



The Honorable Judge **JOHN J. BRUNETTI** is a justice of the Onondaga County Supreme Court in the 5th Judicial District of New York.

Opening, Motion Argument, and Summation

A Walk in a Park or a Minefield?

By Hon. John J. Brunetti

Trial lawyers are often told that what they say in court is not evidence. After hearing the rule stated over and over in preliminary and final jury instructions, in civil¹ and criminal² cases, some lawyers may be lulled into a false sense of security, thinking they can say almost anything in court without consequence – a walk in the park, metaphorically speaking. Case law shows that nothing could be further from the truth. In fact, case law shows that an appellate court may classify what a lawyer says in court as “ruinous” and “fatal” to the client’s case.³ With that backdrop, we discuss the minefield that awaits the unwary trial lawyer.

Openings

First, there is the danger of opening the door to ruination in the opening statement. For example, the Court of Appeals upheld a trial court’s ruling that the lawyer for a county jail inmate, charged with assault on a deputy during his incarceration, had opened the door to proof of the inmate’s record, which had been precluded *in limine*. In the Court’s view, counsel “converted the shield of the preclusion order into a sword.”⁴ The client suffered the consequence.

In a Third Department case, a victory on a statement suppression motion was lost by a defense lawyer who, on opening, claimed “there was no proof” connecting

the defendant to the drug at issue.⁵ This opened the door to the use of the suppressed statement. Perhaps a more cautious lawyer would have said that the jury “will not hear” any proof, rather than “there was no proof.”

Admissions – Formal and Informal

Another mistake made in opening statements is making an admission as the agent of the client. Such an admission by counsel may be classified as either formal or informal. A formal judicial admission is conclusive and dispenses with the need for evidence of the fact admitted.⁶ An informal judicial admission, on the other hand, is simply evidence of the fact admitted therein.⁷

In 2013, both the First and Second Departments left no doubt that “a factual assertion made by an attorney during an opening statement is a judicial admission.”⁸ The fact that the admissions in these two civil cases were classified as informal was likely of little solace to the lawyers who made them.

The Second Department case was a divorce action where the status of real property as marital property was in issue. Counsel’s concession in the opening statement that the husband acquired title during the marriage, albeit partially with money from a non-marital source, was ruled an informal admission.⁹

“Ruinous” and “fatal” were the adjectives used by the First Department to describe the consequences of a lawyer’s admitting the client’s negligence in the opening statement, resulting in a directed verdict in the plaintiff’s favor on the claim of negligent maintenance of steps where the plaintiff had fallen.¹⁰

As for admissions by criminal defense counsel in openings, a Fourth Department case has addressed the issue. There, the defendant was convicted of possession of a dangerous instrument, consisting of sneakers.¹¹ Defense counsel admitted in opening statement that the defendant was wearing sneakers. On appeal, the People conceded that there was no explicit proof offered at trial

testified at trial in a manner inconsistent with his former counsel’s statements, the prosecutor sought to use counsel’s statements to impeach the defendant. The Court of Appeals found that, since the defendant was the “only source of the information” for counsel’s statements concerning the defendant’s proposed testimony and that counsel was acting as the defendant’s authorized agent in making those statements, counsel’s statement was properly used to impeach the client.

Prior inconsistent statements by counsel made at arraignments¹⁵ and bail hearings¹⁶ are also admissible to impeach the client. For example, the Second Department has ruled that a defendant may be impeached with his

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indicating that the defendant was wearing sneakers at the time of the crime. The Appellate Division rejected the People’s attempt to advance defense counsel’s admission so as to relieve them of their burden to prove an essential element of the crime, and so the conviction was reversed for insufficient evidence. The court did not address whether things would have been different had the People ordered a transcript of the defense opening and offered it into evidence before they rested.

