January 2009

Closing Argument

Francis J. Carney

Atticus Finch arguing for the life of Tom Robinson in that hostile Alabama courtroom. Clarence Darrow pleading for the lives of Loeb and Leopold. Vincent Bugliosi's devastating attack on the Manson "family." You get the point. Closing argument is the culmination of the trial lawyer's art and the moment when all of the work, all of the sweat, all our training and all of the hopes of a case come to a head. I will share my thoughts with you, for what they are worth, on this subject.

Does Closing Argument Matter?

There are those who will tell you that closing argument doesn't really matter, that the jurors have already made up their minds by that point. Then there are those who hold that closing argument can and does win or lose a case. The experts who write about this are all over the board on the importance of closing argument, but I think it does matter, and matters a lot.

I agree with Dr. Richard Crawford's take on this in his excellent book, *The Persuasion Edge,* that closing arguments can be compared to the last minute of a basketball game. If one team leads by twenty points that last minute isn't going to matter. But if the game is close, that last minute will be *all* that matters.[1] But it is also true that those who have already firmly made up their minds aren't likely to be persuaded otherwise by your impassioned closing argument. Judge Ralph Adam Fine gives a startling, but nonscientific, example from a trial practice course concerning a hypothetical employment

---

[1]Richard J. Crawford, *The Persuasion Edge: Winning Psychological Strategies and Tactics for Lawyers*, p. 161. Professional Educational Systems, 1989.

case, *Norman Rock v. U.S. Postal Service:*

> *One year, when I delivered the closing argument lecture at the Trial Advocacy Institute in Virginia, I decided to try an experiment. For five days, lawyers attending the program had heard faculty demonstrations on the Rock file. They were now going to hear closing argument on behalf of Norman Rock . . . I asked those in the group who would, at that moment, find for Rock to raise their hands. About half in the audience did. Then I had those who would find for the Postal Service raise their hands. Again, about half did.*
>
> *After the vote, Robert Weinberg, a superb lawyer with the Washington, D.C., law firm of Williams and Connolly, delivered one of the most stirring closing arguments I have heard anywhere – – either in the courtroom or on the silver screen.*
>
> *After Weinberg's incredible performance, I took another vote. The audience split as before. I then asked who had changed their minds to raise their hands. Of approximately 150 lawyers, less than five did.*
>
> *Later, I talked with some of the lawyers and asked them about Weinberg's closing argument. Those who were predisposed to Mr. Rock loved it. Those who were favoring the Postal Service thought that it was clever rhetoric, but were not persuaded. We believe what we want to believe.*[2]

David Berg perhaps best expresses the dreams and hopes of every trial lawyer:

> *By the time for closing arguments, you may think that you are far behind. You may be far behind. Whether ahead or behind, you must not ease up. A lackluster performance is proof positive of everything your opponent has contended. This is not just a pep talk. Minds can be changed, for or against you, even at the end of a long trial. So forget about being ahead or behind, and keep trying to hook jurors. Deliver an argument so logical and compelling that it can persuade your toughest critics on the jury, be they one or 12*
> *. . . Even late in the game and with the odds against you, it's never too late to win, so don't give up. "Good trial lawyers," says a trial lawyer friend, "got no quit in 'em."*[3]

I agree with both of these gentlemen. I don't think a powerful closing argument is going to fix a

---

[2]Ralph Adam Fine, THE "HOW-TO-WIN" TRIAL MANUAL, pp. 179-80 (Juris Publishing, 2d Ed. 2001).

[3]David Berg, *The Trial Lawyer - What it Takes to Win*, p. 267. ABA Litigation Section, 2006.

case that has gone poorly. Facts are stubborn things, as John Adams said, and if your case is a pig, neither you nor anyone else is likely to change it. But most cases that reach trial are not pigs, and either side might prevail. I will share with you the personal experience of serving as a "juror" in dozens of matters; that is, as an arbitrator. In some percentage of cases, I sense that I and the other arbitrators have pretty much decided where we are going to vote by the time of closing argument. But in some – perhaps a third – my mind is still wide open, at least as far as I can tell. In those cases, closing argument can and does make a critical difference.

