TRIAL TIPS

The Preparation and Effective Delivery of a Closing Argument

By W. Ray Persons

The closing argument is counsel's final opportunity to address the jury. It is during this phase of the trial that counsel should persuade the jury to want to find for his or her client and then show the jury how to do it.

Your preparation of the closing argument started when you began working on the case, for it was at that point that you began formulating ideas for structuring a persuasive case. You refined that process throughout the pleading and discovery phase of the case, and during the entire trial you have been preparing the jury for what you plan to present in summation. The closing argument is the crowning point in the trial, and if done properly, it can be the advocate's finest hour.

In order to deliver a closing argument in the most effectual manner, one must start with an examination of the objectives of the closing argument. First, it is your opportunity to explain the significance of the evidence and to offer reasons in support of the conclusions and inferences. It is also the time to discuss credibility, the law, and the right verdict.[1]

Second, an effective closing argument presents a positive theory of the case explicitly, logically, and not defensively. The theory should be simple and understandable, and should incorporate the same theories that have been employed throughout the trial.

Third, the closing argument must not only engage the jurors intellectually, it must have emotional appeal as well.

Fourth, and perhaps most importantly, in the closing argument you must tell the jury why it should find in favor of your client.

Like all courtroom speech, the closing argument has as its primary aim that of persuasion. In order to be persuasive, the closing argument must have the following attributes[2]:

Structure. A forensic speech has structure—or as William Safire would call it, "thematic anatomy." An example of this simple organizing principle is the old adage "tell 'em what you're going to tell 'em; then tell 'em; then tell 'em what you told 'em." Structure is as essential to speech as a skeleton is to the human body. It is on the structural framework that speakers hang thoughts and ideas.

Theme. A critical ingredient. In the end, the advocate must answer in a word or sentence the question of the person who couldn't be there: "What was this case about?" Sometimes called the "proposition," it must be perceived and understood from the outset.

Purpose. The advocate speaks for good reason. She does not speak to sound off, feed her ego, or flatter or intimidate a crowd. The advocate speaks on behalf of her client for purposes of ennobling, instructing, rallying, leading, and, above all, *persuading*.

Focus. The advocate aims directly at the target and takes the jury, step by step, all the way through to the climax. John Stuart Mill defined the art of the orator: "Everything important to his purpose was said at the exact moment when he had brought the minds of his audience into the state most fitted to receive it."

Phrase. Successful advocates are phrase-makers. They enliven their arguments to help achieve conviction. They employ such terms as "if it doesn't fit, you must acquit," "safety above profit," and "do the right thing."

Pulse. The structure upon which the argument is constructed needs life. Good courtroom speeches have a beat, a changing rhythm, a sense of movement that gets the audience moving with the speaker. Here is an example from Demosthenes: "[W]hen they brought . . . suits against me—when they menaced—when they promised—when they set these miscreants like wild beasts upon me . . . ."

Delivery. The words, ideas, propositions, and themes are all effectively delivered in a manner that is appealing to listeners. The advocate puts his audience at ease and has contact with them. His belief in his case and his cause become contagious to the jury.

Preparation of the Closing Argument

A closing argument is not a spontaneous outpouring of emotion and off-the-cuff eloquence. A good closing argument requires careful and thorough planning. The successful argument requires that you have a well-thought-out theory of the case that leads to a verdict in your favor. This theory should be developed early, after you have investigated the facts but before you make any other decisions about how to try the case.

