

# Chicago Lawyer

## Closing Argument: The best objection I never made

October 01, 2011

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One of the more significant changes during my legal career has been the incredibly aggressive adversarial approach used in courtrooms today. I call it the "take-no-prisoners," "object-when-ever-possible" approach. My decision not to raise an objection during a clearly objectionable closing argument goes against this newer standard. Yet I have learned that an objection is not always the best approach.

A few years ago, I tried a case before an outstanding federal judge on the West Coast. It did not start out favorably. We fought the usual *Markman* hearing, trying to get the court to render a definition of the claim terms that we believed was supported by the patent. However, the court disagreed and rendered a ruling that greatly expanded the scope of the patent.

At the start of the trial, the court informed the jury that our client had infringed the patent. Before I could say one word, the jury heard from the judge himself that our client was an infringer.

This presented a challenge, which we attempted to turn into an advantage. When we addressed the jury we told them that yes, our client was an infringer, but they were among numerous, prestigious companies that also infringed. We explained that a patent is like a fence around property — it tells the public where they may go without trespassing. However, in this case the plaintiff was so greedy, it built the fence far too large and captured everyone — not only our client, but other innocent competitors — even the prior art.

Now, since we had the burden of proof on the only remaining liability issue, I moved for us to proceed first, out of the normal order. The court agreed and the first thing the jury heard in the evidence (from us) was that the patent was far too broad and had improperly captured the prior art. The jury also seemed to accept and admire our expert witness.

Our opponent's expert did not fare quite so well. He admitted his report had been drafted by the lawyers and that it contained errors, like stating that he was being compensated at his normal



(rather high) hourly rate. In reality, he had never been paid an hourly fee. By the time we got to the merits of cross-examination about obviousness, the jury no longer believed the opposing expert.

The evidence phase ended and then came closing arguments. Again, we went first. I explained that the opposing expert's false statement about compensation was not intentional; it was simply a sloppy mistake made by the expert because he had not written the report. Only this sloppiness did not end with the compensation paragraph; it permeated the entire report. I concluded that the only reliable evidence was the prior art and the testimony of our expert.

My opponent spoke next on closing. Astoundingly, he told the jury that they did not need his expert — that they could reach a validity decision based solely on our expert's testimony. He then added the comment that he was a chemical engineer and that the invention was not obvious to him.

Now, it is a well-known requirement of closing arguments that lawyers cannot offer personal beliefs on substantive issues. In addition, it is also considered hugely inappropriate to object and interrupt during a closing argument. When my opponent offered up his own beliefs, I had an immediate decision to make. Should I promptly object or should I follow the more accepted guideline that objections during closing arguments are generally to be avoided?

At that moment, I happened to make eye contact with the judge. I could see by his look that the judge understood that I recognized the argument as impermissible. Then and there I decided I would get a better result raising the issue in my rebuttal rather than interrupting my opponent's argument. Even though I would have been in the right for objecting at that moment, I decided to wait and then with the judge's full acquiescence, let my opponent have it.

On rebuttal, I unloaded with both barrels. I told the jury that it was incredible that opposing counsel had thrown his own witness out the window by saying, "You don't need him."

And then, recognizing his lack of evidentiary support, he attempted to turn himself into a witness. I told the jury this was improper on multiple levels. First, he had not raised his right hand and promised to tell the truth so he could say anything he wanted without committing perjury. Second, because he was not subject to cross-examination he could offer any opinion without fear of being impeached. And third, he had offered himself as a makeshift witness only after all the evidence was in. I finished by telling the jury that the court would likely instruct them that such opinions were improper because they do not constitute evidence.

Ultimately, my faith in the judge and his appreciation of my courtesy in not objecting during the closing argument paid off. The court issued such an instruction and the jury found the patent invalid.

In this case, my "sit-back-and-wait-your-turn" approach paid even more dividends than simple civility. It was the best objection I never made.

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