from the very outset of the case.

The truth is that almost every opening statement contains lots of things beyond a mere summary of the anticipated evidence — including a healthy dose of argument. Indeed, there has probably never been an opening statement that did not contain at least some degree of argument.

**Keeping argument under control**

So, if (1) there is no clear line between a mere recitation of the facts and impermissible argument, and (2) every lawyer argues at least a little bit in every opening statement, what should you do?

First, whatever you do, keep it within reasonable bounds. Don't make it glaringly obvious that you're arguing. Be especially careful about inflammatory words, pejorative characterizations and legal arguments. An opening statement, coming at the very beginning of a trial, is not a propitious time to be rebuked by a judge.

Second, try to know your judge and your court. Regional differences are strong; what is permitted in the South may not be accepted in New England. Even within a region, or a courthouse, different judges tolerate different levels of argument.

Third, employ the time-honored, all-purpose method of disguising argument — that is, using the introductory phrase: "The evidence will show that … ." Although cumbersome, that phrase will cover a great many sins.

Thus, "The evidence will show that Jones is not telling the truth" is somehow more acceptable than "Jones is not telling the truth." But bear in mind that the phrase is awkward; don't overuse it.

Fourth, if you are a prosecutor, be particularly careful. Courts are generally intolerant, for obvious reasons, of unduly argumentative openings by the government.

Finally, remember that overly argumentative or aggressive opening statements may put jurors off. Don't risk losing them right away by coming on too strong.

As a practical matter, the rule against argument in openings often operates more like a guideline than an actual rule. Don't use the rule as an excuse to be stiff or boring, or to encrust your opening with cumbersome lawyer phrases. But don't forget that the rule exists. You don't want the judge to think you're on the wrong side of it.

*Previous installments of Tried & True can be found here. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.*