"START STRONG – FINISH STRONGER"

Presented by:
J. STEVEN KING, *Fort Worth*
The King Firm

Written by:
JILL L. JOHNSTON, *Fort Worth*
The King Firm

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J. Steven King
The King Firm
2900 Airport Freeway
Fort Worth, Texas 76111
(817) 838-3338 / 838-3545 fax
www.kingfamilylaw.com

Education

B.B.A., University of Texas at Arlington, 1971
J.D., South Texas College of Law, 1974
(Member Order of the Lytae; South Texas Bar Journal, 1973-74)
Board Certified – Family Law, Texas Board of Legal Specialization since 1988

Professional Activities

Charter Member, Texas Family Law Foundation
Fellow of the American Academy of Matrimonial Lawyers
President, Texas Chapter, American Academy of Matrimonial Lawyers, 2006, through 2007
Officer, Texas Chapter, American Academy of Matrimonial Lawyers, 2002-2006
Member, International Academy of Matrimonial Lawyers
Board of Directors/Member, Texas Academy of Family Law Specialists 2009 through 2010
Council Member, Family Law Section of the State Bar of Texas, 1996 to 2002
Past Director, Tarrant County Bar Association
Past Director and President, Tarrant County Family Law Bar Association
Member, College of the State Bar of Texas
Member, Who's Who Among Outstanding Americans
Master, Eldon B. Mahon Inn of Court, 2003, through 2008

Awards& Recognition

Recipient, *Eva Barnes Award* for Significant Contributions to Family Law 2001
Selected in *The Best Lawyers In America* 1999 through the present
Selected as a *Super Lawyer* by Texas Monthly Magazine 2003 through the present

Law Related Seminar Publications & Participation

- Author/Speaker, *What To Do after A Temporary Hearing*, Annual Family Law Seminar on Practical Approaches to Divorce Law 1992.
- Author/Speaker, *Discovery Trends: Objections, Sanctions, and Supplementation*, Advanced Family Law Course for Legal Assistants 1995.
- Author/Speaker, *Preparation For The Cross-Examination of A Mental Health Expert In A Sex Abuse Allegation Custody Case*, Annual Advanced Family Law Course 1996.
- Author/Speaker, *An Attorney Ad Litem Is Really A Lawyer*, Attorney Ad Litem Training Seminar 1997.
- Author/Speaker, *Trial Preparation & Planning*, "Nuts & Bolts" Protective Order Seminar 1997.
- Author/Speaker, *Challenging Characterization Issues: Characterizing Trusts, Employee Stock Options, Workman's Compensation Claims, And Intellectual Property*, Advanced Family Law Course 1997.
- Author/Speaker, *Some Changes To The Texas Family Code,* Blackstone Seminar 1998.
- Participant, *Trial of JMC vs. Sole MC & Disputed Allocation of Rights and Duties*, Advanced Family Law Course 1998.
- Moderator, *The New Rules of Discovery*, State Bar of Texas, Dallas 1999.
- Author/Speaker, *The Potential Effect of The New Texas Family Law Legislation Regarding Proportional Ownership, Equitable Interests, Division Under Special Circumstances, & A Look At New Legislative Provisions For Transmutation Agreements*, Advanced Family Law Course 1999.
- Author/Speaker, *Discovery In Property Cases Under The New Rules,* Advanced Family Law Course, Houston, Texas 1999.
- Author/Speaker, *When a Jury Is Needed; Voir Dire*, Nuts and Bolts, Family Law Seminar, Fort Worth, Texas, 2000.
- Speaker, *Business Valuations*, 26th Annual Advanced Family Law Course, San Antonio, Texas 2000.
- Author/Speaker, *Discovery Gotta Haves: Essential Discovery Ideas for Property and SAPCR's*, Marriage Dissolution Institute 2001, Corpus Christi, Texas.
- Author/Trainer, *Discovery*, Advanced Family Law Trial Skills, West Texas Legal Services PAI Program

2001, Fort Worth, Texas.