I do think in most cases your closing argument confirms the opinions that your jurors have mostly already reached, but this is not always so. For every trial lawyer is familiar with the phenomenon of the alternate juror's opinion. Time and time again, an alternate juror, dismissed before deliberations begin, speaks with counsel and indicates a strong leaning one way. Yet the jury does just the opposite. Something *must* be happening in the jury room, whether it's prompted by closing argument or not. This brings me to the real purpose of closing argument.

What is the purpose of closing argument?

Judge Herb Stern hit it on the head when he said that final argument does not take place in the courtroom; it takes place in the jury room.[4] Some of the jurors (one hopes) are strongly in favor of your case, some are opposed, and most may be undecided. The **key** purpose of closing argument, then, is to give your partisans tools with which to persuade those who are not convinced. David Ball calls this "arming" your jurors, and is notably outspoken about it:

---

[4]Herbert J. Stern, *Trying Cases to Win (Vol 4),* p. 29. Wiley Law Publications, 1995.

Only rarely does a juror change his mind during closing, or even move from undecided to one side or the other. That means the real purpose of closing is not to change minds. In fact, your vehement arguments are just as likely to harden some jurors against you.

The goal that will actually do some good, and that you can achieve, is to arm and motivate your favorable jurors to argue on your behalf in deliberations. How well you do this controls the outcome, including verdict size, of most cases.[5]

Although not a trial lawyer, but a retired drama professor and jury consultant, David Ball is an astute student of the trial process and a leader in the "new wave" of trial advocacy teachers. His advice is largely based on actual interviews with jurors, so I tend to find it more persuasive than some of the others. I strongly recommend that you read his book on damages or attend one of his seminars for detailed information and demonstrations on how to best "arm" your jurors.

David suggests that you see the jury as groups of three: those that disagree with you, those that agree with you, and the undecided. In your closing argument, your goal is to talk to all three groups. Try not anger the "disagreers" by mocking their views, but rather attempt to open them up without pushing them farther away. As to the others, give them tools to hold their own in the debates that are sure to occur in the jury room. This is not new information, although David Ball puts it in the clearest terms. Here's how the technique might work in the *Gulch v. Marvel* case:

Plaintiffs' lawyer:

When you go back to the jury room for deliberations, someone might ask you,'but didn't Dr. Marvel do his best, and why should we hold him responsible if he did his best?' To that person, you should say that the case is not about Dr. Marvel doing his best. It is about meeting the standard of care, whether or not to he did his best. The instruction given to you by the court [showing] *says nothing about doing his best as being an excuse for substandard care.*

---

[5]David Ball, *David Ball on Damages: A Plaintiff's Attorney's Guide for Personal Injury and Wrongful Death Cases (1st Ed.),* p. 103. NITA, 2001. (A second edition is now available).

Defense lawyer:

One might ask, 'doesn't the fact that Almira Gulch got rabies and died prove that there was a screw up?' The reply to that is that in medicine and in life, bad things happen without anyone doing anything wrong. The instruction given to you by the court [showing], *which you have taken an oath to follow, says that a doctor can only be liable if he committed medical malpractice. It says nothing about a bad result equaling negligence. If we were to hold every doctor liable for every bad result, without proof of negligence, then we might as well shut down every hospital and clinic in the country.*

This then is the real purpose of closing argument: not to engage in an hour-long emotional rant about why you are entitled to win, but to present logical arguments that friendly jurors can use to argue your case for you in the jury room. Now here's how to do this:

What to do in the closing argument.

1. **Start big, with a short and powerful paragraph or two**.

