Closing Arguments

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SUMMATIONS IN A CIVIL CASE: PIECES OF THE PUZZLE

By Jesús M. Zeno, Esq.

Summation is trial counsel's last opportunity to convey to the jury the facts of the case in such a way that the verdict will be rendered in his client's favor. An outline of the summation should be made before the note of issue is filed. In some cases, the closing arguments may be outlined at the time the investigation of the case is completed and prior to the commencement of the action. Creating an outline to the closing argument at the inception of the case will allow you to better prepare your case, your witnesses and better conduct depositions. In addition, the outline will facilitate trial counsel's presentation of the evidence during trial. And, it will enable counsel to put together all of the pieces of the case in a succinct and clear fashion during summation.

The outline should have a beginning, middle and an end. Each of these parts may be modified as the trial moves along without drastically changing the gist of the argument. The beginning should address the key conflicts (comparative negligence compared to no negligence) or (causally related injuries compared to an exacerbation of a prior latent condition). The middle part of the outline must point to each testimony, pleading, photo, video or document that relates to the strength of the client's case. However, do not forget to address any alleged weaknesses in the evidence. Use the evidence to perform the balancing test by explaining the problems in the case against the strengths of the case. Try to

diminish its effect on the case in chief. Thus, the strength of the case must outweigh any alleged weakness inferred by the proof. However, do not spend too much time explaining the bad evidence because the jury may forget the strength of your case. The end of the outline should contain catch phrases that relate to the evidence and strength of the case. The intent is for the jury to remember the phrases during the deliberation. The phrases should be tided into the facts in evidence that are highly likely to support the party's contentions.

Deliver your outline to the jury as objectively as possible with the evidence in support thereof. Do not express your opinion. The end result should be that the jury believes that trial counsel presented the truth in an objective and fair way.

In addition, utilize the interrogatories that the jury will read and answer during deliberation. Marshal the facts in your outline to each question that the jury has to answer. For example, in the attached interrogatory, I read the question " Was the Defendant Peralte Bros., Inc. negligent ?" to the jury and recommended that the answer should be "Yes" because the landlord replaced a steady light in the staircase with a sensor light in direct violation of the New York State Buildings Department Code which requires that a light be illuminating the staircase 24 hours a day seven days a week where no windows are available. The landlord's actions also created a hazardous condition because the sensor light did not remain on long enough to allow the plaintiff to complete her walk down the staircase in the

predawn hours on her way to work. Thus, it was also the proximate cause of the accident. This was a simple and concise way to tell the jury the defendant's negligence was the proximate cause of the accident. The jury rendered a liability verdict in favor of my client.

The use of the interrogatories during summation will allow the jury to better understand how to answer each question regardless of its degree of difficulty. The jury will appreciate the way trial counsel marshals the evidence in arriving at the answer to each question and will likely render a verdict in favor of your client. In conjunction with the interrogatories, use language of the law that the judge will charge the jury. If jury charge *PJI 2:77, Duty Towards Others*, will be made to the jury, you may use similar language in your summation without charging the law to the jury. For example, you may say that the defendant driver failed to see the other vehicle that was already in the intersection immediately before the accident.

More importantly, maintain as much eye contact with the panel as possible. Refer to but do not read from your outline. If you read from your outline, you will not maintain any connection with the jury; the summation will not be conversational and will not be fluid. Trial counsel must demonstrate knowledge of the evidence, confidence, a sense of comfort and passion when presenting the truth to the jury. Instead of the outline, use the deposition transcript

to point out the strength in your case or a problem with the adverse party's proof. Use the pictures, videos and documents to support your outline.

On April 4, 2017, the Court of Appeals held that a party is not deprived of a fair trial if the adverse party during summation utilizes PowerPoint slides of the evidence. See, *People v. Anderson*, 29 N.Y.3d 69 [2017]. The court held that a visual demonstration during summation is evaluated in the same manner as an oral statement. The PowerPoint "slides depicting an already admitted photograph, with captions accurately tracking prior… testimony, might reasonably be regarded as relevant and fair …commentary on the ….evidence, and not simply an appeal to the jury's emotions". *Id*. The Court held that when the jury has been properly instructed by the trial judge that what the lawyers say during summation is not evidence and that in finding the facts the jury must consider only the evidence, the PowerPoint slides can be used. *Id.* Although the *Anderson* case was a criminal trial, the decision also applies to civil cases.

