

# 13 Closing Argument: Art of Argument

*"I've always considered final summation the most important part of the trial for the lawyer. It's the climax of the case, where the lawyer has his last and best opportunity to convince the jury of the rightness of his cause."*

Vincent Bugliosi. *Outrage: The Five Reasons Why O.J. Simpson Got Away with Murder* (Norton 1997)

*"Are you kidding? Shelly Kates could convince a jury that Jeffrey Dahmer had an eating disorder."*

Jack McCoy, portrayed by Sam Waterston in *Law and Order*, "Paranoia," Season 6, Episode 6 (Nov. 15, 1995)

*"All through the trial, it was the feeling that jurors number seven and number eleven were against Darrow. But when the accused attorney concluded his speech, the two men were openly weeping, as was everybody else in the courtroom including the judge."*

*"The jury was out thirty-four minutes. They had been ready to bring in a 'not guilty' verdict from the moment they went into deliberation. They took three ballots however—as one juror explained—so that no one would claim they had acted in 'undue haste.'"*

Clarence Darrow, *Attorney for the Damned: Clarence Darrow in the Courtroom* (Arthur Weinberg ed., U. Chi. Press 1989)

## I. OVERVIEW

Closing argument is your final opportunity to convince the jury to decide in your client's behalf. This chapter explains the art of argument so you will know how to take full advantage of this opportunity. We discuss what jury instructions and evidence to talk about in your argument. Specifically,

among other argument skills, you will learn how to argue persuasively by employing proven model arguments, argument structures that keep the jury's attention, appeals to the jury (logical, ethical, and emotional), argument visuals, and rhetorical devices.

Closing argument can be planned and delivered in a wider variety of ways than any other part of trial. This diversity stems from the latitude the law permits counsel in presenting closing argument and the unique nature of each attorney's personality as well as analytical and rhetorical abilities. However, the strategies, principles, and practices presented in this chapter are adaptable by every advocate, and they are the keys to delivering a compelling closing.

## II. PLANNING CLOSING ARGUMENT

### A. Preparation

Preparation of the content of your closing argument is a fundamental ongoing process beginning when you first come in contact with the case until you deliver your closing. Even so, there are three distinct points in time when you will concentrate on preparing the content of your closing argument: early in pretrial, as trial approaches, and during trial.

#### ➤ Three Stages

##### *Early in Pretrial—Closing as a Planning Tool*

The first time you will focus on preparing your closing argument is early in the pretrial stage. This begins when you first come in contact with the case, which may be either reading about it in the newspaper or seeing something on television, initially meeting with your client, or receiving the case file. During this early stage, you can produce an outline of ideas for your closing argument. This obviously requires a review of the available legal and factual information of the case. This initial, tentative closing argument can then be your roadmap for organizing further investigation, requests for discovery, cross-examination, and so on.

##### *As Trial Approaches*

Drafting and refining your closing argument is a continuous process. However, it becomes more focused as trial approaches. At this time, you will have a fairly solid understanding of the evidence that will be offered in trial. Therefore, your draft of closing argument will include what you think that evidence is and your proposed jury instructions. The relationship between

proposing jury instructions and drafting closing argument is a symbiotic one. Your jury instructions will provide guidance on the law and the facts you will include in your argument. Likewise, your closing argument provides guidance for determining which jury instructions best express your case theory and theme because you will interpret those instructions for the jurors in your closing argument.

To illustrate how trial counsel drafts closing argument at this stage, consider the *Hill Moveit Personal Injury* case from the plaintiff Darcy Rutherford's perspective. Review page 56.

As Ms. Rutherford's attorney, your legal theory against *Hill Moveit* continues to be what it was when you filed the complaint: product liability imposing strict liability for unsafe construction and design because of the trailer's open construction and lack of tie-downs and failure to provide adequate warnings of unsafe conditions. You will draft your argument using this legal theory as expressed in your proposed jury instructions, your factual theory, the evidence that you intend to produce at trial through exhibits and testimony, and your theme. Your final draft of closing will also meet the other side's case theory as well as attacks on your own case theory, which will require you to deal with case weaknesses.

#### *During Trial*

During the third stage for preparing closing argument, the trial stage, you will listen to the testimony and view the exhibits and then make decisions, in light of the evidence, about whether to add to, delete, or refine your closing argument. Final touches to the closing, such as adding quotes from a witness's testimony or a sudden inspiration for a strong analogy or common life experience that will make one of your points, can be made during trial. For example, as plaintiff's counsel you observe that the defense collision reconstruction expert witness opined that Darcy Rutherford's car was following too closely to the utility trailer. You conclude that the expert was evasive and argumentative during cross-examination, and this might cause you to revise your closing to dwell on the court's credibility instruction and discuss the expert's demeanor while testifying, his reticence, and the implausibility of his testimony.

#### ➤ Incorporating Ideas

As you amass information and ideas that you may eventually blend into your closing, you need to record and organize that information so it will be accessible to you when you draft your argument. To accomplish this, you should maintain a closing argument file folder or a section of your trial notebook or a computer folder or some other storage place where you can store ideas and notes for closing argument. Whenever you have a thought or observation for

closing argument, place a note concerning it in your storage place. Brilliant ideas for closing argument will come to you in the night. Write the thought down on a tablet that you keep by your bedside. In the morning, transfer the notes to your repository, provided you can make sense out of your sleepless scribbling. Especially during trial, listen for words and phrases used by witnesses that ring true and support or generate a new argument. These are the gems that should be saved for inclusion in your closing.

Your notes will be extensive and may include, among other things, analogies, newspaper clippings, rhetorical questions, language from key instructions, lines of poetry, and important quotations from witness testimony. A likely source of ideas is an Internet search which will yield an abundance of information.

You might want to weave into your closing argument some inspiring ideas or quotes that are appropriate for your case and would be well known by jurors. Whether or not you decide to use such quotes or ideas, the time spent researching them and thoughtfully planning your closing are irreplaceable because such research inspires your own creativeness. You can obtain ideas as to structure, choice of words, timing, and so on.

Consider this excerpt of Clarence Darrow's closing argument in *Illinois v. Nathan Leopold and Richard Loeb* (1924) where Darrow argues against the death penalty in one of the most sensational trials in the twentieth century. This trial was also the subject of a fictionalized book, *Compulsion* by Meyer Levin (Simon & Schuster 1956), as well as a Broadway play and movie starring Orson Wells as Clarence Darrow. Leopold and Loeb kidnapped and murdered a 14-year-old boy; the prosecutor argued for the death penalty. This excerpt from the trial transcript and the famous trial are on the Web site of Professor Douglas O. Linder, *Closing Argument: Illinois v. Nathan Leopold and Richard Loeb (Delivered by Clarence Darrow, Chicago, Illinois, Aug. 22, 1924)*, <http://www.law.umkc.edu/faculty/projects/ftrials/leoploeb/darrowclosing.html> (accessed Mar. 31, 2008).

## CLOSING ARGUMENT

### *Incorporating Ideas*

#### *The Leopold and Loeb Case*

#### Excerpt of Clarence Darrow's Summation Against Imposition of the Death Penalty

"If these two boys die on the scaffold, which I can never bring myself to imagine,—if they do die on the scaffold, the details of this will be spread over

the world. Every newspaper in the United States will carry a full account. Every newspaper of Chicago will be filled with the gruesome details. It will enter every home and every family.

"Will it make men better or make men worse? I would like to put that to the intelligence of man, at least such intelligence as they have. I would like to appeal to the feelings of human beings so far as they have feelings,—would it make the human heart softer or would it make hearts harder? How many men would be colder and crueller for it? How many men would enjoy the details, and you cannot enjoy human suffering with out being affected for better or for worse; those who enjoyed it would be affected for the worse.

"What influence would it have upon the millions of men who will read it? What influence would it have upon the millions of women who will read it, more sensitive, more impressionable, more imaginative than men. Would it help them if your Honor should do what the state begs you to do?

"What influence would it have upon the infinite number of children who will devour its details as Dicky Loeb has enjoyed reading detective stories? Would it make them better or would it make them worse? The question needs no answer.

"You can answer it from the human heart.

"What influence, let me ask you, will it have for the unborn babes still sleeping in their mother's womb? And what influence will it have on the psychology of the fathers and mothers yet to come? Do I need to argue to your Honor that cruelty only breeds cruelty?—that hatred only causes hatred; that if there is any way to soften this human heart which is hard enough at its best, if there is any way to kill evil and hatred and all that goes with it, it is not through evil and hatred and cruelty; it is through charity, and love and understanding."

## B. Case Theories as Guides

Planning the content of closing argument applies the same basic methodology that we suggested for opening statement. You rely on your case theory and the other side's case theory as guides for deciding what information to include. Closing argument, however, will differ from your opening because now you can argue the inferences you want the jury to draw from evidence. You can characterize the evidence. You can discuss the law by referring to specific jury instructions. And you can put the entire trial

in perspective. In this section, we discuss how you can draw on your case theory to select the content of your closing argument.

### Legal Theory—Critical Jury Instructions

Closing argument is your opportunity to provide a roadmap of the law to the jury. That roadmap describes your legal theory, and if followed and applied properly to the evidence, it will lead the jury to a verdict favorable to your client. For example, defense counsel in a criminal case could select the reasonable doubt instruction and argue that when the reasonable doubt law, as expressed in the instruction, is applied to the lack of evidence, it leads to an acquittal.

You should focus on those jury instructions that best express your legal theory and convey a picture of your case. Among the jury instructions, only a few will be vital to understanding your legal theory. Four jury instructions are usually pertinent to explaining a legal theory in closing:


- Elements of the legal claim.
- Burden of proof.
- Central issue in dispute, and
- Other side's case theory

We will now discuss each of these and illustrate how to use them in selecting jury instructions for emphasis in closing.

#### Elements of Your Claim or Defense

If you are making a claim, such as the plaintiff claims that defendant was negligent or the defendant asserts comparative negligence, you need to make sure that the jury understands what you must prove. Because the plaintiff or prosecutor bears the burden of proving the elements of a claim for relief or of a crime, plaintiff's attorney or the prosecutor in closing argument usually will discuss instructions that set out and explain elements of the claim or crime. Likewise, the defense will select those jury instructions that define the elements of the crime or claim that defendant contends plaintiff has failed to prove. If the defense asserts an affirmative defense, the defendant will also wish to select the instructions explaining that defense.