It is traditional for lawyers to start their closing arguments by thanking the jury for their service. Most "experts" call this a scandalous waste of time, while a minority find it to be appropriate.[6] I don't find it to be all that harmful, and is probably just simple courtesy, as long as it doesn't go on too far. My own tendency is to skip the ritual thankings, and get right into a one paragraph encapsulation of the case, and why my side should win:

Defense lawyer:

I told you at the start of this case that the death of Almira Gulch was an unfortunate human tragedy, but not the result of any negligence by Dr. Morgan Marvel. Now, after two weeks of testimony, and despite the strenuous efforts of the families most able attorneys, what I told you then has proven to be true: all we have heard is the testimony of one out-of-state doctor of dubious credentials, acting with the benefit of hindsight, as the sum of the evidence that Dr. Marvel committed medical malpractice. That is not

---

[6] Read the humorous discussion in Judge Stern's book on closing argument at pp. 62-63.

nearly enough, and that is why again I'm going to ask you to do the appropriate thing and reject this unfair and unsupported claim.

Plaintiffs' lawyer:

Almira Gulch died an agonizing death and left her devoted sisters alone. This was an unnecessary death, and I think everyone in this courtroom now knows it. Dr. Morgan Marvel did not think to take the simple steps to treat her properly; perhaps he was too busy, perhaps he was distracted, perhaps he was just not thinking. It really doesn't matter. What is clear is that he did not do what any careful doctor would have done. We are here to hold him accountable for this, and we are here to speak for the standard of health care you deserve in this county. The only way we can do that is by holding Dr. Marvel answerable in damages for the loss this family has suffered.

Do **not** waste the start of your closing argument by explaining what a closing argument is to the jury (they already know that) and surely do not tell them what you're going to say is not evidence (and therefore you shouldn't be believed).

2. **Tell Them What You Had to Prove, and How You Did It**.

Probably the worst form of closing argument is that where the attorney takes the jury through what each witness said in chronological order in excruciating detail. Never do this. Tell the jury what you had to prove (as a plaintiff) and how you proved it, issue by issue. On the defense, take the opposite tack – explain what the plaintiff needed to prove, and how it failed to do so. And don't take the jury through each of the exhibits either. In any trial, there are only a few key points of testimony from each witness and only a half dozen exhibits that really matter. Focus on these and ignore the rest.

3. **Don't Read It**.

I once second-chaired a trial in my early days with a senior partner in the firm, a respected former jurist. He read his closing argument from the lectern. While his words were sweet and well thought out, I was impressed with how much of the force of the speech was lost by reading it. And I

think that is a universal experience – words that are read have little of the power and persuasiveness of words that are spoken off the cuff. While you may write out your closing argument as an exercise, never read it, and never bring that written version to court. If it's there, you will use it. Use only the most sparing of notes, and get out from behind that lectern.

How exactly does one get by without reading? Well certainly not by memorizing; that's nearly impossible and equally unimpressive. Most of us use some sort of brief outline notes, and I have demonstrated earlier in the seminar the technique of using the flipchart as a mnemonic device to keep you on track without notes. In advance, simply write a brief note on a flip page about the issue or witness you want to discuss, and then use it as your visible "note" in your closing argument, writing down a few more keywords on the chart page as they occur to you.

Eye contact is crucial. This is one reason I think reading is so unimpressive, beyond the fact that one wonders about your belief in your case if you have to read your comments. When you read you inevitably lose eye contact, fatal to good communication. The same can happen with computer presentations, and this is one reason I have gotten away from using them in jury arguments. Stand at a comfortable distance from the jury box, not infringing their space, but close enough to make good eye contact with the jurors. There's no harm in looking away to refer to your chart or point to an exhibit, as long as you come back to eye contact. (And please, not the same ones each time.)

4. **Slow down**.

Most non-practiced public speakers speak too quickly in front of audiences. Please slow down, and speak as if it sounds to you that you are moving a little bit slowly. As an arbitrator, I find it sometimes difficult to follow the arguments of counsel, because things take some time to sink in. So

slow down.

5. **Arm Your Jurors**.

