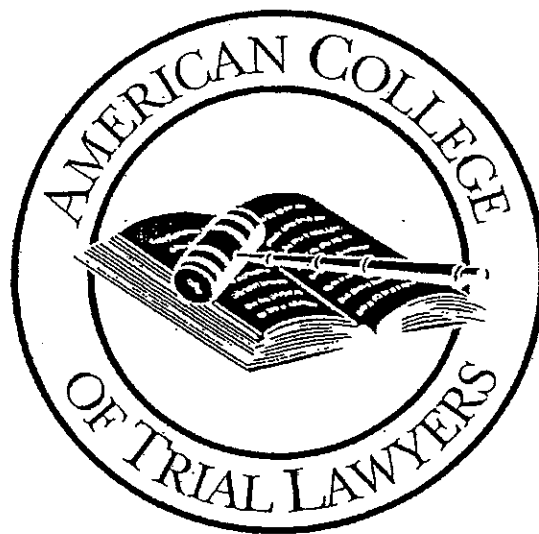


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I. GENERAL OBSERVATIONS

A. The six phases of a jury trial:

1. Preparation - develops the lawsuit for trial.
2. Voir Dire - seeks information from the prospective jurors who will be the fact finders, particularly bad answers, to help strike unfavorable juror prospects.
3. Opening Statement - outlines the undisputed facts of the case, the good, the bad and the ugly, articulates the themes of the case and argues the rest.
4. Direct Examination - the lawyer retreats to the background and essentially sets up the client and supporting cast to tell the story.
5. Cross-Examination - challenges the adverse party's witnesses to develop helpful responses and information and to utilize unfavorable responses to attack the credibility of the witness.
6. Closing argument - the lawyer pulls together the case in a neat and, hopefully, effective package to persuade the jury to find facts that are favorable to the client's case.

B. Themes

1. Themes are crucial to the lawsuit and are dictated by the substantive law (court's charge) and the facts in the case. Themes should make even the most complex case interesting and enable jurors to understand and grasp the issues they will decide.
2. The themes should be simple, direct and powerful. They should give the jurors compelling reasons to favor your client.
3. Themes enable the lawyer to present the evidence and to tell the client's story in a way the jury will understand and relate to both intellectually and emotionally.
4. A theme should capture the essence of what the case is about - e.g., in a patent infringement case, the theme might be that opposing party stole your client's invention and then made a fortune as a result, or, in a fraud case in which a partner improperly used firm money to develop his private enterprises, the theme might be "This is a case about greed and breach of trust and how the defendant cheated his long-time partners out of their hard-earned money just to line his own pockets," or as a defendant in a fraud case, plaintiff seeks to avoid a contract signed several years earlier by now making unfounded charges of fraud and racketeering against the company with whom it signed the contract and with whom it has regularly done business in the same place and in the same manner for more than ten years.
5. The theme is the foundation upon which all the evidence will be developed.
6. Equally important, the theme represents the matrix of the case around which the final argument is constructed.

II. PHILOSOPHY OF THE CLOSING ARGUMENT

A. Importance of closing argument

1. Closing argument is the opportunity to tell the client's story in the trial lawyer's own words, on his or her own terms, and in his or her own style.
2. At trial, the facts come from witnesses. The closing argument belongs entirely to the trial lawyer.

3. It is important to remember that preparation for closing argument starts even before the actual trial begins.

B. Goals

1. One goal is to reinforce the merit and righteousness of the client's case in the hearts and minds of the jurors who are favorable to the client's position.
2. An equally important goal is to persuade those jurors who may be straddling the fence to jump off that fence and support your side of the case.
3. Another goal is to arm those jurors who are favorable to your client with sufficient persuasive arguments to convince the undecided jurors. Once in the jury room, jurors who support your client's case must work for you.
4. Also a goal is to make the facts of the case so appealing that it will provoke strong positive and sympathetic emotions that will imbue the jurors with a passion for the client's case.

