



OPENING STATEMENTS AND CLOSING ARGUMENTS

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INTRODUCTION

Some great trial lawyers will begin writing and honing their opening statement six months to a year before they get to trial. One reason for this is that the opening statement is not just the words you speak; it is your vocal inflection, expression, gestures, and demonstrative evidence. It is also your opportunity to simplify your case. The stark reality is that you've got a jury or judge to persuade. The opening statement and closing argument are your first and last chances to tell your story.

A few great trial lawyers do not prepare detailed presentations, preferring spontaneity. However, in complex or major litigation, clients ordinarily want to preview the presentations and make suggestions. Detailed written preparation also improves the clarity and flow of the presentation. It helps winnow out unpersuasive facts and arguments, and aids in the preparation of time lines and electronic and other demonstrative evidence essential to reinforce key points.

Skillful use of these techniques is fundamental to the successful trial of intellectual property cases.

OPENING STATEMENT

The opening statement is limited to presenting the facts. A well-balanced structure enhances clarity.

A. Introduction

The parties and principal witnesses should be introduced at the beginning because the flow of the presentation is lost if you keep looping back to identify the defendant, your president or other witnesses. The introduction is an opportunity to explain the parties and relationships in the case so that the judge or jury will feel you are trying to help them understand things better. You may also want to portray your client as a sympathetic entity, or as relatively small or put-upon by the other party.

B. Set The Scene

The scene you want to portray will vary in each case. In the Sun Life cases in the Eleventh Circuit, two insurance companies, Sun Life of Canada and Sun Life of America had coexisted since 1917. At the outset, the Canadian company normally would have had superior rights because it was the prior user of the Sun Life name and mark in the United States. It had waited many years, however, and had written more than a dozen letters to state insurance commissioners stating that the coexistence of the two names was not confusing! To win the case, the Canadian company needed to set a scene that would overcome its laches and acquiescence.

We chose a two-pronged attack. First, we established that the insurance industry had recently experienced revolutionary changes and was now dominated by the sale of annuities through brokerage houses such as Paine Webber and A.G. Edwards. Second, we presented a scene of wholesale confusion that risked the life savings of investors. The Court was convinced by these facts and accepted our closing argument that the resulting "inevitable confusion" precluded the defenses of laches and acquiescence. Despite over eighty years of co-existence, Sun Life of America was ordered to stop using the Sun Life name and mark.

In recent years, Ford Motor Company has sued more than fifty counterfeiters of Ford automotive parts, many relying on internet sales and misleading addresses to avoid seizure of their counterfeit goods. While the lawsuits are motivated in part by economic losses in the billions of dollars to Ford, a Congressional hearing also revealed that poor quality counterfeit parts cause serious injury and death. Ford's principal witnesses testify to these facts to help the juries understand that Ford is also protecting the public interest.

C. Identify What Is In Dispute

In most trademark and unfair competition cases, the object in dispute is a mark, label or false advertisement. In *Ford Motor Co. v. Money Makers*, in 2005, the dispute was about used parts repackaged as new. Our demonstrative evidence highlighted defendant's electronic printer obtained during the seizure with counterfeit labels still in it.

D. Use Custom And Practice

In some cases, custom and practice are important. Franchisors, for example, customarily do not consent to any changes in the ownership and control of franchisees. A few years ago Hawaiian Punch was sued by its Texas franchisee for wrongful termination. In fact, the franchisee had sold 65% of its ownership to Donaldson, Lufkin and Jenrette, a New York investment firm, despite Hawaiian Punch's objections. It was helpful, therefore, to show prior instances where Hawaiian Punch had refused to grant its consent when a change in ownership or control was proposed. These practices helped explain that changes in control can diminish the value of the license.

E. Define The Issue

The statement of the issue or issues should be kept as simple as possible. In most cases likelihood of confusion is the issue. In Hawaiian Punch the issue was whether Hawaiian Punch had the right to consent to a leveraged buyout. In *Ford v. Money Makers*, the issue was simply whether the defendant's photomechanical copies of Ford's packaging constituted infringement.

F. Explain How The Dispute Arose

Explaining how the dispute arose is a means of focusing the jury on your theory of the case. In the Hawaiian Punch case, the franchisee had written and asked for consent. If the franchisee didn't think it needed consent, why did it write and ask for consent? The visual displays highlighted the franchisee's admissions in its request for consent that it had already taken steps so "that a new entity would acquire all the common stock" and the "controlling interest would be owned by Donaldson, Lufkin and Jenrette."

