Strategies for effective closing argument

by Derrick L. Walker

The main objective of closing argument is to summarize the evidence for the jury and to persuade them your client should win the case. It is the last opportunity to provide a concise, yet compelling story of your case to make the jurors want to find in your client’s favor. It is the time to tie up all the loose ends from the trial. All the subtle details, inferences, deductions and conclusions you hoped the jurors were making during the presentation of the evidence should be addressed in closing argument in a cogent and persuasive manner. Of course, there is no specific formula that can guarantee a virtuoso closing argument, however, the chances of delivering a highly effective closing argument will increase substantially if you keep in mind the following practice pointers when preparing and presenting your next closing argument.

Begin planning your closing argument early

It is never too early to begin planning your closing argument. In fact, early preparation is an absolute must. It is only because closing argument comes at the tail end of a jury trial, that it becomes easy to put off preparing for it. When it comes to closing argument, procrastination is a trap for the unwary. By deferring preparation, you squander those invaluable impressions formed early in the case. Instead of allowing those ideas to slip through your fingers, start a “closing argument” section of your trial notebook as soon as you accept a case. As discovery unfolds and strategies hatch, these ideas and thoughts can be tweaked and eventually incorporated into the overall theme of your case. Obviously, whatever does not work can always be discarded.

Early preparation of the closing argument also permits the gathering of feedback from family, friends, colleagues, mock juries and focus groups. Often, the input from these sources can change the entire framing of a case, resulting in the complete revamping of the case theory and theme. Getting started on the closing argument early will enable you to make any wholesale changes to your closing should it become necessary.

Familiarize yourself with the law of closing argument

Many of the limitations and restrictions imposed on other parts of the trial do not apply in closing argument. Generally, closing argument is a no-holds-barred event symbolizing the very essence of our adversarial system. Nevertheless, there are some things that are simply off limits during closing argument. Knowing precisely what the law prohibits during closing argument will provide you with the confidence to go right up to the line without crossing it.

You cannot misstate the facts or the law. There is no advantage to be gained in doing so. In fact, there is no quicker way to lose credibility in the eyes of the jury then by misstating the facts or the application of the law to the facts in evidence. The jury will either think that you do not understand your own case, or that you do not know the law. Even worse, they may perceive you as someone who refuses to play by the rules, and therefore, cannot be trusted. Any of these conclusions will cause the jury to disengage from your arguments, and your client will suffer as a result. The best way to avoid inadvertent misstatements of law, is to base your argument of the law directly from the jury instructions which are presumably accurate statements of the law. At a minimum, if an instruction has been given by the presiding judge, it constitutes the law of the case.

You may not directly ask the jury to put themselves into your client’s shoes. This is commonly referred to as the prohibition against arguing the “Golden Rule.” It is important to bear in mind that although you must refrain from explicitly asking the jury to step into the shoes of your client, you can make the suggestion more tacitly with persuasive effect. The key is to avoid directly urging the jury to decide the case based on how they would want to be treated under similar circumstances. Of course, the whole point of closing argument is to attempt to persuade the jury to empathize with your client, and there are ways to accomplish this without running afoul of the law. For example, instead of asking the jury “how would you feel if you had received this type of medical treatment,” you might argue “most reasonable people would have been offended to be treated like that.” The bottom line is that while you want the jury to step into your client’s shoes to try to understand the harms and losses presented in the case, this can be done only through subtle and indirect means.

Finally, you may not appeal to the passion or prejudice of the jury. It is important, however, to keep this rule in perspective. The rule does not preclude you from attempting to make an emotional connection with the jury by appealing to their feelings or sensibilities. It simply means that you cannot influence the passions of the jury by referring to matters which do not form a basis for assigning liability or apportioning damages.

It is always important to remember that the strength of a closing argument depends in part on the momentum you gather from delivering your argument with the fewest objections possible. If you skirt the rules, you will most assuredly relinquish this momentum to a series of objections.

Present the theory and theme of your case

If nothing else, the theory of the case must be communicated to the jury. During closing argument, you will find that some witnesses may be disregarded, some details omitted, some legal issues can be overlooked, but an expression of the theory of the case is absolutely indispensable. The best way to illuminate your theory of the case is not by merely reciting the facts. Rather, the argument should synthesize information from various sources and exhibits in a way that persuades the jury that there can be only one result in the case.

