



How to: Make sure your closing argument doesn't open can of worms

By: Nancy Crotti September 4, 2014 0

Trial lawyers take note: A couple of decisions from the 8th Circuit Court of Appeals issued earlier this year stand as warnings of what not to do during closing arguments.

There has already been considerable discussion about *Gilster v. Primebank*, No. 12-3064 (8th Cir. April 4, 2014) and more recently, *Valadez v. Watkins Motor Lines Inc.*, No. 12-3679 (8th Cir. July 11, 2014).

In *Gilster*, defendants Primebank and Joseph Strub appealed a \$900,000 jury verdict in favor of plaintiff Mindy

Gilster on her claims of unlawful sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964.

During her closing argument, Gilster's attorney related her own experience with alleged sexual harassment and lauded her client's courage in pursuing the case. The District Court overruled defense counsel's objection to the personal remarks of Gilster's attorney.

Although the district court judge later admitted to erring in overruling the defense objection, he denied the defendants' post-trial motion, writing that the argument was not sufficiently prejudicial to influence the jury.

Gilster's attorney made "emotionally charged" and "unfairly prejudicial" remarks in rebuttal closing argument, injecting her own experience as the alleged victim of sexual harassment, personally vouching for her client, and directly referring to facts not in evidence, Judge James Loken wrote for the three-judge panel. The panel he reversed and remanded for a new trial.

Valadez is more complicated. Plaintiff Fernando Valadez was injured in a traffic accident when his van was struck by a semi-truck driven by Dennis Watts and owned by Watkins Motor Lines, Inc. Valadez sued Watts and Watkins for his injuries, past and future medical expenses, and impaired earning capacity.

The Missouri district court judge ruled the police report about the collision inadmissible because the officer who made the report was unavailable to testify. Valadez's attorney cross-examined a different police officer on the stand about the report in an attempt to impeach Watts. Watts' attorney argued that Valadez's attorney had "opened the door" to improper evidence and that he should be allowed to "cure" the error by inquiring further about the report.

During closing argument, Watts' attorney "relied significantly" on the officer's testimony regarding the accident report. He argued that the jury should focus on the conclusions reached by the investigating officer. Valadez's attorney objected, but the court overruled the objection. The jury assigned no fault to either party, and Valadez appealed. The 8th Circuit panel held that the District Court had allowed Watts' attorney to "open the door" too widely. The panel reversed and remanded for a new trial.

"We are particularly troubled by [Watts' attorney's] emphasis of this evidence in his closing. In closing, [Watts' attorney] reminded the jury of what the 'official highway report' concluded — that Valadez was at fault and that Watts was not at fault. This is exactly the sort of opinion testimony about an ultimate conclusion that we have cautioned merely tells the jury what result to reach and is therefore not sufficiently helpful to the trier of fact to be admissible," the panel concluded.

Two exceptions to the Federal Rules of Evidence would have allowed Watts to pursue such a tactic, according to Craig Roen, a former trial attorney who teaches at the University of Minnesota Law School — the business-records exception of Fed. R. Evid. 803(6) and the public-records exception of Fed. R. Evid. 803(8).

"As a trial lawyer, I have used impeachment many times to get in front of a jury information I could not get into evidence," Roen said. "It is a standard trial tactic. Lawyers do it all the time."

Still, Roen agreed with the 8th Circuit's decision, because he found the "cure" was too aggressive.

Minneapolis attorney Seth Leventhal felt strongly enough about both decisions that he wrote about them on his blog, Minnesota Litigator.

"I think that it's tragic for lawyers and/or clients to go through the huge challenge and expense of trial only to have the results tainted by improper argument in closing," Leventhal said.

Attorney and former University of St. Thomas law professor Bob Brabbit agreed, particularly regarding Gilster.

"If lawyers decide to interject their personal opinions, they do so at the peril of themselves and their client," said Brabbit, of Brabbit & Salita in Minneapolis.

Brabbit, who has taught Trial Advocacy and Advanced Trial Advocacy, had several suggestions for attorneys in preparing closing arguments:

- Focus on how to organize and present the facts of the case.
- Read the applicable rules of evidence and of professional conduct, especially if you have not tried a case in a while.
- Be prepared. Rehearse your argument. This is your last chance to communicate with the jury.
- Establish your theory and theme of the case early on, and work them into your closing argument.
- Even if the case is complex, do not rely on notes.
- To sustain the jury's interest, keep your argument simple and not too lengthy.
- Discuss the evidence that supports your case, acknowledge your weak points, and return to your strengths. Tell a persuasive story.
- Do not allow your argument to be sidetracked by rebutting the other side's evidence.
- Explain testimony that you elicited during cross-examination, particularly information that may not have been apparent to the jury.
- Use visual evidence — photographs or charts — if your case lends itself to them.
- If your opponent says something inappropriate in closing, object immediately.

"Once the jury has heard it, once the bell has been rung, you can't take it back," Brabbit said.

Leventhal advised colleagues to be conservative in presenting their closing arguments.

"I think there is empirical research that shows that jurors' minds are made up prior to closing argument, and that lawyers are unlikely to move the needle, so to speak, significantly, in closing argument," Leventhal said. "You can't lose if you stick to the evidence. ... If you take risks with improper argument, you are really taking a big gamble for dubious payoff."