> A case theory is an account of the facts and the argument that fits them into the legal issues of the conflict in such a way that it states a compelling case for your client. In order to convince someone else of the merits of your client's position, you must first believe in the theory yourself.
>
> The theory of the case should be logical and complete. It

Published in *The Brief*, Volume 46, Number 2, Winter 2017. © 2017 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

PHOTO: ISTOCK

> should be logically based on the evidence and consistent with common sense. The more you can let the facts and common sense speak for themselves, the less you will have to resort to intricate arguments and legal technicalities, and the easier it will be for the jury to accept your theory. Your theory should be complete in that it should account for all of the evidence. Your theory should explain how the facts and the witnesses support your position and should include an explanation for unfavorable evidence.[3]

Preparation of a detailed outline or a full statement of your argument in advance of trial is the most effective method of preparing your closing. It forces you to think through each argument and each problem in advance. You must predict the most persuasive and compelling argument the opposing lawyer could present and develop a method for countering it. When you are satisfied with your argument, reduce it to a simple outline rather than run the risk of reading a narrative to the jury. This outline is not the final version of what you will actually deliver to the jury. It will be refined based on developments at trial.

Most of your closing argument can be prepared before trial. However, there always will be a few unanticipated events that occur during trial. A good working outline can be supplemented by a few notes as the trial progresses. Statements made and concerns expressed by jurors during voir dire can provide clues to points that should be emphasized in argument. Any overstatements or exaggerations made by opposing counsel in his or her opening statement can be noted. The demeanor of a witness can be highlighted. The exact words used by a witness can be written down so they can be quoted verbatim. If any evidence is unexpectedly excluded, such can be noted so that it is not inadvertently referred to in closing. And of course, the same applies to requests to charge that the court refuses to give.

The final preparation of your closing argument can be done either at a recess on the last day of trial or the night before. This is the time to make sure that you have all the materials ready—notes, exhibits, charts, and demonstratives.

The closing argument must have certain elements in order to be effective. Among these are the following:

Logical structure. Whether it is chronological, by issue, by witness, or in some other order, the closing must have a structure that makes sense.

Theory of the case. The closing argument should present the theory of your client's case in an explicit way and demonstrate why your theory most logically incorporates and explains both the contested and the undisputed facts adduced at trial.

Argue the facts. Dazzling oratory will not carry the day. Your closing argument must rely on facts in order to persuade the jury. This involves more than a simple recitation of the testimony. It requires analysis. Juries decide cases on the basis of impressions—what they think the truth is—based on the way the parties have presented the evidence. Effective trial lawyers selectively pick and emphasize the parts of, and inferences from, the evidence which, when presented as an integrated whole, creates an impression that convinces the jury that their side should win.

Use exhibits and demonstratives. Your outline should contain references to key exhibits that corroborate and

Published in *The Brief*, Volume 46, Number 2, Winter 2017. © 2017 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

TIP
A powerful closing argument weaves the facts and the law into a compelling narrative.

highlight the main points of your argument. The same holds true for demonstrative aids such as blowups, diagrams, animations, and posters.

Weave jury instructions into the argument. Closing arguments that selectively utilize instructions have a greater impact on the jury. By suggesting that the court's instructions of law, as well as the facts, support your side, a doubly effective argument can be crafted. Argue the facts; then argue that they support a particular legal principle. The key to utilizing this approach is to follow the factual argument with a recitation of the corresponding jury instruction so that the association is firmly fixed in the jury's mind.

Use analogies and stories. Analogies and stories, if short and pertinent, can be effective in defining and crystallizing an idea in the jury's mind. They must be short, because the time for arguing is limited, and pertinent, because a story told for its own sake, without making a point, is counterproductive.

Use themes. A theme, periodically woven into the argument, is an effective way to capsulate your theory of the case so the jury will remember it.

Emphasize strengths of your case. Successful arguments are those that have a positive approach and concentrate on the evidence produced at trial which affirmatively demonstrates that your party should prevail. Argue your strongest point early and refer to it once or twice in the course of the argument.

After preparing the closing argument, ask yourself these questions:

- Does the closing argument tell the jury why to find for your client?
- Does the closing argument make the jury want to find for your client?
- Does the closing argument tell the jury how to find for your client?
- Does the closing argument satisfy common sense questions the jury is likely to pose?[4]

If you can answer yes to all of the above, only then are you ready to deliver your closing argument.