Trial counsel can use the Power Point slide to prove to the jury that the defendant was negligent. The Power Point slides will allow the jury to understand the depth, width, height and length of the defect to decide on the question of constructive notice- negligence. *See, Taylor v. New York City Transit Authority*, 48 N.Y.2d 903[1979]. Each department of the Appellate Division has consistently followed the decision of the Court of Appeals in the *Taylor* case that a triable question of fact on the issue of constructive notice exists that can only be

determined by the jury *when a photograph of the defect that was taken at or near the time of the accident is submitted.* The rationale is that a jury can infer how long the defect existed prior to the happening of the accident. *See, Salvia v. Happauge,* 47 A.D. 3d 791 [2d Dept 2008]; *Sotomayor v. Pafos Realty, LLC,* 43 A.D.3d 905[2d Dep't 2007]; *Degruccio v. 863 Jericho Turnpike Corp.,* 1 A.D.3d 472 [2d Dept 2003]; *Leventhal v. Forest Hills Gardens Corp.,* 308 A.D.2d 434 [2d Dept 2003]; *Degiacomo v. Westchester County Healthcare Corporation, et. al.*, 295 A.D.2d 395 [2d Dept 2002]; *Atkins v. Francesca Realty Associates,* 238 A.D.2d 457 [2d Dept 1997]; *Farrar v. Teichol,* 173 A.D.2d 674[2d Dept 1991]; *Ferlito v. Great South Bay Associates,* 140 A.D.2d 408[2d Dept 1988]; *Calderon v. Noonan Towers Community LLC,* 33 A.D.3d [1st Dept 2006]; *Karten v. Consolidated Edison Company of New York, Inc.,* 109 A.D.2d 126[1st Dept 1986]; *Moons v. Wade Lupe Constr., Inc,* 24 A.D.3d 1005[3rd Dept, 2005]; *Kniffin v. Thruway Food Markets, Inc.*, 177 A.D.2d 920 [3rd Dept 1991]; *Reardon v. Benderson Development Co.*, 266 A.D.2d 869 [4th Dept 1999].

Place all of your proof in power point software as soon as you obtain them before trial.

The style trial counsel utilizes varies according to his or her personality and level of comfort. The novice should shadow a trial counsel who has similar personality and a style that is of interest to you. Preside as a judge in Mock Trial Competitions or develop your own style as you go along, The important factor to

remember is that you put together the pieces of the puzzle in a cohesive and clear way in order obtain a verdict in favor of your client. However, regardless of the style trial counsel exercises, counsel should be completely aware of the do's and don'ts of summation. Otherwise, a mistrial, violation of the Code of Professional Responsibility, contempt of court or a reversal on appeal will be the likely result.

RULES TO KNOW AND ADHERE TO

Wide latitude is given to trial counsel in presenting arguments to the jury during summation. *See, Acosta v. City of New York*, 153 A.D.3d 765 [2d Dept 2017]. The Court in *Acosta* held that during summation, an attorney "remains within the broad bounds of rhetorical comment in pointing out the insufficiency and contradictory nature of a plaintiff's proof' without depriving the plaintiff of a fair trial". *Id.* [Citing, *See, Selzer v. New York City Tr. Auth.*, 100 A.D.3d 157, 163 [1st Dept 2012].

In fact, trial counsel can comment to the jury that the defendant did not prove that the plaintiff was negligent. Likewise, defense counsel can say that the evidence did not demonstrate any fault on the part of the defendant. Similarly, either party may comment on the percentage of fault of a party. Thus, counsel may properly make comments concerning the evidence provided that the comments do not deprive the adversary of a fair trial and the comments are not intended to distract or falsely sway the jury away from the truth.

In addition, trial counsel may comment on the value of the plaintiff's injuries provided that the court makes curative instructions to the jury as specified in C.P.L.R. § 4016 (b) (1-3).

However, counsel is forbidden to mention anything concerning insurance coverage for the accident in question if the purpose of the comment is for the jury to find the party liable. *See, Peters v. Wallis*, 135 A.D.3d 922 [2d Dept 2016]*; Grogan, et. al. v. Nizam, et. al.*, 66 A.D.3d 734 [2d Dept 2009]; *Alben v. Mid-Hudson Medical Group, P.C.*, 31 A.D.3d 471 [2d Dept 2006].