When it comes to other stages of a criminal case, informal judicial admissions by counsel may be committed where defense counsel expressly names the client as the source of the proffered information, or it may be fairly inferred that the client was its source. That was the ruling of the Court of Appeals in *People v. Rivera*.¹² There, defense counsel averred in an affidavit in support of a motion that the defendant possessed “buy money” in a drug sale case because he had made change for the true seller. The trial court ruled the affidavit to be admissible as an informal admission when the defendant testified that he never possessed the buy money. The Appellate Division ruled that the affidavit was a conclusive judicial admission.¹³ The Court of Appeals affirmed on the Appellate Division opinion with the proviso that the admission was informal.

Prior Inconsistent Statements

Akin to admissions by counsel are prior inconsistent statements by counsel with which the client may be impeached. See, for example, the Court of Appeals ruling in *People v. Brown*.¹⁴ At trial, defense counsel moved *in limine* for a ruling that, if the client testified that he was present at the scene to buy drugs, not to sell drugs, with money earned from legitimate employment, he would not be deemed to have opened the door to specified prejudicial information. After the defendant

counsel’s statement at arraignment that “[my client] defendant tells me that the complaining witness . . . came towards him in a very threatening manner and he thought he was going to be attacked” if the client’s trial testimony is inconsistent with that assertion.¹⁷

A review of the impeachment-by-counsel’s-statement cases indicates that, when confronted with the attorney’s prior statement, the client conceded the attorney’s prior inconsistent statement during cross-examination, thereby rendering extrinsic proof of it unnecessary. No appellate court has ever been forced to address two issues: What if the client denies being the source of counsel’s statement? And, what if the client denies that the lawyer made the statement?

The answer to the second question is easy. The cross-examiner need not call the attorney who made the statement to prove the statement. Since the attorney speaks for the client, all the cross-examiner need do is to call any witness who heard the attorney make the statement¹⁸ – usually a court reporter.

A denial by the client that the client was the source of counsel’s statement presents a more difficult issue. If the lawyer who made the statement is the lawyer trying the case, that lawyer would likely be precluded from testifying by the advocate-witness rule¹⁹ found in the New York Rules of Professional Conduct.²⁰ But what of former counsel? Does the attorney-client privilege apply? On the issue of whether the admissibility of an affidavit of counsel presents an attorney-client privilege issue, the First Department said “no” in *Brown* before review by the Court of Appeals, saying, “The objection that receipt of the evidence violates the attorney-client privilege of confidentiality is patently invalid. There can be no confidentiality about an affidavit filed in open court.”²¹ That ruling would appear to allow testimony by a former counsel as to what a former client had said.

The only exception would be if the court were to rule that the client's denial implicating the prior counsel in a misrepresentation to the court was not a sufficient allegation of misconduct so as to result in a waiver of the privilege.²²

In criminal cases, a notice of alibi is required to be served upon the prosecution if the defendant plans to introduce alibi evidence, and thus has the potential to become an admission or prior inconsistent statement. However, if the notice is withdrawn well in advance of trial, it may not be used as an admission or a prior inconsistent statement because it is required so early in the case that it is more a procedural device and should not force the defendant to form a fixed defense so early in the litigation.²³ However, absent a timely withdrawal of an alibi notice, the notice may be used as an informal judicial admission and/or to impeach the defendant if he testifies²⁴ and/or to impeach a defense witness who is named in the notice.²⁵

Closing Arguments

Closing arguments present another fertile ground for a lawyer to speak with negative consequences. Case law shows that even though what a lawyer says in summation is not evidence,²⁶ a lawyer may not make statements in summation with impunity. A lawyer who operates under the assumption that the proof is closed may be in for a rude awakening because there is still the opportunity for counsel to make admissions and open the door during summation.

