

CLOSING ARGUMENT FROM THE DEFENSE PERSPECTIVE

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Final argument is the advocate's art. It is no time for idle recapitulation of the testimony - the jury has already heard it. Instead, there are problems to be solved, and every trial has its share. Final argument is the advocate's opportunity to attack those problems with grace and conviction.

Litigation
James W. McElhaney

I. INTRODUCTION

Every trial lawyer has three closing arguments: the one the lawyer planned to give, the one the lawyer actually gave, and the one the lawyer wishes he would have given. The best planned closings do not always go exactly as intended. Even the most experienced lawyers later think of things they should have said or issues they could have addressed more effectively. No closing argument you will ever give will ever be perfect, particularly if you have a worthy adversary emphasizing the weaknesses in our case and the slightest misstatement in your presentation of the case.

There are no absolutes when it comes to closing argument. Each closing argument will be unique based on the facts and circumstance of the case and the personality of the lawyer making the argument. The following guidelines, however, are offered as a checklist to use in developing a successful closing.

II. SUGGESTED ELEMENTS OF THE DEFENDANT'S CLOSING ARGUMENT

1. Introduction

Begin the closing argument with a greeting. Thank the jurors for their time and effort, but do so in a sincere and honest way. Nothing is more offensive than hollow praise and phony gratitude. Be brief and not solicitous. It is important to be polite, but the jury wants to hear what you think about the case, so get to the point. The jury is most attentive at the start of your presentation. Do not waste that opportunity.

2. Issues

As in opening statement, closing argument should be told as a story. Generally speaking, the defendants' closing argument should be broken down into the broad categories of liability and damages. There will be many sub-issues under both liability and damages that will vary with each case. Argue those issues in order of most important to least important.

When discussing liability, tell the jury that their deliberations should start with considering whether the defendant is liable. Often the injuries and damages are the strength of the plaintiff's case. They need to consider liability first, before any consideration of the damages. If they do not find the defendant liable, they should stop and return a verdict for the defendant. Since you are asking them to cover liability first in their deliberations, you should cover liability first in your closing argument. You want a defense verdict. Tell them why they should give you one.

After you cover the liability issues, then talk about damages. Be sure to tell the jury that by discussing damages, you do not want them to have the impression that you

believe the evidence warrants a verdict for the plaintiff. To the contrary, you believe a verdict should be returned for the defendant. But, since they have heard argument from the plaintiff already on damages and because some people may disagree, you are going to share your thoughts with them on the subject. Very rarely do you want to completely omit any argument on damages. If the plaintiff is overreaching as to injury or damages, you can get a lot of mileage out of comparing the actual evidence to what the plaintiff claims.

3. Basis of Non-Liability

Review the credible evidence which favors a defense verdict. Discuss the testimony of the witnesses and the documented evidence supporting your position. Use the one or two best pieces of demonstrative evidence that were used during the testimony. Doing so will remind the jury of that part of the case and of the evidence. Some lawyers make notes in front of the jury on a large flip pad during the testimony. This can be an effective technique if it fits your style. If you have done that, bring the flip pad out and refer to it as you argue those points. The jury will remember that testimony.

It is important not to rehash all the evidence presented during trial. If the entire case is presented during closing, this will become too boring and the jury will be put to sleep. Instead, select the most important issues, then point out the highlights of the testimony and the key pieces of the evidence in the trial.

4. Plaintiff's Claims and Contentions

Make your arguments first, but do not fail to discuss the arguments made by the plaintiff's lawyer. Summarize plaintiff's arguments, then make your arguments in opposition. Compare the plaintiffs' evidence with defendants' evidence. Compare plaintiffs' witnesses with defendants' witnesses (was their expert certified in the field at issue or a general practitioner?) The goal is to help the jury realize the strength of the defendants' case. Do not gloss over the plaintiffs' winning points. The jury needs to hear that the defense counsel recognizes the theory behind the plaintiffs' case and can still refute it. By bringing up the plaintiffs' key points, the defense counsel maintains credibility, strengthens the defense argument, and helps the jury understand each relevant piece of evidence.

5. Anticipating Plaintiff's Rebuttal

It is important to anticipate the arguments that may be made by the plaintiff in rebuttal. The plaintiff has spoken once. You have not heard all of the arguments. Some have been held back, so that they can be made at a time when you do not have an opportunity to respond. Try to anticipate those arguments and make your response. Tell the jury that the plaintiff has the last argument because the plaintiff has the burden of proof. Do not complain about that. Use it to your advantage by emphasizing that the jury should return a verdict for the defendant, unless the plaintiff meets that burden of proof. Point out to the jury that the plaintiff's lawyer likely has held back certain arguments so that they can be made when you cannot respond. Any good lawyer

would do that. Ask the jury to, when they hear those arguments, think of what you have said or what you would probably have said if you had an opportunity to respond.

