International Association of Defense Counsel

Trial Academy

Closing Argument

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Closing Arguments

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THIS ARTICLE provides practical suggestions that practitioners should consider when preparing and giving a closing argument.

I. Practical Considerations

Regardless of whether you represent the Plaintiff or the Defendant and regardless of what the case is about, there are house-keeping matters that need to be considered. If you do not know the answers to any of following questions, you should ask the trial judge, or the trial judge's law clerk, how or whether any of the following apply:

1. Are there any time limits that will be imposed on the closing argument and how does the Court count the time? Will time spent arranging the courtroom during the break be counted?
2. Are there any restrictions on use of demonstrative exhibits that have not, themselves, been accepted in evidence? In other words, can you use blow-ups of trial exhibits during the closing argument when the blow-ups are not in evidence?
3. Will the Court provide copies of the Court's jury instructions, or otherwise tell you what instructions will be given, in advance of the closing argument?
4. Will the Court provide a copy of the verdict form before the closing argument?
5. Will the Court submit a general verdict or special interrogatories to the jury?
6. Will the Court allow you to use an overhead projector, slide projector, PowerPoint or some other form of computer aided projection during closing argument?
7. When using a projector, where is the best location to place the screen, the projector, the computer, and the necessary power cords?
8. Will there be a need to dim the lights, and if so, where are the controls located and how do you create the desired lighting during a computer projected presentation?
9. If each member of the jury has his/her own copy of the exhibits, will they be allowed to keep them and refer to them during closing argument? Will they be allowed to take theirs into the jury room?
10. Do the acoustics of the courtroom require use of a microphone and amplification?
11. May you move around during closing argument or are you required to stand at the podium or at counsel's table?
12. Which party speaks first? In most jurisdictions the order is Plaintiff, Defendant and then Plaintiff's rebuttal. In some jurisdictions, the Defendant's attorney leads off.
13. Will the Court charge the jury after the closing, which is normal, or before?
14. Will the court reporter provide daily or partial trial testimony transcripts? Always speak with the court reporter at the outset of trial and request a copy of any partial transcript ordered by the opposition as a standing request. Then, put on the record that you have done so.

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II. Proper Preparation for the Closing Argument

In preparing closing argument, you should prepare a complete outline of the points to cover. Often the points covered in the Opening Statement are a good beginning outline of what should be discussed in closing. Many lawyers find it particularly helpful to memorize the opening sentence, the transition sentences between points that will be covered and the closing paragraph.

Being absolutely familiar with those aspects of the closing will allow spontaneity when discussing the substantive points, while at the same time provide anchors that will help you move fluidly through the argument in a persuasive way. A typical outline consists of a phrase to identify the point to cover, followed by a list of the exhibits, witnesses' statements or other evidence in the order that they will be discussed. The exhibits and/or blow-ups of exhibits that are used are themselves helpful reminders of the structure and flow for the closing. The following is an example:

1. Intro: Importance of Jury Service

2. Issues:
   - i. Statements False
   - ii. Public Figure
   - iii. Malice

3. Instruction: Falsity (BLOW UP – 1)
   - i. Statement:Lousy Painter
     1. Bad Paint Results
        - a. Jones (Ex. 9 Picture – BLOW UP 2)
        - b. Smith (Ex. 10 Picture– BLOW UP 3)
        - c. McTea (Ex. 11 Picture – BLOW UP 4)

     2. BBB Complaints
        - a. 1/5 letter (Ex. 12 – BLOW UP 5)
        - b. 2/27 letter (Ex. 16 – BLOW UP 6)
        - c. 3/24 letter (Ex. 19 – BLOW UP 7)

[Similar Entries for Other issues]

4. Burden of Proof
   - i. Instruction

5. Verdict Form – (BLOW UP 8)

6. CONCLUSION - Freedom Requires Free Speech

Closing Arguments

Use of a Flip Chart

One technique to remember what needs to be said in closing is to write out the list of topics that need to be covered on a flip chart. Show the jury the flip chart and tell them in a preview what you intend to cover. This follows the rule of public speaking that to be effective, a speaker should tell the audience what you intend to cover, cover the material and then conclude by reminding them what you just covered. A flip chart can be your anchor for the closing and will also remind the jury where you are headed in your closing.