III. PRESENTATION OF THE CLOSING ARGUMENT

A. Techniques in preparing and giving closing argument

1. During trial, keep notes of things that you may want to talk about during closing argument. Otherwise, you will forget many important points. Mental notes that are not recorded fade with the progress of the trial and generally do not return until after you have concluded your argument and returned to your chair at the counsel table.
2. In preparing the closing argument, focus on the themes articulated and emphasized in the opening statement. Themes will resonate with the jurors both during the argument and, most importantly, in the course of jury deliberations.
3. When representing the plaintiff, the trial lawyer will generally want the closing argument to be a complete soup to nuts explanation of why the client is entitled to win. Develop and emphasize the undisputed facts that establish the claim, but also, do not forget to address and refute defendant's themes. Defendant's themes will have a much less dramatic impact and will seem much less persuasive to a jury when the defense lawyer stands up to address these issues.
4. From a defendant's perspective, it is imperative that the trial lawyer prepare a focused and credible attack on the plaintiff's case. Highlight the points that make the plaintiff's claim unbelievable, unreasonable or lacking appropriate credibility. But make certain you develop a persuasive story around your themes. As a general principle, a defendant must not only provide persuasive reasons why plaintiff's case lacks merit and credibility but must, at the same time, provide persuasive reasons that support defendant's version of what really happened.
5. When making a closing argument about credibility, keep in mind that jurors are not inclined to believe that a witness is telling a bald-faced lie. Generally, it is more effective to argue that a witness' memory is colored by bias, an uncertain memory, incapacity or some other reason. Argue the circumstances that strongly suggest a witness or party lied, exaggerated, or is a malingerer, but allow the jury to draw the final conclusion.
6. Another issue that should be addressed in closing argument is motive. Motive is often the key element in persuading the jury. An essential component of any good story is "why." Why did things happen the way they did, why did plaintiff behave as he did, why did he write what he wrote, or say what he said and why did defendant fail to take action. If you do not answer the why, the story has a hole in it. Sometimes the why is easy. For example, a company defrauded consumers by misstating product performance capabilities in order to sell more of its products. A manufacturer concealed a known defect in its product design to hold down production costs and increase profits. The plaintiff made claims of injuries that did

not really exist because of greed and a desire to collect more money than otherwise justified.

7. Motive - why someone undertook certain action or failed to take action - is always important. Your job is to provide the motive. Explain the reasons why a plaintiff or defendant acted as they did in simple and easily understood language.

B. Points to Consider for Closing Argument

1. A trial lawyer has the jurors' most complete attention when he or she first stands up to start the argument. The jury is expectant and eagerly waiting to hear the reasons that support the lawyer's claims on behalf of the client.
2. Total concentration on the part of the jury does not last very long. Usually, the first five minutes constitutes the time when the jurors' attention is transfixed. After that, a juror's attention waxes and wanes.
3. Use the opening moments of your argument effectively. Do not squander this precious time by thanking the jury for fulfilling their civic duty, for their patience during trial, and on and on. Instead, structure a persuasive 5-minute summary that echoes and builds on your themes of the case. If you start strong, the jurors will remember the essence of your case even as their attention begins to wane.
4. Avoid the witness-by-witness recitation of the evidence. It is dull, ineffective, painful to the jury and never very persuasive. A winning argument tells a story that weaves in the testimony of witnesses throughout to make points and to make the story flow. Remember, delivering an effective closing argument is nothing more than telling a story in a logical and compelling manner with sincerity and passion.
5. The first words you utter should summarize your case and should be made in a manner that appeals to the broadest number of jurors. When you have multiple themes, begin with the theme you feel will be persuasive to the broadest segment of the jury.
6. Use the jury charge when appropriate. When you speak in terms that the court has used in reading its instructions to the jury, the jurors need make only a slight leap to fill in the blanks. This does not mean reading verbatim the court's charge. Use only selected portions of the charge that coincide with the themes of the case.
7. Do not begin by defending the client's case or making concessions. If you do, you have probably lost. Start out by firing your best and most persuasive shots. Deal with the negatives in the middle of your argument.
8. Remember, you are not limited to a "lukewarm and sterile argument." Aggressive argument utilizes hyperbole, rhetorical questions, metaphors and flights of old fashioned oratory.

C. Addressing the Difficult Evidence

1. Do not make the mistake of thinking that you can ignore difficult evidence in the hope that the jury will not notice. The jury will. Even worse, so will opposing counsel and you can rest assured opposing counsel will hammer you mercilessly.
2. Where is the best place to deal with bad facts and the weaknesses in your case? Generally, deal with this evidence in the middle of your argument, when the attention level of the jury is dissipating.
3. Address the bad and weak parts of the case in a direct manner. Do not attempt to get cute in dealing with this part of the case. If you do, the jury likely will penalize you severely.

D. Demonstrative Evidence in Argument

1. A good trial lawyer usually utilizes exhibits and visual aids during closing arguments. The adage that a picture is worth a thousand words is never more

appropriate than in an extended closing argument involving a complex mix of facts and opinions.