Delivery of the Closing Argument

Speaking style. Perhaps the single most important factor in presenting an effective summation is the impression the lawyer makes on the jury. If the jury is turned off by your manner of delivery, you will have an uphill fight, even in a case in which all of the evidence is in your favor. Though there are many factors that will determine the impression that you make on the jury, the most important is an appearance of sincerity on your part. Above all, you must convince the jury that you believe that what you are saying is fair, right, and honest, and that you are convinced of the justice of your client's position.

One of the quickest ways for the lawyer to convince the jury of his or her insincerity is to employ an artificial manner of speech. Not many lawyers are naturally gifted orators, and any attempt to employ an unnatural manner of speaking will be spotted at once by even the most unsophisticated juror. A lawyer addressing a jury must be motivated by a desire to convince the jurors that he or she believes what he or she asks them to believe.

Jurors realize that you know more about your case than they do. A lawyer who projects sincerity can, in effect, be an unsworn witness testifying that she has made a thorough investigation of all the facts, had a full disclosure from her client, and concluded that her side of the case is the correct one.

Your final argument should be opened in a restrained and impartial manner to leave the jury with the impression of an extemporaneous presentation. Extemporaneous argument is not to be confused with an impromptu argument. Although the impromptu argument is given on the spur of the moment without any preparation, the extemporaneous argument can be well prepared and outlined, and even practiced orally before delivery. A clear, direct, and logical discussion of the case, delivered in a friendly conversational tone, has been found to be highly effective by many trial lawyers. This is not to suggest that it be a dull and emotionless discourse. When the facts appeal to the emotions, the delivery will appeal to emotion; but this is a natural reaction, and the spontaneity of an occasional emotional outpouring can be highly effective in making a lasting impression on the jurors.

The conversational style is characterized by conversing with the listeners rather than aiming direct oratorical speeches at them. By far the most important quality of the speaker employing the conversational style is to make the jurors feel that they are being spoken *with* rather than spoken *at*. People who perform at concerts, plays, and dance recitals are expected to have unusual skills and to show them off. But the trial lawyer's purpose is to communicate. Basically, he or she needs the gestures, voice inflections, and facial expressions used in everyday conversation. The primary differences between conversation and public speaking are simply that public speakers talk longer before their turn is up and that they need more time selecting, organizing, and clarifying their thoughts before they talk. The actual speaking should be the easy part.

The trial lawyer employing the conversational style is striving to make his or her statement sound more like ordinary communication than a performance. There is absolutely nothing inconsistent between the conversational style and power, conviction, and persuasion. To be eloquent, the trial lawyer does not have to wave his or her arms, shout, rant, and rave.

W. Ray Persons *is a senior litigation partner at King & Spalding, where his practice focuses on products liability, mass torts, and complex litigation. He has been lead counsel in over 80 jury trials, 90 percent of which went to verdict. He is a fellow of the International Society of Barristers, the American College of Trial Lawyers, and the Litigation Counsel of America. He may be reached at rpersons@kslaw.com. This article is based on a paper presented at the ABA Section of Litigation 2016 Professional Success Summit.*

Published in *The Brief*, Volume 46, Number 2, Winter 2017. © 2017 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

The advocate can be supremely convincing and persuasive by moving about and speaking in a conversational manner.

This is what instructor Thomas Montalbo says of the conversational style:

> The more closely your manner of speaking in public resembles the way you speak in private conversation, the more eloquent you will be. That's because you are speaking naturally, you are concentrating on the substance of whatever you are saying, and you are expressing your thoughts convincingly.
>
> Speaking conversationally doesn't mean talking monotonously. On the contrary, when people engage in conversation, their talk is lively. Their voices sparkle with change—change of pitch, change of volume, change of pace. Their voices move up and down, never stay at the same tone. Their voices range all the way from whispers to shouts. They speak fast, slowly and at in-between pace. As by changing the tempo of a musical piece, changing the rate of speaking provides their conversation with rhythmic animation.[5]

When you address the jury, it is absolutely essential to have their undivided attention. Although it is inadvisable to give the appearance of talking to any one juror or any particular group of jurors, an effective means of holding their attention is to establish eye contact with them. As you speak, you should look at the jury, not at the floor or some spot above their heads. You should also avoid giving the appearance of reading a prepared statement. If you appear to be reading a prepared text, it not only will detract from your ability to project sincerity, it also tends to distract the jury from your message.[6]

Nonverbal communication. The advocate communicates with the jury through mind, voice, and body. The moment a trial advocate rises and faces the jurors, she is sending signals about herself. In essence, she is talking to the jury with her physical person. Trial advocates tend to underestimate the significance and effect of this type of nonverbal communication.

