



Closing Arguments: Strategy, Technique & Style

By: Gary Guichard*

Introduction

"It is more probable that a well tried case will be lost due to a weak, poorly organized final argument than it is that a poorly tried case will be won by an effective argument."

Joseph V. Guastafarro

The closing argument is obviously an important phase of a trial. However, to echo Joe Gustafarro's viewpoint, it is no more important than any other phase. Or, more precisely, we cannot deliver an effective, winning closing if we fail to develop a well reasoned theory of the case and then advocate that theory throughout every phase of a trial. Furthermore, brilliant oratory will do us no good without effective jury selection, opening statements that tell the story of our client's innocence, proper control cross examination technique and well prepared direct examinations.

I believe that each phase of a trial requires the application of three elements: strategy, technique and style. The strategy of a closing argument is controlled by your theory of the case. A theory of the case is developed by brainstorming, by investigation, by motions practice and by careful and thorough case preparation. The techniques used to deliver a compelling closing argument include; organization, vivid language and compelling imagery. Style involves injecting your personality into every element of your presentation.

There is a view among some lawyers that we should write out our closing argument prior to trial. I do not completely subscribe to this theory. We should, at least, be able to outline our ideal closing prior to trial. We should know by the end of the process of developing, and fine-tuning, our theory of the case what our ideal closing should look like. The process of trial preparation, and our actions at trial, should then have the goal of allowing us to present the necessary evidence to the jury to be able to deliver the ideal closing. However, a necessary part of all closing arguments are the unforeseen elements that occur during trial. No matter how hard we prepare we cannot anticipate all the surprises at trial. We must be flexible enough in our planning to allow for and to incorporate these surprises into our closing.

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Strategy

- Theory of the case – an overall strategy emanating from careful pretrial planning and towards which everything we do at trial leads the trier of fact.
- The nature (emotional signature, theory of the case, themes, objectives and strategies) of a case dictates the nature (style, manner, body language, vocal tone and level, tense and voice) of the closing.
- The closing argument is the final and ultimate act of persuasion during the course of a trial. Persuasion is the primary purpose of a closing argument. However, you cannot wait until the end of a trial to begin the process of persuasion. Persuasion begins with the formulation of your theory of the case and should be the goal of every step in the trial process.
- The closing argument is the first opportunity to add meaning to the facts and link those facts to the law that applies. Avoid arguing the law as much as is possible. Argue instead the factual and emotional implications of the law. In my experience the intricacies of the law mean little or nothing to the average juror.
- Our task is to define the issues and present them in a powerful way. Our version of the facts, our images and analogies should dominate the deliberations.
- This is closing argument not summation. It is not enough to merely list the state's witnesses, summarize their testimony and discuss the law that applies. We must adopt and commit to a theory and then argue that theory persuasively and with conviction.
- Focus your argument on what the jurors need to vote your way. This will have an intellectual component and an emotional component. Jurors want to believe that they are doing the right thing. Our job is to give them an emotionally and morally acceptable reason to vote our way in this case. We are not trying to convert jurors. That will never happen.
- A closing argument is not about how clever we are. A closing argument is about how effectively we can connect and communicate with jurors.
- Closing arguments should finish the development of the themes suggested in voir dire and introduced in opening statement.
- The subject matter of persuasive closing arguments should include information and techniques that come from non-legal disciplines, such as speech and drama.
- A closing should have unity, coherence and emphasis. Organize your closing according to the emotional themes developed in your theory of the case. Avoid automatically organizing by chronology or by the list of witnesses called at the trial. Focus on the issues the jurors must decide. Organize your closing into chapters; each chapter should contain a specific, important point and the support for that point. Priority is important; the order of the points as well as the time spent on each idea. Plan the transitions between points and between chapters.

Technique

- Your arguments are directed at non-lawyers. They should not have to work to understand our legal arguments. We must use language, images and themes that appeal to jurors on an emotional level because that is where their decision will come from.