The Closing Section of Your Trial Notebook

During the trial of the case, maintain a separate section of your trial notebook for the issues, thoughts, comments or items that may be useful in closing argument. As things come up in the trial, jot down a note in this section. Include the stupid things opposing counsel says, mistakes made by the adverse witnesses, aspects of a witness's demeanor of which the jury should be reminded, statements opposing counsel made in his/her opening statement that were not supported by the evidence, inconsistencies in witness statements and any other occurrences during the trial that may enhance the persuasiveness of the closing argument. Although you probably will not use all of the items, this can be a good source of material for your closing.

Preparing to be Extemporaneous

You may want to consider the following practice tool that will assist in making your closing appear to be extemporaneous. Think of a few key terms or issues such as "warnings." Once you've outlined your thoughts, randomly pick out a term and force yourself to think about all the important facts you need to address on that point. Jump around with the various points in your prep time so that you get comfortable with each issue. Juggle them up in your mental prep session so that you don't need to have one follow another in your head in order to present the closing. You can play this mental game anywhere, including sitting in court, without the appearance of looking at notes. The exercise is designed to make you feel comfortable that you know what you need to say inside and out.[1]

Don't read your closing. You need to have eye contact with the jury. You need to appear as if you know your case well. Reading your closing does not create that appearance. Although you should aspire to be so prepared for the closing that you can give it spontaneously and without notes, until that level of skill is acquired, it is recommended that you have your outline available to avoid unintentionally omitting any of the important points. Some of the very best lawyers still check their outline during the closing, rather than relying entirely on memory.

Prepare the Courtroom Outside the Jury's Presence

Know the answers to the fourteen numbered questions in Section I above. When using a flip chart, an overhead projector, PowerPoint or other type of computer aided projection, give careful thought as to when there will be an opportunity in advance of making the argument to put all of the things that will be used during the closing where they can be easily retrieved. You should organize the blow-ups of the exhibits in the order they will be used and put them where they will be readily available. During the closing, you should be in complete control of all of

[1] Thanks and credit to Baltimore attorney Bruce Parker for this device. However, many lawyers admit to simply not having sufficient time to achieve this level of mastery of the closing. If you find yourself pressed for time in preparing your closing, you are by no means alone.

the elements in that courtroom. At the start of the closing, you may want to move the podium from where it is resting to some other more advantageous position simply to give a physical manifestation of that control. You may want to spend a few minutes purposefully removing all the exhibits Plaintiff used and replacing them with your exhibits. The point is that whatever you do should be because you intend it to have a positive effect on the jury and not because you failed to think in advance about what exhibits you will use. You should try to avoid spending any time in front of the jury looking for or arranging exhibits, fooling with the computer, or anything else that could have been done in advance, unless you have made the decision that the jury should see that activity. Absent a compelling reason otherwise, it is preferable to perform most of the arrangements during the break, before the jury is brought back into the courtroom. If you need time to arrange the exhibits while the jury is sitting there, you can consider asking the judge to let the jury stand and stretch while you spend a few minutes retrieving what you will need.

Don't Leave Plaintiff's Exhibits in Front of the Jury

One of the most common mistakes defense lawyers make is to ignore the blow-ups, charts or graphs that the Plaintiff has left in front of the jury at the end of his or her closing. If your opponent does leave his/her exhibits where the jury can see them, you should first efficiently collect those items and take them to some place out of the jury's sight, with their contents facing against the courtroom wall.

Practice, Practice, Practice

Your closing will be better if you practice it before your spouse, children, or the mirror. Doing so will enable you to consider the nuances and phrasing of the transition sentences. It allows you to practice deliberate choices as to the emphasis placed on the words that you use. Even the most experienced lawyers are nervous during closing. Practicing the closing argument until you are very familiar with it is a tremendous help. It will help you settle down and be comfortable with the experience. Even in cases that have only a few witnesses, you should not attempt to memorize every sentence of the closing. Doing so will tend to diminish (or destroy) your spontaneity. Rather, you should know exactly what points should be made with respect to the evidence and feel free to discuss those points with the jury. By practicing the closing several times, you will usually gain insights into how the points should be presented. When using PowerPoint, you should practice so as to be entirely comfortable with what animation or slide is coming next. When the PowerPoint presentation syncs well with the oral presentation, it creates an impression you are well-prepared and knowledgeable. Without practice, fumbling around with a PowerPoint presentation will distract from (or destroy) the impression of control and preparedness.