- Panel Speaker, *Closing the File, Including Closing Documents*, 27th Annual Advanced Family Law Court, San Antonio, Texas 2001.
- Speaker, *Winning Trial Techniques in Property Cases*, Texas Academy of Family Law Specialists Annual Seminar, Cancun 2002.
- Speaker, "The Child's Voice", A Symposium On The Child's Involvement In Parenting Plan Orders. September 27, 2002.
- Author/Speaker, *Drafting Trial Documents With An Eye Toward Winning*, Advanced Family Law Drafting Course 2002, New Orleans, Louisiana 2002.
- Author/Speaker, *Discovery: Tools, Techniques & Time bombs*, Texas Academy of Family Law Specialists Annual Trial Institute, Cancun 2003.
- Player, *Associate Judge Do's & Don'ts*, Tarrant County Family Law Bar Association, Fort Worth 2003.
- Speaker, *Evaluating A Custody Case*, 26th Annual Marriage Dissolution Institute, Houston 2003.
- Speaker, *Evidence*, 29th Annual Advanced Family Law Seminar, San Antonio 2003.
- Speaker/Panelist, Texas Academy of Family Law Specialists Trial Institute, New Orleans 2004.
- Speaker, *Advanced CYA For The Family Law Attorney*, Family Law Ultimate Trial Notebook, Dallas 2004
- Speaker, *Advanced CYA For The Family Law Attorney*, State Bar Summer School, Galveston 2005
- Speaker, Law Practice Management Seminar, Perfecting Your Family Law Practice, 30th Annual Advanced Family Law Seminar, Dallas 2005
- Litigator in Mock Trial Demonstration, Texas Academy of Family Law Specialists Trial Institute, Reno, Nevada, 2006.
- Panelist/Author, 29th Annual Marriage Dissolution Institute Boot camp – Practical Aspects of Enhancing Your Practice, *How To Lose A Paralegal In 10 Days, or Keep One for 10 Years*, Austin, 2006.
- Speaker, Family Law Essentials Seminar, "If You Can't Get Before the Fact Finder, You Can't Win" – Mineral Wells, Texas, April 2007.
- Speaker, "Closing Argument", *The Trial of a Family Law Jury Case*, Texas Bar CLE, Dallas January 2008.
- Speaker, 31st Annual Marriage Dissolution Institute, "*CYA in Family Law*", Galveston, Texas 2008.
- Speaker, "Mechanics of Effective Cross Examination", 35th Advanced Family Law Seminar, Dallas, Texas 2009
- Panel Speaker, 33rd Annual Marriage Dissolution Institute, *Top Ten Ways to Show the Client You Care and Avoid a Grievance*, San Antonio, Texas 2010.
- Speaker, 2011 Family Law 101, "*It Ain't Over Till It's Over, Closing the File*", Houston, Texas, 2011.
- Speaker, 38th Annual Advanced Family Law Seminar, "*Negotiating a Loser*", Houston, Texas 2012.
- Speaker, 39th Annual Advanced Family Law Seminar, "*Utilizing a Private Investigator without Getting Yourself in Trouble*", San Antonio, Texas 2013.
- Speaker, 40th Annual Advanced Family Law Seminar, "*Nuances of Selecting a Mediator*", San Antonio, Texas 2014.
- Speaker, 41st Annual Advanced Family Law Seminar, "*Criminal and Civil Collision*", San Antonio, Texas 2015.
- Speaker, TCFLBA 2015 Advanced on a Shoestring Seminar, "*Direct and Cross of Financial Experts*", Fort Worth, Texas 2015.
- Speaker, 42nd Annual Advanced Family Law Seminar, "*Effective Listening*", San Antonio, Texas 2016.

Course Director

Marriage Dissolution Institute 2007, El Paso, Texas.
Texas Academy of Family Law Specialist Trial Institute 2012, Law Vegas, Nevada

Law Related Periodical/Magazine Publications

- Author, "Beating Out the Big Firms", *Texas Lawyer*, Vol. 18, No. 21, July 29, 2002.

Jill L. Johnston
The King Firm
2900 Airport Freeway
Fort Worth, Texas 76111
(817) 838-3338 / 838-3545 fax
www.kingfamilylaw.com

Education

B.A., University of North Texas, 2002
J.D., Texas Wesleyan University School of Law, 2008

Professional Activities

Member, Tarrant County Bar Association, 2009-present
- Habitat for Humanity Committee Member, 2010
- Bears and Books Committee Member, 2010 – 2012; Chair, 2012-2013
- Holiday Party Committee Co-Chair, 2015
- National Adoption Day Committee, 2015

Member, Tarrant County Family Law Bar Association, 2009-present
- Holiday Party Committee Member, 2014 –present
- Continuing Education Committee Member, 2014
- Ex Parte Social Committee Member, 2015

Member, Tarrant County Young Lawyers Association, 2009-present
Member, State Bar of Texas – Family Law Section, 2009-present
Member, State Bar of Texas – Young Lawyers' Division, 2009 - present
Member, American Bar Association – Young Lawyers' Division, 2009-2011
Member, American Bar Association – Family Law Section, 2009-2011
Associate, Eldon B. Mahon Inn of Court, 2010 – 2012
Volunteer, National Adoption Day, 2010, 2013, 2014
Volunteer, Tarrant Attorney Volunteer Services, 2014-present