To illustrate the selection and utilization of the elements of jury instruction in closing, imagine you represent the defendant *Hill Moveit*. Among other defenses, *Hill Moveit* claims comparative negligence because plaintiff was following too closely and was intoxicated. You have researched the law and drafted proposed jury instructions by modifying Major Pattern Jury Instructions. Consider your proposed instruction on intoxication.



**CLOSING ARGUMENT**  
*Intoxication Instruction*  
**The Hill Moveit Case**

No. \_\_\_\_

It is a defense to an action for damages for personal injuries that the person injured was then under the influence of alcohol, that this condition was a proximate cause of the injury, and that the person injured was more than 50 percent at fault.


Your argument can begin by explaining this complete defense of intoxication. So that the jury can understand the elements, you could create a chart so the jury can see the requisite elements and place the chart on an easel in front of them.

**INTOXICATION**

It is a defense to an action for damages for personal injuries:

1. Person injured under the influence of alcohol,
2. This condition was a proximate cause of the injury, and
3. The person injured was more than 50 percent at fault.

You could provide the jury with an overview on the law, a brief discussion to the effect that the law in Major provides that an intoxicated driver is not entitled to recovery if the driver is more than 50 percent at fault and reminding them that they were sworn to follow that law. Then you could discuss each element of the intoxication defense and apply the law to the facts proven during the trial.



**CLOSING ARGUMENT**  
*Using Jury Instructions in Closing Argument*  
**The Hill Moveit Case**

The first element of this defense is that the person was under the influence of alcohol. You have heard that Darcy Rutherford had a blood alcohol level between .06 and .10. The limit in the State of Major is .08. She was

*continues* ▶

under the influence. The second element requires that her intoxication be a cause of the injury. Was Ms. Rutherford's condition a cause? You heard the testimony of the collision reconstruction expert that Ms. Rutherford was tailgating the utility trailer and that if she had been at a legal distance back she would have had time to evade the falling furniture. But she was too close, and her intoxication slowed her reaction time. If she had been sober and following at a legal distance, she would probably not be in the tragic condition she is in today. As hard a decision as it would be, you could conclude that she was 100 percent at fault. The evidence is conclusive that she was well in excess of 50 percent at fault as required by the third element. It sounds callous and hard-hearted, but you recall when we discussed during jury selection that your deliberations should be free from sympathy for her. Now, the court has instructed you that you should not be swayed by sympathy. . . .

Now consider your other defense for *Hill Moveit*—comparative negligence. Your approach to drafting your closing is the same as for the intoxication defense. Begin with your proposed jury instructions on negligence and comparative negligence that you wrote by modifying the Major Pattern Jury Instructions.



**CLOSING ARGUMENT**  
*Negligence Instruction*  
**The Hill Moveit Case**

No. \_\_\_\_

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances. . . .



**CLOSING ARGUMENT**  
*Comparative Negligence Instruction*  
**The Hill Moveit Case**

No. \_\_\_\_

Comparative negligence is negligence on the part of a person claiming injury that is a proximate cause of the injury complained of.

If you find comparative negligence by the plaintiff, you must determine the degree, expressed as a percentage, to which plaintiff's comparative negligence contributed to the claimed injury. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

You could begin this segment of your argument by explaining: "Comparative negligence, as her Honor has instructed you, is a defense to the product liability claims." Then your argument turns to the elements of negligence using these instructions and/or an elements chart. You can argue: "Ms. Rutherford failed to use ordinary care by following too closely and driving drunk."

A verdict form can assist in the explanation of the claims, defenses (legal theories), damages, and how to approach deliberations. For example, either plaintiff's or defendant Hill's trial lawyer could use an enlargement of the verdict form to explain such issues as product liability, comparative negligence, and percentage of fault that the jury will be discussing during deliberations. The following is a sample verdict from the *Hill Moveit* case. (For simplicity's sake, the verdict form contains only one of the product liability claims.) In closing, counsel can propose percentages of fault and dollar amounts for damages, and then fill in the chart with dollar amounts and percentages on an enlarged verdict form as counsel argues each point.

**SAMPLE SPECIAL VERDICT FORM**

|   |                        |
|---|------------------------|
| SUPERIOR COURT OF MAJOR IN JAMNER COUNTY                              |                        |
| Darcy Rutherford,   | )                      |
|   | ) No.: XX - 01-549031  |
| Plaintiff,  | )                      |
|   | )                      |
| vs.   | ) SPECIAL VERDICT FORM |
|   | )                      |
| Hill Moveit International   | )                      |
| Corporation, Stanley Laby,  | )                      |
| and Fergun GasPump  | )                      |
|   | )                      |
| Defendants  | )                      |
| We, the jury, answer the questions submitted by the court as follows: |                        |

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QUESTION 1: Did the defendant Hill Moveit International Corporation supply a product that was not reasonably safe as designed?

ANSWER: \_\_\_\_\_ (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to question 1, answer Question 2.)

QUESTION 2: Was the unsafe condition of the product a proximate cause of the injury to the plaintiff?

ANSWER: \_\_\_\_\_ (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 3.)

QUESTION 3: What do you find to be the plaintiff's amount of damages? Do not consider the issue of contributory negligence, if any, in your findings.

ANSWER:

(a) Past Economic Damages \$ \_\_\_\_\_

(b) Noneconomic Damages \$ \_\_\_\_\_

(c) Future Economic Damages \$ \_\_\_\_\_

(INSTRUCTION: If you answered Question 3 with any amount of money, answer Question 4. If you find no damages, sign this verdict form.)

QUESTION 4: Was the plaintiff also negligent?

ANSWER: \_\_\_\_\_ (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 4, sign this verdict form. If you answered "yes" to question 4, answer Question 5.)

QUESTION 5: Was the plaintiff's negligence a proximate cause of the injury to the plaintiff?

ANSWER: \_\_\_\_\_ (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 5, sign this verdict form. If you answered "yes" to Question 5, answer Question 6.)

QUESTION 6: Assume that 100% represents the total combined fault that proximately cause the plaintiff's injury. What percentage of this 100% is attributable to the plaintiff's negligence? What percentage of this 100% is attributable to the unsafe condition of defendant's product?

| ANSWER:                        | Percentage |
|--------------------------------|------------|
| To plaintiff Darcy Rutherford: | _____ %    |
| To defendant's product         | _____ %    |
| TOTAL                          | 100%       |

(INSTRUCTION: Sign and return this verdict.)

DATE: \_\_\_\_\_, 20\_\_\_\_\_

Presiding Juror

### Burden of Proof

In a criminal case, the burden of proof, beyond a reasonable doubt, generally is the subject of argument. In civil cases, attorneys often do not focus on the civil burden of proof, a preponderance of the evidence—defined in the jury instructions as enough evidence so that a proposition is "more probably true than not." The civil burden of proof places the two sides so procedurally close together that attorneys generally try to prove that their side is correct rather than risk relying on the burden. However, if counsel discusses the burden, plaintiff's trial counsel can argue that the difference is 51 versus 49 percent, or that it tips the scale of justice only so slightly toward the plaintiff's side. Defense counsel may argue, "Plaintiff has only proven a 50-50 probability that the parties intended to enter into a contractual relationship. That's simply not preponderance."

## CLOSING ARGUMENT

### Burden of Proof in a Criminal Case

#### Defense Argument

Criminal defense counsel might explain the reasonable doubt burden of proof by referring generally to how difficult and important a decision the jury has to make. Defense counsel might attempt to make the jurors believe that the "beyond a reasonable doubt" burden is like a religious canon and almost insurmountable. For instance, in closing argument defense counsel may suggest that jurors should find the defendant not guilty if they have "any doubt" and argue that the prosecution has the burden of proving guilt beyond "a shadow of a doubt." Or, in discussing the burden of proof, defense counsel may describe the jurors' role and how the jurors might approach the burden of proof. The defense attorney might explain why there is such a strong burden by highlighting the concern that an innocent person not be wrongfully convicted.

Even more important to the defense than the magnitude of the burden beyond a reasonable doubt may be the existence of the burden itself. It permits defense counsel to acknowledge negative inferences in the case ("My client walked out of the store without paying for the razor blades so maybe he did intend to steal them"), and then balance these negative inferences with positive inferences ("But he had \$40 and credit cards so maybe he didn't"). Counsel can then rest on the burden in asking the fact finder for a defense verdict ("So maybe he did, maybe he didn't, but you knew that before you heard any testimony, and the prosecution cannot carry any burden, let alone 'beyond a reasonable doubt,' with a 'maybe he did, maybe he didn't' case").

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### Prosecution Argument

The prosecutor will describe the burden as something that can be overcome. The duty of the prosecutor to do justice constrains prosecutors from interpreting the "reasonable doubt" concept to adversarial advantage: "That's a reasonable doubt, not beyond a shadow of a doubt, not beyond all doubt, not just any doubt, but a reasonable one. As jury instruction 5 states: 'A reasonable doubt is one for which a reason exists.' Now can one reasonably doubt Mr. Strait's guilt in this case in light of the uncontradicted evidence that . . . ?"

### Issue in Dispute

In most cases there are one or two central issues in dispute. You want to argue by referring to a jury instruction on issues. Often, both plaintiff and defense counsel will include the same proposed instruction because each trial attorney recognizes that that instruction expresses the law in the area of the case where there is a major dispute or conflicting evidence.

The approach that structures argument around instructions can be coupled smoothly with one centering on the issues in the case. This structure works well for plaintiff's counsel because the plaintiff has the burden to prove each element. And this simplifies the case for the jurors by making the claims more understandable. For example, plaintiff's counsel first discusses the elements of negligence with the exception of proximate cause. Having done this, counsel asserts that the evidence establishes each of the other elements and then narrows the discussion to the one central issue—proximate cause. Counsel could state: "The single issue in this case is: Was the defendant's failure to exercise ordinary care the proximate cause of plaintiff's injury?"

### Other Side's Case Theory

You will want to argue against your opponent's case theories, and so you will select instructions you can employ to argue the weaknesses in the other side's case. You want to choose those instructions that best allow you to discuss those weaknesses. For instance, in the *Hill Moveit* case, you as plaintiff's counsel know that the defense is asserting comparative negligence and intoxication. Therefore, you need to argue based on the comparative negligence and intoxication instructions to refute the defense arguments.

### Factual Theory—The Evidence

A crucial function of planning closing argument is to marshal critical evidence that proves your legal theory as expressed in the jury instructions.

Argument on the evidence consists of persuading the jury to follow and trust your analysis, witness testimony, and exhibits. Determining which witness testimony, exhibits, and credibility issues to argue requires that you focus on essential points in your case theory. Just as with opening statement, you should avoid inconsequential evidence because the jury will have a difficult time following your core facts if you also include the minutiae.

