THE TEN COMMANDMENTS OF CLOSING ARGUMENT

By: George M. Walker*
Hand Arendall, L.L.C.

Irving Younger identified the Ten Commandments of Cross Examination during a speech he gave in Montreal at the ABA annual meeting in 1975. (The Commandments were later published in Younger's *The Art of Cross-Examination*, ABA Section of Litigation Monograph Series, No.1 (1976)). A summary version is available at http://nebarfnd.org/PDFS/10commandments.pdf). I was lucky enough to hear him reprise that talk about ten years later, and I have always tried to keep his admonitions in mind when designing or conducting cross-examinations. In thinking about his cross-examination commandments recently, it occurred to me that his framework can be applied to virtually every aspect of a trial. There are, in every stage of the trial, certain things that effective and persuasive lawyers do (and don't do) that make a difference in the outcome of their cases. Herewith, with a grateful nod to the memory of Mr. Younger (and to Moses), are the Ten Commandments of Closing Argument.

I. Thou Shalt Not Thank the Jury.

There are a couple of reasons for this. First and foremost, it seems insincere. The jurors did not ask to be called for jury duty, and they did not ask to be on your jury. They are there because the law required them to

be there, and they will be deciding your case because they took an oath promising to do so. Second, it consumes time that could be better spent addressing issues that the jury will have to decide. Third, it is unnecessary clutter that is a distraction to the jury at a point in time when they should be listening to the reasons why they should be championing your arguments in the jury room.

If you are filled with the urge to suck up to your jury, compliment them instead of thanking them: “Ladies and gentlemen, we could not help but notice throughout the trial the attention that each of you gave to the evidence as it was presented. Your job is not an easy one, and you have taken it seriously. I believe that you will find when you get back to the jury room that the serious attention that you have given to the evidence presented throughout the trial will help you greatly when you retire to determine your verdict in this case.” Let the jurors know that you understand that their work is important, that their forthcoming task is difficult, that you believe that they have taken their assignment seriously, and that their hard work to that point will assist them when they begin deliberating in the jury room.

II. Thou Shalt Not Diminish the Importance of Thy Words.

How many times have you heard lawyers in closing argument remind the jurors that “what the lawyers say is not evidence”? Think about the likely juror reaction to that statement. The lawyer is talking directly to

me about the case, but he's telling me that what he says is not evidence. Do I pay attention to him? If I do, how much weight should I give to what he says? If what he is saying is not evidence, why does he get to talk to us at all about the case? Obviously, none of these reactions is helpful. Do not say or do anything that gives any juror any reason to believe that he or she should be doing anything other than paying rapt attention to your every word.

III. Thou Shalt Not Ignore the Argument of Thy Opponent.

If you are counsel for the defendant, in almost every jurisdiction your opponent will present closing argument both before you and after you. The jurors are going to expect you to disagree with the positions taken by your opponent, and they are going to expect you to explain clearly and cogently why your position is correct and just and why that of your opponent is unjust and wrong. Do not disappoint them in this regard by acting as if nothing happened and nothing was said before you stood up. Identify for the jury each issue about which there is factual or legal disagreement, and remind them of the evidence that establishes that your position on each such issue is correct. If there are bad facts, explain why they are not relevant or are unimportant. Assume that every argument presented by your opponent that you leave unanswered in closing argument will be answered by the jury in favor of your opponent when the verdict is returned.

The fact that plaintiff's counsel has the opportunity to present a rebuttal argument after you sit down creates some additional concerns that require careful planning on the part of defense counsel. To the extent that you can, try to anticipate arguments that plaintiff's counsel will most certainly make in rebuttal, let the jury know that those arguments are coming, and explain to the jury why those arguments are wrong. If the evidence in the case permits you to ask some questions that you know your opponent cannot honestly answer, by all means ask them.

Of course, you cannot predict every rebuttal argument that may be made, and you should not try to do so. Instead, you should condition the jury against the effects of the rebuttal argument by saying something like this: "I'm going to sit down in a few minutes and counsel for plaintiff will be back before you making an additional argument. He gets to argue first and last because plaintiff has the burden of proof in this case. As you already know from the evidence you have heard, it is a substantial burden. I don't know what he is going to say to you in this final argument, and I will not get a chance to get up and respond to it. But I do know this – he will not make a single argument that we have not already answered, or that you cannot answer yourselves in favor of the defendant based on the evidence presented to you in this case. So as you listen to his final argument, remember what I have told you today, and remember what you have learned from the evidence throughout the trial."

IV. Thou Shalt Not Make Any Unfavorable Reference to Thy Opposing Counsel.

You would think this would be a self-obvious and unnecessary commandment, but it is one that is far too often violated. Whether they are frustrated, baited, or Rambo-minded, too many lawyers are far too willing to use their closing argument as an opportunity to rail against opposing counsel and his or her conduct during the trial. This should be avoided at all costs. At best, it is a waste of precious argument time on a matter that will not likely make any difference in the outcome of the trial. At worst, you will offend the jurors, or the judge, or you will otherwise unfavorably muddle the thinking of those who you are trying to persuade.

If opposing counsel has taken a shot or two at you in his initial closing argument, don't rise to the bait and respond in kind. Instead, tell the jurors how much you regret that opposing counsel decided he needed to get personal in his closing, and tell them that you are not going to respond in kind because you have important issues to discuss and a limited time in which to discuss them. Remind the jury that the case is about the parties, not the lawyers, and move on.

V. Thou Shalt Not Read Thy Closing Argument to the Jury.

Some lawyers, either innately or as a result of substantial experience, are able to stand up and extemporaneously deliver compelling closing arguments without referring to a single note. Most lawyers do not

possess this talent. We need an outline. We need notes. There is nothing wrong with an outline or notes, so long as you have sufficiently prepared yourself so that your references to the outline or notes are intermittent, not constant.