The purpose of the closing argument is to persuade. It is your job to persuade the jury that your case is believable. The first step in doing that is to persuade the jury that you are believable. Consider speaking about truth and fairness. Minimize references to yourself as a lawyer. Be honest. Admit unfavorable facts. Demonstrate a sense of fair play. Avoid taking extreme positions, and avoid stressing facts the jury is unlikely to believe.[2]

The duration of the closing depends on the case. But, normally, closing arguments run between 20 and 45 minutes, with 30 minutes being the average.

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[2] RONALD J. WAICUKAUSKI, PAUL MARK SANDLER & JOANNE EPPS, THE WINNING ARGUMENT, American Bar Association, 35-37 (2001).

III. Deciding What to Say

A typical closing argument consists of three parts: the introduction, the body of the closing, and the conclusion. The introduction consists of comments to warm up the jury and educate them as to what is to come. The body of the closing contains a review of the evidence and an explanation of why the evidence compels a particular verdict. The conclusion is a final summation suggesting what the jury should do and the importance of doing it.

Most cases have one or two major issues that determine the case. You should frame those issues in your opening statement and attempt through your direct and cross to demonstrate how each witness or piece of evidence supports your characterization of those issues. In your closing argument, you bring together all of the evidentiary points that support your version of how the jury should decide the crucial issue/issues.[3]

The Theme

Many find it useful, if not essential, to develop a theme for the case. The theme is a catchy, short phrase that both embodies a key aspect of the case and powerfully suggests why your client should prevail. In the O.J. Simpson case, one of Johnny Cochran's themes in closing argument was, "if the gloves don't fit, you must acquit." Developing an effective theme does not come easily. It requires boiling the case down to its very essence and picking the few right words that will resonate with the critical facts of the case, and drive home the intended conclusion to be drawn from those facts. But be careful: an ineffective or inaccurate theme can badly backfire.

[3] Many thanks to Judge John Hamilton Smith for his thoughtful suggestions for this article.

A. How to Begin

Often, attorneys begin by perfunctorily thanking the jury for their time and reminding them that what the lawyers say is not evidence. Judge Joseph F. Anderson, Jr., the author of an extremely helpful book on closing argument, recommends against both practices and suggests that a more thoughtful description of the trial process and the jury's role is more effective.[4] The introduction should be short and designed to grab the jury's interest. The following is an example of effective introductory remarks given by Kermit King of Columbia, South Carolina, when representing a Plaintiff:

> *. . . Mr. Foreman, ladies and gentlemen of the jury, the thought has occurred to me from time to time that perhaps we ought to require high school students some time before they graduate to come and see a case tried, because if there is any one thing that distinguishes our form of government, it is that a jury comes into a court house to hear controversies between citizens and make a decision so that those controversies can be resolved in some peaceful way. Obviously, the system would not work at all were you citizens not willing to take up your time and give of your effort to make that happen. You have been an unusually attentive jury during this very long trial. Mr. and Mrs. Litigant and I thank you for that.*
>
> *At this point in time I am going to do what we lawyers call make a closing argument to you. If someone were to hand you a box filled with pieces of a jigsaw puzzle it would no doubt be of a great deal of assistance to you in trying*

[4] JUDGE JOSEPH F. ANDERSON, JR., THE LOST ART, AN ADVOCATE'S GUIDE TO EFFECTIVE CLOSING ARGUMENT, 1 (South Carolina Bar Ass'n, 1998). Judge Anderson has given his permission for the numerous quotations from his treatise that are contained in this article.

> *to put those pieces together if you were permitted to see the picture on the top of the box that shows how the thing is going to look when it is all put together. What I want to try to do at this point is to summarize in the briefest possible manner what we have heard during the course of this trial and to submit to you for your consideration how I think the pieces of the puzzle fit together in order that you can see that for yourself.*[5]

Irving Younger adopted a more concise approach:

> *Ladies and gentlemen of the jury:*
>
> *You know what you heard, and I know what you heard. It would be an insult to your intelligence for me to tell it all to you again. But as I heard my worthy opponent tell you what you heard, which didn't sound anything like it. I need to do some clarifying here. I need to take this opportunity to straighten out what we all really heard.*[6]

