

Opening / Closing Arguments

I. Argument – The Act or Process of Attempting to Persuade (Blacks Law Dictionary).

II. Opening Statements

A. Substance of Statement

1. The opening statement “shall be limited to expected proof by legally admissible evidence.” USCR 10.2

1. “A prosecuting attorney’s opening statement is limited to the statement of what the state expects to prove, including what he expects his witnesses to testify to.”

Parker v. State, 277 Ga 439 (2003)

2. Opening statement “confined to brief statement of issues in the case and to remarks on evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible.”

Alexander v. State, 270 Ga. 346 (1998)

B. Good Faith

1. The “Good Faith Test” is applied by appellate courts to determine if reversal is warranted in cases where a prosecutor fails to prove something argued in the opening statement

Parker v. State, 277 Ga 439 (2003)

Alexander v. State, 270 Ga. 346 (1998)

Bellamy v. State, 272 Ga 157 (2000)

Holton v. State, 280 Ga 843 (2006)

2. The burden is on the prosecutor to show the argument and the subsequent failure to prove it were in good faith.

Alexander v. State, 270 Ga. 346 (1998)

C. Practical Tips

1. Don’t repeat “the evidence will show” over and over.

2. Don’t overstate your case.

3. Minimize any discussion of the law.

4. Use a theme or catch phrase when appropriate.
5. Tell the story!!!
6. Don't give disclaimers such as "this is not evidence".
7. End strong and tell the jury what verdict you want from them.

III. Closing Arguments

- A. At the conclusion of the evidence, each party to a case has the right to summarize its case for the jury and argue that the jury find in its favor. Moody v Davis, 10 Ga. 403 (1851)
- B. Time Limits in Criminal Cases
 - 1) Non Capital Felony – One Hour OCGA§ 17-8-73
 - 2) Capital Cases – Two Hours OCGA§ 17-8-73
 - 3) Misdemeanors – Thirty Minutes OCGA§ 17-8-72
 - 4) Extensions at the discretion of the court OCGA§ 17-8-74
- C. Order – the State has the right to open and conclude closing arguments in all cases. (Thanks to House Bill 170 in 2005)
- D. Prosecutor may waive the opening portion of his closing argument and argue only after the defense has concluded their argument. Lewis v State, 283 Ga 191 (2008)

IV. Organization of Closing Argument

Organization is the key to an effective closing argument. A closing argument should include the following:

- A. Burden of Proof – Attempt to clarify for the jury.
- B. The Law – Judge charges the jury on the law but prosecutor can focus on parts of the law. Explain confusing concepts.
- C. The Facts – Remind the jury what the evidence established as fact.
- D. The verdict demanded by the law and the facts when they are considered together.
- E. The Emotional Appeal

V. Resources/Tools Used in Closing Argument

- A. Physical Evidence
 - 1) Objects
 - 2) Audio/Video Tapes

- 3) Diagrams/Charts
- 4) Photo
- B. ELMO
- C. Blow Ups/Enlargements
 - 1) Law
 - 2) Facts
 - 3) Arguments
- D. PowerPoint
- E. Witness Presence

VI. Improper Argument

- A. The following arguments have been held to be improper
 - 1) Improper for any attorney to argue his personal beliefs as to the guilt of the accused or the truthfulness of a witness.
Metts v State, 270 Ga. 481 (1999)
US v Butera, 677 F.2d 1376 (1982)
 - 2) Improper to argue about a statement that was never introduced at trial.
Johnson v State, 238 Ga. 59 (1976)
 - 3) Improper for either side to make “Golden Rule” argument in a criminal case.
Hayes v State, 236 Ga. App. 617 (1999)
 - 4) Highly Improper to argue or comment about defendant’s failure to testify.
Graham v State, 118 Ga. 807 (1903)
 - 5) Improper to comment on the fact that the spouse of an accused did not testify.
James v State, 223 Ga. 677 (1967)
Ferry v State, 161 Ga. App 795 (1982)
 - 6) Improper to comment on appeals process or possibility of pardon or parole.
Willingham v State, 134 Ga. App 144 (1975)
Faust v State, 222 Ga. 27 (1966)

- 7) Improper to argue that state tries to only prosecute the “guilty.”
Hall v U.S., 419 F. 2d 582 (1969)
- 8) Improper to compare the case at issue to other cases you have prosecuted.
Conklin v State, 254 Ga. 715
- 9) Improper to argue about possible sentence that could be imposed.
Hill v State, 239 Ga. 799 (1977)
- 10) It may be improper to make “jury nullification” argument.
Andrews v State, 222 Ga. App 129 (1996)
- 11) Improper to misrepresent the facts in evidence.
Garrison v Rich’s, 154 Ga. App 667 (1980)
- 12) Death is cheaper than life.
Brooks v State, 762 F2d 1383 (11th Cir. 1985)

VII. Allowable Argument

A. The following arguments have been allowed by trial courts.

- 1) Allowed to draw inferences or deductions from the evidence even if illogical.
Alexander v State, 263 Ga. 474 (1993)
- 2) Allowed to comment on conduct of opposing party or counsel during trial.
Arevalo v State, 275 Ga. 392 (2002)
- 3) Allowed to refer to the crime problem and the price paid by society.
Philmore v State, 263 Ga. 67 (1993)
McKibbons v State, 216 Ga. App 389 (1995)
- 4) Allowed to argue for conviction for the safety of community or to send a message to others that criminal activity will be punished.
Green v State, 244 Ga. App 697 (2000)
- 5) Allowed to use well known cases or history.

For example, courts have allowed the comparison of a murder to the Nazi extermination of Jews.

Forehand v State, 235 Ga 295 (1975)

6) Allowed, within reason, to refer to defendant using derogatory terms.

- “Gangster” Allowed
- “Killer Rapist” Allowed
- “Satan’s Lap Dog” Not Allowed

Resources:

Jack Goger, Daniel’s Georgia Criminal Trial Practice, 2008-2009 Edition.
Paul Milich, Courtroom Handbook on Georgia Evidence, 2009 Edition.
Prosecuting Attorney’s Council of Georgia