We suggest two methods for this sifting through the facts to find and arrange the important evidence for argument: (1) concentrate on the critical jury instructions and (2) construct a story (narrative).

### Critical Jury Instructions

By concentrating on the core jury instructions, you will naturally select the evidence to argue. This is because you will argue to the jury how to apply the law in those instructions to the facts and thereby reach a verdict. Your organization of the significant facts will flow from the jury instructions.

For example, continue to assume you are plaintiff's counsel in the *Hill Moveit* case, and you wish to determine which evidence you should discuss when arguing damages. Recall that you have two purposes in arguing damages: persuading the jurors that you have established damages within legally accepted categories of harm (that constitutes the damage element of your legal theory) and convincing the jurors of your view as to how damages should be calculated within such categories.

The following is an instruction on damages.



### CLOSING ARGUMENT

#### Damages Instruction

#### The *Hill Moveit* Case

No. \_\_\_\_

It is for the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the defendant, apart from a consideration of comparative negligence.

If you find for the plaintiff, your verdict must include the following **past economic damages** elements: (1) the reasonable medical care, treatment, and services received to the present time; (2) the reasonable value of

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earnings lost to present time; and (3) reasonable value of necessary non-medical expenses that have been required to present time.

In addition, you should consider the following **future economic damages** elements: (1) the reasonable value of necessary medical care, treatment, and services with reasonable probability to be required in the future; (2) the reasonable value of salary and earning capacity with reasonable probability to be lost in the future; and (3) the reasonable value of necessary nonmedical expenses that will be required with reasonable probability in the future.

In addition, you should consider the following **noneconomic damages** elements: (1) the nature and extent of the injuries and (2) the pain and suffering, both mental and physical, and the disability, disfigurement, loss of enjoyment of life experienced, mental anguish, loss of society and companionship, loss of consortium, and humiliation experienced and with reasonable probability to be experienced in the future.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

Using the jury instruction on damages, you could enlarge the instruction just as we illustrated with the verdict form that appears earlier in this chapter. However, this blow-up of the damages jury instruction is visually complicated. You would be bogged down in complicated details trying to point to each of the three categories of damages. Instead, what you want the jury to understand is that there are three separate categories of damages and how to apply the evidence for each of the damages categories: past economic damages, future economic damages, and noneconomic damages.

Accordingly, in addition to or in place of the blowup of the actual damages instruction, you could also use individual charts for each of the three damages categories. For instance, concerning the first category of damages in the instruction, past economic damages, your chart would list the elements for those damages.



## CLOSING ARGUMENT

### *Damages Instruction*

#### *The Hill Moveit Case*

#### Past Economic Damages

- (1) The reasonable medical care, treatment, and services received to the present time;
- (2) The reasonable value of earnings lost to present time; and
- (3) Reasonable value of necessary nonmedical expenses that have been required to present time.

For each type of damage, you could then discuss evidence that you contend proves that category of damages. Among other things, as you explain the elements of each you could itemize the medical expenses at Ruston Medical Center and then outpatient care, along with the loss of earnings using Darcy's salary as a bartender as a starting place. You would talk about the evidence that proves those damages and justifies your calculations. This would include plaintiff's testimony, medical bills, W-2s, and so on.

#### *A Story*

Telling a story is an effective way of discussing the evidence during argument because juries approach a case from their human experiences. Jurors can best understand evidence that is structured in narrative form—what we mean by telling a story.

However, a caution is in order. Closing argument is not an opportunity to tell prolonged stories or to reiterate your entire story of the case. In Chapter 7 on opening statement, we pointed out that it is a common fault of trial lawyers to give closing argument for an opening statement and opening statements for a closing argument. Opening statement is a time to tell a story, to relate the facts of the case, not to argue. Closing argument is the time to argue and to use the story structure to weave together (with the legal theory) the factual story of the case. By the time the jury has arrived at closing argument, they have heard the factual story in opening statement and then during the presentation of the evidence as well as smatterings of parts of the story during jury selection. Belaboring by giving a litany of facts at this point in a narrative wastes the jurors' time and runs the risk of boring them.

However, a presentation of the facts in a short narrative form to bolster or make an argument can be successfully integrated into closing. For instance, relating an analogy can be effective. Or painting a word-picture of the plaintiff's life before and after the injury along with showing pictures of the plaintiff before and after can drive home the human story aspect of your factual theory. Later in this chapter, we offer examples of storytelling designed to do just these things.

### C. Accentuating the Theme

You also can design your argument around your case theme. The theme links the parts of the trial together. The theme is the memorable word, phrase, or sentence that captures your case theory. It is the thread that runs throughout and evolves during the trial from jury selection until now when you come back to it in closing. Perhaps you recall the theme "Rape is a secretive crime" that we mentioned in Chapter 3. Now, in closing argument, the prosecutor can refer again to this theme, which, like a thread, runs throughout the trial. Ten years after the trial when a juror recounts the experience of serving on a jury, the theme is hopefully how the juror will describe what the case was about if asked about "a rape on a dark dirt road."



#### CLOSING ARGUMENT

##### *Using a Case Theme Throughout the Trial* The Sexual Assault Case

#### Prosecutor in Jury Selection

Ms. Enquist, you understand that rape is a secretive crime. It doesn't happen in a room like this with 40 some people watching. It can happen in an alley, a car on a dark road, in an empty house with only two people present. Would you, if you become a juror in this case, require the state to produce multiple eyewitnesses to what happened before you could find the defendant guilty of rape?

#### Prosecutor in Opening Statement

Rape is a secretive crime. On June 3 of last year, Zena Grant, the victim in this case, accepted a ride home with the defendant after they met at the Noble Restaurant and Lounge. The defendant turned off onto a dark dirt road . . .

#### Prosecutor in Closing Argument

Members of the jury, it is not necessary to have multiple witnesses testify that they saw the defendant rape Zena. As you'll recall, we discussed in jury selection that rape is, by its very nature, a secretive crime, and that is why the law does not require proof by multiple witnesses. Here, you heard from Zena Grant who testified that the defendant raped her. She was a thoroughly believable witness who had no reason to make up what happened. Beyond that, her testimony is corroborated by the witnesses who saw her leave the Lounge with the defendant, witnesses who saw her beaten and bruised condition when she staggered onto the Interstate . . .

### D. Responding to Your Adversary's Case Theory and Attacks on Your Case Theory

Another component of your closing argument consists of meeting your opponent's case theory and assaults on your case theory. Planning this part of closing argument begins by envisioning the most devastating closing argument opposing counsel could deliver. You will need to speculate about what opposing counsel will argue and then formulate your response to those arguments. When you make these arguments depends on whether you represent the plaintiff or the defendant, as discussed at pages 559-62.

#### Anticipating Attacks

During pretrial, you will be able to anticipate attacks on your theory. After all, throughout case preparation you have thought about how the other side would respond to your case, especially those areas of potential vulnerability. Also, for certain claims there are predictable patterns of response or finite areas of attack that are dictated by experience and common sense. For example, the available avenues for attacking a claim for damages are credibility of the witnesses, inability to calculate accurately, excessive mistake in calculations, and exaggeration. Knowing these options and looking at the information in the case, you should have a good idea of where to expect the attack if you are claiming damages. There also are predictable techniques of attack. For example, attacking the credibility of a witness who is a relative of a party on the grounds of bias: "She's the plaintiff's daughter; it is only natural that she would testify as she did about her mother's pain and suffering." Accordingly, patterns or areas of attack and techniques for attack often meld together in practice.

## Meeting the Attack

Anticipating the attack is a part of the battle; meeting it in your argument is essential. You can meet the other side's case theory and accompanying attacks by:

- Stressing the strengths of your own case theory, and/or
- Pointing out the weaknesses in your adversary's case theory.

Defense counsel may attack weaknesses in plaintiff's case theory by either arguing that the plaintiff failed to meet the burden of proof on an element or by asserting that the evidence establishes an affirmative defense or both. Plaintiff's counsel may meet a defense theory that attacks the persuasive sufficiency of plaintiff's evidence by arguing that the evidence proves the elements or by attacking weaknesses in the defense's evidence. If the defense raises an affirmative defense, plaintiff's attorney may meet it by arguing the vulnerable points in defense evidence or by accentuating plaintiff's evidence refuting the affirmative defense.

## Emotion

Sympathy and emotion should not affect a jury's deliberations, and the judge will instruct jurors to this effect. However, sympathy and emotion can be powerful persuasive tools. To counteract an emotional appeal to jurors, you can stress the jury instruction, and you can bring it to the surface and attempt to diminish it. In the excerpt below, plaintiff's trial lawyer John Edwards describes how opposing counsel met his appeal to juror emotion:

"I fully expect that while you hear Mr. Edwards arguing to you, he will have most of you in tears by the time he's done," she said. "I suspect we'll all be affected by his argument. I plan on having my box of Kleenex ready."

John Edwards with John Auchard, *Four Trials*, 99 (Simon & Schuster 2004).

## E. Juror Beliefs and Expectations

Unfortunately, there are case weaknesses that are often unspoken during the trial, and the trial lawyer learns about them only after the verdict. After a verdict is returned, the trial lawyer asks the jurors, "Why did you decide to award the plaintiff \$6 million?" The lawyer finds out that the jury's verdict turned on something that neither trial attorney discussed in argument. Trial counsel is left with the question, "Why did the jury place so much weight on that evidence?" Here, we deal with answers to that question.

Jurors examine the evidence from their own experiences, understanding, and expectations of human behavior. They expect that people will have acted and events will have occurred according to certain norms with which the jurors are familiar. When the evidence is not in accord with their expectations, the jurors may conclude that the evidence is unsatisfactory and does not comport with common sense. A few of the illustrations we offered in earlier chapters were case-related expectations, such as the belief that a rape victim will attempt to escape given an opportunity or that an abused child will report the abuse even if the abuser is an authority figure. Media-generated beliefs, such as the McDonald's coffee case, which contributed to the impression that there are too many frivolous lawsuits, and the "CSI effect" (from the television series *Crime Scene Investigation*), create the expectation that the prosecution will produce forensic science that will conclusively prove the defendant's guilt.

Another way of explaining jury decision making of this nature is that jurors are likely to understand, and be persuaded by, evidence in terms of the story it tells. If a piece of the story is missing or does not make sense, jurors then may either finish the story according to their belief as to how they think things occurred (or should have occurred) or reject the story because it does not sound correct.

