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It's your closing argument – Argue, don't summarize!

Closing argument may not be the most important part of the case, but it is certainly the most fun for the trial lawyer. It gives the lawyer an opportunity to address the jury and attempt to persuade them to return the verdict in his or her client's favor.

Argue, don't summarize

Final argument is sometimes referred to as "summation" because it is the lawyer's chance to sum up and tie together all those bits and pieces of testimony, facts, document excerpts and other evidence that the jury has seen and heard throughout the trial. In a complex products-liability trial involving technical or scientific data, such a summation is important, but you should never fall into the trap of merely providing a summation to the jury.

It is also called a "closing *argument*" because it is also your only chance to argue your case. Instead of summing it up, I like to take the key facts that have been proven during trial and use those to *argue* my case. In the process, you are also able to diffuse the defendant's main arguments. It is important that the jurors are ready to accept your logic on liability and damages and the reasonableness of the amount you seek. Jurors cannot do this unless they are truly convinced that the defendant is at fault.

What is your perspective?

In preparing and giving a closing argument in a products-liability case, it is important that you consider and address the jury's perspective and point of view about the issues arising from your case. Even when the facts are objective, concrete and certain, and the law is without dispute, neither side is halfway home until the values of the community become part of the underlying themes of the arguments. The defendant manufacturer will insinuate that the competitive system of free enterprise in a troubled economy cannot survive the experience of runaway million-dollar-verdicts. The plaintiff takes on the mantle for the consumer and advocates for safer products and corporate responsibility in an era marked by unchecked corporate greed.

It is important to invoke on behalf of your client each juror's own code of right and wrong. Your argument must therefore not only be interesting, but it must also *involve and motivate* the jury. You must focus their attention to the facts in such a way that you will persuade the jurors to make their own declaration of conscience to rectify the situation, and to do the right thing.

Involve and motivate the jury

Your client is an unique human being, with spirit and personality, and it is your job as your client's advocate to compel the jury to see your client as such and *not* as a mere statistic or as "the plaintiff." Many jurors are people who have never had an opportunity to make a decision involving or affecting another person's life. You must persuade them that their verdict is an opportunity to do something noble, important and hugely significant. *This is the truth*. Involve your jurors in this crusade from the beginning of the case to the very end by making the case interesting and compelling to them. Do not let the trial, and especially the argument, become so dull and unimportant to them that they end up deciding the case based on which lawyer irritated them the least.

In a products-liability case, you must make the jury realize that they are a group of people brought together for the business of doing justice. This is not always an easy task. Initially, they will believe that they are being forced into duty to render a verdict on a conflict in which they are not involved and involving people whom they do not know. They are taken from their own businesses and lives, which are both disrupted and inconvenienced. You must change this perception. You must involve them, and you must make them feel as if they *do* know and identify with your client by the end of the case. You must convey to them that your client, much like each of them, is fragile and suffers from disillusion, self-doubt, melancholy and embarrassment.

Many times, the intelligence of the jurors is underestimated, and lawyers speak down to them. This, I believe, is a mistake. If you speak to the jury at the highest level of which you are capable, they will reach up to grab the content of your thoughts. Motivate the jurors to appreciate that what they are being asked to do is so important that it cannot be relegated to a computer or a machine. Machines cannot feel or suffer or dream or hope. The jurors must realize that only with these capabilities can they decide the conflict before them.

Preparing and giving the closing argument

There are numerous books, articles, and seminars devoted to the fundamental requirements of an effective closing argument, and these well known principles need not be repeated here. The following are some suggestions which I have found helpful and which you should consider when preparing and giving your closing argument in a products-liability case.

• The use of technology

In our fast-paced society and due to the nature of the high-speed technology now available in almost every household, perception has become reality. Today's jurors, after seeing numerous famous trials or fictionalized shows about trial lawyers on television, *expect* to see technology in the courtroom. It is now esti-

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mated that nearly 50 percent of your next jury could be "Gen X" (born in 1966-1981) or "Net Gen" (born in 1982 or after) jurors. These jurors spend the majority of their days surfing the Net and using multiple gadgets designed to give them instant access to information and entertainment. Keeping these types of jurors entertained and interested during a lengthy and detailed closing argument in a products-liability case can be challenging.

To keep up with this technology-based society, there are now numerous presentation programs available for trial lawyers to use during closing arguments. Trial Director and Sanctions have become relatively standard in courtrooms to display, enlarge, and highlight documents or to play snippets of videotaped depositions or other types of videos. Some attorneys use PowerPoint™ to organize and display key points of their arguments. I prefer to use Apple's Keynote program for my closing arguments because of its unique ability to easily display documents, photographs and movies with three-dimensional transitions. These programs are not expensive, and an effective presentation can easily be put together by a lawyer without any technical assistance.

The use of these programs makes it possible for you to organize your thoughts, exhibits and arguments in a presentation so that you will be able to make your closing argument without relying on a single note. It is important to remember, however, that you must force yourself to maintain eye contact with the jurors. You cannot merely read the words on the computer screen and neglect your jury. If you choose to use these programs, you must be able to still connect with the jurors with passion and emotion. Remember, you, and *not* the computer, must persuade the jury.

I have seen and heard very effective closing arguments by very skilled trial lawyers who never use any type of technology in the courtroom, but instead, rely on their passion and emotion to excite and motivate the jurors. This is a skill that you either have or you do not. The longer and more detailed the closing argument, the harder it is for the lawyer to maintain such passion or stimulate interest in the jurors. Sometimes, effective graphics on slides can impassion both the lawyer and the jurors. If you can effectively combine both technology and passion, you will have a winning combination that will make any closing argument effective.