The Third Department has recognized the possibility that a lawyer may commit an informal judicial admission in summation, though the court found in that case that what the lawyer said did not measure up to an admission.²⁷ In *Wheeler*, the plaintiff had sued GTE for gender discrimination in the form of discharge. In order to prevail, she had the burden to prove that the discharge occurred under circumstances giving rise to an inference of gender discrimination. The defense took the position that there was no discharge, but rather a resignation. The jury found that the plaintiff was fired, but for misconduct. The trial court set aside that verdict as against the weight of the evidence, but rejected the plaintiff's claims that defense counsel's statements in summation were admissions. Those statements included: (1) "The issues we had with Ms. Wheeler . . . didn't warrant her discharge and no one was going to discharge her"; and (2) "You're going to hear that somehow [GTE] terminated the plaintiff for misconduct. I'm not quite sure how we did that. The fact is that – is that she quit."²⁸ The Appellate Division reinstated the verdict, observing that while the trial court was wrong in setting aside the verdict, the trial court correctly recognized defense counsel's statements as arguments, and not as judicial admissions, because none was a concession of a fact.²⁹

The First Department and the Court of Appeals have ruled that criminal defense counsel may open the door to additional proof in summation. In the First Department case, defense counsel was found to have opened the door during summation to proof of a photographic identification procedure that would otherwise have been inadmissible,³⁰ because counsel had "created an unfair impression" about the witness's identification of the defendant. In the Court of Appeals case, *People v. Thompson*, decided in 2014, defense counsel was found to have opened the door during summation to evidence (a glove) that had been ordered suppressed. The Court affirmed the trial court's order permitting the People to re-open their proof to introduce the suppressed evidence before returning to summations.³¹

The *Thompson* case makes re-examination of a case decided by the Court of Appeals 10 years earlier well worthwhile. In *People v. Massie*,³² the Court took particular note that in summation defense counsel asserted a proposition that defense lawyers sometimes advance during jury selection, in opening and in closing: "Look at the setting. We're here in a courtroom. I'm the defense attorney. I'm asking the questions. [The defendant] is sitting next to me. Who else are [the witnesses] going to identify in this courtroom?"

In *Massie*, there were a total of three identifications by a single witness: (1) a photo identification that, absent an exception, is inadmissible on the People's case in chief;³³ (2) a line-up identification that had been ruled inadmissible on right to counsel grounds;³⁴ and (3) an in-court identification. When defense counsel elicited evidence about the photo identification, the trial court ruled that the door was opened to the use of the suppressed line-up identification. In the wake of *Thompson*, the "who else are the witnesses going to identify in this courtroom" argument may very well be viewed by a court as an attempt to create a misimpression that the witness had not identified the defendant or his or her picture as the perpetrator until the witness came into the courtroom. Under today's case law, that is the kind of misimpression that may very well open the door to the re-opening of proof, to allow the People to prove the prior identification.

Conclusion

The foregoing tour of the minefield that awaits the unwary lawyer who speaks in court would not be complete without mention of a Court of Appeals case where a lawyer opened the door by failing to speak. That case is *People v. Bolden*,³⁵ where defense counsel on cross-examination asked a question that called for a "yes" or "no" answer. Did you ever say that you "did not get a good look at the perpetrator"? The witness's non-responsive answer was that "she had been shown a number of photographs at the time she made that statement." The

Court of Appeals upheld the trial court's ruling that "[b]y failing to move to strike that unresponsive answer, defendant's attorney opened the door to an explanation by the People concerning the circumstances under which she had seen the photographs."³⁶ ■