As discussed above, the primary purpose of closing argument is to arm the favorable jurors for the coming debates in the jury room. So tell them that they are going to be asked to render a verdict, and that you want to give them some tools. Here's another example:

> *If someone were to tell you, for example, that Dr. Marvel didn't intend to hurt Almira Gulch you should say, but the case is not about intent. It is about whether he acted as a reasonable physician would have. Nobody is saying that Dr. Marvel intended to hurt Almira Gulch. That's simply not relevant, and it is nowhere in the instructions given to you by the judge.*

6. **Use Visuals, Exhibits, and the Special Verdict**.

It is surprising to see how much effort attorneys put into getting exhibits into evidence and how little effort they put into explaining the importance of exhibits in closing argument. Take the half dozen key exhibits and blow them up, mark them up, and explain to the jury why they matter. Throughout your closing, mix up your words with demonstrative exhibits, charts, and the occasional computer slide if desired. And every plaintiff's lawyer should use a blowup of the special verdict, and walk through it with the jury, explaining it and filling in the blanks.

7. **Use the Words of the Witnesses**.

Few things are as powerful as the actual words of the witnesses, especially your opponent's witnesses. You will probably not have a daily transcript of the trial. However, there is nothing to prevent you from asking the court reporter to transcribe key testimony, even just a page or two. If the proceedings have no court reporter, get the daily DVD and have the relevant piece transcribed. If it's significant enough, I might even play the DVD itself back to the jury to remind them of exactly what was

said.

8. **Deal With the Warts**.

Every case has warts, and you need to forthrightly recognize yours before your opponent gets the chance. And you need to be honest about it – I have repeatedly emphasized in this seminar the power of simple honesty. For example, if your plaintiff was guilty of some comparative fault, don't evade it, deny it, or hide from it. Bring it right out and deal with it:

> *They say that Almira Gulch was herself at fault and was responsible for her own death. You know what? To some extent, we agree – she should have done some things differently. But please remember this: she was a layperson with no medical training. Dr. Marvel has many years of training and experience and 10 times as much experience in this area as Almira. So who should bear the brunt of responsibility in the case of an obvious medical error? The patient, with no medical training, or a doctor with years of training and experience. 10% seems about the limit for which Almira should be responsible, given that 90% or more of the knowledge belongs to Dr. Marvel.*

By the way, "giving" something to your opponent where you can (or where you must) is an excellent way of bolstering your credibility.

9. **Do Not Attack Opposing Counsel**.

Sometimes they really deserve it, and it's hard to hold back, but you have to hold back, and not attack jerks on the other side. Believe me, the judge and the jury will know who they are. I know it's tough, but don't get down in the mud to wrestle that pig. The pig will have a good time and you will come out filthy. Take the high road – it's the right thing to do, and it works.

10. **Deal With the Scary Things Under the Bed -- If You Can**.

All of us who try cases know that juries sometimes decide cases on things that really shouldn't be considered by them. Here are some examples:

•These bills will all be covered by medical insurance anyway.

• There are too many lawsuits and this will only raise our insurance rates.

•What good will money do now that she is dead?

•Won't this force Dr. Marvel out of business?

• This plaintiff has really been injured. Isn't that what the defendant has insurance for?

To the extent that you ethically can do so, you need to address these "hidden" issues. I might, therefore, put forth something like this:

> *Now back in the jury room, someone might ask you, 'what good will damages do now that Ms. Gulch is dead?' I suggest that you need to pay attention to not only what the instructions say, but what they do* ***not*** *say. This instruction given to you by Judge McVey says that you must award compensation to the heirs of Almira Gulch if you find fault by Dr. Marvel. But nowhere does it or any other instruction say that you can ignore this and award damage because they won't do any good.*
>
> *In fact, you have taken an oath to follow the law as given to you by the judge, just as the judge and I and opposing counsel have also taken oaths. So if someone were to suggest to you that damages should not be awarded because they would do no good, you might ask that person to remember their oath to follow the law. Because the net effect of not following the law is that you will be saying that a doctor's misconduct doesn't matter, and that it's OK to practice negligent medicine, as long as there's not a husband or children left behind.*

You can probably talk about the fact that a verdict against Dr. Marvel will not affect his license, but I doubt any judge is going to let you address the hidden issue of a feared rise in insurance rates or similar hot-button issues.