There are numerous helpful guides and books that can assist you in using these types of programs effectively to send a motivating message. One of them is Beyond Bullet Points by Cliff Atkinson, which advocates the elimination of boring and standard bullet points now seen by almost every juror in school, at work, or during any type of meeting. Atkinson believes that bullet points *kill* presentations and make information harder, and not easier, to understand. Instead, Atkinson suggests the use of story-telling through words and images without the use of a single bullet. Each slide contains a single thought coupled with a memorable, creative, and inspiring graphic to tell a part of the story. Numerous trial attorneys throughout the country, including myself, have grasped this concept and have won very significant verdicts. You must find and be comfortable with the method that best suits your personality and skills, and then use that method effectively to motivate your jury.

•The use of jury instructions

During the closing argument, it is helpful and effective to discuss with and show to the jurors the basic principles of law that they must apply to the facts of the case in order to reach their verdict. Prior to getting into a discussion of the specific law, I like to discuss the burden of proof. The burden of proof might be easily understood by lawyers, but some jurors have difficulty with the concept. Other jurors are convinced that the only standard is the criminal standard of "beyond a reasonable doubt" because they have heard it so many times on their favorite television shows. You must be able to convey to the jury that in a civil case, the plaintiff need only prove his or her case by a mere preponderance of the evidence. I usually use the scales of justice and show a slight tilting of the scale, or even a feather placed on the scale, to demonstrate this concept. It is important that you always address the burden of proof and dissuade any juror from any impression they might have that the burden of proof is something greater than a mere preponderance of the evidence.

Before discussing the law itself for the jurors, I remind them that in life, whatever we do imposes certain obligations and responsibilities, and the same is true in the lawsuit before them. The conduct of the parties imposes obligations and responsibilities as set forth in the law. I try to explain to the jury why the law is not only correct, but also morally sound. I then tell the jurors that it is only right and proper for the plaintiff to recover under the law for a debt that was created and owed by the defendant manufacturer.

Product-liability jury instructions can be confusing and they must be explained and shown to the jury. I find it helpful to display the jury instructions to the jurors and highlight significant parts of such instructions. I thereafter display and review the exhibits and evidence that corresponds with each part of the instructions, and that supports the plaintiff's claims. As you go through each piece of evidence, you can reason with the jury why that piece of evidence supports your contention that the product is defective. By doing so, you will empower the jurors leaning your way and give them the ammunition needed to persuade other jurors to return a verdict in your favor.

•The use of exhibits

Rarely will a lawyer be able to use all the exhibits that have been introduced in the trial during final argument. Trying to do so will overload, confuse and bore the jury. It is important to pick out the *key exhibits* and highlight the portions which support your case. Whenever displaying documents, you must highlight the key excerpts of the document that will assist the jurors in deliberating on

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the case. It is also helpful to identify the specific trial exhibits by exhibit number so that the jurors can make notes and quickly go to or ask for those exhibits during the deliberation process.

•The use of trial testimony

Using and displaying pertinent portions of the testimony of witnesses during the trial can be very effective during your closing argument. It is very easy to get daily transcripts of the trial, and throughout the trial you should be reviewing such transcripts and highlighting those portions you want to use during your closing argument. If you do not want to order daily transcripts for the entire trial, you can always order the transcripts for specific witnesses. When showing such transcripts to the jury, you should explain that the court reporter prepared a transcript each day of the testimony of the witnesses. Whenever using quotations from such testimony, you should show the page and line of the transcript from which such quotations were found so that the jury knows that the quotations are from the official court trial transcript.

•The use of defense counsel's opening statement

When defense counsel makes his or her *opening statement*, be sure to listen carefully and note whenever they make any claims which you know they will not be able to prove. If and when that occurs, have the opening statement transcribed so that you can use and show portions of it during your closing argument. During my argument, I show the jurors what the plaintiff proved in the case, and I then transition into an area entitled, "What Defendants Told You They Would Prove." During this portion of my closing argument, I display each portion of the transcript of the defense counsel's opening statement that was not proved, and I show the jurors how the defense counsel did not prove what they promised to prove.

•The use of defense contentions

I have found it very effective to devote an entire section of my closing argument to an area I call "Defense Contentions," in which I go through each of the contentions and defenses that I know will be made by defense counsel during his or her closing arguments. This is often referred to as "reverse theming," and it can be very effective in casting doubt on defense counsel's closing argument before he or she even makes it out of the chair. You can effectively diffuse each defense in your final argument, and when defense counsel addresses these defenses during his or her closing argument, the jury will have already heard and considered your responses. Obviously you should not wait until final argument to address these defenses, as they should be evaluated during the discovery process and addressed in your opening statement and throughout the trial.

•The use of the special verdict form

Most products-liability trials will involve the use of extensive special verdict forms. These special verdict forms can be confusing even to the most skilled lawyers. It is very important, therefore, for you to review and display each question on the special verdict form during your closing argument and explain each portion to the jurors. The jurors must understand which questions they must answer in order for the plaintiff to prevail. On occasion, jurors have answered the special verdict form incorrectly and mistakenly assumed they had returned a plaintiff's verdict when, in fact, they had found for the defendant because they were confused by the form. It is very important that you walk the jurors through the verdict form and explain each and every question so that there will be no confusion when they begin deliberations. I usually show them where and how to answer each question by placing an "x" where I want them to place it when they render the verdict.

Conclusion

Practice makes perfect. Make sure you practice before you stand up at trial to give the closing argument. Give your closing argument to your family, friends, or even the mirror. If necessary, videotape it and watch your closing argument. This preparation and practice will give you confidence when it is time to make that final argument. Your final argument will improve and get better each and every time you give it. And when it is time to give your closing argument, don't forget to maintain the emotion and passion you have shown throughout the trial.

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