Awards& Recognition

Selected as a *Top Attorney* in Fort Worth Magazine 2014 -present

Law Related Seminar Publications & Participation

- Co-Creator, *Love Me, Love Me Not*, Teen Dating Violence Handbook, Texas Young Lawyers Association, 2010.
- Author, 33rd Annual Marriage Dissolution Institute, *Top Ten Ways to Show the Client You Care and Avoid a Grievance*, San Antonio, Texas 2010.
- Author, 2011 Family Law 101, "*It Ain't Over Till It's Over, Closing the File*", Houston, Texas, 2011.
- Author, 38th Annual Advanced Family Law Seminar, "*Negotiating a Loser*", Houston, Texas 2012.
- Author, 39th Annual Advanced Family Law Seminar, "*Utilizing a Private Investigator without Getting Yourself in Trouble*", San Antonio, Texas 2013.
- Author, 40th Annual Advanced Family Law Seminar, "*Nuances of Selecting a Mediator*", San Antonio, Texas 2014.
- Author, 41st Annual Advanced Family Law Seminar, "*Criminal and Civil Collision*", San Antonio, Texas 2015.

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I. START STRONG

We can all remember a great dramatic jury argument from the movies…Gregory Peck in "To Kill a Mockingbird"; Paul Newman in 'The Verdict"; and Matthew McConaughey in "A Time to Kill". Of course it's a lot easier when you look (and sound) like Matthew McConaughey and John Grisham writes your argument for you.

While you may not be a talented actor or a gifted writer, it is your job to tell your client's story. It is your job to take the facts, the witnesses, and the exhibits that you have and use them to weave a tale - to describe to your judge or jury what your client wants and why they should agree with him. Your story should be consistent, and its persuasive impact should be enhanced by you weaving it through all the components of your case including voir dire, opening statement, direct and cross examination, and closing argument.

II. PERSUASIVE ARGUMENT

If you want to convince your judge or jury that your case is more legitimate than your opposing counsel's; or if you want to persuade your judge or jury to adopt your point of view or to take a particular action it will help to know a few basic theories of persuasive arguments.

A. Appeal to the Senses

The art of persuasion dates back to the ancient Greeks, when Aristotle identified the three main elements of persuasion as ethos, logos, and pathos.

1. Ethos

Ethos means appealing to one's ethics when attempting to persuade him. It mean so much more however, than just relying on your audience's sense of right or wrong. Ethos relates to *your* credibility as the "persuader". Ethos is convincing your audience that you are believable, reliable, qualified, knowledgeable, etc. If you want to persuade the judge or jury, to believe your version of the story, they must find you ethical and credible.

2. Logos

Logos is an appeal to logic. It's persuading your audience by reason. You can accomplish this by telling a clear, well-organized, consistent story. Stick to your theory, don't go off on tangents, and make sure that every fact you present relates to the point you are trying to make.

3. Pathos

An appeal to emotion is known as pathos. It's a way of convincing an audience of an argument by creating an emotional response. This does not mean you have to appeal to the factfinder's sympathy; rather it means something that is capable of invoking emotion. It includes all of the motivating factors that drive human reasoning: what is at stake, what my interest is, and what consequences follow.

To appeal to your factfinder on an emotional level engage their imagination, use descriptive language, and say something they will remember.

B. First, Last, and Often

When presenting a persuasive argument you should also remember the theory of primacy, recency, and frequency. A well-supported psychological finding that while jurors remember only a small percentage of what is said during a trial, they remember most that which is said first, last, and most frequently.

III. MOTION IN LIMINE

If you will be arguing your case to a jury, you can begin preparing to tell your client's story well in advance of your opening statement. You can start by filing a motion in limine.

A motion in limine should always be considered before a jury trial. There are multiple reasons you may want to utilize a motion in limine; the most important reason however is to eliminate any potential questions or evidence prejudicial to your case from being presented in front of the jury. *Bridges v. City of Richardson*, 354 S.W.2d 366 (Tex. 1962).

If your motion in limine is granted, your opposing counsel has to approach the court before attempting to address any topics contained in your motion in limine. It is your job to pay attention to the evidence and to object if such a topic is offered or addressed. Be careful though, you should also avoid the topics in your motion in limine, or it is likely the trial judge will allow the other side to proceed through the door that you opened.