A good trial theme provides the incentive for a verdict in your client’s favor. It sets the stage for everything you say. In addition to being logical, plausible and credible, it must also express notions of morality, ethics, societal values and fairness. A strong theme crystallizes the thought that your client should prevail against arguing the “Golden Rule.” It is important to bear in mind that although you must refrain from explicitly asking the jury to step into the shoes of your client, you can make the suggestion more tacitly with persuasive effect. The key is to avoid directly urging the jury to decide the case based on how they would want to be treated under similar circumstances. Of course, the whole point of closing argument is to attempt to persuade the jury to empathize with your client, and there are ways to accomplish this without running afoul of the law. For example, instead of asking the jury “how would you feel if you had received this type of medical treatment,” you might argue “most reasonable people would have been offended to be treated like that.” The bottom line is that while you want the jury to step into your client’s shoes to try to understand the harms and losses presented in the case, this can be done only through subtle and indirect means.

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safety and that a substantial verdict in favor of the plaintiff will reduce that potential danger.

The options for themes are seemingly boundless. Below are some examples.

• The doctor who was too busy to be careful
• The company that chose profits over people
• Lies to avoid responsibility
• Dying an unnecessary death
• Pain made her a prisoner in her own body
• Expectations: Customers expect to be warned about known hazards
• David vs. Goliath
• Quality of life: Sometimes one’s quality of life is so diminished that death would be more humane
• Rules: Every person in the world has rules to follow
• Choices

Regardless of the chosen theme, it should not be heard for the first time during closing argument. On the contrary, the theme should be established as early as voir dire and subsequently woven through opening statement, the evidence, and eventually hammered home during the closing argument.

**Tap into the power of primacy and recency**

In recent years social psychologists, communication experts and contemporary advocates have established that in addition to contemplating what information to provide jurors, we must also give considerable thought to when that information should be provided to maximize its influence. A glaring example of this thought process can be seen in the principles of primacy and recency. Primacy refers to the psychological principle that individuals tend to place the greatest emphasis on the information they receive first. Recency is the psychological principle which suggests that individuals remember longest that which they hear last. In order to take full advantage of the power of primacy, start your closing argument with a high-impact beginning. Consider beginning powerfully even if it means taking less time to thank the jury for their service. Similarly, utilize the principle of recency by concluding your closing argument with issues of strength. Whatever you do, avoid squandering the persuasive advantages of primacy and recency during closing argument.

**Take full advantage of persuasion techniques**

There are a myriad of techniques that can be employed during closing argument to enhance the persuasive effect of the argument. These “persuasion techniques” are effective because they tap into the most basic psychological aspects of individual decision-making. In some instances, juror reception to these techniques can actually occur on a subconscious level. Many of these techniques are intuitive. In fact, they may already be a part of your repertoire under a different moniker.

Immunization is a persuasion technique which fosters jurors’ resistance to defense arguments. Much in the way an individual is inoculated to prevent the contraction of a communicable disease, immunization in the trial advocacy context “inoculates” jurors for certain defense arguments before they are presented; making jurors less receptive to those arguments. Some specific examples of immunization include forewarning, supportive arguments and rhetorical questions.

Forewarning occurs when the opposition’s anticipated argument is revealed to jurors in advance. What makes forewarning an effective persuasion technique is the underlying rationale that jurors are better equipped to resist the opposition’s argument if they see it coming in advance.

Supportive arguments take forewarning to the next level. They not only alert jurors to the fact that a specific opposition argument is on the horizon, they go a step further and expose the fallacy of those arguments. This makes jurors even more resistant to those arguments because in addition to being conditioned to hear them, they are simultaneously provided the analytical framework with which to dissect and discard the argument.

There is a pervasive belief that jurors are more likely to be persuaded by a position or decision they form on their own. Consequently, one must resist the urge to dictate each and every position you hope the jury will adopt. In some instances, it is more effective to guide them towards the desired response without drawing the conclusion for them. Rhetorical questions are an effective means of accomplishing that goal. Here is a hypothetical example:

> The defendant manufacturer didn’t take this van to market without testing it. Some very smart people working for the defendant – its ‘science people’ tested this van extensively. The result of that testing led those folks to conclude that this van was unsafe for passengers because it was prone to rollover. Those science people took that information to the defendant’s executives – the ‘money people’ and those folks decided to sell this van anyway. As people bought this van all over the country, the concern expressed by the defendant’s science people became a reality and people died including my client’s husband. Members of the jury... Why? Why in the world would this defendant continue to market and sell a van it knew to be unsafe because it was rolling over and killing people all over the country?”