Comments of insurance during summation can be made by trial counsel provided that proof of insurance is in evidence for the purpose of demonstrating ownership and control of the instrumentality or to prove bias, motive or interest on the part of the IME physician. *See, Dominicci v. Ford, et. al*, 119 A.D.3d 1360 [4th Dept 2014] [*Citing, Salm v. Moses*, 13 N.Y.3d 816, 818 [2009]. A case by case basis approach is made by the trial court in allowing counsel to comment on insurance. Thus, unless it is absolutely necessary for the insurance information to be disclosed during trial, you can be setting yourself up for an appeal and a reversal of the verdict. *See, Peters, Supra* at 923.

More importantly, a thin line exists between prosecuting or defending a case zealously for your client and violating the court rules, the canons of ethics or the code of professional responsibility. *See, Smith v. Rudolph*, 151 A.D.3d 58 [1st Dept 2017]. In *Smith*, the defense counsel engaged in conduct that deprived the

plaintiff of a fair trial. The Appellate Court began its opinion by stating "We *will admire the work of an advocate who performs his or her duties with competence and diligence on behalf of a client. Competent and diligent representation, however, does not mean a lawyer should strive to "win" a case at all cost, if that means harming adversaries and their clients unreasonably and unnecessarily in the process and undermining the authority and integrity of the court." Id. at 58.* The Court in *Smith* affirmed the trial court's decision to set aside the verdict and grant the plaintiff a new trial although the jury returned a liability verdict of 70% against the defendant and 30 % against the plaintiff.

The Court held that the fact that the jury returned a liability verdict against the defendant did not cure defense counsel's misconduct, which constituted fundamental error that deprived the plaintiff of substantial justice and likely affected the verdict. *Id.* The Court emphasized the more egregious conduct of defense counsel included ***denigration of two doctors that treated the plaintiff for the injuries she sustained in the accident.*** Defense counsel **made unsupported assertions that the doctors provided unnecessary treatment as part of a moneymaking conspiracy;** defense counsel's assertions of **his personal view** that the plaintiff was pursuing the lawsuit only because she wanted to ***"take the rest of her life off"*** *were also egregious. Id.* The Court held that defense counsel's denigration of plaintiff's witnesses and unsupported inflammatory comments throughout the trial appear to have been calculated to influence the jury

by considerations which were not legitimately before them and cannot be dismissed as inadvertent, thoughtless or harmless. *Id.*

In *Sanchez v. Manhattan and Bronx Surface Transit Operating Authority*, 170 A.D.2d 402 [1st Dept 1991], the conduct of the defense counsel during summation swayed the jury to render a defense verdict. The Appellate Court reversed the verdict and ordered a new trial because of the improper conduct of the defense counsel. Counsel for the defendant referred to MABSTOA as "**we" and "us"** and in summation referred to the defendant's case as "**my side of the story"** which placed her own credibility on the side of her client and *made herself an unsworn witness. Id. [Citing, Caraballo v. City of New York, 86 AD2d 580 [1st Dept 1982]*. Defense counsel also characterized the plaintiff's case as a "**bunch of crock**, **"bunch of bunk**" and "**hogwash".** Defense counsel further referred to the plaintiff's medical expert as "**Here comes Howie**" and **misstated** that the expert had his privileges at New York Hospital revoked.

In *Chappotin v. City of New York, et. al*., 90 A.D.3d 425, 426 [1st Dept 2011], l*v denied,* 19 N.Y.3d 808 [2011], the trial granted the plaintiff's motion to set aside the verdict. Justice Friedman held that defense counsel's entire summation was *"suffused with improper and highly prejudicial remarks" whose purpose was to prejudice the jury against the plaintiff. Id.* Defense counsel's references to plaintiffs **"playing the system" and being on disability benefits** so contaminated the trial as to deprive the plaintiff of a fair trial. *Id.*