G. Refute Your Opponent's Case

Having stated your case, it is important to refute opposing counsel's case. Sometimes refutation can be accomplished by attacking the credibility of the other party. In *Ford Motor Co. v. G.M.B.*, the defendant claimed Ford's damages should be low because several hundred thousand counterfeit Ford boxes and labels had been destroyed by fire in defendant's Tokyo warehouse before they could be distributed to the public. But downtown Tokyo is densely populated, highly inflammable and subject to a strict fire code. In our opening statement for Ford, we showed the jury the Tokyo Fire Marshal report that no official records existed of any fire at defendant's warehouse.

Demonstrative evidence can become a critical factor in persuading a jury. Almost everything gains attention from a visual presentation. In *Ford Motor Co. v. Keystone*, a false advertising case, the issue was whether automotive replacement fenders, hoods and other crash parts from Taiwan were of "like kind and quality" to original Ford replacement parts as defendant claimed. As refutation, we prepared a time-lapse two minute video showing a 500-hour salt water splash test. As the time-lapse video played, the Ford fender successfully resisted corrosion while the defendant's counterfeit fender gradually turned into lace, all to the hypnotic and amusing background music of Leroy Anderson's "Syncopated Clock."

H. Conclude On A Strong Point

You should conclude your opening statement quickly. In the *Ford v. Keystone* case we felt the video was the best conclusion. The goal is to end on a strong point.

CLOSING ARGUMENT

Although its purpose differs, the closing argument should generally follow the same progression as the opening statement. The principal and repeated emphasis in closing argument is corroboration. Corroboration is essential so that the judge or jury knows that what you're saying is true and supported by the evidence. Juries, in particular, may find it difficult to discriminate fact from artifice when opposing counsel are telling diametrically different stories. But with corroboration, you can say to the jury, "You remember when I told you in the opening statement that thus and so had happened. Well, it did happen. Mr. X said so." I often display the transcript on screen and say, "here's exactly what Mr. X said last week in answer to this question." By corroborating each key element of proof using visual evidence and displays, the closing argument can remind the jury of the flow established by the opening statement.

In *Galaxy Chemical v. BASF*, BASF, the second largest company in the world, asked another company, Galaxy Chemical, to verify whether it was using the trademark GALAXY. Although Galaxy Chemical responded that it was using the mark in its plumbing and supply

business, BASF used the same mark anyway for its agricultural herbicide. As a result, Galaxy Chemical brought suit against BASF for trademark infringement.

The trial only lasted six days, so BASF decided that its closing argument would consist of day-by-day review of the trial, instead of following the format of the opening statement. This can be a successful alternative because the jury can follow the argument easily and the day-by-day review conforms to a simple method jurors themselves often use to review the evidence. From the testimony and exhibits of each witness, BASF could highlight facts which corroborated its view and refuted Galaxy's claims.

A. Damages

In closing argument, a defendant should respond to the plaintiff's damages claims first. In the Galaxy case, the plaintiff was seeking millions of dollars in damages. Refuting damages last, which is where damages logically seem to belong, is the equivalent of saying, "I'm not liable; and besides, the damages should be low." Psychologically, this does not work. So, we began defendant's closing argument by saying, "Before I get to the issues in this case, let me discuss plaintiff's demand for damages you just heard."

B. Characterize The Witness

It is important to characterize the witnesses so that the jury can remember them. You will not get very far if the jury can't remember the testimony you are relying upon. In *Galaxy v. BASF*, plaintiff's first witness, Mrs. Lavita, the wife of the founder of Galaxy Chemical Company, was a highly sympathetic witness, but her testimony was not harmful to BASF. We wanted to show respect for her but focus the jury on her helpful testimony, so we said "You remember Mrs. Lavita? She was plaintiff's first witness. She was a very pleasant person who told you that there were eight GALAXY companies already in existence in Illinois when the plaintiff was founded." Characterization is not simply what you say; you play act a little bit. If she's an elderly lady, why you kind of shrink yourself down a little bit. If the witness is a bombastic person, you kind of swagger a little. We had a trial in St. Louis for W.R. Grace and Company a few years ago in which our expert was Donald Banner, a very distinguished former Commissioner of Patents and Trademarks, and a large man. When opposing counsel described him, he puffed out his chest and said, "You remember the expert Mr. Banner" and you could just see the whole jury thinking, "Yes, I know exactly who you mean."

C. Emphasize Credibility

Credibility is of utmost importance. For the BASF trial, we had prepared a display board that showed there were 220 Galaxy companies in existence in the midwestern United States. It was strong support for our argument that one more wouldn't infringe plaintiff's rights any more than the other 220 did. We decided not to use the display board in the opening statement because plaintiff had objected to the underlying records. You have to be very careful of what you publish to the jury. Jurors often remember evidence excluded in open court and may conclude that you were trying to show them something that wasn't true. Our decision to withhold our display board was correct because the judge declined to admit the underlying evidence.

