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CLOSING ARGUMENT

Spencer H. Silverglate

> [Preparation] is the be-all of good trial work. Everything else — felicity of expression, improvisational brilliance — is a satellite around the sun. Thorough preparation is that sun.
>
> Louis Nizer,
> *Newsweek*,
> December 11, 1973[1]

Closing argument, like all trial work, is not extemporaneous. It is a painstakingly choreographed production that begins long before the actual trial. Muhammad Ali used to say the fight was won or lost months before he stepped into the ring. The outcome was determined not under the bright lights before the crowd, but alone, in the dark, while he did his road work at 4 o'clock in the morning. While he punched the heavy bag for hours on end. While he jumped rope, sparred and trained almost to the point of exhaustion. So it is with trial work.

Great closings do not require the oratory skills of Clarence Darrow. They require preparation. With it, inexperienced lawyers can defeat seasoned veterans. Weaker cases can triumph over stronger ones. Yeoman lawyers can beat brilliant advocates. Preparation is the great equalizer.

That is not to say that a dog of a case will or should win the day with lots of preparation. It won't and it shouldn't. Nor will the best planned closing rescue an otherwise mediocre trial. Facts and law win cases, not closings. However, in a case where reasonable minds can differ — the vast majority that go to trial —a well-constructed closing argument conceived early enough to direct the preparation of the case may mean the difference between victory and defeat.

I. WHEN TO PREPARE THE CLOSING ARGUMENT

Closing arguments, at least the good ones, are not prepared the night before. But don't you need to know what evidence has come in before preparing your closing? Yes, you do, and you will know, at least generally, because you began preparing the evidence long before trial. In fact, the first outline of your closing will lay the foundation for the evidence you collect in your investigation and in discovery.

Preparation of the closing should begin the day the case first lands on your desk. Start by creating a closing argument file. Pull the jury instructions and learn what the plaintiff must prove and what defenses you must prove. Then prepare a preliminary outline of the closing. Obviously, you will need to be flexible to modify the outline as the case develops. But make no mistake, good closings don't just happen. They are conceived long before they are delivered.

II. ANATOMY OF A CLOSING: ARGUMENT, NOT SUMMATION

An effective closing is argument, not summation. Closing is one of the few times in trial that the lawyer may speak directly to the jury. It should not be squandered by summing up the evidence in laundry list fashion or giving a witness-by-witness account of what transpired during trial. The closing should be argument — a persuasive analysis of the facts and law that leads the jury to return a verdict in your client's favor.

People communicate by telling stories, and trials are no different. A good closing tells a story. It has a beginning, middle and end. It has drama and tension. It is interesting. It is logical. It is conversational (not delivered in legalese). And most importantly, it is supported by the evidence.

The anatomy of a defense closing should look something like this: (1) dramatically introduce your theme; (2) discuss the issues; (3) explain your theory of case; (4) integrate the law of the case; (5) highlight the key evidence and argue inferences; (6) attack the plaintiff's case; (7) discuss damages; (8) request a verdict for your client; (9) conclude by returning to your theme.

A. Dramatically Introduce Your Theme

"1 . . . 2 . . . 3 . . . 4 . . . 5 . . . 6 . . . 7 . . . 8 . . . 9 . . . 10 . . . 11 . . . 12 . . . 13 . . . 14 . . . 15 . . . 16 . . . 17 . . . 18 . . . 19 . . . 20."

"Twenty seconds. That's how long the plaintiff stood with his back to the elevated truck-bed after he unchained the load of half-ton metal pipes. Had he not been so careless, his foot would not have been crushed by the falling pipe."

When you stand up to give your closing, all eyes and ears are fixed on you. Don't waste the jury's fickle attention span with patriotic platitudes about jury service. Hit them right between the eyes with your case theme — the same theme you introduced in your voir dire and opening statement and wove through all of your witness examinations. Now is the time to bring it home. No more build-up. The first words out of your mouth should be a dramatic reminder of your theme.

The laws of primacy and recency tell us that people best remember what they hear first and last. Therefore, the strongest points should be made at the beginning and end of the closing. For that reason, the first and last five to ten minutes of your presentation should be memorized. For everything in the middle, a word outline is fine—as long as it's limited to words, not paragraphs. The closing should never be read. Any loss of eloquence occasioned by not reading from a prepared text is more than overcome by the eye contact and genuineness established in communicating directly with the jury.