This rhetorical question is compelling for several reasons. First, it reinforces the likely theme of the case, which is clearly “profits over people.” Next, it poses a compelling question that taps into the common sense of the jury, while making an emotional appeal. Finally, it takes advantage of recency because of its placement near the end of closing argument.
**Clarity the burden of proof**

It is a mistake to assume that the jury will understand the difference between the burden of proof in a civil case and a criminal case. An effective way to educate the jury on the applicable standard of proof in a civil case is to begin by explaining the differences between civil and criminal trials in general. Then, compare and contrast the standards of proof applicable in each case. Finally, provide an example of how the burden of proof works in a civil case. For example, counsel may explain that the greater weight of the evidence is akin to the scales of justice. That is to say, if the scale tilts to one side just a fraction, then that is sufficient to be considered the greater weight of the evidence. From there, segue into a discussion of the specific elements of the plaintiff’s cause of action and how the evidence supports the theory of the case. The jury must be assured that even though the law requires mere proof of each element by the greater weight of the evidence, plaintiff has proven their case far beyond that standard. This is important, to address any feelings that the “greater weight of the evidence” standard may be too forgiving.

**Utilize illustrative exhibits**

In his book, *Theater Tips and Strategies for Jury Trials*, David Ball, Ph.D, reminds us that people remember (or are affected by) visual input 4 to 10 times more than what they hear or read. These statistics make it clear that we must use visual aids and illustrations to maximize juror interest and promote retention during closing argument. Be mindful not to overdo it. Excessive exhibits can be distracting. Striking the appropriate balance is of the utmost importance. For example, when presenting the medical issues to the jury, use one exhibit for every important medical issue in the case.

**Tell the jury what you want**

At some point during closing argument, usually at the very end, you must clearly and concisely tell the jury what you want them to do. For example, counsel for the plaintiff in a personal injury case should tell the jury to find in the favor of the plaintiff and to award a specific amount of damages. One effective way to do this is by using the verdict form. Using the verdict form accomplishes several things. First, it familiarizes the jury with verdict form which they will use to reflect their decision in the case. Secondly, it provides an opportunity to tell the jury precisely how to answer the questions on the form, and why they should answer them the way you want them to. Finally, it gives you a means for integrating the law and the facts in your closing while relating those issues directly to the questionnaire that will reflect the eventual verdict in the case.

**Restore your case theory and theme during rebuttal closing**

Far too often lawyers neglect any pretrial consideration of what will be presented during rebuttal closing. In fact, some believe that one simply cannot prepare for rebuttal closing as though it is some sort of exercise in improvisation. Such thinking marginalizes rebuttal closing to nothing more than a series of disjointed afterthoughts rather than a cohesive extension of the initial closing. The true goals of rebuttal closing are to restore commitment to the case theory and theme, rebut the major points of the opposition’s closing argument and to regain any momentum which may have been lost as a result of the opponent’s closing argument. This can be achieved only when the two closings work harmoniously to further the same persuasive goal. This requires preparation well in advance of trial.

Some lawyers are proponents of the periodic use of “soft” closings. This is calculated sandbagging. The strategy is to hold back certain substantive arguments for rebuttal closing in order to prevent the opposition’s likely rejoinder to those arguments. While this strategy can work, it is not without substantial risk. First, by retaining a compelling argument for rebuttal closing, you lose the advantage of primacy — the unique benefit of arguing first. Secondly, since your rebuttal closing is limited to the scope of the opposition’s closing, you run the risk that the argument saved for rebuttal will exceed the scope of the opposition’s closing remarks. The enlightened approach is to save some ammunition for rebuttal in order to end on a high note and capitalize on recency. Just be careful that what you save is not your most compelling material and that the likelihood of the defense depriving you of the argument by artificially narrowing the scope of their closing is remote.

**Conclusion**

No aspect of a jury trial offers the persuasive power of an effective closing argument. In close case, it can be the difference between winning and losing. By planning early, knowing your boundaries, and using the persuasive techniques at your disposal, you are primed to deliver effective closings time and time again.

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