The main rules in doing a closing are don't read it, start strong and end strong. Before the closing begins, anticipate the worse possible things that Plaintiff's counsel is likely to say. Think ahead of how you will diffuse a powerful emotional argument. If you haven't thought beforehand how to diffuse the natural sympathy that many jurors will have for the Plaintiff, it is likely you will be unprepared to do so when you begin your closing. You will want to avoid appearing emotionally cold, which is exactly the response your opponent wants to achieve. Consider whether your first comments should respond directly to what the Plaintiff said. If the Plaintiff takes a cheap shot at you, you need to respond immediately. If you don't, jurors may conclude the point was accurate. The emotion with which you start the closing is a function of the severity of Plaintiff's counsel's attack. After two or three hopefully powerful opening comments that immediately address what the Plaintiff just concluded, you can step back, and re-group, so to speak, discuss the importance of their service and then proceed with your review of the evidence.

B. The Body of the Closing

The closing argument is for the purpose of persuading the jury how to decide the verdict. Generally speaking, the body of the closing is a combination of what the evidence was and an explanation of why the evidence compels deciding the verdict in the client's favor. It is your job to organize the summary of the evidence in a persuasive fashion. Although a typical organizational structure is chronological, that is to say, starting at the beginning and telling the story of what happened in the case in the order that the events occurred, that structure often does not work so well for the defense.

A typical organizational structure used by the defense is issue-based: the legal or factual issues in the case that need to be decided to reach a verdict.

> *. . . In this case, there are three issues that you must decide: whether the statements made by Mr. Slanderer are true, whether Mr. Slanderer made the statements intending to hurt Mr. Plaintiff and whether Mr. Plaintiff is a public figure. Judge Know-It-All will tell you that the law is that if the answer to any of those questions is yes, then your verdict is for Mr. Slanderer. Let's review the evidence that was presented to you on each of those issues.*

Normally, you should review the evidence that is favorable to your case, explaining why the evidence compels a particular verdict. That is typically followed by a discussion of why the evidence that is unfavorable is not reliable.

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[5] *Id.*
[6] *Id.* at 95-96.

The review of the evidence should be visually appealing when possible. Ways to do this include enlarging and mounting the written exhibits on illustration board, highlighting the important language, using animated PowerPoint slide presentations and preparing charts and/or timelines. The point is to review the favorable evidence in a manner so that it is understandable, believable and compelling.

Four tools that are often used in the body of the closing are the instructions from the court, the verdict form, the rhetorical question and analogies.

1. The Jury Instructions

A tool, common to every case, is those instructions that bear on the critical findings required of the jury.

Incorporating the exact language that the judge will use in the final charge is thought to create an identity between the lawyer and the judge and to be an effective device during closing.

Chilton Varner of Atlanta, Georgia, employs the following use of the Court's instruction. Ms. Varner takes the definition of "defective" from the jury charges and writes the words on an easel as she talks. The point is to make every effort to persuade the jury that the standards those definitions present are very high.

> *Think about this for a moment. In order for you to find for Mr. Plaintiff, you will have to find that the Cadillac was both defective and unreasonably dangerous. One of these is not enough; the Cadillac must be both. These are harsh, severe words. They were meant to be. Note that it is not enough, that the product might be 'dangerous' under some condition; it must be unreasonably [great emphasis] dangerous under the circumstances of <u>this</u> case."*[7]

Ms. Varner often constructs an appropriate graphic to illustrate the "decision tree" by which the law, as charged, is applied to the facts to produce the desired results.

2. The Verdict Form

A second tool is a blow-up or projection of the verdict form itself. Juries often become confused in filling out the verdict form, particularly if it is a special verdict with interrogatories to be answered. You can tell the jury during the closing exactly how they need to fill out the verdict form or answer the interrogatories and where to sign the form in order to render the desired verdict.

3. The Rhetorical Questions

A third tool is the rhetorical question. As you review the evidence, asking well-phrased questions to the jury can be an effective way to drive the point home. Examples of use of the rhetorical question are included in the quoted portions of Tim Bouch's closing statement in Section IV below.

