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The closing argument

CREATING A MASTERPIECE EVERY TIME

For days or weeks, twelve to sixteen members of the community have intently watched, listened, notated, and reacted to the evidence you and the opposition have diligently presented. They are excited – perhaps desperate – to start deliberations. Tired of small talk during breaks and at lunch, they are hungry for substantive discussion on everything they have seen and heard. In the hallway outside the courtroom, anticipation is building.

Waiting for the jury's arrival at counsel table, you are calm and self-assured, because there is no greater honor and privilege than giving the closing argument. Despite operating on little sleep for several weeks, you are ready, because the most important day of the trial has finally come.

There is a popular misconception that closing arguments don't matter because jurors make their minds up early in the case (some say, as early as voir dire). To the contrary, the closing argument – and the equally significant rebuttal – is one of the few times you can speak directly to the jury and demonstrate the righteousness of your client's position. By delivering an argument that shows that you trust the jury to deliver a favorable verdict, you will solidify their commitment to your client. Your outstanding argument requires your attention to substantive, procedural, and personal elements:

The power of substance

Draft early, draft often

It is never too early to begin drafting – and redrafting – your closing argument. In addition, writing your closing argument before your opening statement is a good way to get all of the argument out of your system, and remind you of what you need to prove so you can say what you want when the time comes. Keep drafting the closing throughout the trial. While you may not always need or be able to purchase dailies to review trial testimony, make sure to keep daily notes about important testimony in a single file in your trial binder.

Keep a large envelope that is three-hole-punched so you can place post-its and other small clips that would otherwise become lost. Sometimes perfect lines or important insights come to you during trial preparation; those too must be recorded in your same central file for consideration. If you are working with a team, assign one person to record individual jurors' reactions to particular testimony. Then, when you are delivering your closing, you can emphasize those points to the right "partner" jurors who will assist you in delivering a verdict. Ideally, you should enter the trial with the basic structure of your argument written out, to be completed with those important testimonial gems that can only be mined during the trial.

Acknowledge the court staff, the jury, your client, and your team

You don't need to lay it on too thick, and certainly, don't be insincere. Make an effort to acknowledge all the other people that have been involved in the trial process. For some jurors, this is their first trial – by leaving them with a positive impression, you give them a reason to want to return and provide service. To avoid impropriety, a brief and accurate statement of thanks is all it takes for the judge and court staff.

Acknowledging the jury's attention is fine for shorter trials, a couple of sentences regarding their commitment and sacrifice may be appropriate for longer ones. Jurors appreciate that you remember they are human beings and not just tools to be used for your client's cause. As for your team, only solo practitioners have truly done a case on their own; everybody else should recognize their hard-working associates with a simple statement and physical gesture to the individuals in question, such as "My colleagues – Ms. Smith and Mr. Gonzales – and I appreciate the attention you have given to our client's case." Younger jurors will certainly notice a partner who, in closing, forgets to acknowledge the associate who has been sitting at counsel table for three weeks providing diligent assistance. Don't give jurors reasons to dislike you – show respect for your staff.

Keep it simple* – not *stupid

Of course, you should streamline your presentation, which careful and repeated editing can do to make your complex facts deceptively simple. But don't fall for the trope of "dumbing things down." The vast majority of jurors are highly intelligent and highly perceptive, and those who are not will be in deliberation with the others. (See *People v. Johnson* (1973) 32 Cal.App.3d 988, 1002-1003 ["It is high time that lawyers and judges accept the fact that the rest of society is entitled to the respect and consideration of equals. The mere possession of an LL.B or J.D. does not anoint the holder with powers of discernment not vested in ordinary mortals."].) Assuming you and your witnesses have presented the facts appropriately, jurors appreciate and recognize that they are being trusted with difficult and complex concepts, and reward lawyers who treat them like the thoughtful and committed citizens that they are. The vast majority of jurors take their obligations very seriously; most trial judges (and you and opposing counsel) are effective at eliminating jurors who will sully the process with a refusal to participate or who, during voir dire, express anger at the prospect of being selected for the panel.

Practice your delivery

If you are working with a team, practice with them as much as you can before the delivery. Ideally, you can also practice in front of other objective, neutral observers. Take fair criticism, but do not permit personal attacks, and if possible, do not allow your team to force you to say anything that is not authentically your voice. Ultimately, your confidence and your honest belief in your closing argument is what is important – anything less than that will be apparent.