6. Anticipating Jury Instructions

The defense attorney should always anticipate the jury instructions in closing. You will have had the charge conference before the argument began. Weave the jury instructions into your argument. When the judge gives the instructions as you stated them, your credibility will rise. The jury will remember not only that you told them about this instruction, but also what your argument was related to that instruction. Be sure to remind the jury that the plaintiffs have the burden of proof in the case. Remind the jury that they are the sole judges of the credibility of the witnesses and that as jurors they cannot be influenced by sympathy or prejudice, but only by the credible evidence of the case.

7. Do Not Make Personal Attacks

Do not make personal attacks against the plaintiff's lawyer. The temptation to do that can be great in the heat of battle, but resist it. The jury will not like it. Personal attacks often backfire. Under no circumstances, engage in a personality battle with the opposing party or counsel. Focus on the evidence.

8. Damages

It is important to discuss damages in a purely logical and mathematical way. The defense should remind the jurors not to reward the plaintiff, but solely to compensate

the plaintiff and only if liability exists. Discuss whether the plaintiffs have recovered from their injuries or if they suffered any damages. Discuss plaintiffs' own fault in receiving the injury or causing the damages or failing to mitigate the damages. The goal is to limit the amount of damages awarded by minimizing the defendants' culpability in causing the injury or damage to the plaintiff.

Some defense lawyers believe that no particular amount should be discussed during closing argument, while others believe that the specific dollar request should be addressed. In some respects, it is a manner of style. Choosing not to discuss specific damage requests has proven to be effective for many defense attorneys, but it is also a very dangerous practice. If the jury plans to award the plaintiff a compensatory award, and the defense does not discuss specific amounts, the jury will have no range of figures within which to conduct their deliberations. Give the jury a sincere and conservative discussion of damages which includes an alternative amount whether it be nothing or a smaller percentage of what they are seeking.

9. Conclusion

Conclude your closing argument with a strong ending. The heart of the case should be proclaimed, followed by a request that the jury find in favor of your client. Thank the jury for their attention, then sit down at counsel table and appear confident that justice will be served.

III. DELIVERY POINTERS

1. Preparation is key.

Great closing arguments are rarely spontaneous. They require proper preparation, organization, practice, and inspiration. Remember that an effective and properly delivered closing may make all the difference in the result of the trial. Thus, you should devote sufficient time and effort to properly preparing the closing argument.

2. Emphasize your theory and theme.

Your theory and theme, first emphasized in opening statement, should be tied back in for the jury at the outset of closing. Organize your argument to suit your theory rather than simply in the order in which the witnesses appeared. Unless you have misread the case entirely, you can generally use the outline of your opening statement as the starting point for your closing argument outline.

3. Stay away from the podium.

The use of a podium blocks communication and sends a message to the jury that there is something between you and them. Closing argument should be presented without notes or with as few notes as possible. If notes must be used, then use flash cards or very well-organized papers so that you are not fumbling through documents when closing the case.

4. Use plain English.

Your closing should be delivered in a convincing, precise, and organized manner. Avoid using excessively flowery language or complex legal terms. If complex terms must be used, explain and define them well in advance of the closing argument.

5. Keep it honest.

Never misstate the evidence or your position in the case. Jurors can and will forgive a lawyer if he is kind and honest, but if they think the lawyer is lying to them or misstating the evidence or the law, the jury will never forgive that lawyer and the client may suffer as a result. If you say something that is wrong, the plaintiff's lawyer will make you pay for it.

6. Use headlines.

Tell the jury what you are going to say before you say it. This is done to maximize the clarity and impact on the jury.

7. Revisit your demonstrative evidence.

Use your demonstrative evidence in explaining the key points in your case. The jury should see and hear the important parts of your argument. The use of demonstrative evidence greatly increases the effectiveness of the closing argument.

According to James McElhaney, demonstrative evidence makes for a more effective closing because:

1. It makes you a teacher--a fundamental symbol of credibility.
2. It highlights important information and helps make memories.
3. It involves the jurors so they reach the conclusion on their own instead of just being told what to think.

8. Remember credibility.

Closing argument is all about credibility, and credibility is the most important element in any trial. The side the jurors find to be most credible is the side that will win. Do not leave the jurors with a bad taste by using your closing to make personal attacks or misstating the evidence.