1. The pattern jury preliminary instruction for civil cases contains the following assertion: "What is said [by counsel] in opening statements is not evidence." PJI 1:3. The pattern final PLJ instruction states: "[A]rguments, remarks, and summation of attorneys are not evidence." PJI 1:25.
 2. The pattern jury preliminary instruction for criminal cases contains the following assertion: "What the lawyers say in an opening statement or at any time thereafter is not evidence." CJI 2nd. The pattern final instruction for criminal cases states: "Remember, nothing the lawyers say at any time is evidence." CJI 2nd.
 3. *Echavarría v. Cromwell Assocs.*, 232 A.D.2d 347 (1st Dep't 1996).
 4. *People v. Rojas*, 97 N.Y.2d 32 (2001) ("In its opening statement, the defense strongly suggested, if not argued, that the jury should acquit defendant because, having done nothing wrong, he was abused and mistreated, culminating in a scuffle with guards who surrounded him in his cell. . . . Having argued that defendant's confinement was unjustified, the defense converted the shield of the preclusion order into a sword by arguing that the People should not be allowed to supply that justification.").
 5. *People v. Everett*, 96 A.D.3d 1105 (3d Dep't 2012) ("County Court did, in fact, grant his motion to suppress most of his statements. The court permitted the People to introduce those suppressed statements at trial, however, after defense counsel stated during his opening remarks that there was no proof to connect defendant with the cocaine or the sneakers. The court did not abuse its discretion when it held that these comments created a misleading impression, thereby opening the door to the admission of defendant's statements.").
 6. See Richardson 8-215.
 7. See Richardson 8-219.
 8. *Kosturek v. Kosturek*, 107 A.D.3d 762 (2d Dep't 2013); *Tullett Prebon Fin. Servs. v. BGC Fin., L.P.*, 111 A.D.3d 480 (1st Dep't 2013).
 9. *Kosturek*, 107 A.D.3d 762 ("This unequivocal, factual assertion made during opening statements constituted a judicial admission.").
 10. *Echavarría*, 232 A.D.2d 347.
 11. *People v. Johnson*, 241 A.D.2d 954, 955 (4th Dep't 1997) ("The People concede that there was no explicit proof offered at trial indicating that defendant was wearing sneakers. The admission by defendant's attorney in his opening statement does not constitute evidence, nor does it relieve the People of their burden of proof.").
 12. *People v. Rivera*, 45 N.Y.2d 989 (1978).
 13. *People v. Rivera*, 58 A.D.2d 147, 149 (1977).
 14. *People v. Brown*, 98 N.Y.2d 226 (2002).
 15. *People v. Gary*, 44 A.D.3d 416 (1st Dep't), *lv. denied*, 9 N.Y.3d 1006 (2007) ("The court properly permitted the prosecutor to impeach defendant by way of statements his attorney made at arraignment (citations omitted). It was a reasonable inference that these statements were attributable to defendant, and they significantly contradicted his trial testimony."); *People v. Moye*, 11 A.D.3d 212 (1st Dep't 2004), *lv. denied*, 4 N.Y.3d 766 (2005) ("On cross-examination of defendant Moye, the court properly received statements that defendant Moye's original counsel had made at arraignment as prior inconsistent statements by Moye affecting his credibility. Moye was concededly the source of the information and counsel, attorney of record at the time, was acting as Moye's agent (see *People v. Brown*, 98 NY2d 226, 232-33 (2002)). An attorney's statement at arraignment, relaying information supplied by the defendant and offered for the purpose of obtaining favorable rulings on matters such as bail, clearly falls within Brown's ambit.").
 16. *People v. Mahone*, 206 A.D.2d 263 (1st Dep't), *lv. denied*, 84 N.Y.2d 869 (1994) ("Further, it was not improper for the prosecutor to use for impeachment purposes a statement made by defendant's attorney at a bail application which was made in defendant's presence and with his active participation (citation omitted).").
- People v. Johnson*, 46 A.D.3d 276 (1st Dep't 2007), *lv. denied*, 10 N.Y.3d 865 (2008) ("[T]rial court properly permitted the prosecutor to impeach defendant by way of statements made by her attorney at the bail hearing as it is a reasonable inference that such statements were attributable to defendant, and

they significantly contradicted her trial testimony.").

