

PERSUASIVE CLOSING ARGUMENT

by George M. Walker

Closing argument is the defense attorney's last opportunity to persuade the jury. All of the testimony has been given, all of the exhibits have been admitted into evidence, and the Court has advised the attorneys of the instructions that will be given to the jury. Its now up to you to take all of that and to put it together and present a closing argument that will persuade the jury of the justness of your cause. How are you going to do it?

First and foremost, don't lose sight of what it is you are trying to do. Forget about what you think of your case; focus upon what the jury must think of it. Forget about what you want to say; focus on what the jury needs to hear. Forget about what you believe is important; focus on what the jury must think is important. Unless you analyze the trial issues as if you were in the jury box, you're not going to be able to construct and present a very effective, or very persuasive, closing argument.

If the case is substantial enough to support it, recommend to your client that the trial issues be "pre-tried" through mock juries, focus groups, or by other means. In smaller cases, get common sense feed back on your trial issues from spouses, relatives, friends, or others who have either no legal background or no stake in the outcome, or both. It is imperative that you determine how lay people can be expected to react to your trial issues.

Once you have determined what trial issues need the most emphasis in your argument, spend some time outlining and constructing your argument. This should be done well in advance of trial. A hastily thrown together argument is often worse than no argument at all. While every case is different, and, therefore, the content and structure of every closing argument will be different, there are some fundamental things that should be accomplished in every closing argument.

First, at the outset, or very close to the outset, of your argument, compliment the jury on the energy and the attention that they have brought to the trial. Don't thank the jurors; they didn't want to be there, they wouldn't have been there if they'd had a choice, and they were not doing you a favor by being there. They had to be there, and your expression of gratitude is not going to be persuasive. On the other hand, your suggestion that they have clearly paid attention and are therefore ready and able to complete their work in the jury room will inspire their confidence. How about something like this:

I want to compliment each and every one of you on the attention and energy that you have brought with you to the jury box during each day of this trial. This could not have been an easy case to sit through; trials never are as short or as interesting as the jurors would like for them to be. But that attention and energy that you brought with you will be very valuable when you get back in the jury room and start discussing the evidence and talking about what your verdict should be in this case.

Your expression of confidence in them will maximize the likelihood that they will listen to, comprehend, and be persuaded by, your message.

Let them know the importance of their coming task. The jury knows that they are going to have to decide the case, and that their decision will have an effect on the parties' rights. Tell the jurors why their decision is important, and let them know that you are aware of how important it is to each of them to reach the correct decision.

Tell them what verdict you are going to ask for at the end of your closing, and let them know that you are going to spend your argument time giving them reasons to support that verdict. It is very important that you let the jury know fairly quickly exactly what it is that you want them to do. And it is also important to convey to the jury that if they will listen to you, you will give them the reasons they will need to support that result. Remember that most jurors will already have a pretty good idea of what result they think is proper before you stand up. Let your jurors know that you are going to give them the ammunition they will need in the jury room; let the jurors leaning away from you know that there are good reasons why they may have the wrong impression.

After the foregoing introductory matters, go to the substance of your argument. First, respond to your opponent's closing argument. You can't ignore it, and you shouldn't. If warranted, express admiration at the eloquence and logic of your opponent. But respond to the argument and explain to the jury why your opponent is wrong and why you are right.

Do not, however, disparage your opposing counsel in any way. If your opponent has made personal attacks on you in his closing, seize the opportunity to impress the jury with your fairness and integrity by lamenting the fact that your opponent felt the need to get personal, by apologizing to the jury for his attack on you, and by reminding the jury that if the facts or the law supported your opponent, no personal attack would have been made. Resist by all means responding in kind. Any time talking spent talking about opposing counsel is time lost from persuading the jury.

To be most persuasive, discuss the questions that the jury is going to have to resolve in the jury room, and remind the jurors of the testimony and physical evidence that they will need to remember to resolve those questions. In structuring this part of your argument, put yourself in the jury room with the issues to be resolved, and try to conceptualize what conversations, arguments, or comments will take place there. Remember that a primary goal of your argument should be to supply jurors with the information or arguments they will need to reach your desired result once the deliberations have begun in the jury room. Remember also that the most persuasive argument is one that answers a question that a juror has in mind during your closing.

In discussing the issues, admit the weaknesses in your case, and explain to the jury why they don't matter. You absolutely cannot ignore case weaknesses; the jury will make you pay for that. By the same token, emphasize the weaknesses in

your opponent's case, and explain to the jury why they do matter. If your opponent has ignored or avoided a weakness in his case, certainly call that to the jury's attention and if the weakness is on a major issue, dwell upon it.

To emphasize or accentuate your arguments, use analogies whenever possible. Analogies give the jurors a non-legal basis to support their decision, and they allow you to import some common sense into your case. Just choose your analogies carefully, and make sure they can't be reversed or turned against you in plaintiff's rebuttal. Nothing is worse than hearing a carefully constructed analogy come apart after you have had your last say. If you have never heard Jim McElhany speak on the use of analogies in closing argument, at the very least read his article "Analogies in Final Argument", which you will find at pages 645-665 in McElhany's Trial Notebook (3d ed. 1994).

Use exhibits in your argument, but only those that you want the jury looking at in the jury room. I have seen many lawyers who feel compelled to discuss every exhibit in evidence during their closing arguments. You don't have that much time, and it is not persuasive to do so anyway. Pick the top five or so exhibits that support your best arguments, and emphasize them. Those are the exhibits that you really want the jury to look at in the jury room anyway, so emphasize them in your argument.

In the same fashion, use favorable portions of the Judge's instructions to give the jury a foretaste of what the Judge will tell them later. When the jurors later hear the Judge say it, it will enhance your credibility. Moreover, if you don't explain to the jury how the law relates to the facts to compel your requested result, it is unlikely that the jurors will come up with that relationship on their own.

Throughout your argument, resist the impulse to tell the jury what it must or should do. Instead, show them the way without telling them where to go. An argument that highlights reasons why a verdict in your favor is a just verdict is far superior to an argument that suggests only that the jury must rule in your favor. Reaching the verdict is their job, not yours, and many jurors resent it when the lawyers intrude on their job. Let them know that you recognize that, and that you want nothing more than to assist them in reaching a just verdict.

In presenting your arguments, feel free to use notes or your outline, but do not read from them. If you are organized, eloquent, and confident enough to get by without notes, by all means do so. Most people are not. The jury will not mind, unless you read from the notes or the outline persistently.

Use regular language, not lawyer talk, in presenting your argument. Do not talk like you write, and do not expect lawyer language to be effective. In a recent case, I heard plaintiff's counsel use the phrase "ipso facto" during his closing argument. I was thrilled; the jury was confused. In the same vein, a catchy phrase

never hurts. Just ask Johnny Cochran and O.J. Simpson. It must be pertinent, and it must not be too cute. But a carefully thought out phrase, if pertinent, will likely be echoing in your juror's ears as they sit down in the jury deliberation room.

At the end, finish strong! There is nothing less persuasive than a lawyer telling a jury "So, we, uh, ask for, uh, a verdict in favor of our client," and then sitting down quietly. If you have told the jurors why that is the just verdict, then tell them that you know they are ready to return that just verdict. Every juror has, at some level, a sense of justice. Your closing argument should play to that sense of justice in every juror, and it should be designed, constructed, and presented to persuade each juror that the just verdict is the one that you have sought. If you have done that, then you can await the verdict with some certainty that your message is being repeated in the jury room, where it really counts.