IV. VOIR DIRE

Voir dire is the first opportunity you and your client have to meet with potential jurors, and as you know first impressions are everything. At this preliminary stage you can set the tone and mood for the entire trial. Voir dire is essentially a pre-opening statement, where you must balance beginning your persuasive argument and selecting the best jury for your case.

A. Scope of Voir Dire

The scope of voir dire includes any matter reasonably related to the kinds of issues presented by

the facts of the case; and the trial judge should give the lawyers broad latitude during a voir dire examination of the jury panel. *Babcock v. Northwest Memorial Hospital*, 767 S.W.2d 705, 709 (Tex. 1989); *TEIA v. Loesch*, 538 S.W. 2d 435, 440 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.). That said however, the trial court also has broad discretion in ruling on the propriety of the voir dire. *Dickson v. Burlington N.R.R.*, 730 S.W.2d 82, 85 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.).

B. Purpose

Voir dire serves two basic purposes: 1) to begin telling your client's story to the potential jurors; and 2) to select, to the extent possible, the jurors that will be most beneficial to your client.

1. Jury Selection

When your potential jurors walk into the courtroom, it is likely that they already have a predetermined idea about you, your client, and your case in general. If not, they will begin making such judgments immediately. It is highly unlikely that you will change a juror's mind. Trying to do so might not only be a waste of your valuable time, but it could alienate the jurors, shut down any possible dialogue, and encourage arguments, or lying.

Your rapport with the jury begins with honesty and trust and you should begin developing that relationship during voir dire. You can establish rapport by sharing personal information, asking meaningful questions, and not being judgmental of the jurors or their answers.

If you want the jurors to share personal information with you, then briefly share personal information about yourself. This will make it easier for the jurors to communicate openly and share important and personal information they may not otherwise wish to disclose. Further, if you allow jurors to verbalize their opinions, attitudes, and feelings, then the other jurors are more likely to give honest answers.

It is important to talk to as many jurors as possible in order to weed out unfavorable jurors. You also don't want to spend too much time questioning any one juror as it could lead him to feel defensive or embarrassed; and it might make the rest of the jurors feel unimportant or ignored.

Most importantly, don't be judgmental of your jurors or their answers to your questions; don't ask them questions that would alienate them; and don't make them feel defensive or put on the spot. If you do, not only will you lose that juror, but the other jurors may feel empathy for him and anger towards you.

Remember, the jury is more likely to listen to, remember, and ultimately side with the lawyer with whom they have formed a bond.

2. Begin your Story

Since you can't choose all the jurors you want, or strike all the jurors you don't want, you should use voir dire to begin influencing all the potential jurors who may be empaneled on your case.

In voir dire, you have the right to give a brief overview of the case to the jurors. *Powers v. Ohio*, 499 U.S. 400, 114 L.Ed.2d. 660, 111 S. Ct. 1364 (1991). In *Powers* the United States Supreme Court held, "the voir dire phase of the trial is the juror's first introduction to the substantive factual and legal issues in a case". *Id.* at 1371.

In telling your client's story, develop a consistent and persuasive theme that will be believable to a larger pool of persons. Your theme should be simple and easy to remember; and you should use voir dire to begin exposing the jurors to that theme.

If you do not begin weaving your client's tale at the voir dire examination, you have wasted a valuable opportunity.

V. OPENING STATEMENT

Before you delve into the uncertain world of witnesses and testimony, where your story is likely to be presented disjointed and out of order; and before your opposing counsel has the opportunity to poke holes in your case; you have the opportunity to weave a tale for your client.

Opening statements occur after jury selection (if there is a jury), and before testimony and evidence are presented to the judge or jury. The general purpose of an opening statement is to tell the judge or jury what the evidence will show, but in reality it is so much more.

An opening statement allows you to take control of the narrative of the case. The story that you began to introduce in voir dire should be fully developed in your opening statement.

A. Order of Statements

The party whom rests the burden of proof on the whole case shall state to the jury briefly the nature of his claim or defense and what said party expects to prove and the relief sought. Immediately thereafter, the adverse party may make a similar statement, and intervenors and other parties will be accorded similar rights in the order determined by the court. TEX. R. CIV. PRO. 265(a).

