PRESENTED AT

Webcast

May 15, 2020

Opening Statements and Closing Arguments

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OPENING STATEMENTS AND CLOSING ARGUMENTS

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I. INTRODUCTION

Opening statements and closing arguments are the bookends to the trial. Trial lawyers set up their themes and their promises in the opening statement. In the closing argument, trial lawyers recap those themes and show that they kept their promises and they should prevail.

Many trial attorneys believe that jurors decide by the end of the opening statements which party will prevail in a trial. But the research most often cited in support of this proposition shows no such thing. Research does confirm however, that even before opening statements, jurors often begin to lean in one direction or another. This leaning profoundly affects how the jurors receive and process the evidence presented at trial. During the trial, jurors may discount evidence contrary to their leaning and give greater weight to evidence consistent with their leaning.

At a minimum then, opening statements are an opportunity for the trial attorney to have the jurors leaning against the opposing party before the first witness testifies. Opening statements also allow trial attorneys to begin establishing a case theme and credibility with the jurors. *See* Q. Brogdon, "Maximize the Effectiveness of Opening Argument," *Texas Lawyer*, November 25, 2013.

Although trial attorneys differ on the extent to which closing argument determines a trial's outcome, an attorney making a closing argument has no choice but to assume that the outcome of the trial hangs in the balance and to use every bit of rhetorical advantage allowed by the rules and the reported cases. *See* Q. Brogdon, "What Attorneys Can't Say in Closing Arguments," *Texas Lawyer,* October 8, 2012.

II. TEXAS RULE 265

Texas Rule of Civil Procedure 265 is the only rule specifically addressing opening statements. Rule 265 allows each party to "state to the jury briefly the nature of his claim or defense" and what the party "expects to prove and the relief sought." The rule requires the party with the burden of proof to proceed first, followed by the adverse party, and then intervenors and other parties in the order determined by the court.

A defendant may have the right to give the first opening statement if the defendant has the burden for the entire case according to the pleadings. In determining which party bears the burden of proof for purposes of Rule 265 primacy, courts ask which party would lose if no evidence was admitted. The defendant has the burden of proof only if the defendant would lose. *See Union City Transfer v. Adams*, 248 S.W.2d 256, 260 (Tex. App.–Fort Worth 1952, writ ref'd n.r.e.); *Ocean Transp. v. Greycas, Inc.*, 878 S.W.2d 256, 269 (Tex. App.–Corpus Christi 1994, writ denied).

Within the bounds of the rule, the trial court has the discretion to control the order and timing of opening statements. For example, in *Fibreboard Corp. v. Pool*, 813 S.W.2d 658 (Tex. App.–Texarkana 1991, writ denied), the Texarkana Court of Appeals found that the trial court had the discretion to refuse the request of one defendant in a multi-defendant case to wait until after the plaintiffs' case-in-chief before making its opening statement. *Fibreboard*, 813 S.W.2d at 691.

III. WHAT IS ALLOWED AND NOT ALLOWED IN OPENING STATEMENTS

Texas Rule of Civil Procedure 269 requires attorneys "to confine the argument strictly to the evidence and to the arguments of opposing counsel." Rule 269's restrictions apply to "arguments" in court but may also apply to opening statements. Attorneys must avoid personal criticism of opposing attorneys, and the rule explicitly directs the court to treat such criticism as contempt of court. The rule states that side-bar remarks by opposing attorneys during argument "will be rigidly repressed by the court," and it prohibits "unnecessary interruption made on frivolous or unimportant grounds" during an opponent's argument.

IV. OPENING STATEMENTS ON APPEAL

Trial courts' rulings on opening statements are reviewed under an abuse of discretion standard. *See Tacon Mechanical Contractors Inc. v. Grant Sheet Metal Inc.*, 889 S.W.2d 666, 675 (Tex. App.–Hous.[14th Dist.] 1994, writ denied). A party complaining of improper jury argument faces a steep hurdle. The party must prove that the error was not invited or provoked; was preserved by the proper trial predicate, such as an objection, motion to instruct or motion for mistrial; was incurable; and constituted reversible harmful error. *Wells v. HCA Health Services of Texas Inc*., 806 S.W.2d 850, 854 (Tex. App.–Fort Worth 1990, writ denied)

In a number of the reported cases, courts of appeals find that error in an opening statement was harmless error because both parties made improper arguments, and the arguments cancelled out each other. Courts of appeals also often find that error in an opening statement either was not preserved or was harmless in light of later testimony or evidence in the case.

For example, in *Tacon Mechanical Contractors Inc. v. Grant Sheet Metal Inc.*, 889 S.W.2d 666 (Tex. App.–Hous.[14th Dist.] 1994, writ denied), Houston's Fourteenth Court of Appeals found that a party's mention of a bankruptcy during an opening statement in violation of a motion in limine was harmless error because "the bankruptcy was raised often during testimony." *Tacon*, 889 S.W.2d at 675.

Likewise, in *Wells v. HCA Health Services of Texas Inc*., 806 S.W.2d 850 (Tex. App.–Fort Worth 1990, writ denied), the Fort Worth Court of Appeals declined to find any reversible error based upon statements made during either party's opening statement because "[t]he trial court erred in tolerating both parties' opening statements." *Wells*, 806 S.W.2d at 855.

V. ATTORNEYS NOT COMPLETELY HANDCUFFED IN OPENING STATEMENTS

One of the most often cited cases on the limitations of opening statements is *Ranger Insurance Co. v. Rogers,* 530 S.W.2d 162 (Tex. App.–Austin 1975, writ ref'd n.r.e.). In *Ranger*, Austin's Third Court of Appeals noted that Rule 265 "does not afford counsel the right to detail to the jury the evidence which he intends to offer, nor to read or describe in detail the documents he proposes to offer." *Ranger*, 530 S.W.2d at 170. The *Ranger* court reasoned that allowing this type of argument "places matters before the jury without the trial court having had an opportunity to determine the admissibility of such matters." *Id.*

Nevertheless, trial courts generally allow attorneys to discuss testimony, documents and facts during opening statements if the discussions are based on agreed facts, pre-admitted exhibits or deposition offers that received no objection. Trial courts also generally allow opening statements on matters if the attorney has a good faith belief that either a witness will be testifying to the fact or an admissible document will support the fact.

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