Trial counsel may not bolster his case by accusing the witness of being a "liar". *Gregware v. City of New York,* 132 A. D.3d 51 [1st dept 2015]. Counsel cannot engage in an unfair and highly prejudicial attack upon the credibility of the adverse party's witness or attorney. See, *Berkowitz v. Merriott Corp*., 163 A.D.2d 52, 53-54 [1st Dept 1990]. In *Berkowitz* a new trial was ordered because defense counsel repeatedly referred to the plaintiff's experts as "hired guns" brought in to "fluff up the case". *Id.*

However, the court in *Gregware* held that although some of the comments made by plaintiff's counsel were highly inflammatory, they did not create a climate of hostility that "*so obscured the issues as to have made the trial unfair".* *Gregware, Supra* at 61-62. The court further held that although referring to the defense witnesses as **"liars"** was highly improper, the remarks were isolated and constituted "*fair comment on the evidence"* and the "*cumulative effect"* of the remarks did not deprive the defendant of a fair trial. *Id.*

PRESERVE THE RIGHT TO SET ASIDE THE VERDICT OR TO APPEAL.

During summation, trial counsel should preserve the right to set aside the jury verdict or to appeal by objecting to any improper comments made by the adversary. The objection should be made immediately after the improper comment is made with the request to the Court to make a curative instruction to the jury. The objection must be made regardless of the magnitude of the improper

comment. The failure to make a timely objection may result in a verdict that will be sustained by the Appellate Court.

In *Chappotin v. City of New York, et. al*., 2010 N.Y. Slip Op 31845(U) [Sup. Ct., New York County, July 9, 2010], the trial court granted the plaintiff's motion to set aside the verdict. Justice Friedman held that defense counsel's entire summation was *"suffused with improper and highly prejudicial remarks" whose purpose was to prejudice the jury against the plaintiff. Id.* Defense counsel's references to plaintiffs **"playing the system" and being on disability benefits** so contaminated the trial as to deprive the plaintiff of a fair trial. *Id.*

However, the appellate court reversed the decision of the trial court and reinstated the verdict. See, *Chappotin v. City of New York, et. al*, 90 A.D.3d 425,426 [1st Dept 2011], *lv denied*, 19 N.Y.3d 808[2011]. The Appellate Court in *Choppotim* held "*plaintiff failed to object to 13 of the 15 comments of which he now complains"….' Plaintiff failed to preserve his objections and the verdict should be reinstated". Id.*

Justice Manzanet-Daniel's dissent states "*Given the egregious nature of the remarks, however, I believe that this Court should reach the issue in the interest of justice"*. The dissent further stated defense counsel's remarks were not isolated, but constituted a "seemingly continual and deliberate effort to divert the jurors' and the court's attention from the issues to be determined" *Id.*

The *Chappotin* case is a textbook example of what will happen to trial counsel if he or she fails to object to improper comments made by the adversary during summation. Although the trial court may grant counsel's motion to set aside the verdict, the appellate court may reverse the decision. Do not let this happen to you.

Counsel should keep in mind that the purpose of summation is not to make improper comments to the jury but to clarify to the jury the issues presented and marshal the important facts from the evidence in a logical and persuasive manner.

IMPROPER COMMENTS

The following are examples of an improper comment or improper conduct of counsel during summation that should be timely objected to on the record.

1. **Race-** *Dunne v. Lemberg,* 54 A.D.2d 955[2d Dept 1976], *appeal denied*, 40 N.Y.2d 809 [1971].

2. **Nationality-** *Reyes v. Arthur Tickle Eng Works, Inc,* 2 A.D.2d 703[2d Dept 1956], *aff'd* , 3 N.Y.2d 837 [1957].

3. **Religion.** *Giuamara v. O' Donnell*, 96 A.D.2d 1049 [2d Dept 1983].

4**. Personal knowledge or opinion of attorney**. Rule 3.4 (d) of the Rules of Professional Conduct;. *Doody v. Gottshall,* 67 A.D.3d 1347 [4th Sept 2009].

5**. References to facts not in evidence**. Rule 3.4 (d)(1) of the Rules of Professional Conduct*;*. *Stewart v. Olean Med Group, P.C.*, 17 A.D.3d 1094 [4th Dept 2005].

6. **Appealing to the jury's sympathy**. *People v. Holiday*, 142 A.D.3d 625 [2d Dept 2016].

7. **Attacks on any witness**. *Smith v. Rudolph*, 151 A.D.3d 58 [1st Dept 2017]; *Maraviglia v. Lokshina*, 92 A.D.3d 924 [2d Dept 2012].