It is typically the Petitioner that goes first, but the Respondent has the right to make the first opening statement in limited situations, i.e. where the Respondent bears the burden of proof, meaning that if no evidence were presented, the Respondent would lose the case. *Union City Transfer v. Adams*, 248 S.W.2d 256, 260 (Tex.App.—Fort Worth 1952, writ ref'd n.r.e.); and where the Respondent admits before trial begins, that the Petitioner is entitled to recover,

subject to proof of defensive allegations in the answer. TEX. R. CIV. PRO. 266. The Respondent must unequivocally admit liability and remove it as an issue from the case. *Seigler v. Seigler*, 391 S.W.2d 403, 404 (Tex. 1965).

Being able to make the first opening statement is a huge advantage, because you have the opportunity to tell your client's story, in a light most favorable to him, directly to the judge or jury before your opponent gets to tell his side. Your opening statement also allows you to organize the evidence and provide the judge or jury a guideline for what you intend to prove at trial.

B. Proper and Improper Statements

The rules governing what can be said in opening statements are significantly more restrictive than the rules that govern what can be said in closing arguments.

The trial court has broad discretion to limit what matters can be discussed in opening statements. *Tacon Mech. Contractors v. Grant Sheet Metal, Inc.* 889 S.W.2d 666, 675 (Tex. App.—Houston [14th Dist] 1994, writ denied.). Typically, you are not permitted to detail to the jury the evidence you intend to offer. For example, you cannot name the witnesses you intend to call and outline the substance of their testimony; nor are you permitted to read, display, or provide descriptions of the documents and photographs you propose to offer into evidence. *Ranger Ins. Co. v. Rogers*, 530 S.W.2d 162, 170 (Tex.App.—Austin 1975, writ ref'd n.r.e.); *Guerrero v. Smith*, 864 S.W.2d 797, 799 (Tex.App.—Houston [14th Dist.] 1993, no writ.

You can however briefly state to the jury the nature of your client's claims and defenses, what you expect to prove, and the relief your client seeks. TEX. R. CIV. PRO. 265(a). Any statements that you make in opening statement are not evidence nor are they judicial admissions. *Carrasco v. Texas Transportation*, 908 S.W.2d 575, 580 (Tex.App—Waco 1995, no writ); *Weslaco Federation of Teachers v. Texas Education Agency*, 27 S.W. 3d 258, 263 (Tex. App.—Austin 2002, not pet.).

C. Delivery of your Statement

More often than not, during trial, witnesses can't always be called in a logical and sequential order, and exhibits can be problematic and confusing. Therefore a well-developed opening statement should provide a framework of the case. It should emphasize the facts in a sequential manner and create a mental image for the jury. It should help the jury to better understand the issues and evidence and to make the entire trial more understandable. It should set forth your client's story, and a theory of the case that jurors are willing and able to accept. All of which will hopefully lead to a favorable outcome for your client.

Whether you are trying a jury trial or not, utilizing the Texas Pattern Jury Charges is a great way to organize and outline your opening statement. The jury charges contain the law that is pertinent to your case, as well as any questions that must be answered by the jury.

To accomplish this don't present the facts to the jury in a plain and boring manner. Don't talk in a monotone, low-pitched voice, never changing pace or intonations. Tell your client's story in detail so that the jury can visualize the case based on the facts given to them.

The jury needs to connect with your client. Make them understand that you care about your client, and that you are standing in solidarity with your client. Humanize your client so that the jurors are driven by feelings and compassion. However, be subtle and sincere in your story-telling. Your factfinder will likely see right through any theatrics, and it will likely negatively impact his opinion of you, your client, and your case.

Don't alienate the jurors. Let your audience know that you respect them by implying that you are going to be mindful of their time; that you are going to focus on information relevant to the case; and that you are going to advocate honestly, even if it means discussing law or facts that may weaken your case. Talk to the jurors like they are your friends, so that they feel like they are part of the conversation when you later question a witness. When possible, avoid technical terms, legalese, and terms of art; instead use words that are well known and used in every day conversation so you don't patronize or speak over the jurors heads. If these terms are unavoidable, make sure the jurors know the technical terms and are comfortable with their meanings.

Lastly, pay attention to your body language during your opening statement. Everything from eye contact to where you stand, and how you stand, could influence the jury. Don't pace while you talk as it could be distracting; don't stand behind a podium or it may appear you have something to hide; don't turn your back to the jury or it may be perceived as a lack of respect; don't read your opening statement or it could appear that you lack belief or faith in your case.

D. Objections during Opening Statements

Legal objections that you might use (or hear) during opening statements are prejudicial and/or inflammatory; instructing jurors on the law; covering facts which will not be admissible; misstating the law; and stating personal belief on the merits of the case. However, the most frequently used objection during opening statements is arguing the case.