Jim M. Purdue of the Texas Bar says the trial advocate's bodily action will do one of three things to those who listen:

1. If you use no action, or almost none, jurors will relax too much or even become drowsy. They will not pay close attention to what you say.
2. If you fidget and fumble, or if you constantly meander back and forth, the jurors will inwardly fidget and fumble with you. These actions will make some jurors outright nervous or irritated and will distract everyone from what you are saying.
3. If you use controlled and purposeful action, and enough of it, the jurors will keep aroused and alert. They will find it easier to pay attention to what you say.[7]

Studies show that the physical presence of a speaker is established in the first 10 seconds of his or her physical movement before the audience.[8] The first rule is to avoid awkward movement that distracts or disturbs. Strive for poise, graceful movement, and erect posture. A good way to accomplish an aura of poise and grace that says "preparation, confidence, and knowledge" is to be prepared in advance when your time to speak comes. Have your packet of notes carefully in position. Then, when authorized by the court, rise slowly but deliberately and approach the jury in a calm and steadfast manner. After addressing the court, *pause*. Do not blurt immediately into the presentation. Allow the jury a momentary opportunity to observe you and your countenance.

The short pause before the commencement of address is a time-honored technique of outstanding speakers and advocates of all variety. It lends itself especially well to the courtroom setting. Avoid all unnatural and distracting mannerisms. This includes pacing back and forth uncontrollably, a movement that is highly distracting to jurors. Most of the advocate's movement during his or her courtroom speech should be restricted to the upper body. This still leaves plenty of room for physical expression.

Courtroom movement involves an appreciation of the principle of controlling space. This involves not invading the jurors' or the judge's territory. A good rule to follow is to act as if you belong where you are. Apply brisk, purposeful, but effortless physical movement. It entails standing still at times, standing up straight, and keeping your hands away from your mouth and out of your pockets. It is a good idea not to shuffle, rock back and forth, or slouch or slump.

When you address the jury, it is absolutely essential to have their undivided attention.

Just as a song must be sung and a play performed, forensic speech must be spoken. The trial lawyer must deliver his or her closing statement and make it come alive. This is accomplished through the use of natural gestures.

Natural gestures are not forensic ornaments or means of dramatic effects. Spontaneous gestures are indispensable means of communicating ideas and emotions; they help to hold attention on the idea and the desired response; they may help the speaker break down restraints, relax taut muscles, overcome nervousness, intensify emotional fervor, and think more readily.

If the speaker's gestures are too copious, too self-conscious, or too abandoned, his or her movements become conspicuous. They violate the dictates of art. Nothing in the speaker's gestures should draw attention to himself or herself and thus detract attention from the ideas the speaker espouses and the response he or she seeks.

Until the trial advocate is sure of himself or herself and his or her technique, it is better to make gestures above the waist level. Gestures made below the waist tend to suggest suppression or debasement and are more difficult to perform for beginners. As experience increases, natural gestures can be added to the lower and middle planes of movement as well.

Remember that to some extent, jurors unconsciously appraise the characteristics and emotional state of lawyers by

Published in *The Brief*, Volume 46, Number 2, Winter 2017. © 2017 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

the movements of the muscles of their faces, necks, arms, and bodies. Gestures that are without motivation are fitful, aimless, and serve no purpose except to release nervous energy.

