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Trials and Tribulations

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DRI Resources

Featured Articles

Preparing Your Closing Argument

by Matthew J. Smith

I. Introduction and Overview

Black's Law Dictionary defines a "Closing Argument" as:

> *The final statements by the attorneys to jury or court summarizing the evidence that they think they have established and the evidence that they think the other side has failed to establish.*

The importance of the closing argument cannot be overstated nor should it be underestimated. Judges, attorneys and most importantly jurors will tell you closing argument is probably the most anticipated and crucial point of any trial, whether civil or criminal.

In contrast to the opening statement, we clearly recognize the closing is an argument. The opening statement is intended to lay out a summary of what the case is about, what the evidence will show and what the witnesses will testify concerning. Judges will instruct, and opposing counsel who know what they are doing will object, when an attorney tries to convert an opening statement into an opening *argument*. Theclosing argument, however,is where the lawyers are truly presented the "stage" and the opportunity to do their best to compel the jury to rule in favor of their client's position in the pending litigation. How well the attorney does her or his job on closing argument may well be the deciding factor in the outcome of the verdict.

II. You Are Up Against a Very High Standard

Most trial attorneys know very well the closing argument is the "high drama" point of the trial. It is not uncommon for the normally empty benches in the courtroom to fill with attorneys and staff from each of the respective law firms, witnesses who testified in the trial and even spectators to watch the closing arguments of even "routine" jury trials.

Those of us who make our living in the courtroom are thrilled by the opportunity to present a closing argument, and it is quite literally the dream of many young lawyers and those aspiring to the practice of law to present their summation of the evidence to the waiting jury. What you may not have considered, however, is your closing argument is not being judged by the jury only in comparison to the one presented by your opposing counsel.

Although I did not realize it at the time, I was fortunate to do my undergraduate studies in radio, television and film. Little did I know how well those four years of college-level study would prepare me for the practice of trial law. Whether in a civil or criminal case, and regardless of what cautionary instructions the judge may give, the reality is the people we seat in the jury box have been indoctrinated for decades as to what a closing argument is, and how an attorney should appear, act and speak in the course of representing their client.

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jpierce@butlerpappas.com

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cbottcher@sirote.com

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In his book "When Law Goes Pop" author Richard K. Sherwin addressesthe effect of "pop" culture, and specifically television and movies, on the perception of jurors in the courtroom. One of the most dramatic examples of this is closing argument. While jurors may on some level understand the trial they are participating in is not a Hollywood set, it is virtually impossible for them to divorce in their minds the collective images instilled from years of watching television and movie portrayals of attorneys and closing arguments, and the false perceptions of reality those create. Lawyers in the electronic era may well lose a case before the jury and never fully appreciate or understand the reason was failing to live up to the jury's, albeit artificial, expectations.

While few may be fortunate enough to possess the good looks or apparent charm of a Hollywood star, that does not mean we still are not being compared to that artificial image when we stand and present our closing argument. Years ago, I tried an extremely serious bodily injury case against a very experienced and competent plaintiffs' attorney. After more than a week of jury trial, witnesses and expert testimony, a defense verdict was rendered. When I spoke to the jury, the forewoman spoke first, but was joined by every other juror in telling me one of the primary factors in reaching their decision was the fact I knew my case better, and the opposing counsel looked at his notepad too often. I won the case, but perhaps for all the wrong reasons! Sadly, I have heard similar comments in the twenty-plus years since. This is the reality we face as trial attorneys in the modern era of television, movies and now the Internet.

The unfortunate fact is you are never going to overcome the inherent misconceptions and misperceptions of the jurors. All we as trial attorneys can do is be aware of those factors and endeavor to present our closing arguments to the best of our ability, and with the level of professionalism and expertise each and every one of our clients deserve.

III. The Well-Presented Closing Argument – Connecting With the "Theme" of Your Case

For all of its high drama at the end of the trial, planning your closing argument must be a consideration from even before the trial begins. A well-presented closing argument must be seamlessly woven into the entirety of the case, literally from your jury *voir dire* questions throughopeningstatement and all of the witness testimony and evidence presented. If the jury views your closing argument as disjointed or not connected to the case they have just heard presented before them, you will not be successful in convincing the jury. They will probably be confused as to why the closing argument does not appear to tie directly to, or relate with, what they have just spent days (or even weeks) hearing in the courtroom.

The Road Map

Many attorneys develop themes or analogies they use repeatedly in trials. This has served me well for nearly twenty-five years. On opening statement, I tell the jury I want them to view my opening as a "road map." What I proceed to tell them is over the course of the trial, we will be taking a "trip" together. Although we may never leave the courtroom, I want them to picture the trial as a journey during which the witnesses who will testify and the evidence introduced will create a clear map of the case leading to the reasons why they should rule in favor of my client.