4. The Analogy

A fourth tool is the analogy, which is a shorthand way of describing the use of expressions, parables, stories, literary references, biblical references, or other matters believed to be within the common understanding of the jury to explain why the point being made should be believed. In a wrongful discharge case, where the employer complained that although the Plaintiff was meticulous, he was too slow in completing tasks, the story of the tortoise and the hare may be an effective way to recall for the jury the common childhood belief that the slow and steady application of effort should be valued over quick completion of a task. The point of the analogy is to present the case in terms to which the jury will favorably respond

[7] Chilton Varner, IADC Trial Academy Presentation, printed with the permission of the speaker.

because of the images and the emotion that the analogy naturally evokes.[8]

The following are some examples of analogies that have been used in situations that often occur in trials:

(i) How to Respond when the Opposing Party has Asserted Multiple Inconsistent Claims or Defenses

The following argument was made by Bob Hanley when representing MCI in its antitrust case against AT&T, whom he considered to be making a series of inconsistent arguments:

> *. . . Have you seen the way AT&T has defended this case? First they have one argument then another. If you don't like those, they have a third and a fourth. And that's just the start. They have more arguments and defenses and excuses than you can possibly keep track of.*
>
> *And you know what? There is no rule against that. The Rules of Procedure actually say you can have as many different theories as you like – and they don't even have to be consistent or make sense. I think we can agree they certainly have taken full advantage of that rule.*
>
> *It's like they tell you in law school. Take the simplest case you can imagine. A farmer has a patch of cabbages. His neighbor has a goat. The goat breaks loose, gets in the cabbage patch and eats all the cabbages.*
>
> *The Farmer brings a lawsuit against his neighbor. He says, "I had a patch of cabbages worth $100. Your goat ate my cabbages. Give me my $100."*
>
> *"And if he was represented by these lawyers for AT&T,"* said Hanley, pointing at the defense table, *"what would the owner of the goats say?"*
>
> *You have no cabbages.*
>
> *If you had any cabbages, they were not eaten.*
>
> *If your cabbages were eaten, it was not by a goat.*
>
> *If your cabbages were eaten by a goat, it wasn't my goat.*
>
> *And if it was my goat, he was insane!"*[9]

It is important that you pick your analogies carefully otherwise Plaintiff's counsel can turn the analogy against you in his/her rebuttal. You should float the analogy among your colleagues and friends to make sure it can't boomerang on you.

(ii) Handling an Opposing Witness Who has Been Caught in an Outright Lie

When a witness had been trapped in a single outright lie, the goal is to persuade the jury to disregard the rest of his testimony. John Burgess of San Francisco approached it in this fashion.

> *. . . You got a problem with the testimony of Gwendolyn Ross. She lied to you and got caught. Now I know you won't have any trouble with that. The question is what to do with the rest of her testimony? Accept it? Reject it? Or what?*
>
> *You know, ever since Mom passed away, every Sunday afternoon my family and I take Dad for Sunday supper.*

[8] It is important to choose an analogy that resonates well with the jury. Using an example of what happens in a polo match, while perhaps persuasive to those who play polo, might well be expected to be counter productive when presented to most juries.

[9] James W. McElhaney, *Great Arguments*, A.B.A. J., (March 2004), at http://www.abajournal.com/magazine/great_arguments/.

Dad's favorite dish is beef stew. He loves it. Mom used to fix it for him. Whenever we take him, if the restaurant has beef stew on the menu, he orders it.

A few weeks ago we went to a new restaurant outside of town – it was called Country Inn. It was one of these places that has a menu board behind a glass door, mounted on a post in front of the restaurant.

When I saw they had "Grandma's Beef Stew" on that menu, I didn't tell Dad, but I made a bet with myself: that's what he'll order.

He almost fooled me. Looking over at the next table he saw that someone had ordered swordfish and said, "That swordfish steak looks wonderful." But when the waiter took his order, Dad said, "Well, I guess I'll try your beef stew."

The waiter brought out the most delicious looking plate of stew you have ever seen. Big pieces of beef, nice slices of carrot, new potatoes, whole little onions in rich brown gravy. Smelled wonderful.

But when Dad took his first bite he said, "I can't eat this. The meat's rancid. It's been left out too long." Now what was he supposed to do with that stew? Pick through it until he found something good? Or say, "Here take this back." "I'm going to order something else."

What are you entitled to do with the testimony of Gwendolyn Ross?