Many lawyers come to the trial bar without formal education in public speech. They should be encouraged, however, by knowing that mastery of posture, gestures, and movement can be obtained through attention to the foregoing principles, coupled with practice and experience. For the novice, it is suggested that the delivery be practiced in private until he or she acquires a "feel" of them. Only then can these nonverbal methods of communication be delivered in such a way that they appear natural and spontaneous.

"I see and I understand."
—Chinese Proverb

Use of demonstrative aids. In trial practice as in other aspects of life, a picture is worth a thousand words, and in this age where most Americans get their information via television, it is essential that the trial advocate employ visual images in addition to the spoken word. Thus, slides, videos, computer graphics, transparencies, flip charts, blowups, and diagrams should be considered for use where appropriate in delivering the closing statement.

"If you can show 'em, show 'em!"
—Melvin Belli

You can fortify your case by showing the jury how the transaction unfolded by time and date. A chronology, either blown up or projected, has proven a highly useful tool. Not only does it aid juror grasp and comprehension, but you can also use it advantageously to point out gaps and delays in the sequence during the course of argument.

Visual aids are especially advantageous, and the uses to which visual aids can be put are limited only by the advocate's imagination, judgment, and good sense.

The following is a checklist for using courtroom visuals:

1. Use simple terms and relationships.
2. If a visual does not explain something better than words, do not use it.
3. Use a minimum number of lines, rarely more than eight.
4. Show only highlights.
5. Cover only one idea per visual. Dwell on it briefly.
6. Use visuals to accentuate the central theme.
7. Keep everything large.
8. Keep visuals invisible until you need them.
9. Do not stand in front of the visual while speaking.
10. Be sure to place the visuals where the jurors can see them.[9]

Dos and don'ts. Finally, some dos and don'ts of the closing statement:

Dos

1. Prepare your closing before trial.
2. Select and decide what it is you want to emphasize.
3. Develop a theme or proposition.
4. Amplify the theme using principles of rhetoric.
5. Use vivid, image-producing language to convey your message.
6. Emphasize the strongest points of your case and eliminate the minor and insignificant.
7. Attack your opponent's greatest weaknesses.
8. Promise only that which you can deliver.
9. Focus on the weighty evidence.
10. Be clear and explicit—hug the almighty facts.

Don'ts

1. Rely upon blind inspiration.
2. Employ exaggeration.
3. Strain at the inconsequential.
4. Embrace points that are not crystal clear to the average person.
5. Use legalese, technical jargon, and unwieldy words.
6. Use the overly general, the vague, and the unspecific.

Conclusion

In sum, the key to success in delivering an effective closing statement is to begin thinking about and conceptualizing the contents and delivery of the closing from the time you are first engaged to undertake the matter. Thereafter, your preparation, however incremental the steps, should continue throughout the course of discovery, pleading, and pretrial. On the eve of trial, you should have prepared an outline of your remarks, developed a central theme, and practiced the delivery to a focus group or other audience. While this will not guarantee success, it will ensure that your client has the benefit of the most effective delivery possible. ■

Notes

1. The Litigation Manual 455 (John G. Koeltl ed., 2d ed. 1989).

2. Bertram G. Warshaw, The Trial Masters: A Handbook of Strategies and Techniques That Win Cases 148 (1984).

3. J. Alexander Tanford, The Trial Process: Law, Tactics, and Ethics 148–49 (1983).

4. Roger Haydock & John Sonsteng, Trial: Theories, Tactics, Techniques 619 (1991).

5. Thomas Montalbo, The Power of Eloquence: Magic Key to Success in Public Speaking 155 (1984).

6. Ralph C. McCullough & James L. Underwood, Civil Trial Manual 651–53 (2d ed. 1980).

7. Jim M. Perdue, Who Will Speak for the Victim? A Practical Treatise on Plaintiff's Jury Argument 54 (1989).

8. Keye Productivity Ctr., How to Make Powerful Presentations 6 (1987).

9. James M. Thomas, Speaking in the Courthouse: A Lawyer's Guide to Persuasion, Georgia ICLE (1993).

Published in *The Brief*, Volume 46, Number 2, Winter 2017. © 2017 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.