I have found the road map analogy to be very beneficial, as it is something most jurors can easily relate to. As I tell them, without a map to guide, all of us involved in the trial will simply be wandering and lost. It is important to understand not only where we are going, but also establish there is a very clearly defined path and roadway we will follow, so as to not waste their time on unnecessary "side trips."

The Photo Album

Having laid the foundation for this concept on opening statement, it then allows me to use a corollary for closing argument. At the start of my closing argument, after thanking the jury and reminding them of what I mentioned about the

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road map on opening statement, I then tell them in contrast I would like them to view my closing argument as a "photo album."

The concept of the photo album then becomes not only the analogy I use to focus the jury's attention during my closing argument, but the very method in which I deliver the closing argument and tie the evidence and witness testimony directly into a cohesive presentation.

IV. Tying the Evidence and Witness Testimony Into the Closing Argument

After laying the foundation for the jury of the closing argument being a "photo album," I remind them again of the road map from opening statement and tell them my closing argument is my opportunity to review with them the "trip" we have taken together, and why the witness testimony and evidence now supports a verdict in favor of my client.

Using my hands to symbolize the opening and the turning of the pages in the photo album, I then proceed to review the testimony of each witness in chronological order. As I "turn" each page, I remind the jury of the key points supporting my client's position which that witness testified to, whether on direct or cross examination. I will often ask them to "remember" the key point from that witness's testimony or a key piece of documentary or other evidence which was introduced through the testimony of that witness and explain why it supports a verdict in favor of my client.

To further illustrate these points, and tie the closing argument back to the trial, I will frequently order daily transcriptions of key witness testimony in whole or in part. I effectively try to use this to contrast with the opposing counsel and tell the jury, unlike the other side's attorney, I do not want to just "argue" in front of them. I want to show them the actual "picture" or evidence to prove my client's case. I will then re-read a portion of the witness's testimony, replay an excerpt of a video deposition or read the actual transcript from a discovery deposition if that transcript questioning was used to effectively cross-examine the witness in the jury trial. In like manner, I will have pre-sorted, and in the correct order, key exhibits I want to again show the jury as "photos" to remind them of crucial testimony or evidence throughout the course of the trial and which I believe they should view or read during their deliberations.

Especially giventheconstraintsof a long trial, sometimes there are witnesses I either leave out intheir entirety, or spend very little time discussing on closing argument. You do need to be cautious on this, as if a witness testified in a damaging manner to your case, you cannot simply skip over that "photograph" or the jury will hold you accountable for being less than honest. In those situations, you simply have to make whatever arguments are available to minimize or neutralize the effect of that witness's testimony on your case or, where appropriate, to attack their credibility. If a witness truly contributes nothing to the case, then be honest, tell the jury that, and move onto the next page of your "photo album" summary.

On rare occasions, I have had to also deal on closing argument with a witness who testified differently than anticipated. Obviously, if the witness's change of demeanor or testimony favored your client's position, this is a windfall you want to maximize. On those occasions, however, when a witness turned out to be less desirable for your case than anticipated, you also have to address this head-on and frankly with the jury.If you have prepared your case appropriately for trial, hopefully this will not be an issue which ever occurs, or if it does, it should occur very rarely.

Finally, I use an analogy effectively with the "photo album" which is now somewhat outdated in the era of electronic photography. To point out the deficiencies in my opposing counsel's case, I will refer to the "old days" of taking film in for developing only to get the prints back and have some turn out "blank" because of photographer or camera error.I refer to these as the "undeveloped" pictures and point to key witnesses or crucial evidence which the opposing party failed to produce in the case to show the jury. These "undeveloped"

pictures often become my strongest arguments in showing why, in conjunction with the judge's instructions on the burden of proof, the jury must decide and rule in favor of my client.

I have many jurors tell me after the trial, presenting the closing argument in this manner and going succinctly back through each witness's testimony and the corresponding key evidence was extremely beneficial to them in their deliberations. Interestingly, one of the most common feedback comments I receive is when a jury was initially split on a verdict during deliberations. I have had jurors tell me they were able to use my closing argument and the key points from testimony and corresponding exhibits to convince other members of the jury to change their position. This, too, is something we attorneys often overlook. A well-presented closing argument should be intended to win over the entirety of the jury, but that may not always be possible. If, however, your closing argument is presented well and factually based, you mightprovide the "ammunition" those jurors who are convinced by your argument need to help compel others to join in a verdict in favor of your client.

V. Some Closing Points and Suggestions

Having now presented closing arguments for twenty-five years, I realize I am no longer a novice or new attorney. I equally try, however, to view each and every closing argument with a fresh approach and the excitement of it being my first. Over the years, I have seen far too many lawyers err in a number of ways on closing argument. A good friend of mine, whose legal career spanned from being an insurance defense attorney to sitting on a State Supreme Court, once gave great advice, telling me more lawyers lose their cases by talking too much than saying too little!