Mr. Burgess also demonstrates another very effective approach in closing argument, which is to give the jury just enough to form its own conclusion, without hitting it over the head with the point. Mr. Burgess allowed the jury to conclude on its own the final point that they should reject the testimony of Gwendolyn Ross.[10]

(iii) Whether to address the issue of the amount of Plaintiff's damages

If the case has gone well and you are confident of a defense verdict, it may be appropriate to omit any discussion of the plaintiff's damages. However, in those cases where there is credible evidence supporting the Plaintiff's claims on liability, it will be necessary to address the amount of damages to attempt to avoid an excessive verdict. An approach that works well is to keep the discussion brief and put it in the middle of your argument, between other strong points for your case. You should begin the discussion with a statement to the effect that because the plaintiff has devoted so much time to damages, you feel obligated to respond. Move quickly through the competing evidence to demonstrate that your estimate of damages is more reasonable. Normally, your goal will simply be to make the point that any damage award should be substantially less than the Plaintiff's request.

C. The Conclusion

It is critical to end strong. This is one aspect of closing to consider memorizing, knowing beforehand that you will have to modify it in light of what the Plaintiff has said (unless you practice in New York or Massachusetts, where the Defendant goes first).

The conclusion often reminds the jury of its responsibilities. Joel Collins of Columbia, South Carolina, used the following in the defense of a products liability case:

We know that all products can be improved and that many of these improvements relate to safety. Think of the products you come into contact with every day in your life. Think of the improvements that have been made in those products over the years. Surely we can agree that just because there have been improvements, does not mean

[10] *Id.*

that the men and women who designed and made those products in the past should be punished.

Nobody in this case needs or deserves to be punished.

Please bear in mind that only if product designers and manufacturers can expect and receive fair and reasonable treatment from juries like you, can we continue to enjoy the economic prosperity that has made our nation so great.

Of the 216 sovereign nations on this earth, only one nation guarantees in its Constitution the right to a trial by jury in a civil case. That one nation is the United States of America. This wonderful right, like any other right, cannot be abused and continue to be enjoyed. Our Constitution also embraces individual freedom and personal responsibility.

His Honor will instruct you that you have no friends to reward and no enemies to punish. My client respectfully submits to you that punitive damages in this case are unwarranted. I trust that when you deliberate, you will reasonably and fairly apply the standards given you by the Court. I trust that you will apply your conscience and your common sense. If you apply those standards and uphold your oath to well and truly try this case according to the law, you will not award punitive damages against my client. Thank you.[11]

One approach is put the verdict form on a flip chart and with great fanfare, show the jury what lines they need to check off in order to give you the verdict you deserve. In most jurisdictions, the defense closing argument is followed by the Plaintiff's rebuttal. A tactic that also works well is to leave a list of questions on the easel for the Plaintiff's counsel to answer in his rebuttal. The list can be accompanied by a statement to the jury that if Plaintiff's counsel does not answer all of the questions, they can properly conclude that he has agreed with the defense as to each unanswered point. A variation of this technique is to show the jury the killer defense document using a transparency on the overhead projector and make a show of leaving the transparency on the projector and challenging Plaintiff's counsel to turn the projector on and explain to the jury why the document does not mean what it says.

If you end with questions, documents or exhibits that you challenge Plaintiff's counsel to answer or explain, tell them that the Plaintiff's counsel is not going to be able to answer those questions. Suggest to them that when opposing counsel opts to repeat what he has already said they ought to tell themselves that he is ducking the questions you challenged him to answer. Leaving this thought in their mind will cause them to listen only for the explanation of the questions you posed.

The goal of closing for a Defendant is to provide a set of simple arguments that a small group of defense-minded jurors can continue to raise in the jury room when you are not there to argue your case. Tell them that you can't be in the jury room to argue your case but that the points and arguments you are presenting to them ought to be the issues discussed in the jury room. This empowers defense-minded jurors to confront Plaintiff's jurors with confidence that they know what to say in response to Plaintiff's jurors' arguments.

IV. The Right Argument for the Right Case

Cases can often be characterized by one of the following general categories: (1) a credibility case; (2) an inferences case; and (3) a policy case.[12] In a credibility case, the most important issue is who is telling

[11] ANDERSON, *supra* note 4, at 222-23.

[12] *See* Ronald L. Carson and Edward J. Imwinkelried, *The Three Types of Closing Argument*, 18 AM.J.TRIAL ADVOC. 115 (1994).

the truth. In an inferences case, the important issue is what most likely actually happened given the circumstances of the case, or, said with legalese, what inferences are most properly drawn from the evidence in the case. In a policy case, the issue is what result is most fair or desirable given the circumstances of the case. The closing argument will differ somewhat depending on the type of case.