- Avoid convention or being inhibited by preconceived formulas.
- Legalisms and legal concepts rarely have any impact on a jury. Avoid abstractions like reasonable doubt, burden of proof and presumption of innocence. If you feel compelled to discuss legal conceptions find a way put them in human terms. (e.g. self-defense is not about the legal elements that establish an affirmative defense it is about helping the jurors to feel our client's fear on a visceral level.)
- Don't waste time and effort responding to every element of the state's case or argument. Prioritize and narrow the focus of your arguments to the crucial issues and elements.
- Credibility is a key element of persuasion. It is something you earn during the course of a trial by how you handle yourself, the evidence and the various elements of a trial. Persuasion demands credibility. Behave with honesty, integrity and professionalism and you will have credibility with the jurors. Our goal is to be the person the jurors trust enough to look to for answers.
- Be simple but not simplistic. Identify your three or four key points/issues and address them completely and thoroughly. Use language precisely. Our language should be simple yet moving. We must use language that addresses emotional themes. Be brief and to the point.
- Use nouns, verbs, consonant/vowel sounds appropriate to the emotional content and appeal of your case. This also goes for your vocal tone, pacing, attitude and phrasing. You should not use the same type of language for a rape case where your theory is mistaken identity that you would use in a self-defense case. Use language/words to paint vivid, moving word pictures for the jurors.
- Help the jurors to organize and structure their deliberations. Help them view the information they have been given in a way that is easy for them to digest and that furthers your theory.
- Arguments should fit within the structure of the juror's experiences in life as well as their view of how the world works.
- Order and priority are important. What the jurors hear first and last have the most impact; primacy and recency. Key points should not be buried among weak points. Don't waste time on trivial matters or matters either not in dispute or which do not further your theory
- Demystify instructions that are important to your theory.
- Organize. Each chapter in your argument should be a key point within the structure of your argument. Develop each and every point within each chapter. Arrange the chapters according to their importance to your theory and as you progress through the chapters you should build to your conclusion. Use body language and positioning within the courtroom to illustrate divisions within and between chapters.
- You are seeking to induce an emotional response in your audience. Involve and engage your audience. Shape your argument to enlist the jurors emotionally in your theory. Provide them with the factual and emotional means to rationalize their decision.
- The content of closing has as its sources the law from the instructions and the facts from the evidence. Your closing must be confined to facts admitted and reasonable inferences from those facts. Great closing arguments are developed within the area of reasonable inferences. Your closing will consist of direct proof – facts in the record – and indirect proof – background, context, motive, character (the details of the story). Every word, image, analogy, theme, theory, sound, body movement, gesture, facial expression you use should be carefully chosen to further your established objectives.

- I recommend a jury-centered approach to the preparation and delivery of closing arguments. Your preparation and delivery should be done with a focus on the jury. Discuss possible arguments and presentation approaches with non-lawyers. If you need to argue a legal concept, do so within the context of human experience. We must recognize that jurors take a presented argument and measure it against their beliefs, attitudes, prejudices, perceptions, life experiences, backgrounds, values and education/training. Deal directly and courageously with the issues before the jury; those from the facts in the record and those from the dominant emotion(s) in the case (emotional signature).
- Deliver your closing. Don't read. Eye contact is of vital importance. Use an outline form for notes. Vary your delivery in speed, tempo, volume, vocal quality and emotional pitch. Use pauses, silence and positioning within the courtroom to add variety and emphasis.

Style

- Your only limits are your imagination. Take inspiration from art, literature, quotations, speeches, music, poetry, movies. Think creatively about storytelling methodology. (e.g., the movie "Momento" wherein the story is told in reverse starting with the conclusion and ending with the beginning.) Use book titles, song titles, lyrics, literary references, movies, TV, or radio to grab jurors and give them a reference point.
- Find your focus, energy & commitment.
- Invest yourself, your emotions and your energy.
- Communicate your belief in your client's cause. (You can find something to believe in, in every case you take to trial. No one can sell what they wouldn't buy themselves.)
- Learn to use yourself to persuade. Project trustworthiness and competence. We must be comfortable enough to allow feelings appropriate to our case and the setting to show. Our audience will feed off of our intensity and energy.
- Rhetorical devices: quotes, analogies, similes/metaphors, illustrative stories, word pictures, parallel structure, repetitive structuring, trilogies, refrain, enumeration.
- Law school robs us of our humanity. Learn to be yourself. Your greatest tools are your belief in your cause, your voice and your body.
- Other tools for emphasis and variety: Pitch – change octaves; Rhythm – slow down or speed up to add emphasis; Volume – project to fill the space of the courtroom; Articulate – pronounce words carefully, concisely and precisely; Gestures. Use word choice to convey color, meaning, and nuance.
- Tell a story – use your voice and body to enrich and enhance your story. Finish strong.
- Be concise, cogent and congruent. If you must speak of the law, speak English. Make the law come alive with anecdotes, analogies and common experiences.

Conclusion

Closing argument is the most individualistic of trial endeavors. Each of the other phases of the trial has more clearly defined rules. Opening statements are constrained by the uncertainty of proof at trial. Voir dire, cross examination and direct examination all involve an exchange with a juror or a witness. Closing argument is the only opportunity for a free and unfettered "discussion" of the facts and the implications that

arise from the facts. With courage, commitment, energy and style as well as attention to preparation and proper technique we can give effective, winning closing arguments. All we need is the courage and confidence to be ourselves and to be free from convention, formula or inhibition. ■