And don't be afraid to be dramatic, within reason, especially at the beginning and end of the closing. Drama and creativity are not reserved for plaintiff's lawyers. By the same token, don't go over the top. A dramatic closing can and should be delivered in a engaging, understated fashion.

B. Discuss the Issues

Before the jury can decide the case, it must know the issues. The best way to communicate them is to refer to the verdict form. This can be done by blowing up the actual verdict form or recreating it on an erasable board or flip-chart. The verdict form can be used as a backdrop for the entire closing.

As the defendant, this is also the time to explain to the jury that the plaintiff has the burden of proving the case. Don't assume a burden you don't have. There is no reason to ask the jury to consider what the evidence "clearly" shows. Rather, the inquiry should be whether the plaintiff has met his or her burden.

C. Explain Your Theory of the Case

Before discussing the evidence, give the jury an overview of your theory of the case. The theory is different than the theme. The theme is a word or phrase that summarizes the theory — "if it doesn't fit, you must acquit." The theory is a more in-depth (but not lengthy) explanation of your case. It combines the law and the facts and explains why your client should win.

D. Integrate the Law of the Case

The law of the case is not relegated to a discrete section of the closing. It should be integrated into all aspects of the presentation. When possible, refer directly to key jury instructions. In fact, blow them up. For example, the standard jury instructions on logic and common sense and believability of witnesses apply to all cases. They should be cited early and often.

E. Highlight Key Evidence and Argue Inferences

The meat of the closing is highlighting the key evidence and arguing inferences from it. It is unnecessary and, indeed, counterproductive to review all of the testimony and exhibits in the case. Choose the evidence that best supports your case, and highlight it for the jury. But don't stop there. You then must argue inferences from the evidence. Cases in which the facts are clear and all questions answered don't go to trial. Trials are filled with disputes. It's your job to explain why they should be resolved in your client's favor. The defense lawyer has various tools to accomplish this.

Sympathy invariably resides with the plaintiff, and it is a powerful weapon against the defense. The best response is an appeal to logic and common sense. Standard jury instructions admonish against a verdict based on sympathy. Rather, the jury is to apply reason and common sense, as well as their collective life experiences. This instruction provides ample fodder for argument.

Standard jury instructions also address believability of witnesses. Where testimony between witnesses conflicts, argue the witnesses' bias, interest and ability to perceive and recall events. Does the witness have a financial stake in the outcome of the case? Is she a relative or friend of the plaintiff? Is she a disgruntled former employee of the defendant? Was her memory poor? Did she have an obstructed view of the accident? Does she wear glasses? Was she under the influence of alcohol or drugs at the time? The list goes on.

When arguing inferences from the evidence, tell a story. Use analogies. Paint word pictures: "It's been said that if we could all reach out and kick the person who has caused us the most trouble in life, none of us would be able to sit down. We'd be kicking ourselves. And so it is with the plaintiff. In this case, he has no one to blame for his injuries but himself." There is nothing worse in trial than a dull closing argument that does not resonate with the jury. Be engaging.

Finally, be understated. Leave the fire and brimstone for plaintiff's counsel. Juries, like all people, resent being told what to do. People tend to be fond of their own ideas and conclusions. Lead the jurors to the right answer; don't beat them over the head with it.

F. Attack the Plaintiff's Case

The plaintiff's case must be dealt with head-on; it should never be ignored. However, the time to attack the plaintiff's case is *after* you argue your own case. Again, the laws of primacy and recency tell us that people are influenced more strongly by what they hear first and last. People also respond more favorably to positive rather than negative arguments. For these reasons, the attack on the plaintiff's case should be sandwiched in the middle of your closing (the same is true for a brief), flanked by positive arguments about your own case. This structure also avoids the pitfall of becoming sidetracked by the plaintiff's arguments.

When it is time to attack the plaintiff's case, first differentiate the defense theory. Then discredit the plaintiff's theory by attacking (a) how the plaintiff framed the issues; (b) the credibility of the plaintiff's witnesses and exhibits; (c) the gaps in the plaintiff's evidence (especially if counsel made a promise in closing on which he did not deliver); (d) the inferences that the plaintiff draws from the evidence; and (e) the plaintiff's application of the law. Civility and professionalism are especially important when attacking the opponent's case.