17. *People v. Killiebrew*, 280 A.D.2d 684 (2d Dep't), *lv. denied*, 96 N.Y.2d 802 (2001).
18. *Rivera*, 58 A.D.2d at 149 ["The fact that the attorney was not called to testify is not a valid objection to the admissibility of the affidavit. Almost the whole point to the vicarious admission rule is that someone other than the agent testifies to the fact that the agent has made an admission out of court."].
19. See *People v. Paperno*, 54 N.Y.2d 294 (1981).
20. N.Y. Rules of Prof'l Conduct, Rule 3.7.
21. *Rivera*, 58 A.D.2d at 149.
22. See, e.g., *Gen. Realty Assocs. v. Walters*, 136 Misc. 2d 1027, 1029 (N.Y. City Civ. Ct. 1987) ("DR 4-101(C)(4) permits the attorney to testify in defense of the charge, even if the testimony breaches the confidentiality rule. Nor need the charge be formal or precise: Where the fair implication of the client's assertion tends to jeopardize the attorney's position, the right of self-defense attaches.").
23. *People v. Burgos-Santos*, 98 N.Y.2d 226, 235 (2002).
24. *People v. Harvey*, 309 A.D.2d 713 (1st Dep't), *lv. denied*, 1 N.Y.3d 573 (2003) ("Defendant failed to preserve his argument that, since he had withdrawn or disavowed the notice, it was error for the court to admit his false notice of alibi as an informal judicial admission. . . . Unlike the situation in *People v. Burgos-Santos* (98 NY2d 226, 233-35 [2002]), defendant first attempted to disavow the alibi notice late in the trial. In any event, were we to find any error in this regard, we would find it to be harmless.").
25. *People v. Byfield*, 15 A.D.3d 262 (1st Dep't), *lv. denied*, 4 N.Y.3d 884 (2005) ("The court properly exercised its discretion in permitting the People to cross-examine a defense witness as to whether she was the source of certain information contained in defendant's alibi notice, as well as in receiving the alibi notice as an informal judicial admission that was contrary to defendant's position at trial.").
26. *People v. Roche*, 98 N.Y.2d 70, 78 (2002) ("[W]e note that the People's closing argument does not provide an evidentiary basis for [the requested charge]. As cogently stated by the dissenting Justice at the Appellate Division, statements in a summation are not evidence and may not supply proof supporting a charge request.").
27. *Wheeler v. Citizens Telecomm. Co. of N.Y., Inc.*, 18 A.D.3d 1002 (3d Dep't 2005) ("Supreme Court correctly recognized defense counsel's statements as arguments, and not as judicial admissions. Formal judicial admissions take the place of evidence and are concessions, for the purposes of the litigation, of the truth of a fact alleged by an adversary (see Prince, Richardson on Evidence § 8-215 [Farrell 11th ed.]). Informal judicial admissions are facts incidentally admitted during the trial. These are not conclusive, being merely evidence of the fact or facts admitted (see Prince, Richardson on Evidence § 8-219 [Farrell 11th ed.]). A review of the statements made by defendant's counsel during argument reveals that none are formal or informal concessions of a fact alleged by plaintiff.").
28. Drawn from the Plaintiff's brief on appeal reproduced in Westlaw as follows: 2005 WL 5746264 (Appellate Brief) Plaintiff-Respondent's Brief (Jan. 18, 2005).
29. See *Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 629 (1997) ("To support a prima facie case of age discrimination under the Human Rights Law, plaintiff must demonstrate (1) that he is a member of the class protected by the statute; (2) that he was actively or constructively discharged; (3) that he was qualified to hold the position from which he was terminated; and (4) that the discharge occurred under circumstances giving rise to an inference of age discrimination (citations omitted). The burden then shifts to the employer 'to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision' (citations omitted).").
30. *People v. De Los Angeles*, 270 A.D.2d 196 (1st Dep't), *lv. denied*, 95 N.Y.2d 889 (2000).
31. *People v. Thompson*, 81 A.D.3d 670 (2d Dep't 2011), *aff'd*, 22 N.Y.3d 687 (2014).
32. *People v. Massie*, 2 N.Y.3d 179, 182 (2004).
33. *People v. Caserta*, 19 N.Y.2d 18 (1966).
34. *People v. Massie*, 305 A.D.2d 116, 117 (1st Dep't 2003).
35. *People v. Bolden*, 58 N.Y.2d 741, 741-42 (1982).
36. *Id.* at 742.

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