Use formal presentations as necessary

Of course, each trial calls for different optics. Sometimes, you may want to be in contrast with the well-financed defense team who will pull out all the bells and whistles. In other cases, reenactment animation, or slideshows with audio or deposition clips may be necessary and warranted. At this point,

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many jurors expect to see an electronic presentation even for simple cases, and for more complex cases, especially involving financial figures or testimony from multiple experts, they are almost required.

Take the jury through the trial witnesses and evidence

With minor exceptions for witnesses who have to be taken out of order for scheduling purposes, your trial witnesses and evidence were chosen and presented deliberately. Now it is time to explain why. For example, if you have read any discovery responses into the record – which is easily forgotten in the moment – it is now the time to remind the jurors why those admissions are so important.

If you have the budget, using clips from video depositions is effective to trigger the jury's memory of important testimony, particularly for lengthy trials. In a six-week jury trial that concluded in February 2020, the parties displayed jointly selected video testimony of one of defendant's former employees. The witness's purported lack of knowledge and recall (which he intoned in response to every single question) was so transparent and ludicrous that by the end of his 45-minute video, the jury (and almost everyone else in the courtroom, including some of defendant's counsel) was not even trying to hold back their laughter. During closing, as soon as his name and a video still appeared on the presentation screen, jurors smiled and some even laughed as they recalled the day of his video.

While the purpose of the video may not have been clear at the time it was shown, by the time of the closing the jurors had heard from a litany of defendant's employees who claimed a similar lack of knowledge, and during the closing argument the pattern was emphasized with this "poster boy." Remember as well that plaintiffs can waive theories by neglecting to mention them at trial. (*Richmond v. Dart Indus., Inc.* (1987) 196 Cal.App.3d 869.) If there is anything you want to preserve for a potential appeal, make sure you bring it up – or risk waiving it.

Deal with bad facts and bad witnesses

Every case has at least some bad facts, and some have bad witnesses. Do not ignore these issues – your opponent certainly won't. The jury will appreciate that you see the case realistically. Just be sure that the explanation you offer is appropriate – the jury will see a swindler for what they are.

Use the instructions and fill out the verdict form

If you only do one form of visual presentation, make it copies of the important instructions (in the exact format that the jury will see them, such as pleading paper) and the verdict form. This is particularly requisite in cases with special-verdict forms, which can be complicated. Using the animation feature in your presentation software to show them exactly how to place the checkmark is especially effective. For lengthy and complex cases, the jury is exhausted and overwhelmed – they will appreciate this roadmap for their verdict form. Give the verdict form the sacred treatment it deserves during your presentation, because successful completion of the verdict form is really all that matters.

Organize your argument logically

Whether you have multiple causes of action or just one, it is effective to (1) give an introduction, including your acknowledgments; (2) discuss the applicable burden of proof; (3) summarize all of the evidence (including any bad facts, which will be dealt with) in connection with the jury instructions; and (4) present the "completed" verdict form along with your damages request. In the first portion of your closing argument, you can close with your promise to return one final time for a *brief* rebuttal.

Remind the jury of earlier promises

Whether or not you also delivered the opening statement or that role was performed by a colleague, it is important as you take the jury through the evidence that you remind them of the promises that were made by both sides during the opening statements. If you failed in any way to deliver on your promises, make sure you explain why. If you did everything that you promised, you can gracefully acknowledge that you have done so. If your opponent broke any promises, it may be a better strategy to reserve that attack for rebuttal after they have given their closing.

Present damages calculations simply and effectively

Whether you are using a whiteboard or presentation software, it is critical that you present your damages calculations clearly and logically so the jury can make your award. Do not race through important slides presenting financial calculations. Leave those up so the jury can write down your requested damages. Empower them to give you exactly what you ask for. And when you do make your ultimate ask for damages, look the jurors in the eye.

The power of procedure

Know your judge's rules for closing argument

Clarify with your judge as early as possible whether they have any standing orders or rules for closing arguments delivered in their courtroom. Are you allowed to enter the well or position your lectern there? When will the parties exchange copies of the electronic presentations, and in what format? If at all possible, get an electronic copy of your opponent's presentation; not all judges will require this exchange, or it may be too chaotic in the moment. Ensure you have a backup plan in case the equipment malfunctions – it can and it will.

