FUNDAMENTALS OF TRIAL TECHNIQUES

Second Canadian Edition

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a. Arguing the law

Opening statements permit the lawyers to tell the jury what they anticipate the evidence at trial will be. Accordingly, it is usually objectionable to review or discuss in detail the law applicable to the case. Judges, however, differ widely on how strictly they require counsel to adhere to this rule.

b. Argumentative

The opening statements should be a synopsis of the anticipated facts that will be presented during the trial. Accordingly, it is improper to make the opening statement argumentative, such as arguing the credibility of witnesses and other evidence the jury will hear, or arguing inferences and deductions from that evidence. These are appropriate only during closing arguments.

c. Mentioning inadmissible evidence

It is always improper to mention to the jury, during opening statements or at any time, evidence that is inadmissible. Judges rarely consider questions of admissibility until the evidence is offered. Therefore, at the time you open to the jury, there may be evidence whose admissibility is uncertain. Such evidence must not be referred to in your opening. If you do, and the evidence is later ruled inadmissible, you run the risk of a mistrial. Common examples of such evidence are:

1. Out-of-court statements by an accused to a person in authority ("confessions"). In practice, such evidence is *never* referred to in opening.
2. Matters that may be excluded because of privilege.
3. Any matter that only becomes admissible in rebuttal if the opposing party leads certain evidence in its case.

d. Mentioning unprovable evidence

It is improper to mention evidence which, although true, is incapable of being proved at trial. If a witness has died or cannot be found for trial, it is improper to state what the witness' testimony would be. If exhibits have been lost or destroyed, it is improper to tell the jury what such exhibits contained. The test here is good faith. A lawyer can

include in her opening statements only evidence that she in good faith believes is both available and admissible at trial.

e. Giving personal opinions

It is improper to tell the jury your personal opinion on any evidentiary matter. Such personal opinions are not proper because they directly inject the credibility of the trial lawyer into the trial. Accordingly, phrases such as *I think* or *I believe* are best left out of your trial vocabulary.

f. Discussing other side's evidence

It is improper to tell the jury during opening statements what you expect the other side to present as evidence during the trial, since the other side can present whatever evidence it chooses. In particular, the other side may elect *not* to call evidence that you expect it to call.

g. Reference to damages claimed

The jury should be advised of the upper limit for nonpecuniary damages in a catastrophic case.[141] Beyond that, however, judicial opinion as to how much guidance on assessment of nonpecuniary damages should or may be given to the jury varies considerably among jurisdictions. However, even in those jurisdictions that limit the information that may be given to the jury, an inappropriate reference to the assessment of nonpecuniary damages, such as information about the range of damages in similar cases, will not necessarily require that a new trial be ordered. A new trial is required only if the inappropriate reference caused some substantial wrong or miscarriage of justice.[142] Of course, reference may be made to evidence that will be led concerning these claims.

h. Reference to insurance

It is generally considered improper to refer to the fact that any party is insured or, on the other hand, not insured. If such a disclosure

141. The so-called "$100,000 rule", which now permits adjustment for inflation: *Andrews v. Grand & Toy Alta. Ltd.* (1978), 83 D.L.R.(3d) 452 (S.C.C.); *Lindal v. Lindal*, [1981] 2 S.C.R. 629.

142. See, for example, *Barkhouse v. Vanderploet* (1976), 16 N.S.R.(2d) 445 (N.S.S.C.,C.A.); *Halliday v. Sanrud* (1979), 15 B.C.L.R. 4 (C.A.); *Bracchi v. Horsland* (1983), 147 D.L.R.(3d) 182 (B.C.C.A.); *Howes v. Crosby* (1984), 6 D.L.R.(4th) 698 (Ont.C.A.); *Schwartz v. DePauw* (1985), 16 O.A.C. 66 (C.A.); *Scicchi v. Gronow* (1985), 62 B.C.L.R. 174 (C.A.); *McGrath v. Pendergras* (1988), 60 Alta.L.R.(2d) 276 (C.A.); *Rieger v. Burgess*, [1988] 4 W.W.R. 577 (Sask.C.A.); *Quintal v. Datta*, [1988] 6 W.W.R.