If an arguing the case objection is sustained against you, adding the phrase "the evidence will show" or "we will prove" will usually avoid objection

and you will still be able to present the full case in the most persuasive manner possible.

Keep in mind, error is waived concerning any improper comments made during an opening statement unless an objection is made at the earliest practical moment. *City of Corsicana v. Herod*, 768 S.W.2d 805, 816 (Tex.App.—Waco 1989, no writ). Furthermore, where both parties engage in improper discussions during opening statements, the errors, cancel each other out; and on appeal, both will be considered harmless error. *Wells v. HCA Health Services of Texas, Inc.*, 806 S.W.2d 850, 855 (Tex. App.—Fort Worth 1990, writ denied). Where both parties violate Rule 265(a) of the TEXAS RULES OF CIVIL PROCEDURE, a trial court's failure to limit opening statements of either is not calculated to cause rendition of an improper judgment. *Id* at 855.

VI. CLOSING ARGUMENT

All the dust has settled. All the evidence, testimony, and exhibits have been presented and ruled on, so now it is time for your closing argument. This is your last chance to plead your case. Often evidence presented in trial is fragmented and out of order. Closing argument is your opportunity to take all the evidence and put it in the most advantageous order to advance your theory of the case that you have been weaving throughout the trial. Don't be afraid to tell your client's story one more time.

Use this opportunity to review the critical facts and issues that are the main theme of your case. Highlight and reinforce the story you began to develop back in voir dire and continued to weave through trial. Point out the key evidence that support the theory of your case; and show how the law, fairness, and common sense all come together to support your position. Show the jury how the evidence presented was exactly what the jury was promised during opening statements; and how your opposing counsel failed to prove what they said they would.

A. Order of Argument

The party having the burden of proof on the whole case, or on all matters which are submitted by the charge, shall be entitled to open and conclude the argument; where there are several parties having separate claims or defenses, the court shall prescribe the order of argument between them. TEX. R. CIV. PRO. 269(a)

B. Proper and Improper Argument

The rules about what can be said in closing arguments are not near as strict as the rules about what can be said in opening arguments. Attorneys have great latitude to argue their case on closing, but there are, of course, limits.

Argument should be confined to the evidence presented at trial. TEX. R. CIV. P. 269(e). Any evidence in the record is fair game. *In re Toyota Motor, U.S.A., Inc.*, 407 S.W.3d 746, 761 (Tex. 2013). Don't inject your own personal opinions into argument; however, you may properly "discuss the reasonableness or unreasonableness of the evidence and its probative effect or lack of probative effect." *Tex. Sand Co. v. Shield*, 381 S.W.2d 48, 57-58 (Tex. 1964). Further you may argue reasonable deductions and inferences from the evidence properly before the jury. *Clark v. Bres*, 217 S.W.3d 501, 510 (Tex.App.—Houston [14th Dist.] 2006).

Further, you can make fair and reasonable criticisms of the witnesses' testimony and the evidence. *Dyer v. Hardin*, 323 S.W.2d 119, 127 (Tex. Civ. App. 1959). This includes commenting on any bias or prejudice that a witness may harbor. *Id.* However, attorneys are not allowed to offer their personal opinions regarding the credibility of the witnesses. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04(c)(3). Credibility determinations are for the jury to decide.

Most obviously, violating a court's order in limine by commenting on topics covered therein is not permitted in your closing argument. *Nat'l Union Fire Ins. Co. v. Kwiatkowski*, 915 S.W.2d 662, 664 (Tex.App.—Houston [14th Dist.] 1996, no writ).

Arguing that the jury should consider the case from any viewpoint other than through the credible evidence is also improper. This is sometimes referred to as the "golden shoes" argument – asking the jury to place himself in the position of one of the parties to the case. You can however use the "golden rule" argument, i.e. do unto others as you would have them do unto you. *World Wide Tire Co. v. Brown*, 644 S.W.2d 144, 146 (Tex.App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

It is also improper to make an argument that appeals to a judge or jury's racial, religious, or other passions or prejudices. *Sw. Greyhound Lines, Inc. v. Penalver*, 256 S.W.3d 678, 681 (Tex. 2008). An argument of this nature encourages a decision based on emotion (rational or irrational) instead of the law and credible evidence.

Personally criticizing your opposing counsel in your closing argument should be avoided too, and when indulged in shall be promptly corrected as a contempt of court. TEX. R. CIV. PRO. 269(e). Likewise, it is also inappropriate to make sidebar comments while your opposing counsel is making his closing argument, and the trial court should repress any such comments. TEX. R. CIV. PRO. 269(f). Not to mention that making such criticisms and/or sidebar comments makes you look unprofessional and could damage your credibility with the jurors.