A dramatic event in the *Galaxy* trial was the voir dire of Galaxy Chemical Company's survey expert which resulted in his exclusion. He had conducted a survey that purported to show that BASF's Galaxy agricultural herbicide was likely to be confused with one of Galaxy

Chemical's plumbing products, a root destroyer which could be used by farmers. In the full presence of the jury, we asked the expert an excruciating run of questions that proved his credibility had been found lacking by Federal judges in prior cases. Just a portion of that testimony will provide a sense of the drama:

Q: You testified that no survey of yours had ever been refused by a court. Are you familiar with the Girls Club of America case, decided by the United States District Court for the Southern District of New York?

A: Sure.

Q: Do you recall the court saying that your "survey lacks any probative value on the question of confusion"?

A: As one thing, yes.

Q: Do you recall the court saying, "The most glaring and fatal flaw in the survey is demonstrated by its irreconcilable conflicting purposes?"

A: I remember that.

Q: Do you recall the court saying that you "made the incredible and counterintuitive assertion that the placement of Flash Cards would have no bearing on the responses?"

A: Yes.

Q: Do you recall the court saying, "These inadequately explained errors compel the conclusion that the survey was fatally skewed to favor defendant's litigation position and, indeed, was less than honest?"

A: I remember the court saying that, yes.

Galaxy's counsel chose to ignore the event in closing argument. We wanted to remind the jury of its effect on the case but did not want to generate any sympathy for the expert. We did this by emphasizing Galaxy's failure to present any survey evidence and reminding the jury that the only surveys in evidence were those introduced by BASF, which showed that there was neither confusion, reverse confusion nor dilution.

D. Use Discovery Admissions

The next witness was plaintiff's consultant who had made admissions on discovery damaging to Galaxy Chemical. Based on those admissions, we argued that Galaxy Chemical

was simply angry over a lost business opportunity with BASF, not because of trademark infringement or dilution or any of the issues in the case. Our theory provided a logical and credible explanation for how the dispute arose. Since BASF had not violated plaintiff's rights, plaintiff was not entitled to a remedy.

In *Frito Lay v. Bachman*, we used a visual display which featured admissions during discovery by Bachman's president of intentional trademark infringement.

Q: Were you concerned that [your] package would be confused by the public with the more popular RUFFLES package?

A: Some would confuse it with one that looks like it, yes.

Q: If it's causing confusion, Mr. Welch, wouldn't it be better for you to go ahead and stop using a bag that's causing confusion?

A: Maybe you should go ahead and stop using yours, if the confusion bothers you. I have economic reasons to sell it. . .

E. Use Analogies

Analogies can make complex facts simple and memorable. Galaxy's Vice President testified he had personally scoured several recent trade shows and dozens of hardware and lawn and garden stores where his GALAXY products were displayed and had found no other uses of GALAXY by any other company, including, he admitted on cross-examination, any use by BASF. His point was that GALAXY was a strong mark. In closing argument, however, we turned his testimony against him and argued by analogy that his visits to trade shows and retail stores constituted two very revealing surveys which proved that BASF did not promote or sell its product in any of plaintiff's markets.

F. Explain Legal Tests

A principal difference between opening statements and closing arguments is that you are permitted in closing argument to inform the jury of what the judge is going to say in the jury instructions. When you are putting together your proposed jury instructions, you should keep this in mind. For example, in the *Galaxy* case the Judge agreed to give a standard pattern jury instruction that the jury may not consider damages unless it determines liability. So, we began our damages defense by saying, "The court, I believe, is going to instruct you that you are not to consider damages unless you determine liability and BASF believes there is no liability in this case." Foreshadowing the judge's instructions in this way can be very effective with a jury.

After our review of each witness in the *Galaxy* case, we presented the nine legal tests of liability which we knew the judge was going to give the jury in his instructions. By tying each test from the instructions to the key facts in support of our defense, we provided the jury with a guide to its own forthcoming deliberations.

G. Conclusion

Ordinarily closing argument should conclude by showing the jury the special verdict form and explaining how they should answer each interrogatory. This explanation is crucial to ensure that the jury knows what to do with the special verdict when they return to the jury room. Finally, you should request that you be given a verdict in your favor.

CONCLUSION

Opening statements and closing arguments, like most trial techniques, improve with experience. Experience helps build on the basic goals of credibility, persuasiveness and clarity. Hopefully, the techniques and experiences described here will help you in achieving these goals.