11. **As a Plaintiff, Deal With the Burden of Proof**.

I think it is critical for a plaintiff to deal with the burden of proof. Many jurors seem to think that negligence, especially as to a physician defendant, must be proved with near certainty, or beyond a

reasonable doubt. You need to explain to them that this is not so, using the relevant instruction. While the old metaphor of the scales with a feather is now quite corny, it works. On the defense side, I always stressed that things are complicated, but the plaintiff has the burden of proof, and that if on any issue the jury could go either way, then that meant that the decision had to be for the defense.

In regard to the burden of proof, David Ball emphasizes that a plaintiff's attorney should address those jurors who are uncertain. He recommends telling them in closing argument that "*if anyone tells you they're not certain, you tell them that's fine. We don't need to be certain. That's not the standard. All we need to be is more likely than not. That's all it is, and here's the instruction that says so.*"

12. **Use the Court's Instructions**.

As you can see from what I've already said, I believe it is important to blow up and use the court's instructions in your closing argument.[7] Not all of them – just the four or five that really matter, such as the definition of medical malpractice, the burden of proof, damages, and one or two others. Instructions matter because they are the words of the person most trusted in the courtroom – the judge on the bench. So use that most trusted person's words to bolster your arguments.

13. **Don't Chase That Tail**.

Argue your own case, and don't get trapped just responding to arguments of your opponent. This is particularly applicable to a defendant – make the closing argument you want to make, and don't merely respond to what you just heard from plaintiff's counsel. Always make your own best case first

---

[7]U.R.Civ.P. 51(g) provides that summation is given after the jury has been instructed on the law by the court; the federal practice is just the opposite.

before responding to the arguments of your opponents. Yes, surely address those, but never allow yourself to be thrown off track by chasing your opponent's argument. This also goes for plaintiffs in the rebuttal closing.

14. **Highlight Misstatements and Broken Promises**.

One of the more enjoyable things in closing argument is catching your opponent in a misstatement or broken promise from opening remarks. *Do you remember that he told you this and they promise that? Where was that evidence?* I need say no more.

15. **Be Plain and Be Yourself**.

You need to be yourself and find your own voice. A tiresome platitude, but true. You can't be Gerry Spence, nor should you try to be. The days of flowerly oratory are long gone. That doesn't mean that passion and emotion have no place in today's closing arguments, but that they need to flow from logic and facts. Using legalisms and excessive quotations from literature is generally unproductive. Talk plainly but professionally, be as brief as can be, keeping in mind that the time needed is always nearly less than you think.

16. **Inoculate**.

You must learn to "inoculate" the jurors from what is coming next. Usually, we think of this in the context of the defense counsel, who only gets to speak once, while plaintiff's counsel gets to follow up with a rebuttal argument:

> *Now, my time is finished and I need to sit down. You will next hear again from plaintiff's counsel. I don't get to respond to what he may say. If you hear anything new, I hope that you will consider that I will not have a chance to respond. You might even ask yourselves why those things were not raised before. But new or not, think to yourselves what I might say in response to these arguments, and I'll trust in your judgment.*

17. **Argue Damages Specifically (and Big) for the Plaintiff**.

Obviously, plaintiff's counsel must argue damages. The controversy comes over how much to ask for. In former days, counsel were not allowed to ask a specific sum of general damages, but that is now no longer the rule. Some leave the question of the amount of compensatory damages to the jury's discretion; others propose a specific amount. I tend to think you should leave the amount of compensatory damages blank on the special verdict form, but give the jury a liberal range of figures (more than you expect to get), and explain where they come from. David Ball's book on damages gives some excellent examples on how to do this.

18. **If You Represent the Defense, Address General Damages**.