Arguing a question of law to the jury is improper; instead those arguments are to be directed to the court. TEX. R. CIV. PRO. 269(d). Once the law controlling the issues has been settled, the court will reduce that law to a written jury charge. Mischaracterization or embellishments in an attorney's argument of the charge are impermissible. *Timberwalk Apts, v. Cain*, 972 S.W.2d 749, 755 (Tex. 1998). Additionally, you are not permitted to comment on the effect of the jury's answer to a question submitted to them. *Magic Chef Inc. v. Sibley*, 546 S.W.2d 851, 859 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.). However, if jurors, through the exercise of ordinary intelligence, can determine the effect of their answers to the issues, the argument does not constitute reversible error because it does nothing more than tell the jury what they already know. *La. & A.R.Co. v. Capps*, 766 S.W.2d 291, 295-96 (Tex. App.—Texarkana 1989, writ denied).

C. Delivery of an Effective Closing

Your closing argument is your last opportunity to make certain that your case is clear, memorable, and persuasive. So, use your closing argument to put the evidence in a logical order that makes it easy for the jury to see its significance. However, don't use closing argument just to summarize all the evidence chronologically; you must also focus on your argument. Argument is the heart of closing and should lend itself to persuading jurors.

If you are closing a jury trial, just like in opening statements, the jury charge is possibly the most powerful tool you have. The jury charge contains the law, as defined by the court, and any questions that must be answered by the jury. It is effectively the jury's outline for their deliberations. Take the jury charge and show the jurors how the law applies to the evidence you presented; and why your theory of the case should prevail.

Use demonstratives in your closing arguments. Not only will the visual stimuli help keep the jurors attention during your closing argument, but it allows you to take the evidence presented at trial and use it to tell your client's story in a visual display.

Just like was discussed in opening statements, pay attention to your non-verbal communication during closing arguments. Don't rely on notes during closing. If you rely on notes, you will likely read them thereby hindering your ability to make eye contact and react to the visual clues jurors are giving you. Furthermore, talking without notes provides a certain amount of credibility. You will appear more prepared, more natural, and more knowledgeable about your case.

D. Reversible Error for Improper Argument

To obtain reversal on the basis of an improper closing argument, the appellant must prove:

1. An error;
2. The error was not invited or provoked;
3. The error was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial; and
4. The error was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the Court. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979); *Lone Star Ford Inc. v. Carter*, 848 S.W.2d 850, 853 (Tex.App.Houston—[14th Dist.] 1993, no writ).

If the improper argument was curable, the Appellant must also prove that the argument constituted reversibly harmful error; and the probability that the improper argument caused harm is greater than the probability that the verdict was based upon proper proceedings. Factors such as the length of the arguments, whether it was repeated or abandoned, and whether there was cumulative error are pertinent for this determination. *Reese*, 584 S.W.2d at 839-40; *Lone Star*, 848 S.W.2d at 853. The appellate court must evaluate the jury argument in light of the entire case. *Reese*, 584 S.W.2d at 840; *Lone Star*, 848 S.W.2d at 853-54.

Incurable jury argument occurs when the comments are so inflammatory that their harmful nature cannot be cured by an instruction to disregard. In such cases, a failure to object does not constitute waiver. *Otis Elevator Co. v. Wood*, 436 S.W.2d 324, 333 (Tex. 1968); *Gannett Outdoor Co. of Texas v. Kubeczka*, 710 S.W.2d 79, 86 (Tex.App.—Houston [14th Dist.] 1986, no writ). *Nat'l Union Fire Ins. Co. v. Kwiathkowksi*, 915 S.W.2d 662, 664 (Tex. App.—Houston [14th Dist.] 1996, no writ).

VII. PROVE IT

Since the order of opening and closing argument is based upon who has the burden of proof, it seems appropriate to briefly discuss some of the more common legal presumption and burdens of proof that present in Texas family law cases.

A. Burden of Proof

The burden of proof is the standard by which an issue must be proven in order for the Judge or Jury to rule in one's favor. The burden of proof in most family law cases is a preponderance of the evidence, but a clear and convincing burden will come up occasionally.

A preponderance of the evidence is a balancing test. The Court must be persuaded ever so slightly to one side or the other. If the Judge finds that the evidence weighs just a little more on the husband's or wife's case, then that issue will be decided in favor of that person.

Clear and convincing evidence is a higher burden of proof than just a preponderance of the evidence, but it does not mean beyond any shadow of a doubt.