I have on more than one occasion seen a lawyer actually read his closing argument to the jury, each time to disastrous effect. Think of the likely juror reaction: (1) the lawyer doesn't know the issues very well; (2) the lawyer doesn't have much confidence in the arguments he is making; and (3) the lawyer doesn't trust himself to speak frankly with me about the issues that I've got to decide. None of those reactions will help you in the jury room.

In summary, prepare an outline of your closing or notes to refer to, but practice your closing argument to the extent necessary to deliver it to the jury without distraction.

VI. Thou Shalt Know the Court's Instructions to the Jury and Shalt Include References to Such Instructions in Thy Argument.

It is imperative that you weave the court's instructions to the jury into your closing argument. Remember that your primary goal in closing argument is to give the jurors the tools necessary to carry on your argument back in the jury room. An explanation of the important instructions and why those instructions call for a defense verdict is a very valuable persuasive technique. Blow them up or put them on a screen, so

the jury will see and hopefully understand the language used. If you provide a cogent explanation, most jurors will, when the charge is read to them by the judge, remember that you told them to expect that charge, and they will remember your explanation of why the law in the charge calls for them to return a verdict for the defendant. When those jurors later discuss the law in the jury room, they will remember that you were the first one to explain the law to them and that the judge later confirmed your statements.

VII. Thou Shalt Focus Upon the Trial Exhibits that are Important to the Jury's Determination and Thou Shalt Show or Reference Such Exhibits in Thy Argument.

In most cases, there are a number of exhibits that will be important to the jury's determination. You can be sure that the jury will be looking at and talking about those exhibits in the jury room. Since that will be part of their deliberations, make it part of your argument. Carefully assess which exhibits most strongly demand the verdict that you will ask for, and spend some time in your argument talking with the jury about why those exhibits are important and why they require the jury to return the verdict that you seek. Do not ignore the exhibits that are unfavorable, for your opponent certainly will not do so. Talk about the exhibits that plaintiff's counsel has said are important and, if you are able to do so, tell the jury why they are not important. Remember that the best way to send your closing argument back to the jury room is to have it and highlight it in an exhibit that the jury has its hands on back in the jury room.

VIII. Thou Shalt Speak to the Jury in Language the Jury can Understand and Comprehend.

In an employment discrimination case I tried several years ago, counsel for plaintiff actually said "*ipso facto*" in the course of his closing argument (which he was reading to the jury at the time). While I felt that English was probably the second language for a couple of the jurors, I was certain that Latin was not the first language for any of them. You can imagine the juror reaction to that phrase. Coincidentally, I was thrilled to hear him use it.

To avoid this result, give a great deal of thought to the words that you will use in your closing argument. Think about your audience, and the words that are likely to be in their everyday vernacular. Think about the words that the jurors will likely use in their deliberations, and use those words yourself in your argument. Choose your words carefully, and do not use a fifty cent word when a five cent word will do. You cannot expect any juror to adopt your argument and carry it back to the jury room to the other jurors if you are using words that the jurors are not familiar with.

IX. Thou Shalt Address Each Question that the Jury Must Address to Reach a Verdict, and No Other.

There is nothing more damaging to the effectiveness of a closing argument than spending valuable time talking about facts or issues that the jury does not have to decide or that are not relevant to the questions that the jury does have to decide. At a point in time when the jury is most

attentive, and is most receptive to your arguments, it is a critical mistake to distract the jury with irrelevant or collateral issues. *See also* Commandments II and IV, above.

Make a list of every issue that the jury will have to decide, and argue those issues and the facts related to those issues only. The jury will have a better understanding of your position, and the jury will be much more likely to repeat those same focused arguments when the deliberations begin in the jury room.

X. Thou Shalt Appear to the Jury to be a More Credible and Reliable Source for the Evidence Presented and for the Questions to be Decided Than is Thy Opposing Counsel.

In some cases, the jury's verdict is based on nothing more than the jurors' collective assessment of which attorney they find to be more credible and reliable. Now, the jurors probably would not tell you that, but when the evidence is being discussed in the jury room, the lawyer that the jury believes to be the more credible and more reliable will usually win the close calls that the jury has to make. So it is imperative that the jury perceive that you are more credible and that you are more reliable than your opposing counsel.

How do you create the perception of superior credibility and reliability? You do it in everything you do during the trial in the presence of the jury. Jurors see how you interact with the judge and opposing counsel. They see how you treat court personnel and your own staff in the

courtroom. They see how you treat witnesses, and whether you overstate or embellish. Be conscious of the constant need to protect your credibility, and demonstrate your reliability, and the jury will reward your effort when close calls are being made in the jury room.

CONCLUSION

The effective, persuasive, closing argument requires a great deal of thought and preparation. The ultimate goal – and you must never lose sight of this – is to persuade your jurors to make the same arguments in the jury room that you have made in your closing argument. If you follow these commandments, thou shalt dwell forever in the house of the victorious.

*****George Walker is a member of the Hand Arendall law firm in Mobile, Alabama, where he has a general civil litigation practice with emphasis on defense of product liability, toxic tort, and banking practices cases. In addition to DRI, for which he currently serves as a Director, Walker is a member and is President-Elect of the Association of Defense

Trial Attorneys, is a member of the Product Liability Advisory Council, and is recognized in *Best Lawyers in America* in Commercial Litigation and has been recognized as an Alabama Super Lawyer. Walker also serves as Chairman of the Board of Trustees at his *alma mater*, the University of Montevallo, and as President of the Alabama Golf Association.