The former practice was for defense counsel not to general damages amounts, the thinking being that proposing any number would be validating the right to damages at all, or putting a floor on the verdict. Most now disagree with that, and I think it's a mistake to allow a plaintiff to propose a damage number and the defense say nothing in response. After all, the jury knows nothing about what cases are worth, and they are only familiar with the huge verdicts reported in the media. If one professional person stands before them and says that a case is worth a million dollars, and the opponent – assumed to be equally knowledgeable about such things – says nothing, some jurors might assume that the million-dollar figure is closer to reality. So as a defense counsel, I would generally tell a jury that I don't think the plaintiff is entitled to anything, but that if they were inclined to award damages, a much lesser amount would be reasonable compensation, and take the time to explain why.

19. **End Strongly, Not With a Whimper**.

There is no drama or power in counsel who finishes closing argument by fumbling around with his papers, looking to his associate or his client to see if there is anything further to add, and ending like a balloon deflating. Please don't do this; the time to talk to your colleagues and your client is long past.

Have a powerful closing paragraph prepared, and use it:

You have the power to hold this doctor accountable; if you do not, and if your judgment does not reflect that he has been found to be unreasonable, he will escape all responsibility. Dr. Marvel ignored his responsibility then, Dr. Marvel ignored his responsibility in this trial, and he wants you to ignore your responsibility now. The Gulch family never gets another chance to recover for the death of Almira. You are their only chance for justice. We leave it in your wise hands.

*****

Who are you going to believe: the plaintiff and his hired expert, or the medical authorities whose statements were not made for the purposes of this lawsuit, but for the entire medical profession, in the interests of the advancement of medicine? There you have it. If you think that plaintiffs' experts are right, you bring in a verdict in their favor and thereby announce that you put your stamp of approval on second-guessing. If not, then return the only proper verdict -- one for Dr. Marvel.

Be yourself, and don't overdo it. Gerry Spence's routine ending would seem mawkish and cloying in coming from the mouth of anyone else*:*

Before I leave you I want to share with you a story I tell in nearly every case. It's about transferring the responsibility of the case from us, on behalf of little Polly and her parents, to you, the jury.

It's a story of a wise old man and a smart-aleck boy who wanted to show up the wise old man as a fool.

One day this boy caught a small bird in the forest. The boy had a plan. He brought the bird, cupped between his hands, to the old man. His plan was to say, "Old man, what do I have in my hands?" to which the old man would answer, "You have a bird, my son." Then the boy would say, "Old man, is the bird alive or is it dead?" If the old man said the

bird was dead, the boy would open his hands and the bird would fly freely back to the forest. But if the old man said the bird was alive, then the boy would crush the little bird, and crush it, and crush it until it was dead.

So the smart-aleck boy sauntered up to the old man and said, "Old man, what do I have in my hands?" And the old man said, "You have a bird, my son." Then the boy said with a malevolent grin, "Old man, is the bird alive or is it dead?"

And the old man, with sad eyes, said, "The bird is in your hands, my son."

And so, ladies and gentlemen of the jury, "the case of little Polly is in yours."

The same advice goes for plaintiffs' rebuttal argument. This is a powerful opportunity to get the last word in. Don't waste it by merely going over and rebutting what the defense said. Prepare a strong and final appeal for your case. You can't, of course, sandbag and bring up new things, but you can reach down and have a prepared, but emotional, final plea for justice. Save one nugget for this opportunity.

Preparing for Closing Argument.

Those that recommend fully preparing your closing argument before trial are out of their minds (in my unbiased opinion). There are far too many things that change and come up during a trial. That's not to say I don't have a general outline on what I will say in closing, but I surely do not come up with all the details before trial. You will find that most of your closing arguments won't be finished until late in the night, the evening before the argument is to be given, in a state of total exhaustion.

One thing I have found helpful is to keep a folder in my materials of thoughts for closing argument. During the trial, I will be constantly writing notes to myself on a 4 x 6 pad, thoughts for closing argument, and dropping them into that folder. In the evening, I will type them into my closing argument outline. These include things such as valuable quotes from the witnesses, concessions made,

and all the little thoughts that might be lost if not written down in the helter-skelter of a trial.

FJC