Unspoken weaknesses that should have little or no connection to the claims or defenses also creep into jury deliberations: for example, negative aspects of the victim's or the defendant's personality, lifestyle choices of one of the parties that fall outside the mainstream community's norms or experiences, or race or religion. Even if opposing counsel does not mention the elephant in the room, the jurors may not only see it but also discuss and be swayed by it during jury deliberations. If and when such a "problem" appears in your case, you need to acknowledge it and argue that it should not be a consideration in the jury's deliberations.

To avoid these pitfalls, you should seek to identify what is missing or at odds with juror expectations and then to make your story complete, consistent, and correct. A simple way to uncover juror beliefs and expectations is to tell your case story to colleagues, friends, neighbors, or relatives. Or you could employ a focus group to hear your story. Ask them for their opinions and listen to them. Neither argue with their positions nor readily disregard their assessments, criticisms, or suggestions. Chances are that a juror in your case will express the same difficulty with your case during jury deliberations, and you will not be there to argue the fallaciousness of that juror's belief. Once the problem area is identified, you can seek to complete the story with additional evidence and explanations and distinguish the belief from what happened in your case.

Combating mistaken juror beliefs begins in jury selection when you seek to get prospective jurors to acknowledge the existence of the belief.

discuss it, understand that the proposition that they believe in is different from what the evidence may show in the case, and express a willingness to set aside the preconceived notion and decide the case by applying the law to the facts. For instance, in a child abuse case, questioning during voir dire can explore whether the prospective jurors believe that children who have suffered child abuse complain to others about the abuse. The effort to overcome juror beliefs and expectations continues throughout opening statement and the presentation of evidence. You can call witnesses to explain why something did or did not happen. Also, you can call an expert to testify that what happened is normal, although it is contrary to what one might expect. For example, an expert witness could explain that children do not as a norm report abuse by an authority figure (stepfather, priest, teacher). Or, to combat TV's "CSI effect," a prosecutor can call a forensic scientist to explain why certain scientific evidence does not exist in the case and that the television show does not reflect real life. Closing argument is your most powerful weapon against fallacious beliefs because you can address them head on. "Folks, *CSI* is a television show; it is not reality. You have heard from the criminalist who testified in this courtroom that what you see on *CSI* is pure entertainment, usually not based in reality. She also testified that, under the circumstances of this case, you would not expect to detect DNA on the magazine. She testified . . . ."

## F. Write It

We recommend that you write your closing argument because this process will force you to think through your arguments, carefully chose your words and phrases, and find a logical and clear organization for presentation. The writing process begins when you first enter the case and the product is polished during trial when, for instance, an answer from a witness has the ring of truth about it. The following are pointers about writing your closing.

### WRITING CLOSING ARGUMENT



- **Write for the Audience:** Your closing should be written for the jurors (or the judge, if a bench trial) who will be listening and looking during your closing, not reading.
- **Don't Take It to Court:** The written closing has no place in court. If you take it to court, you will be tempted to read it, and you will lose eye contact with your audience. Use an outline with keywords. Other techniques:

- Use your visuals (elements chart, timeline) as substitutes for notes.
- Put your notes near a cup of water so that you can take a sip of water and glance at them. Or consider using a single page that lists the main points you want to raise printed in a large, readable font.
- Exception: reading is fine when done for accuracy (quoting jury instructions, a document, or a witness).

## G. Length

The judge may limit your time for closing. If so, rehearse it so that you will not run out of time and fail to cover important points. Otherwise, the length of closing will depend on the complexity of the case and the ability of the trial lawyer to maintain the jury's interest. To maintain that interest, the lawyer must have appealing arguments that jurors find valuable to their analysis of the law and evidence—like Aristotelian appeals, which are discussed in the next section.

## III. THE ART OF ARGUMENT

In this section, we offer a different method for the content to include in closing argument. This approach views closing argument from the perspective of choosing information that will sway the jury to reach a verdict for your client.

### A. Aristotelian Appeals

We discussed the importance of Aristotelian appeals in the context of arguing a trial motion to a judge in Chapter 4, page 99. As you will recall, Aristotle formulated the three appeals that may be used to convince an audience: logos (logic), pathos (emotion), and ethos (ethics). In preparing your closing argument, you should concentrate on using all three appeals because they sway an audience. Every human being is receptive to each of the three appeals, and all three should be incorporated into closing argument. Some people are more swayed by one type of argument than another due to their training or life experience. For instance, because judges have been trained to think analytically, the logical appeal carries more weight than an emotional one. But judges are human too and can be moved by a pathos argument. Jury argument tends to place more emphasis on pathos and ethos than would

be used in argument to a judge, but logical arguments are essential to a good closing. Therefore, incorporate all three Aristotelian appeals into closing argument.



## CLOSING ARGUMENT

### Aristotelian Appeals

#### The Blue Moon News Robbery Case

#### The Hill Moveit Personal Injury Case

- **Logos:** The first appeal is logic. Logical arguments stress patterns of thought, rational thinking, and a sense of logic. A jury will reach a verdict by applying the law to the facts. Therefore, arguments appealing to logic and the law is the centerpiece of the jury argument. In the *Blue Moon News Robbery* case, you, as the prosecutor, could structure your argument in a logical pattern by using an elements chart for robbery in the first degree. You could go down the list of elements one by one and argue that the evidence produced at trial has proven each of the elements. For example, you would argue that the testimony of the fingerprint expert who testified that the latent prints on the magazine match the defendant's known print is additional evidence that the defendant was the robber.
- **Ethos:** The second appeal is an ethical appeal. When making this argument, you appeal to the audience's highest moral sense. The argument speaks in terms of truth, duty, honor, justice, generosity, mercy, and the like. Nothing is more appealing to a jury than to correct an injustice or to do the right thing. In your arguments in the *Blue Moon News Robbery* case, as defense counsel, you could repeatedly return to how the circumstances were conducive to a mistaken identification and to how the jurors' duty to uphold the law requires that the defendant's guilt be proved beyond a reasonable doubt. As plaintiff's counsel in the *Hill Moveit Personal Injury* case, you will seek to portray the company as indifferent to the harm of unsecured loads and defectively designed trailers. Convince the jury that the company acted wrongfully, and an incensed jury will be inclined to make things right by sending a message to Hill Moveit that what it did will not be tolerated.
- **Pathos:** Pathos, the emotional appeal, is the third type of argument. Of course, you cannot improperly appeal to the passion and prejudice of your audience, whether judge or jury. In the *Blue Moon News Robbery* case, your emotional argument as defense counsel could center on the risk that your innocent client could be convicted of a crime he did not commit.

## B. Sources for Argument

How do we determine how to argue in terms of both what to say and how to say it? In other words, how do we learn the art of argument? Judge Charles Moylan, former prosecutor, appellate judge, and teacher, once whimsically said that novice trial lawyers should spend some time traveling the country as evangelical ministers and then devote some time to selling previously owned vehicles. A stint selling on the Home Shopping network (HSN TV) might also serve trial lawyers well as a training ground for learning how to persuade.

Another way to learn what and how to argue is to study talented trial lawyers at work. Watch a trial lawyer argue and pay close attention to what the lawyer argues and how. If an approach works, you may be able to adapt it to your case. However, if you do not feel comfortable with the style because it is not suitable to you, discard it.

You can also avail yourself of books, DVDs, and Web sites that contain arguments by skilled trial lawyers. As an example, Vincent Bugliosi, who as a prosecutor tried the Charles Manson case, in his book *Outrage* offers his observations about the *O.J. Simpson* case. His editor for *Outrage* urged him to write the closing argument that he would have given if he had prosecuted the Simpson case. Although Bugliosi declined the offer because of the work it would have entailed given the time he would normally devote to preparing a closing, he did agree to write passages of what he would have argued and commentaries along with these model arguments. Bugliosi's chapter on final summation, over 100 pages, provides a collection of arguments that serve as models of how to argue. Vincent Bugliosi, *Outrage: The Five Reasons Why O.J. Simpson Got Away with Murder* (Norton 1997). *Jury Argument in Criminal Cases* (2d ed., Azimuth 1993), by Professor Ray Moses, is filled with defense and prosecutor arguments; an associated Web site for the Center for Criminal Justice Advocacy (<http://www.criminaldefense.homestead.com>) offers a wealth of examples. *The Law as Literature* (Ephraim London ed., 1966) (originally published in 1901) has about 50 contributors, with such notable authors of each chapter as Supreme Court Justice Felix Frankfurter, Daniel Webster, Plato, Damon Runyon, and Albert Camus.

Throughout the remainder of this chapter and starting with the next sections, we offer a sampling of well-crafted arguments by skilled trial lawyers that incorporate Aristotelian arguments.

### Logos

Vincent Bugliosi offers a lengthy logical argument that he believes could have been made in the *O.J. Simpson* case.


## CLOSING ARGUMENT

*Incorporating Aristotelian Logos in Argument*The Imaginary Closing in the *O.J. Simpson* Case

While Vincent Bugliosi's argument goes on for over five pages in the book *Outrage*, this two-paragraph excerpt from what can be described as the throw-it-out-the-window argument is sufficient to illustrate the logical argumentation:

"Ladies and gentlemen of the jury, the evidence of Mr. Simpson's guilt is so overwhelming in this case that you could throw 80 percent of it out the window and there still would be no question of his guilt. For instance, as we've previously discussed, we know that Simpson beat poor Nicole savagely, and she was in fear of her life at his hands. You recall she told officer Edwards, 'He's going to kill me, he's going to kill me.' I mean who else would have had any reason to murder these two young people, who apparently were both very well liked and popular, and particularly in such a brutal, savage way? But, let's throw this evidence out the window. Let's assume Mr. Simpson and Nicole got along well, just swimmingly, that he never laid a hand on her.

"When he was charged with these murders, if he were innocent, he would have been outraged, blazing mad, at being charged with murders he did not commit, and would desperately want to prove his innocence and find out who murdered the mother of his two children. Instead, he writes this suicide note that absolutely reeks with guilt. Show me an innocent person on the face of this globe charged with murder who would write a note like that. But let's assume there was no such suicide note; let's throw it out the window. After that slow-speed freeway chase, as you recall, the police found a gun, a passport, and a cheap disguise in Mr. Simpson's possession. And his closest friend, Al Cowlings, just happens to have \$8,750 in currency stuffed in his pockets, which he told the police Mr. Simpson gave him in the Bronco. We all know what all of this means. We've already discussed it. Throw this evidence out the window. It doesn't exist."