G. Discuss Damages

Lawyers differ on whether the defense should discuss damages in closing argument. The concern is that doing so may give the impression that you believe there is liability. While the concern is certainly valid, I come out in favor of addressing the issue head-on. That way, if the jury does find liability, it will have an alternative to awarding the figure that plaintiff's counsel requests.

To minimize the potential downside, however, preface the damages discussion by reinforcing the absence of liability. Explain that you are only addressing damages in the event the jury feels differently. Then attack the plaintiff's damages case using the same techniques for attacking liability. Again, while lawyers differ, I suggest providing the jury an alternative damages figure, one much lower than the plaintiff's. Once the attack is completed, circle back and remind the jury that the case is one of no liability (again, primacy and recency).

H. Request a Verdict for Your Client

At the end of your closing, state clearly and confidently what you want for your client. Review the verdict form with the jury and explain how the questions should be answered. There should be no confusion about how you expect the jury to decide.

I. Conclude by Returning to Your Theme

A good closing ends with a bang, not a whimper. "I'm out of time, thank you for your attention" is unacceptable. The final few minutes of the closing contain the last thing the jury will hear you say (recency), so it had better be good. It should reincorporate the theme in a memorable way. Perhaps using a famous quote, a relevant story, or highlighting the key piece of evidence.

Another effective conclusion (and not mutually exclusive) is raising questions for plaintiff's counsel to answer in rebuttal: "The plaintiff's lawyer gets to talk to you one more time. The rules give him the last word. So perhaps he can explain why the plaintiff was standing with his back to the elevated truck bed loaded with unchained, half-ton pipes for 20 seconds. Now I won't get a chance to answer what he says. But you know what the evidence is. And you know there will be things he will say that I would answer if I could. So when he makes his argument, consider the response I would make. And if you do that, I know you will be fair."

Whatever conclusion you choose, it should be dramatic and thematic. And the end of the closing, like the beginning, should be memorized.

III. THE LAW OF CLOSING ARGUMENT: THE REAL GOLDEN RULE

Much has been written about improper closing arguments. While it is beyond the scope of this article to address all of the questionable closing arguments, a good rule of thumb is the "real" golden rule: treat the plaintiff and counsel as you and your client would like to be treated. Note that the rule does not say to treat them as they treat you. Anyone can do that. Treat them better, as you would want to be treated. In fact, the defense lawyer should be the most courteous and polite person in the courtroom, not just to the judge and jury, but to everyone, including courtroom personnel. If you follow this one rule, you will never go far astray.

That said, here are ten general guidelines on the law of closing argument:

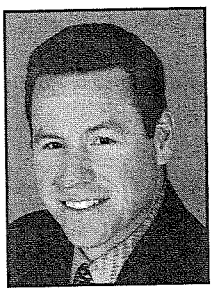
1. Don't misstate the evidence or the law.
2. Don't argue facts not in evidence.
3. Don't ask the jurors to put themselves in the shoes of any party (the "other" golden rule).
4. Don't give personal opinions or vouch for the credibility of a party or witness.
5. Don't appeal to passion, prejudice or the "conscience of the community."
6. Don't suggest an irrelevant or improper use of the evidence.
7. Don't argue the plaintiff's plan or motive in bringing the lawsuit.
8. Don't comment on insurance.
9. Don't reveal settlements with other parties.
10. Don't comment on the failure of a witness to testify when a sufficient reason exists for his or her absence.

CONCLUSION

Preparation is the key to all good trial work, especially closing argument. The goal is a closing conceived early enough to direct the preparation of the case and delivered winsomely enough to impress the jury with a case requiring no derision. Such a closing yields the greatest prospect of hearing those two coveted words, "not guilty."

[1] This work is an amalgamation of what I have personally done, heard, read and observed. I am confident that I have no original thought on the subject of closing argument.

ABOUT THE AUTHOR



Spencer Silverglate is a founding principal of Clarke Silverglate Campbell Williams & Montgomery and serves as the firm's Managing Shareholder. He specializes in complex commercial and employment litigation and the defense of catastrophic personal injury claims. Mr. Silverglate is past president of the Florida Defense Lawyers Association.