B. Legal Presumptions

A presumption is a rule of law that allows a court to assume a fact is true without any evidence until there is a certain weight of evidence which rebuts (disproves or outweighs) the presumption. A presumption removes the burden of proof from one party and shifts the burden to the party against whom it operates. *In re Rodriguez*, 940 S.W.2d 265, 271 (Tex.App.—San Antonio 1997 writ denied), citing *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993). If the burden shifts, then your client may be entitled to tell his story first.

1. Property Issues

a. Community Property

There is a presumption in Texas that all assets owned by a husband and wife are community property; and that all assets acquired during the marriage presumptively belong to the community. TEX. FAM. CODE 3.003. Unless a spouse proves by clear and convincing evidence that an item of property is his separate property, it will be found to be community property. *Id.*

2. Children Issues

Generally the burden of proof in a suit affecting the parent child relationship is a preponderance of the evidence. Decisions concerning issues of conservatorship, possession, and/or support are modifiable, and because the parent still retains some rights in and control over a child, there is not such a serious loss of rights so as to require a stricter burden of proof. *Sanchez v. Sanchez*, No. 04-06-00469-CV (Tex.App.—San Antonio Jul. 3, 2007)(memo. op.). TEX. FAM. CODE 105.005.

a. Conservatorship

In an original suit affecting the parent child relationship a statutory presumption exists that it is in the best interest of a child of the suit to be with a natural parent unless the appointment would impair the child's physical health or emotional development; *and* that both parents should be appointed joint managing conservators of the child of the suit. TEX. FAM. CODE 153.131. If a court does not appoint both parents as joint managing conservators, there is an additional codified presumption that the parent not being appointed sole managing conservator should be appointed as a possessory conservator. TEX. FAM. CODE 153.191.

Accordingly, a parent who asks to be appointed as a sole managing conservator instead of joint managing conservators; and/or a parent that requests that the other parent not be appointed as a possessory conservator has the burden to rebut the parental presumption.

Likewise, a non-parent asking for conservatorship, must rebut the parental presumption by proving that appointing the parent as a managing conservator would result in serious physical or emotional harm to the child. *Taylor v. Taylor*, 254 S.W.3d 527, 53 (Tex.App—Houston [1st Dist.] 2008, no pet.). This includes grandparents.

Additionally, if there is a history or pattern of abuse in a case, there is a rebuttable presumption that it is not in the best interest of the child that the abusing parent be appointed sole managing conservator, or as the conservator who has the exclusive right to establish the residence of the child. TEX. FAM. CODE 153. 004.

Interestingly, the parental presumption does not apply in modifications. *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000).

b. Possession Schedule

The TEXAS FAMILY CODE contains a rebuttable presumption that the standard possession order provides the minimum amount of parenting time unless evidence is presented to the court showing why it is not in the child's best interest. TEX. FAM. CODE 153.252.

c. Child Support

The guidelines for child support set out in the TEXAS FAMILY CODE are intended to guide the court in determining an equitable amount of child support; there is a rebuttable presumption however that the amount of child support established by using these guidelines is reasonable and in the best interest of the child. TEX. FAM. CODE 154.122.

d. Paternity

There are five codified scenarios by which a man can be presumed to be the father of a child. TEX. FAM. CODE 160.204 (a). A presumption of paternity established under any of those scenarios can only be rebutted by an adjudication of parentage, or the filing of a valid denial of paternity by a presumed father in conjunction with the filing of an acknowledgment of paternity by another person. TEX. FAM. CODE 160.204 (b). A party challenging the acknowledgment of paternity or denial of paternity has the burden of proof. TEX. FAM. CODE 160.308.

VIII. FINISH STRONGER

From the minute you meet with your client, begin developing your clients story. In the end, it is your job to tell that story.

If you're heading towards a jury trial, be sure to file your motion in limine to eliminate your opposing counsel's ability to add any potentially prejudicial information to your story. Begin telling that story as

soon you meet the jurors for the first time in voir dire. This is your first opportunity to begin weaving the theme of your case; and to make them like you!

In your opening statement, continue to develop your client's theme that you began to establish during voir dire. Make a direct, powerful, and appealing opening statement, letting the jury know exactly the verdict you want. An authentic and sincere opening statement, while being mindful of the law, will influence the jury in your client's favor.

In your closing argument, push your client's position once again by using the theme you began to establish during voir dire and that you continued to weave throughout the trial. Show the jury how all the evidence fits together nicely to support your client's story. An effective closing that avoids improper arguments gives your client the best chance of receiving a favorable verdict.