**Pathos**

A closing argument by John Edwards incorporates the Aristotelian principle of pathos in argument. In his book *Four Trials*, Edwards recounts his experiences representing the plaintiff in a medical malpractice suit against a hos-

pital resulting from a doctor's delay in a breach-birth delivery. That delay deprived the baby of oxygen and caused the baby's cerebral palsy.

## CLOSING ARGUMENT

*Incorporating Aristotelian Pathos in Argument*The *Medical Malpractice* Case

John Edwards on damages:

"Jennifer's six years old now, and she's cute—she's a wonderful little girl. The problem is this: that you see her now and you think that's what her life is going to be: She's disabled, but everybody adores her. Well, that's true when you're six. But five years from now, she'll be eleven. And at age eleven, she'll have had a chance to experience the cruelty of other children. . . . When she's in her twenties, her sister will be getting married, her sister will be going off to college, but Jennifer will be home. . . . Thirty years from now, Jennifer will be a thirty-six-year old. She'll be working in a sheltered workshop, her life will be a life composed of braces, walkers. . . . Forty years from now, fifty years from now, when she's fifty years old, fifty-six years old, nobody will remember that sweet, cute six-year-old little girl. Fifty-six-year-old women with cerebral palsy are not so cute anymore."

John Edwards discussing the fetal monitor strips evidence that indicated the plaintiff's condition during labor:

" . . . You know, six years ago, Jennifer Campbell did everything she knew how to do on the afternoon . . . to speak to the hospital, and the only way she knows how to do it was through that strip. And what she said to them is this. She said at three, 'I'm fine.' She said at four, 'I'm having a little bit of trouble, but I'm doing okay.' Five, she said, 'I'm having problems.' At five-thirty, she said, 'I need out.'

"And she said it to everyone there. And at six, the cries got weaker. . . . And the cries they heard were the cries of Jennifer Campbell dying. . . . But she didn't die. She made it. She survived, and she's been fighting every way she knows how since.

"And so here we are again. She speaks to you again. But now she speaks to you, not through a fetal monitor strip; she speaks to you through me. And I have to tell you right now—I didn't plan to talk about this—right now I feel her, I feel her presence; she's inside

continues ►

me; and she's talking to you. This is her. What I'm saying to you is what Jennifer Campbell has to say to you.

"And this is what she says to you. She says, 'I don't ask for your pity. What I ask for is your strength. And I don't ask for your sympathy, but I do ask for your courage. I ask you to do what I've done for the last six years. I ask you to be courageous.'"

John Edwards with John Auchard, *Four Trials* 106 (Simon & Schuster 2004).

### Ethos

The closing argument of Enron task force prosecutor Sean Berkowitz shows how an advocate can appeal to the jurors' highest moral sense.



## CLOSING ARGUMENT

### *Incorporating Aristotelian Ethos Argument*

#### *The Enron Case*

During closing argument in the *Enron* fraud, insider trading, and conspiracy case in which Ken Lay and Jeff Skilling were the defendants, prosecutor Sean Berkowitz named the occupations of the jurors—dairy farmer, payroll manager, retired engineer, and so on. And, then he pointed out:

"The final word goes to people like the investors. You get to decide what's right. . . . You get the final word in this historic case. You get to decide whether they told truths or whether they told lies. Black and white."

With a large poster board with *truth* written in black on a white background and *lies* in white on a black background sitting on an easel behind him, Berkowitz argued:

"These men lied. They withheld the truth. They put themselves in front of their investors, and I'm asking you to send them a message that it's not all right. You can't buy justice, you have to earn it."

## C. Picking Persuasive Language

Closing argument frees you as a trial lawyer to draw on a broader way of expressing yourself than during any other phase of trial because in closing you are allowed to draw conclusions and to discuss the law, the evidence,

and inferences from the evidence. By contrast, this is not opening statement when you are restricted to stating the facts and are forbidden from arguing.

### Words with Connotations

Mark Twain put it this way, "The difference between the right word and just about the right word is the difference between lightning and lightning bug." Like most trial lawyers, you may not have the remarkable gift for delivery that Dr. Martin Luther King had. However, you can take the kind of care that he did in selecting the language to be used when addressing an audience. Listen to any of his speeches, and you recognize the care he took in phrasing his thoughts. Emotion and meaning are captured in the phrase "I have a dream" and in the sentence "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."

Your word choice will influence how your thoughts will be received by the jurors. For closing argument, you should employ a vocabulary that will best convince the jury. Your diction may be sternly logical, determinedly nonlegal, or bright and homespun. This is the opportunity to use value-laden words that you are prohibited from uttering in opening statement. When choosing words, you must be mindful of their connotations and of the way they characterize the evidence.

Reread the excerpts from closings in this chapter and you can detect the care those trial lawyers took in selecting the words for their arguments. The words and phrasings are potent. In this excerpt, used earlier in the chapter, Clarence Darrow argues against the death penalty:

Do I need to argue to your Honor that cruelty only breeds cruelty—that hatred only causes hatred; that if there is any way to soften this human heart which is hard enough at its best, if there is any way to kill evil and hatred and all that goes with it, it is not through evil and hatred and cruelty; it is through charity, and love and understanding.

Words have connotations. The distinction between a neutral word and one with many connotations is the difference between "she said" and "she begged." It has been said, "What reaches the mind moves the heart." The word "*begged*" with all its connotation registers in the mind and moves the heart.

As another example, consider the *Blue Moon News Robbery* case. The prosecutor could describe the defendant's testimony as his story. That word suggests defendant's testimony was concocted without quite explicitly declaring it to be fabricated. Or the prosecutor might frequently refer to the alibi witness as the defendant's *friend* to highlight Greg Delaney's interests in the case.

## Rhetorical Devices

A variety of rhetorical devices can enhance your argument. Illustrations of rhetorical techniques that you might choose for closing argument in the *Blue Moon News Robbery* case are as follows.

### Postponement

Postponement is when the speaker touches on a subject briefly and holds it for later discussion. It is designed to retain the jurors' attention and give an important topic special treatment. The prosecutor in the *Blue Moon News Robbery* case may declare, "The next element the state must prove is that the defendant is the person who committed the robbery. This is the single issue in this case, so I will discuss this issue just a little later."

### Concession

Concession is when the speaker concedes unfavorable information so as to acknowledge and thereby deemphasize a case weakness or harmful information. For example, the defense in the *Hill Moveit* case can argue, "What happened to Darcy Rutherford is tragic. All of our hearts go out to her, but the defendant was not responsible." Or the prosecutor in the *Blue Moon News* case can remark, "Yes, it is possible that the defendant could have been in the store on another day and put his fingerprint on the magazine left on the counter, but does that make sense when you put it together with the other evidence in this case such as Mr. Newman's identification of him?"

### Antithesis

A speaker using antithesis places ideas in opposition to one another to emphasize differences or contrasts. Antithesis could also be used by the prosecutor in the *Blue Moon News Robbery* case as follows:



#### CLOSING ARGUMENT

#### Antithesis Argument

#### The *Blue Moon News Robbery* Case

Allibi witness Mr. Delaney claims that he recalls that between 10:00 P.M. and 3:00 A.M. the following day the defendant was at a party at his apartment. Mr. Delaney recalls when the defendant arrived, but he has no recollection of who arrived next at his party. He claims that the defendant wore a blue

and white striped shirt, but he cannot recall what any other guest wore. Mr. Delaney claims that defendant came to the party alone, but he cannot recall who of all the other guests also came alone to the party.

### Metaphors, Similes, and Analogies

Metaphors, similes, and analogies can effectively encapsulate the issues of the case or other concepts for the jury. Analogies are powerful argument for at least three reasons. First, an analogy is persuasive because it relates the argument in a familiar way to the jurors. Second, it tells a story, and we all are receptive to a good story well told. Third, an analogy enables the jurors to compare the analogy to the issue or situation before them and draw their own conclusions. The trial lawyer becomes an advisor who helps jurors reason by analogy, rather than telling them what to decide. For instance, if opposing counsel were to present arguments intended to divert the jury's attention from the central issue in the case, you might describe such tactics as "putting up a smoke screen" or the way Vincent Bugliosi does in his imaginary *O.J. Simpson* murder case argument in *Outrage* (pages 545-46).



#### CLOSING ARGUMENT

#### Analogy Argument

#### The Imaginary Closing in the *O.J. Simpson* Case

I wonder if any of you folks have read Victor Hugo's account of the octopus. He tells us of how it doesn't have any beak to defend itself like a bird, no claws like a lion, nor teeth like an alligator. But it does have what could be called an ink bag, and to protect itself when it is attacked it lets out a dark fluid from this bag, thus making all of the surrounding water dark and murky, enabling the octopus to escape into the darkness.

Now I ask you folks, is there any similarity between that description of the ink bag of the octopus and the defense in this case? Has the defense shown you any real, valid, legitimate defense reasonably based on the evidence, or has it sought to employ the ink bag of the octopus, and by making everything dark around Mr. Simpson, tried to let him escape into the darkness?

I intend to clear up the water which defense counsel have sought to muddy, so that you folks can clearly see the evidence, the facts, the issues in this case, so that you can behold the form of the retreating octopus and bring this defendant back to face justice.

Analogies, like a malfunctioning firearm, can backfire. Opposing counsel will make every effort to find the flaw in the analogy, to convert the analogy to advantage, to mock it, or to distinguish it. For instance, if a prosecutor were to relate the octopus analogy in a self-defense case, defense counsel might respond: "What does a story about an octopus have to do with this case? The prosecutor suggests that we have attempted to darken the water. Quite the contrary, we have done everything possible to make it clear that Rick acted to save his own life. It's the prosecution (faced with the lack of evidence here) who resorts to confusing matters by telling some story about an octopus. And incidentally, the prosecutor might want to get the facts straight here too—an octopus does have a beak." Also, the analogy, simile, or metaphor should be suitable to the jury. Analogies involving war and sports can fall on deaf ears, and they are particularly susceptible to being manipulated by the other side. A reference to a basketball player may only obscure your argument for the juror who is unfamiliar with a player. Or a football analogy used by a prosecutor could be picked up by defense counsel who converts it into an analogy that can be used against you (the evidence left the prosecution one yard short of the goal line and that is a reasonable doubt).

To prevent a backfire, trial counsel should inspect the analogy for flaws and ways opposing counsel may alter it or distinguish it or otherwise turn it back on the teller. Carelessness in selecting an analogy, simile, or metaphor can end up harming your case, like a soldier causing a self-inflicted wound.