Know the law on closing arguments

Published cases overturning verdicts based on misconduct of counsel during closing arguments are few and far between, but post-trial motions for new trial and JNOV are not. It is your obligation to do everything in your power to make sure your opponent loses a second time. As required, aim your closing argument at jurors' reason. Some published decisions have acknowledged violations of the Golden Rule or other inappropriate conduct to be harmless error (e.g., *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 598-599 [remarks from

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counsel that jury's verdict was acting to keep community safe]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250 (Golden Rule violations); *People v. Fields* (1983) 35 Cal.3d 329, 363 [extensive narrative of crime in second person].) Any stray statements will also be viewed in context of a lengthy and complex closing, such as in *Hernandez v. First Student, Inc.* (2019) 37 Cal.App.5th 270, 288, where the defense counsel's referral to plaintiff as a "card shark" with an illustrative PowerPoint of a sinister shark playing cards was held to be harmless error. But why take the chance at all?

Maintain your dignity during the other side's closing

While you are sitting and listening, you are still "delivering" your closing. There will always be cases in which the opposing counsel is difficult or abusive. If so, the jury has already seen and noticed that behavior, and they probably don't like it. Your opposition may even be misstating evidence; unless the statements are truly egregious, you likely will make the strategic decision not to object.

Micro-reactions are most effective at conveying your displeasure – a clenched jaw, a slight head shake, a raised eyebrow, pointed look to a colleague – and be sure to make note for your rebuttal. Of course, there are rare times when statements are so outrageous, you have no choice but to formally object and ask for a curative instruction. (See *Neumann v. Bishop* (1976) 59 Cal.App.3d 451; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 796 [timely and proper objection must have been made at trial, otherwise the claim is forfeited]; *Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 211 [counsel must move for mistrial or seek a curative admonition]; *Soto v. BorgWarner Morse TEC, Inc.* (2015) 239 Cal.App.4th 165, 200 ["[b]y remaining silent during plaintiffs' counsel's zealous closing argument, [defendant] forfeited any right to challenge the remarks as improper or inflammatory at this juncture."].)

Save time and energy for rebuttal

Rebuttal is equally as important as the closing argument itself – in some trials, it can be even more important. You will likely have some idea of the arguments that are going to be made, so you can draw up a basic rebuttal structure and some slides in advance. Take as many notes during the defendant's presentation as you feel is appropriate. The rebuttal is the time to use your last reserves of energy to showcase your passion and commitment to your client – so be sure to save sufficient time with the Court for a brief rebuttal to address the defendant's arguments and any mischaracterizations.

The power of person

Remain humble

Arrogance is the greatest mistake a lawyer can make, not just in the closing argument, but in life – and unfortunately it is endemic in our profession. The jury will discount a lawyer who takes it for granted that they are going to win, or who treats the other side or their team members without couth. The jury will notice your arrogance – everyone else does as well, by the way. By the time of your closing argument, you should have already established a reputation with your jury for being professional, courteous, kind, and respectful. Anything less is incompatible with being an effective advocate, especially for a plaintiff's attorney. Representing your client is an honor and you must truly believe it. (See *In re Johnson* (1992) 1 Cal.4th 689, 705-06 ["As officers of the court, lawyers have obligations to the system of justice that transcend their duties to a particular client."].)

It's OK to use notes

For longer closings, notes are not just acceptable – they are probably going to be necessary. Especially for younger attorneys. It is OK to tell the jury that you are using notes to be sure you summarize everything accurately. However, try to memorize at least (1) four or five sentences to deliver at the outset; (2) several key lines that will be especially effective in conveying your passion for your client's position, and (3) a few sentences in closing. Be sure to deliver those looking in the eyes of the jurors.

It's OK to be human

Jurors want to see your passion, which can be translated by your own personality and demeanor in whatever way is appropriate. You've been sitting next to them for days or weeks and they already know that you are a human being, not an empty suit. If you are angry and indignant after hearing weeks of lies from your opponent, find a way to convey these feelings in a righteous manner. However, make sure any showing of emotion is genuine. There is nothing worse than a false display – jurors will see right through it.

Step away from the lectern

Depending on the constraints of the courtroom and the parameters set by your judge, and your own mobility limitations, if possible, you should use your physicality to present your case. At minimum, some natural movement should be part of your presentation.

Channel your inner creative

After years of IRAC-style pleading, formal presentations in a formal setting, and long days and nights spent dealing with "legalese," many lawyers forget what it is like to be creative. Some lawyers even use "creative" as a pejorative term. Creativity in the context of a closing argument can take many forms. You can and should modulate your voice or tone. Come up with an interesting and appropriate anecdote or analogy to use, which you will tether to your facts and evidence.

Your closing argument is your personal work of art and delivering it to the jury is, without doubt, the most satisfying part of the trial. With careful attention each time, you will enjoy the results.

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