8, **Attacks on adverse party**. *McArdle v. Hurley*, 51 A.D.3d 741 [2d Dept 2008].

9. **Attacks on opposing counsel.** *Pareja v. City of New York,* 49 A.D.3d 470 [1st Dept 2008].

10. **Calling a juror by the juror's name.** *People v. Creasy* , 236 N.Y. 205 [1923].

11. **Insurance.** *Peters v. Wallis,* 135 A.D.3d 922 [2d Dept 2016].

12. **Making speaking objections**: *Smith v. Rudolph*, 151 A.D.3d 58 [1st Dept 2017].

CONCLUSION

The purpose of summation is not to make improper comments to the jury but to clarify to the jury the issues presented and marshal the important facts from the evidence in a logical and persuasive manner.

Use the evidence to tell the jury what the case is about and why the jury should render a verdict in favor of your client. Although trial counsel has wide latitude in connecting the pieces of the puzzle to the jury, trial counsel should know the comments that are improper and maintain your summation within the

defined latitude. Make timely objections to the opposing counsel's improper comment to preserve your client's right to a new trial or right to a reversal of the verdict on appeal. Also, respond to any objections that opposing counsel may make during your summation in order to prevent a reversal of the verdict or a new trial. Use your outline.

Delivery is just as crucial as trial counsel's style. A strong and effective delivery will produce greater and better results.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
----------X
MARIA ESTELLA HERRERA and GABRIEL HERRERA

Plaintiffs,

-against-

PLAINTIFF'S JURY QUESTIONS

INDEX #: 23493/08

PERALTE BROS. ASSOCIATES, INC and "JOHN DOE"

Defendants.
----------X

We, the undersigned jurors in the above-entitled action concur and answer the following questions in accordance with the instructions of the Court herein mentioned, and report our verdict as hereafter set forth:

1. Was the defendant Peralte Bros. Associates, Inc. negligent?

Yes_____ NO_____

At least five jurors must answer to the above question.

Juror # 1_____ Juror # 4_____

Juror # 2_____ Juror # 5_____

Juror # 3_____ Juror # 6_____

I, the undersigned juror do not concur in the above:

_____

If your answer is “NO” skip to question “3”

If your answer is “Yes”, proceed to the next question.

2. Was the negligence of Peralte Bros. Associates, Inc a cause of the accident?

Yes_____ NO_____

At least five jurors must answer to the above question.

Juror # 1_____ Juror # 4_____

Juror # 2_____ Juror # 5_____

Juror # 3_____ Juror # 6_____

I, the undersigned juror do not concur in the above:

_____

PROCEED TO THE NEXT QUESTION.

3. Was the plaintiff Maria Herrera negligent?

Yes_____ NO_____

At least five jurors must answer to the above question.

Juror # 1_____ Juror # 4_____

Juror # 2_____ Juror # 5_____

Juror # 3_____ Juror # 6_____

I, the undersigned juror do not concur in the above:

_____

If your answer is "NO" and your answer to questions "1" and "2" is yes go to question "5",

If your answer is "Yes", proceed and answer question 4.

4. Was the negligence of the plaintiff Maria Herrera a cause of the accident?

Yes_____ NO_____

At least five jurors must answer to the above question.

Juror # 1_____ Juror # 4_____

Juror # 2_____ Juror # 5_____

Juror # 3_____ Juror # 6_____

I, the undersigned juror do not concur in the above:

_____

If your answer is "YES to both questions "1" & "2" and/or if your answer is "YES" to both questions "3" & "4", **PROCEED TO THE NEXT QUESTION**

Otherwise, **REPORT TO THE COURT**

5. What is the percentage of fault to the defendants?

Defendant Peralte Bros. Associates, Inc. _____%

Plaintiff Maria Herrera _____%

Total Must Equal 100%

At least five jurors must answer to the above question.

Juror # 1_____ Juror # 4_____

Juror # 2_____ Juror # 5_____

Juror # 3_____ Juror # 6_____

I, the undersigned juror do not concur in the above:

_____

REPORT YOUR VERDICT TO THE COURT

Dated: Brooklyn, NY
June 1, 2010

Respectfully Submitted,

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