### *Rhetorical Questions*

Rhetorical questions can be used to highlight an issue or to make transitions from one part of an argument to another. In the *Blue Moon News Robbery* case, the prosecutor might ask:

- "Did the defendant have a motive to rob the store?"
- "Was the defendant in the vicinity of the store when it was robbed?"
- "Did the defendant leave a fingerprint on a magazine on the counter?"
- "Was the defendant identified as a robber by Mr. Newman?"

### *Tailored to the Case*

But there is a caution implicit in using these rhetorical devices. They need to be appropriate for your case, within the frame of reference of the jurors and invincible to being turned back on you.

One solution to such concerns is thorough preparation. Rehearse your argument with your rhetorical devices and without them. Try your argument on colleagues and nonlawyers to gauge their reaction. Find out which argument is more persuasive, the one with the rhetorical devices or the one without them. Also, think about how your opponent will react and envision the worst possible use by your opponent of your rhetorical device.

### Stock Arguments

As a trial lawyer, you will collect stock arguments that you can reuse as you move from trial to trial. Included in this category might be your manner of explaining the burden of proof, the role of the jury, or damages. For instance, in arguing damages, many attorneys define pain in general. They discuss society's attitude toward pain, describe the pain suffered, discuss how it is difficult to compute, and suggest a formula for pain and suffering depending on the circumstances. As we suggested earlier, your best source for well-crafted arguments are experienced lawyers. Couple this research with your own imagination, and you will have a stock of arguments that you can call on when needed.

## IV. STRUCTURING CLOSING

Closing argument must have a structure that the jury can follow and readily comprehend. The proven effective structure, paralleling the opening statement structure, has a beginning, a body, and a conclusion. Within this structure, you can choose among many approaches to argument. The content of the beginning-body-conclusion structure will vary widely because attorney styles of wording and performance differ greatly. Keep in mind that these beginning remarks and the words that you speak to the jury at the conclusion of your closing are most important because jurors pay the most attention to what you say first and last.


### A. Beginning Remarks

We recommend that you begin closing argument by seizing the jury's attention. Because they are important, you should memorize and rehearse the words you will use to begin so they flow smoothly.

You might take a moment or two to thank the jurors for their service and their attention, particularly if it has been a long trial. However, to belabor this or to explain the purpose of closing argument is to create a pre-ramble, what we have termed *noise*, that interferes with your argument (page 261).

You want to give them what they are waiting for: your argument of why they should vote a verdict in your client's favor. How you start will depend on whether you represent the plaintiff or the defendant.

### Plaintiff



**CLOSING ARGUMENT**  
*Plaintiff Counsel's Beginning Remarks*  
*The Freck Point Wrongful Death Case*

**Theme**

In the *Freck Point Wrongful Death* case, suppose you started with the greed theme. Now you could play it again and build on it based on the trial evidence.

"In opening statement, I mentioned to you that this is not a case about love or about hate. It is about killing in the service of greed. Now that you have heard the evidence, you know that the defendant was driven by just plain greed."

**A Quote**

Or you might choose to begin with a quote, a figure of speech, or an analogy intended to catch the jurors' attention and interest:

"It's often been said, 'The road to wisdom begins by asking the right questions.'"


**Roadmap**

Or you could give the jurors a roadmap of what you are going to argue. In other words, resort to the classic structure: Tell them what you are going to tell them. And then finish by telling what they've been told. In the *Hill Moveit Personal Injury* case, plaintiff's counsel could begin:

"This discussion has two parts. First, it examines the legal elements of product liability. As we go over the elements of product liability, we will apply the law to evidence and show how it establishes the defendant's liability in this case. Second, we'll review the evidence proving damages."

### Defense

Because plaintiff's counsel has already set the stage, the defense's closing argument begins in a climate slightly different from the one plaintiff's counsel faced.



**CLOSING ARGUMENT**  
*Defense Counsel's Beginning Remarks*  
*The Hill Moveit Personal Injury Case*

**Fairness**

Some possible defense beginning might use the following strategy of reminding the jury of its compact to weigh the defense argument equally:

"When I spoke to you in voir dire, you promised me you would keep an open mind until you heard all of the evidence and argument."

Or defense counsel could begin:

"There are two sides to every coin."

**Pick Up**

Or defense counsel might consider picking up at the place where plaintiff counsel left off and then proceed into the defense argument:

"Plaintiff's attorney just gave you a figure that would compensate plaintiff. We offer you this damage figure—zero [writes a big '0' on a blackboard]. Let me explain why . . ."

As the illustrations suggest, beginning remarks vary. We are partial to attention-getting introductions because, if done well, it pulls the jury into your argument, rendering the argument more persuasive. But again, you will need to assess what you are comfortable arguing.

## B. The Body

The body of your argument is where you apply the law in the jury instructions to the evidence in the case. Crafting these arguments is analogous to writing the concluding pages of a mystery story. Put yourself in the shoes of the author of a mystery story. You developed the motive and clues through many chapters, but now the reader needs guidance to gather the clues, to see the motive,

to assemble the facts into a story, and to draw the conclusions that point to the solution. Your job, like the author in the last pages of a mystery who must tie all the strands together, is to discuss how the law should be applied to the evidence and guide the jurors in the direction of the verdict you want them to reach.

This apply-the-law-to-the-facts organization can lead to an argument that is fundamentally an appeal to logic, or in an Aristotelian term, *logos*. Besides logic, the body of your argument should also, within ethical boundaries, contain ethical (*ethos*) and emotional (*pathos*) appeals.

## Organization and Subjects

### Organization

Many approaches exist for organizing the body of closing argument. In practice, attorneys often blend these approaches in closing arguments.

- **Issues:** State the issue and frame it in your client's favor, if possible. Plaintiff's counsel, for example, could begin with an elements chart and, after applying the law in each element to the facts, reduce the issues to one element: proximate cause. Defense counsel could begin by agreeing that the issue is one of proximate cause.
- **The Evidence:** Apply the law relating to the issue to the facts. For instance, apply the jury instruction on proximate cause to the evidence of the case. Each side contends that the evidence or lack of evidence supports its position.
- **Witness-by-Witness:** An organizational approach that reviews each pertinent witness's testimony in relation to your case theory is a choice we discourage. It is often tedious, disjointed, and hard to follow (particularly because it usually includes too much detail from the witnesses' testimony). However, it can be effective as a subpart of the body—particularly if it is to prove or cast doubt on an element in the case. In the *Blue Moon News Robbery* case, for example, defense counsel could argue reasonable doubt and misidentification by reviewing the testimony of each prosecution witness other than Newman, pointing out that the witness did not provide any evidence on the identity issue. In discussing the witness Newman, then defense counsel could argue that he misidentified the defendant because of poor lighting, the robber's face was partially concealed, and so on.

### Topical Arguments

You can make arguments that center around subjects of argument. Topical arguments can center around the following:

- Critical jury instructions.
- Identifying issues in the case and then marshalling evidence on your side of the issue.
- Telling a narrative story.
- Meeting attacks on your case theory and/or attacking the other side's case theory.
- Arguing why damages are warranted or not.
- Juror beliefs and expectations.
- Your case theme.
- The witness testimony, and
- A blend of these.

### Blending the Approaches

The approaches to organizing the body of closing are not mutually exclusive; they may and often are blended together. As an illustration, consider prosecutor's closing in the *Blue Moon News Robbery* case that blends the (1) by-the-issues, (2) by-narrative, and (3) by-the-numbers approaches.

We offer an illustration of one organizing tool, the blended approach, with the understanding that it is a broad structure and that you may find a better way to arrange your closing for your individual case.

## CLOSING ARGUMENT

### *The Body—Blended Structure Argument*

#### *The Blue Moon News Robbery Case*

#### Body of the Prosecutor's Closing Argument

The single issue is: Did the defendant rob the store?

You have listened to Mr. Newman's eyewitness testimony. As you recall, on January 15 at approximately 11:30 at night, Mr. Newman was working as a clerk at the Blue Moon News convenience store. Mr. Newman saw the defendant browsing at the magazine rack. The defendant came to the counter area where Mr. Newman was. While the defendant had his hat pulled down some, Mr. Newman got a good look at the defendant's facial features. The defendant's face was within three feet of Mr. Newman. The counter area was well lit. Mr. Newman identified the defendant in this court as the person who robbed him that night.

Based on Mr. Newman's testimony alone, the defendant is the person who committed the robbery. But this is not a case where all you have is the

*continues* ▶

testimony of one eyewitness to consider during your deliberation. There is more. There are at least four more pieces of evidence pointing to that man as the person who robbed the store [pointing to the defendant].

First, you have fingerprint evidence. The defendant's latent fingerprint was left on the magazine that the robber placed on the counter. In the real world, that is more than mere coincidence.

Second . . .

### C. Conclusion

A conclusion to your argument should be dynamic and memorable for your case. It might include telling the jury which verdict you request or take the form of a summary statement that emphasizes that the jury should review one witness's testimony, a particular jury instruction, and so on. For example, in the *Hill Moveit* case, your conclusion might be your discussion of damages, walking the jury through the Special Verdict Form (reprinted earlier in this chapter) and explaining how they should fill it in. As defense counsel in the *Blue Moon News Robbery* case, you might conclude by going back to the reasonable doubt instruction.

Or your concluding remarks might be aimed at motivating the jury to embrace an emotional story by appealing to their highest moral character. For example, in John Edward's closing in the medical malpractice case discussed on pages 547-48, he focuses on the plaintiff's suffering and courage and calls for the jurors to have courage in reaching a verdict. In the *Enron* case closing that appeared earlier in the chapter, the prosecutor refers to truth and justice. In the notorious Charles Manson case, the prosecutor concluded by motivating the jury.



#### CLOSING ARGUMENT

##### Conclusion—Motivating the Jury

##### The Charles Manson Case

In prosecuting the *Charles Manson* case, Vincent Bugliosi concluded his arguments in the following ways.

The initial closing was capped with these comments:

"Under the law of this state and nation these defendants are entitled to have their day in court. They got that."

"They are also entitled to have a fair trial by an impartial jury. They also got that."

"That is all they are entitled to!"

"Since they committed these seven senseless murders, the People of the State of California are entitled to a guilty verdict."

The prosecutor finished rebuttal argument with these words:

"Ladies and gentlemen of the jury, Sharon Tate . . . Abigail Folger . . . Voytek Frykowski . . . Jay Sebring . . . Steven Parent . . . Leno LaBlanca . . . Rosemary LaBlanca . . . are not here with us now in this courtroom, but from their graves they cry out for justice. Justice can only be served by coming back to this courtroom with a verdict of guilty."

