CIVIL JURY PROJECT
at NYU School of Law

FACT SHEET:

Interim Arguments By Counsel

Summary: Interim arguments are arguments that counsel make to the jury between opening and closing statements. Counsel are generally given an overall time limit for interim statements and can chose how to allocate that time. Interim arguments are encouraged by Standard 13(G) of the ABA American Jury Project Principles and Standards, which provides that "[p]arties and courts should be open to a variety of trial techniques to enhance juror comprehension of the issues including: alteration of the sequencing of expert witness testimony, mini- or interim openings and closings, and the use of computer simulations, deposition summaries and other aids."[1]

Empirical Studies: 2008 ABA Seventh Circuit Project: In seventeen (17) trials, over eighty percent (80%) of the jurors reported that interim statements of counsel were helpful to aid juror comprehension of the case.[2] Over eighty-five percent (85%) of participating judges thought the use of interim statements increased the jurors' understanding and said they would permit interim statements during trials in the future. Over ninety percent (90%) of jurors thought that interim statements were helpful when used to introduce or summarize evidence.

Current Usage: Only one percent (1%) of civil trials included interim summaries of evidence.[3] An ongoing questionnaire circulated by the NYU Civil Jury Project noted that nineteen percent (19%) of judges have permitted counsel to make interim statements during trial.[4]

Legal Support: The advisory notes to Rule 51(b)(1) of the Federal Rules of Civil Procedure reference the use of interim statements by some courts: "The time limit is addressed to final jury arguments to reflect the practice that allows interim arguments during trial in complex cases; it may not be feasible to develop final instructions before such interim arguments." FED. R. CIV. PRO. 51(b)(1). And interim arguments (or "summations") in some form have been permitted in lengthy and/or complex civil trials. *See* Consorti v. Armstrong World Industries, Inc., 72 F.3d 1003, 1008 (2d Cir. 1995), *judgment vacated on other grounds*,

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[1] American Bar Ass'n, Principles for Juries & Jury Trials (Aug. 2005), http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf

[2] SEVENTH CIRCUIT BAR ASS'N AMERICAN JURY PROJECT COMM'N, *SEVENTH CIRCUIT AMERICAN JURY PROJECT FINAL REPORT 37-38 (Sept. 2008).*

[3] See Paula Hannaford-Agor, NCSC Center for Jury Studies, But have we made any progress? An update on the status of jury improvement efforts in state and federal courts (2015).

[4] Out of twenty-one (21) judicial advisors to the project, four (4) judges have had counsel make interim statements as to what a witness will prove or has proved or failed to prove, and seventeen (17) judges have never used the innovation. Questionnaire for Judges on Use of Jury Innovations (on file with the NYU Civil Jury Project), data current as of April 2016.

518 U.S. 1031 (1996) ("[W]e have noted repeatedly that a district court can greatly assist a jury in comprehending complex evidence through the use of intelligent management devices. Such management devices include . . . interim explanations by the judge on issues of law and fact and on the limited use of evidence, [and] interim addresses to the jury by counsel . . . ."); In re Brooklyn Navy Yard Asbestos Litigation, 971 F.2d 831, 836 (2d Cir. 1992) (as part of handling the consolidated trial of 79 asbestos-related personal injury and wrongful death actions "to ensure that the jurors could assimilate the vast amounts of information necessary to assess the claims," the district court employed an interim summation procedure); In re New York Asbestos Litigation, 149 F.R.D. 490, 499 (S.D.N.Y. 1993) (interim summations "considered and adopted where appropriate during the consolidated trial" of tort actions based on asbestos exposure). *Cf.* Baez-Cruz v. Municipality of Dorado, 780 F. Supp. 2d 149, 151 (D.P.R. 2011) (stating that in a Title VII discrimination action where there was to be a month-long hiatus in the presentation of evidence and the jury requested some mechanism to refresh their recollection of the testimony upon their return to court, "[i]nterim summations would have been considered but the case [was] not lengthy and complex, and only plaintiffs [had] presented witnesses.").

Legal scholars have also noted the helpfulness of interim statements in complex and lengthy civil trials. *See, e.g.*, Tom M. Dees, III, *Juries: On the Verge of Extinction? A Discussion of Jury Reform*, 54 S.M.U. L. REV. 1755, 1778–80 (2001) (summarizing arguments for and against interim summations and citing state task forces advocating use of said); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 537 (1997) (nothing that interim summations are particularly desirable in lengthy or complex cases); Robert M. Parker, *Streamlining Complex Cases*, 10 REV. LITIG. 547, 553-54 (1991) (discussing the many advantages of interim argument in many week or month-long trials). And the Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION § 22.34, at 143 (3d ed. 1995) recognizes the technique of having "counsel from time to time . . . summarize the evidence that has been presented or outline forthcoming evidence." The manual clarifies interim statements should not be used to argue the case—rather, to facilitate the jury's understanding and recollection of evidence presented. *Id.* at 143–44.