Here are several factors to consider and avoid in preparing for and delivering your closing argument:

- Present the case fairly, accurately and completely honestly to the jury. As soon as you twist or distort testimony, evidence or what was said in the courtroom, the jury will lose all trust and confidence in you.
- Try the case you have, not the case you wish you had. Over the years, I have seen many attorneys present a closing argument (and for that matter, opening statement) in which they literally try to present a case which the facts, evidence and witness testimony simply does not support. Jurors will see through this quickly.
- Stick to the facts and evidence of the case, and the issues the jury has to decide. I probably tried five or six jury trials against a well-known attorney in my home state. While I may not have personally cared much for him, his personal dislike of me repeatedly and increasingly became the focus as I did more trial work against him. He never won a single case, largely because it became very obvious to the jury he was targeting me instead of advocating for his client. Stick to the facts and represent your client fully, and to the best of your ability.

We have discussed using themes, and how to tie witness testimony and evidence from the trial into closing argument. There are several other factors you should also consider in presenting a well-done closing argument.

First, find out in advancefrom the judge whether time limits are going to be placed on counsel making closing arguments, and if so, what time limitations you have to work within. Also, if you need to reserve rebuttal time, make certain you have done so at the start and preferably in the presence of the jury so they understand what you are doing and are not confused. You may have rehearsed and prepared the best closing argument possible, but if it runs an hour and you are limited to thirty minutes, the portion the jury never hears is of no value to your case or your client!

Do not hesitate to use the judge's instructions and verdict forms to help educate the jury if the judge will allow you to do so. Devote a portion of your closing argument to not only tell the jury why they should rule in your client's favor, but use the

jury instructions to point out specifically why under the law as the jury will be instructed by the judge, your client is entitled to their verdict. You also shouldtake a few moments to actually walk them through procedurally what they need to do on the jury verdict forms and, if appropriate, interrogators to rule in favor of your client. There is nothing wrong with directly asking the jury to return a verdict in favor of your client and telling them the steps they need to go through to do so.

Finally, understand the people who serve on the jury have just given you days (or even weeks) from their personal lives. Sincerely thank them for the time they have spent away fromtheir jobs and families to hear the case, and the attention they have given to the trial. We all have heard horror stories of jurors falling asleep or not paying attention, but by-and-large those who give of their time as jurors do so in an outstanding manner and they deserve our thanks and appreciation. I heard a judge not long ago tell jurors next to serving in the armed forcesthere is no higher civic calling in our country than jury duty. We should remember that, thank them and respect them for the service they give to our courts, our profession and our clients.

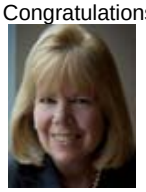
VI. Conclusion

For a trial attorney, there is nothing more thrilling than closing argument. I have equally said the time after closing argument, when the jury is deliberating, is one of the most grueling and excruciating processes as you watch the seconds click by like hours. While it is true you will not win every case, there is simply no excuse for not providing our clients the highest level of quality and service we can give as practicing trial attorneys in every case. Your closing argument is truly your opportunity to shine and to tie together all of the talent, skills, education and training you have invested in for so many years to have the privilege and honor to be a trial attorney. Go for it and do your best!

Matthew J. Smith
Smith, Rolfes and Skavdahl Company, LPA

Collecting, Preserving and Authenticating Social Media Evidence

by Claire F. Rush



Congratulations! You've found the smoking gun: the Tweet, the Facebook posting, the YouTube video or the digital photograph on a web site that irrefutably establishes that your adversary has been less than truthful. Now what? This article explores the efficacy of various methodologies for obtaining and preserving electronically stored information and provides concrete suggestions for how toget social media postings admitted into evidence.

I. Strategies for Collecting and Preserving Social Media

The collection and preservation of social media evidence should optimally start in the claims stage of all litigation. How such evidence is collected and preserved is critically important and will oftentimes determine whether or not this evidence is ultimately admissible at trial. As a general rule social media postings are obtained in one of four ways: (1) by trolling public social networking sites; (2) authorization and subpoena; (3) Court Order or; (4)expert assistance.

Self-Collection

Most lawyers collect social media postings by "surfing" the public portions of a party's social networking groups and then simply "cutting and pasting" the desired postings. Information gleaned from such sites while extraordinarily valuable may nonetheless be difficult, if not impossible, to authenticate at trial. Given the ease with which electronic information can be manipulated and distorted courts are highly skeptical of the integrity of this type of collection process and will subject evidence collected in this manner to a high degree of judicial