### D. Rebuttal

The number of times you are permitted to argue to the jury also shapes the structure of your closing argument. Plaintiff's counsel in most jurisdictions is afforded both opening and rebuttal closing arguments and has the choice of meeting the defense case theory and attacks in either or both arguments. Along with having the burden of proof, which justifies the allocation of another argument to plaintiff's counsel, comes the opportunity refute defense arguments and have the last words. For these reasons, rebuttal has been referred to as "having the hammer." One plaintiff's strategy is to hold back a strong argument for rebuttal so that concluding remarks will be powerful. However, this strategic approach runs the risk of appearing to ambush the defense and diminishes the persuasiveness of the initial closing. Also, the court might sustain an objection that in your particular case, the particular argument is beyond the scope of rebuttal; while this may not be likely to happen, it is a risk you must calculate.

Alternatively, plaintiff's counsel can reserve the motivational concluding remarks until rebuttal. This avoids finishing the initial closing on too high a note and making anticlimactic the concluding comments in rebuttal argument. Further, plaintiff has the advantage of having the last word before the jury retires to deliberate during which counsel can exhort the jurors to reach a verdict for the plaintiff.

While rebuttal is restricted to responding to the other side's argument, that does not mean that trial counsel just waits to hear the closing and then extemporaneously answers it. Rebuttal is a powerful device—the last word. It cannot be left to inspiration. Rather, prior to trial you can fashion your rebuttal by anticipating what the other side will argue and then you can polish your rebuttal during trial. By listening carefully to opposing counsel's argument, you will be able to identify the argument that provides you with

an avenue to respond. You just bridge from opposing counsel's argument into your prepared remarks: "Counsel just said that you should acquit his client if there is any doubt. Is that how jury Instruction 5 defines a reasonable doubt? . . ."

When the plaintiff has a rebuttal, defense counsel must anticipate plaintiff's rebuttal argument and try to undercut its potential impact. Therefore, defense counsel will need to analyze thoroughly what plaintiff's counsel will say in rebuttal about the defense case ("If plaintiff's counsel says . . . ask yourself how the plaintiff can explain why under the circumstances their witness did not come forward until almost a year later.").

While the concept of "reasonable doubt" will play an important role in the criminal defense attorney's closing argument, the "presumption of innocence" plays an equally important part—but here the focus on this latter concept will be in blocking what we call "reversing the presumption of innocence." We'll illustrate with the *Freck Point Murder* case. Expert witnesses for the government will acknowledge that the killer was wearing gloves; police will concede that no gloves, bloody or otherwise, were found in the area. The defense will make strong points with this in support of its reasonable doubt defense—*unless* the prosecution or jurors are left free to "reverse the presumption." The portion of the defense closing argument calculated to block off this possibility might go something like the following



## CLOSING ARGUMENT

### Blocking "Reversing Presumption"

#### The *Freck Point Murder* Case

When looking at the evidence in this case so that my client will get a fair trial, it is crucial that you don't let the prosecution in rebuttal or some juror in deliberations shift the presumption of innocence. Take the missing gloves I've talked about. If you reverse the presumption of innocence and presume my client guilty, then of course he must have done something to hide or destroy the gloves. But, if you presume him innocent, then the absence of those gloves raises a doubt that cannot be made to disappear with speculation and excuses. It only disappears with *evidence*—like having an expert to testify that remnants in the fireplace are of the fiber composition of gloves, or a witness who saw my client take something off his hands and toss it in a ravine. So, if you hear the prosecutor or someone on the jury make excuses and offer speculations to fill in doubts in the prosecution's case, say on behalf of my client, "You're reversing the presumption of innocence."

While on the surface this "blocking reversing presumption" argument might seem appealing, the prosecutor in rebuttal may point out its fallaciousness with an argument along the following lines.



## CLOSING ARGUMENT

### Rebutting the Reversing-the-Presumption Argument

#### The *Freck Point Murder* Case

Ladies and gentlemen, you will recall defense counsel's reversing-the-presumption-of innocence argument. Two things are very wrong with the argument.

The first thing wrong with the argument is that it misstates the law that you received from the Judge in the instructions. The law regarding the presumption of innocence is contained in instruction number 5, which states:

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

The law does not require, as defense counsel suggests, that evidence must be produced to explain the absence of, for example, the gloves. If that were the case, the law would reward murderers who successfully dispose of weapons and other evidence of their guilt.

Rather, the law requires that the defendant here, like any defendant in America, is to be presumed innocent. You might think of the presumption as a cloak that covers the defendant. That cloak of innocence, however, can be removed, as the instruction says, by evidence beyond a reasonable doubt. We gladly accept that burden.

The second thing wrong with the defense counsel's argument is that it is an invitation to abandon your common sense during deliberations. As the Judge has told you, you may use your common sense during your deliberations. Let's apply the law on the presumption of innocence to the missing gloves example and see why the defense argument is an invitation to abandon common sense. During your deliberations you will have overwhelming evidence to overcome the presumption of innocence beyond a reasonable doubt—to remove the cloak of innocence from this defendant. Defense counsel hopes that a juror will say that the gloves are missing, that the absence of the gloves cannot be explained by the evidence and therefore the defendant did not murder Sondra. The common sense explanation

continues ▶

is that the defendant successfully disposed of the gloves. That's not speculation. Based on the ample evidence of the defendant's guilt that's just plain common sense. Defense counsel hopes with the reversing-the-presumption argument that you will not use your common sense.

I urge you to follow the law on the presumption of innocence as given to you by the court and to draw upon your well of common sense in reaching your verdict.

## V. DELIVERING CLOSING

Closing, like opening, is a speech, and the techniques described on pages 262-67 apply equally to closing argument. The following is a summary of pointers for delivering both opening and closing. You might also want to review the approaches, strategies, and techniques described in Chapter 2 on trial persuasion principles.

### DELIVERING CLOSING ARGUMENT



- **Take a Center Courtroom Position:** You want to take a position in the courtroom in front of the jury and at a distance comfortably back so that you don't invade the jury's space. Your movement around the courtroom should be purposeful. For instance, you may move to a chart, move to another position when you shift to another subject, and so on. (Be mindful of the rules and etiquette of the judge.)
- **Manage Nervousness:** Utilize these techniques: thoroughly prepare, practice, and concentrate on your message, not yourself.
- **Rehearse:** Besides helping to overcome nervousness, this will make the closing flow smoothly and enable you to communicate with the jury.
- **Project Sincerity:** Believe in your case, be candid, and be courteous.
- **Tell a Story, Use a Theme:** Do this during those points in argument when you discuss the facts.
- **Use Visuals.**
- **Be Passionate, Be Fair, and Be Ethical.**

A final word of advice about your delivery: It is all right to be righteously indignant if either opposing counsel or another party steps out of bounds. It shows you care about fairness. But generally, be sincere showing your indignation or it will appear to be a tactic.

## VI. VISUALS FOR CLOSING

Visuals can serve several purposes in closing:

- Applying law to the facts.
- Explaining the law.
- Reviewing the facts.
- Defining terms.
- Showing relationships between the participants, and
- Arguing the case.

### A. Illustrating the Use of Visuals

Let's return to the *Freck Point Murder* case to illustrate how visuals can create a persuasive closing argument. Assume for the following illustrations that you are the prosecutor.

#### Applying the Law to the Facts

You can show the jury the same elements chart that you introduced them to in your opening statement. With the aid of the chart, you go element by element applying the law as stated in the jury instruction from which the elements chart is drawn to the facts proven during the trial. In this way you explain to the jury that the conduct of the person who stabbed Sondra Griffith to death fulfilled all the elements of murder in the first degree.

#### CLOSING ARGUMENT ELEMENTS CHART

##### The *Freck Point Murder* Case

##### MURDER— FIRST DEGREE

1. On or about October 16, the defendant Samuel Griffith
2. In the State of Major
3. Killed Sondra Griffith
4. The defendant acted with intent to kill
5. The intent was the result of premeditation
6. Sondra Griffith died as a result of defendant's acts

### Explaining the Law

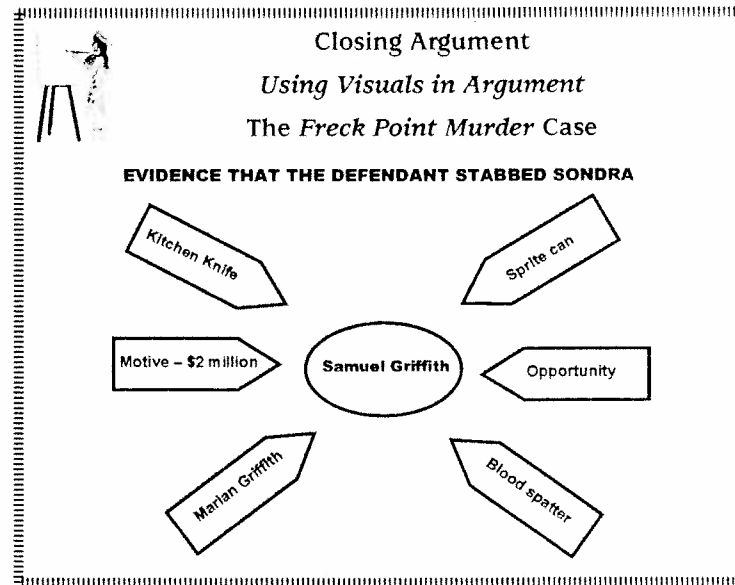
To explain the law to the jury as the prosecutor, you could use a visual to explain the meaning of the word *premeditated*. The jury instructions define *premeditated* as "considered beforehand." You might illustrate *premeditated* with a visual of a stop sign as you explain in everyday terms that people routinely premeditate action. "When you come to a stop sign, you stop, then look to the left, then the right for on coming cars. You consider beforehand whether to proceed. That's premeditation." The visual of the stop sign will highlight your explanation.

### Reviewing the Facts

To review the facts for the jury, you could employ the timeline chart described on page 274. You could show photographs and the diagram of the bedroom where Sondra was stabbed to death and so on.

### Arguing the Issue

As you apply the law to the facts with the aid of the elements chart, you reserve the discussion of one issue: "The single issue in this case is: Did the defendant do it?" Later, you can use a visual to present your arguments on that issue. The animation feature of a computer software program such as PowerPoint can facilitate your argument because you can use your remote to make words and/or objects appear on the slide one at a time. This way, you engage the jury's attention on your argument. When you conclude your arguments, the slide will show an accumulation of evidence proving your ultimate argument point. To illustrate, let's return to the *Freck Point Murder* case and examine a visual that could be used.