2. These aids graphically illustrate various points to the jury and eliminate the need to recite large volumes of evidence. Because we are a generation weaned on the T.V., we increasingly rely on pictures, graphs, models and illustrations to communicate and to enhance understanding.
3. A good exhibit can illustrate a central theme of the case — when it does, it is locked in the juror's minds and has a profound effect on the jury. Most likely, the jurors who are positively affected by the evidence will use that demonstrative evidence to convince their colleagues in the jury deliberations.
4. The *Witcher* trial example — a piece of plywood with three moving parts on its face replicating the three moving parts of an automobile's carburetor that allegedly malfunctioned when the vehicle encountered certain rough conditions in the road. It totally devastated plaintiffs theory that these three components were improperly designed so as to lock up under certain driving conditions and cause the vehicle to accelerate out of control. The actual carburetor was technically too complex in design to give the jury an understanding of its operation and expert opinion consumed all of two full weeks.

E. Delivery of the Closing Argument

1. The three acknowledged components of an effective delivery are competency, credibility, and charisma.
 - a. Competency is best accomplished by thorough preparation, organization and the ability to tell a story in a clear and understandable fashion.
 - b. Credibility is the cornerstone of persuasiveness because it conveys truth telling about all things large and small.
 - c. Charisma is established by a presentation that fits the trial lawyer's own style and personality. In relating to the jury, it is important that you be yourself. Phoniness does not sell well with jurors.
2. Try to be interesting. Remember, the jury is anticipating a good story well told.
3. Do not prepare a written-out script for the oral argument. The temptation to read the script will be overwhelming. Reading an argument does not work, is not effective and is not productive. Reading an argument is almost guaranteed to put the jurors to sleep.
4. Utilize a word or phrase outline that lists the points you will want to make. An outline enables the lawyer to make the argument more spontaneous and persuasive. An extemporaneous presentation communicates sincerity and conviction.
5. Because the argument should unfold in a logical sequence, a good practice is to arrange the outline in topical sequence and then not stray afield during the argument.
6. Eye contact is important to persuasiveness. Remember it is impossible to maintain eye contact when reading a script. Remember also to move around and be animated. If you remain rigid and bolted to the floor, you will eventually mesmerize the jurors into a hypnotic trance.
7. Check your body language - arms folded across the chest conveys defiance; hands held together below the belt-line signals that you are hiding something.

8. Use the volume of your voice in making your argument. Silence is one of the least used tools in closing argument, but it also can be one of the most effective. Jurors pay attention to silence. When making an especially important point, stop, be quiet, and let the point hang for a moment. This delivers an exclamation point to the argument.

9. Always use plain, direct, and uncomplicated language. Remember the make-up of your audience. Six syllable words and long sentences score no points with a jury. Single syllable words and short sentences are the most effective.
10. Use a clear, loud voice and speak in positive terms. A timid monotone does not persuade. The worst possible combination is a timid monotone reading of a script. As noted in Corinthians, ch. 14, "If the trumpet sounds an uncertain note, who shall follow into the battle." Certainly, not the jurors.
11. Remind the jury that you have kept the promises made in your opening statement. Reminding the jury you have kept these promises demonstrates to them that you have been honest and have not exaggerated. If appropriate, remind the jury that your adversary made but then failed to keep his/her promises. You must keep your bond with the jury. If you lose credibility with the jury, you lose your client's case.
12. If appropriate, in a highly charged case that has been hotly contested, tell the jury you have done your best to present the client's case. But tell them that if you have said or done anything during the trial that has offended them, you personally apologize. Ask the jury to hold you responsible and to direct their displeasure at you and not your client who does not have the opportunity to speak on his/her own behalf.

F. Some don'ts in final argument

1. Do not misstate the evidence - the jury remembers and your adversary will surely remind them. And your credibility is forever impugned.
2. Do not misstate the law - the court will surely remind you in a most embarrassing way.
3. Do not interject your personal beliefs - it will offend the jury.
4. Do not appeal to any form of ethnic, racial or religious bias - it will offend the jury, the court, and ultimately, the appellate court.
5. Do not engage in attacks upon your adversary - you will most likely generate a backlash from the jury.
6. Do not accuse your adversary or witnesses with lying, cheating, stealing or malingering unless it has been established in the evidence beyond any challenge - it will incense the jury.
7. Do not get haughty or patronize the jury - jurors eschew arrogance and condescension.
8. Do not feel compelled to use all of the time the court has allocated for argument - if you have argued the case fully and persuasively, rearguing the same points only diminishes the impact of the story and encroaches on the jury's patience.

G. Concluding the Closing Argument

1. End with a concise and persuasive statement of your case.
2. Sum up in two or three sentences the major themes you developed in support your client's case. These two or three thematic sentences will continue to resonate in the deliberation room as the jury reviews the evidence in light of the court's charge.