In each type of case, all of the above approaches are normally employed: review of the supporting evidence, review of the opposing evidence, use of a theme or label, discussion of the relevant, favorable jury instructions, review of the verdict form, rhetorical questions and use of analogies. However, the emphasis is different.

A. The Credibility Case

In the credibility case, you should pay particular attention to explaining why the witnesses supporting one's case are believable and why the witnesses opposing it are not. Pay particular attention to the credentials of the witnesses, the opportunity of the witness to observe or otherwise have the knowledge testified to, the witness' demeanor on the stand and the presence or absence of inconsistencies in their testimony. Focus on items such as untruthful acts that may have been committed by the witness, prior convictions or inconsistent statements, and whether the opposing party failed to bring a relevant witness who was under its control.

A useful tactic is to begin (after the jury has been hooked) to ask rhetorically whether it's important to keep one's promise. Answer that by saying yes and then go back to the opening and remind the jury what you promised you would prove and read (when it works) the words of the Plaintiff's attorney promising something that wasn't delivered. Weave this failure into the broader theme of lack of credibility. The lesson is, whenever possible, remind the jury of what Plaintiff promised and what he failed to deliver. The unspoken thought you want to create is that if Plaintiff's counsel misstated what the evidence would show before, he is probably doing so again in his closing.

B. The Inferences Case

In an inferences case, although the credibility of witnesses may be important, the emphasis is not so much on truth telling or lying but on describing the evidence in a way that leads the jury to decide that the conclusion offered by your client is more likely what occurred than the conclusion offered by the opponent. Products liability cases are often inference cases, where competing experts disagree on the likely chain of events that occurred, given the evidence presented. In such a case, you should describe the physical evidence that was presented to the jury along with the expert testimony so that each corroborates the other and leads to the desired conclusion. Effective arguments present the evidence in terms of what "normal people would expect" or "what happens in the real world."

An example of an inferences argument was made by Tim Bouch of Charleston, South Carolina. Note the use of a theme and repeated use of rhetorical questions.

> . . . *Two weeks ago yesterday in my opening statement, I said a few things that I would like to bring back to you today. To bring a verdict for the Plaintiff, you must believe that trace elements of chemicals in the Plaintiff's well water caused his cancer. You must believe that – despite the absence of supporting medical literature, medical proof, or medical testimony. To bring back a verdict for the Plaintiff, you must believe that water flows up hill.* [The Theme.] *You must believe that massive amounts of toxic chemicals were dumped on property yet you cannot find a trace of them today. You must believe that DHEC and EPA, despite 5 years of*

testing, drilling and investigations were wrong.

Ladies and gentlemen, when as a jury you come to court, we encourage you not to leave behind your common sense. Hundreds of samples were taken and approved by DHEC and approved by EPA. What have they found? [The Rhetorical Question.] *Nothing. Does it make common sense that these chemicals migrated in the quantities and misdirection across the intervening properties, and there is no trace? No evidence. That defies one's common sense.*

In the state of the evidence as described, did the chemicals in the well cause the illness? [The Rhetorical Question.] *No. Did the Plaintiff consume the water in the stated quantities?* [The Rhetorical Question.] *Probably not. Does the scientific evidence support the causation between these chemicals and the illness?* [The Rhetorical Question.] *Absolutely not. Is the Defendant the source of the chemicals in this well?* [The Rhetorical Question.] *Not at all. When it is all said and done, we believe that you will find that water does not go up hill. Medical science does not support these chemicals causing this disease*.[13]

C. The Policy Case

In a policy case, it is important to appeal to the conscience of the jury, to remind them of their role as setting standards by which others will act and as representatives of the community at large. Time should be spent educating the jury as to their important role in declaring what is right and wrong given the circumstances of the particular case. An example of the difference between an inferences case and a policy case is the difference between a products liability case and a medical malpractice case. In the products case, the issue is whether the evidence demonstrates that the product failed, or whether the evidence points to some other cause of the accident. In a medical malpractice case, the issue often is not so much whether the doctor could have avoided the outcome, but whether the doctor should have, by running more tests, spending more time with the patient, or simply being smarter, prevented the outcome.

