

Preparing And Delivering The Defense Closing Argument

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The closing argument is your final address to the jury—and your best opportunity to persuade them to find for your client and show them how to do it.

PREPARATION OF THE closing argument begins as soon as you start working on a case. From the very beginning, you start formulating ideas for structuring a persuasive defense. You refine that process throughout the pleading and discovery phases of the case, and during the entire trial you prepare the jury for what you plan

to present in summation. The closing argument is the crowning point in the trial, and if done properly, it can be any advocate's finest hour.

THE OBJECTIVE: PERSUASION • To deliver a forceful closing argument you have to start by considering its objectives:

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- First, it is your opportunity to explain the significance of the evidence, to offer reasons in support of conclusions and inferences. It is also the time to discuss credibility, the law, and the right verdict. *The Litigation Manual*, 455 (ABA, 2d ed., 1989);
- Second, an effective closing argument presents a positive theory of the case, explicitly, logically, and not defensively. The theory should be simple and understandable, and should incorporate the same theories that have been employed throughout the trial;
- Third, the closing argument must not only engage the jurors intellectually, it must have emotional appeal as well;
- Fourth, in the closing argument, you must tell the jury why it should find in favor of the defendant.

Attributes Of Persuasion

Like all courtroom speech, the closing argument has as its primary aim that of persuasion. To be persuasive, the closing argument must have the following attributes:

- *Structure*. Forensic speech has structure—or as William Safire would call it, “thematic anatomy.” An example of this simple organizing principle is the old adage “tell ‘em what you’re going to tell ‘em, tell ‘em, then tell ‘em what you told ‘em.” Structure is as essential to speech as a skeleton is to the human body. It is on the structural framework that speakers hang thoughts and ideas;
- *Theme*. A critical ingredient. In the end, the advocate must answer in a word or sentence the question of the person who couldn’t be there: “What was this case about?” Sometimes called the “proposition,” it must be perceived and understood from the outset;
- *Purpose*. The advocate speaks for good reason. She does not speak to sound off, feed her ego, or flatter or intimidate a crowd. The advo-

cate speaks on behalf of her client for purposes of ennobling, instructing, rallying, leading and, above all, persuading;

- *Focus*. The advocate aims directly at the target and takes the jury, step by step, all the way through to climax. John Stuart Mill defined the art of the orator: “Everything important to his purpose was said at the exact moment when he had brought the minds of his audience into the state most fitted to receive it”;
- *Phrase*. Successful advocates are phrase-makers. They enliven their arguments to help achieve conviction. They employ simple, memorable phrases such as “if it doesn’t fit, you must acquit,” “safety above profit,” and “do the right thing”;
- *Pulse*. The structure upon which the argument is constructed needs life. Good courtroom speeches have a beat, a changing rhythm, a sense of movement that gets the audience moving with the speaker. Here is an example from Demosthenes: “When they brought suits against me—when they menaced me—when they promised—when they set these miscreants like wild beasts upon me ...”; and
- *Delivery*. The words, ideas, propositions, and themes are all effectively delivered in a manner that is appealing to listeners. The advocate puts his audience at ease and has contact with them. His belief in his case and his cause become contagious to the jury.

See Bertram G. Warshaw, *The Trial Masters* 148 (Prentice-Hall, 1984).

PREPARATION OF THE DEFENSE CLOSING ARGUMENT

• A closing argument is not a spontaneous outpouring of emotion and off-the-cuff eloquence. A good closing argument requires careful and thorough planning. The successful argument requires that you have a well-thought-out theory of the case that leads to a verdict in your favor. This theory should be de-

veloped early, after you have investigated the facts but before you make any other decisions about how to try the case.

The Outline

The most effective way to prepare your closing is to develop a detailed outline or a full statement of your argument. It forces you to think through each argument and each problem in advance. As defense counsel, you must also anticipate the plaintiff's various theories and positions. You must predict the most persuasive and compelling argument the plaintiff's lawyer could present and develop a method for countering it. When you are satisfied with your argument, reduce it to a simple outline rather than run the risk of reading a narrative to the jury. This outline is not the final version of what you will actually deliver to the jury. It will be refined based on developments at trial.

Development During Trial

Most of your closing argument can be prepared before trial. However, there always will be a few unanticipated events that occur during trial. A good working outline can be supplemented by a few notes as the trial progresses. Statements made and concerns expressed by jurors during voir dire can provide clues to points that should be emphasized in argument. Any overstatements or exaggerations made by plaintiff's counsel in her opening statement can be noted. The demeanor of a witness can be highlighted. The exact words used by a witness can be written down so they can be quoted verbatim. If any evidence is unexpectedly excluded, such can be noted so that it is not inadvertently referred to in closing. And of course, the same applies to requests to charge that the court refuses to give.

The final preparation of your closing argument can be done either at a recess on the last day of trial or the night before. This is the time

to make sure that you have all the materials ready—notes, exhibits, charts, and demonstrative aids.

The closing argument must do certain things to be effective. Among these are the following:

- *Present a logical structure.* Whether it is chronological, by issue, by witness or in some other order, the closing must have a structure that makes sense;
- *Present the theory of the case.* The closing argument should present the theory of the defendant's case in an explicit way and demonstrate why your theory most logically incorporates and explains both the contested and the undisputed facts adduced at trial;
- *Argue the facts.* Dazzling oratory will not carry the day. You must rely on facts to persuade the jury. This involves more than a simple recitation of the testimony. It requires analysis. Juries decide cases on the basis of impressions—what they think the truth is—based on the way the parties have presented the evidence. Effective trial lawyers selectively pick and emphasize the parts of, and inferences from, the evidence which, when presented as an integrated whole, creates an impression that convinces the jury that their side should win;
- *Use exhibits and demonstratives.* Your outline should contain references to key exhibits which corroborate and highlight the main points of your argument. The same holds true for demonstrative aids such as blow-ups, diagrams, animations and posters;
- *Weave jury instructions into the argument.* Closing arguments which selectively utilize instructions have a greater impact on the jury. By suggesting that the court's instructions of law, as well as the facts, support your side, a doubly effective argument can be crafted. Argue the facts and then argue that they support a particular legal principle. The key to this approach is to follow the factual argument with a recitation