Moe Levine gave the following "policy" type closing:

Sunshine, a playground, a library across the street. Does a seven-year-old go to the corner to cross? You know he doesn't. He comes out between cars on roller skates. You know that. The truck driver knew that there was a playground and an exit from it, and a library across the street. Just as every ball has a boy attached to it, so do every two cars have a prospective boy coming from between them. He was going too fast. Measure his conduct, not by the conduct of the boy, but by his responsibility. And his responsibility is a social responsibility. He is charged with the protection of the boy. He is charged with it in law. If he should have anticipated it, he should not have let it happen. Should he have anticipated that from playgrounds with an exit, with children's libraries across the street, there is an invisible line of attachment, should he not have reduced his speed to a point where he could have stopped? Should he not have seen the boy? He says he did, but he says he thought he could stop. The wonder and the uncertainty should have been translated into action, and he should have not struck the boy. And so measure the conduct of the two participants in this tragedy according to their capacity to reason: the boy of seven, acting like a boy of seven, and the truck driver, acting unlike a safe,

[13] ANDERSON, *supra* note 4, at 95-96.

careful truck driver under the circumstances.[14]

V. Deciding How to Say It

There is no one best way to deliver a closing. Some lawyers preach. Some orate and some talk as if over a back yard fence with a neighbor. You should pick a style that reflects your personality and is one with which you feel comfortable. The jury can often sense when a lawyer is "acting." It is more likely to respond well to a style that comes naturally to you.

VI. What Not to Say

Deciding when and whether to object to your opponent's closing argument requires balancing the need to object in order not to waive an issue for appeal with the possible bad impression that can be created with the jury by interrupting other counsel's argument. Many times, the trial judge will not be paying attention and will overrule an objection that counsel has misstated evidence, stating it is for the jury to recollect what the evidence was. If you have successfully fought to exclude certain evidence, you should be vigilant to object to any reference to that evidence in the closing argument. However, very few cases are reversed because of improper closing argument. Therefore, you should err on the side of not objecting and object only where there is a specific purpose in doing so.

You should be aware of the authority in your state on the various improper arguments listed below. If the argument is made and you decide it is appropriate to object, it will enhance the chances of the trial court's sustaining your objection if you cite the specific authority on which the objection is based.

The following arguments are improper:

1. Referring to evidence that has not been admitted during the trial of the case.
2. Proposing remedial measures taken by Defendant in a products liability case unless the measures have been admitted into evidence.
3. Referring to evidence to which an objection has been sustained or which has otherwise been excluded.
4. Criticizing opposing counsel for objecting to evidence that was excluded. Although it is permissible to argue the law, particularly where the court has advised what instructions it will give, it is impermissible to read from a law book. The same is true with respect to medical books and other books that have not been admitted into evidence.
5. The Rules of Professional Ethics in many states prohibit a lawyer from framing his/her argument as his/her own observations or his/her own personal knowledge, belief or opinion.
6. Invoking national, racial, religious or local prejudice.
7. Arguing that if his client's case was not meritorious, the trial judge would have dismissed it.
8. In many jurisdictions, addressing jurors by name, or otherwise making a personal appeal to any particular member of the jury.
9. The *per diem* argument is one made by a Plaintiff in a personal injury case. The jury is asked to consider what the value of the Plaintiff's pain and suffering is for a single day and then asked to multiply that over the life expectancy of the Plaintiff. Some states allow the *per diem* argument, some states prohibit it altogether, and some states qualify how the argument can be used.

[14] MOE LEVINE, THE BEST OF MOE: SUMMATIONS (Oceana Publications, Dobbs Ferry, New York, 1983).

10. The "golden rule" argument-requesting the jury to treat one of the parties as they would want to be treated. The "golden rule" argument is improper.
11. Direct or indirect arguments to the existence of insurance or other collateral sources are improper.
12. The closing may not refer to settlement negotiations.

VIII. Conclusion

I have made very liberal use of Judge Joseph F. Anderson, Jr.'s treatise, *The Lost Art, an Advocate's Guide to Effective Closing Argument,*[15] and of Ron Waicukauski, Paul Mark Sandler and Joanne Epps' *The Winning Argument*.[16] Both books contain an excellent, thorough and practical compendium of suggestions and examples of effective closing argument.

There are numerous other devices and techniques that can be used effectively in the appropriate trial. However, the two fundamental points for an effective closing are that you should talk with the jury, not to it, and you should believe in the arguments you make and not make arguments you do not believe.

[15] South Carolina Bar Ass'n, 1998.
[16] American Bar Association, 2001.