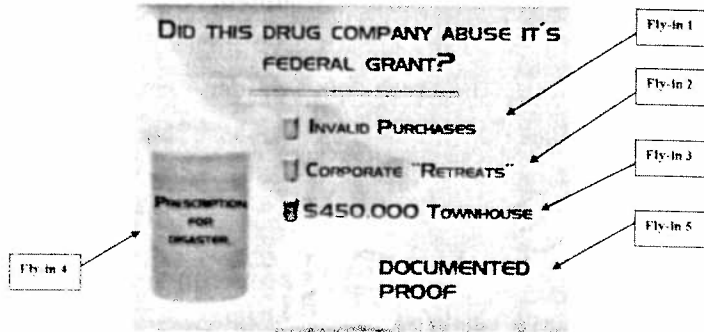


It is not necessary to use a computer slideshow. Another approach is to use a board with the defendant's name in the middle and attach Velcro arrows to the board.

## B. Visuals in Diverse Cases

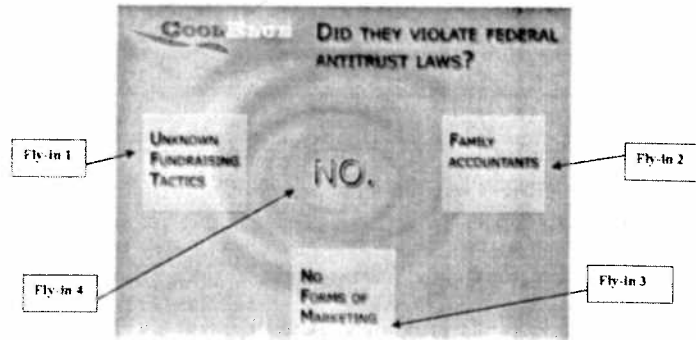
As you have seen with the *Freck Point Murder* case, you can be creative in designing visuals that support and enrich your argument. Now, examine some visuals to see what is possible. As you look at them, you will note two attributes. First, they are aimed at a particular issue that is at the heart of the case. Second, once the visual is complete, it is freestanding, requiring no explanation. Completion involves assembly of all the pieces by the use of a computer slideshow program using a custom animation feature or by pasting them onto a display board. By the time the visual has been assembled, it should be convincing on the issue.

**Visual 1: Prosecution for Fraud**



Borrowed Ladder Media Services Inc.—<http://www.borrowedladder.com>.

**Visual 2: Defense of Antitrust**



Borrowed Ladder Media Services Inc.—<http://www.borrowedladder.com>.

The fly-ins in visuals 1 and 2 represent animations that will bring in the statements one by one until they are all assembled, showing how the jury should find on an issue. This technique is easily activated in PowerPoint or similar programs.

**Visual 3: Defense of Medical Malpractice**

This visual is from a medical malpractice case involving the birth of a brain damaged (cerebral palsy) baby. It was important to show that the nurses let the doctor know as soon as difficulties in labor were detected by the fetal monitor strip. The monitor records the fetal heart rate (top line) and the strength and timing of the mother's uterine contractions (bottom line). The fall-off in the fetal heart rate, a sustained pattern of bradycardia, is a sign of fetal distress (the fetus is not getting enough oxygen).

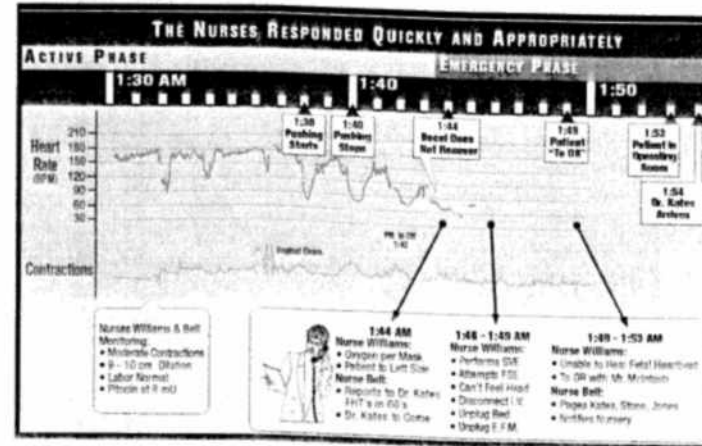


Exhibit Express—<http://www.exhibitize.com>.

## Damages

Trial lawyers avail themselves of visuals to argue damages. This is a chart showing economic losses due to injury.

| <b>JANE SMITH</b>   |                  |
|---|------------------|
| <b>ECONOMIC LOSSES DUE TO INJURY</b>                          |                  |
| <b>Earnings Loss #1</b>                                       |                  |
| Works to Worklife Expectancy                                  |                  |
| Jane Smith will be delayed in her teaching career by 3 years. |                  |
| Past Loss .....   | \$59,406         |
| Future Loss .....   | \$147,457        |
| <b>Total Earnings Loss .....</b>                              | <b>\$206,863</b> |
| <b>Earnings Loss #2</b>                                       |                  |
| Works to Worklife Expectancy                                  |                  |
| Jane Smith will be delayed in her teaching career by 5 years. |                  |
| Past Loss .....   | \$59,406         |
| Future Loss .....   | \$226,591        |
| <b>Total Earnings Loss .....</b>                              | <b>\$285,997</b> |
| <b>Earnings Loss #3</b>                                       |                  |
| Works to Worklife Expectancy                                  |                  |
| Jane Smith will only work as a substitute teacher.            |                  |
| Past Loss .....   | \$59,406         |
| Future Loss .....   | \$778,315        |
| <b>Total Earnings Loss .....</b>                              | <b>\$837,721</b> |
| <b>Preliminary Life Care Plan</b>                             |                  |
| Totals for Future Damages                                     |                  |
| Appraisal based on Carol Hyland's Report.                     |                  |
| Part 1 - Medical Services .....                               | \$64,711         |
| Part 2 - Medical Supplies/Medication .....                    | \$32,682         |
| Part 3 - Medical Equipment .....                              | \$9,586          |
| Part 4 - Mobility Equipment/Transportation .....              | \$251,781        |
| <b>Grand Total .....</b>                                      | <b>\$358,760</b> |

High Impact—<http://www.highimpactlit.com>.

## VII. ETHICAL CONSIDERATIONS

ABA Model Rule of Professional Conduct 3.4 on Fairness to Opposing Party and Counsel outlines the boundaries of professional conduct that are of particular significance for closing argument:

A lawyer shall not: . . .

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justice of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused. . . .

The following four sections discuss Rule 3.4 and provide additional illustrations of closing arguments that exceeded the boundaries set by the Model Rules of Professional Conduct or ethical conduct. Rule 3.4 applies to all lawyers. Because prosecutors are charged with the duty to see that justice is done and must exercise particular care in how they phrase closing arguments, several of the illustrations come from prosecutors' closing arguments.

### A. Personal Opinion

#### CLOSING ARGUMENT

##### *What Not to Do—Personal Opinion*

Prosecutor: "Ladies and gentlemen, I believe it is very clear, and I hope you are convinced too, that the person who committed this crime was none other than Christina Marsh." And later: "I'm sure she committed the crime." Referring to Marsh's testimony, the prosecutor states: "Use your common sense, ladies and gentlemen. That is not true. It's another lie. It's a lie, ladies and gentlemen, an out-and-out lie." Regarding the alibi witnesses' credibility, the prosecutor says: "You should entirely disregard their testimony because, if you will remember, every one of them lied on the stand. . . . I sincerely doubt if she (witness) had seen Christina Marsh there." Of another witness's testimony, the prosecutor states: "I find that awfully hard to believe."

*State v. Marsh*, 728 P.2d 1301, 1302 (Hawaii 1986), held:

"The rationale for the rule is that '[e]xpressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued.' ABA Standards for Criminal Justice, Commentary, at 3.89. The Supreme Court has observed that a prosecuting attorney's 'improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.' *Berger v. United States*, 295 U.S. 78, 88 (1935)."

## B. Venturing Outside the Record

Trial counsel should discuss only the admitted evidence. She should never state any facts or inferences other than those based on the evidence introduced at trial. To step beyond this boundary is to become an unsworn witness, which Rule 3.4 prohibits. The following excerpts illustrate closings that departed from the evidence.



### CLOSING ARGUMENT

#### *What Not to Do—Venturing Outside the Evidence*

Prosecutor: "Those of you who have some medical knowledge know that cocaine is a downer, you get mellow on it. It's not like methedrine which strokes you up and causes you to do irrational acts. Cocaine is a downer. You don't go out and shoot people on cocaine. You make love: you mellow." *People v. Bell*, 778 P.2d 129, 149-150 (Cal. 1989).

Prosecutor: "Well, ladies and gentlemen, we can't tell you everything he did after his arrest and he knows it. Maybe when this is over, I will tell you what he did when he was arrested." *People v. Emerson*, 455 N.E.2d 41, 45 (Ill. 1983).

Personal stories can run afoul of the rule. In *People v. Barraza*, 708 N.E.2d 1256 (Ill. App. 1999), an aggravated sexual assault case, the prosecutor told a personal story in closing argument to refute the defense attorney's suggestion that the testimony of the two minor victims were not credible because they delayed reporting for two years. The prosecutor's story recounted a conversation with his ten-year-old daughter in which she told him that she would not tell him if she were touched inappropriately despite his instructions to her that she should tell.

## C. Irrelevant Material

Arguments appealing to ethnic, racial, sexist, ageist, political, economic, or religious bias violate the fundamental principles of our justice system. Arguments calculated to inflame the passion, prejudice, or fear of the jurors should be avoided because they are morally and ethically wrong. Such arguments inject matters into the trial that may undermine a fair determination of the case. The following are some examples.



### CLOSING ARGUMENT

#### *What Not to Do—Introducing Irrelevant Matter*

##### Religion

Prosecutor: "And this child embraced the Lord and embraced the word of God and tried to grow. And in the child's growth, he met Don McCary. It is the word of the Lord that this child was learning and that this man was corrupting, and that is what happened to this child."

The Tennessee Court of Criminal Appeals in *State v. McCary*, 119 S.W.3d 226, 254 (2003), disapproved of the argument stating, "In our view those arguments, replete with inappropriate religious references, were improper" and observed "[w]hether the defendant should be 'damned for eternity' is the exclusive jurisdiction of a far greater authority than the state courts."

## D. The Golden Rule

A golden rule argument asks the jurors to put themselves into the place of the party; it is improper.



### CLOSING ARGUMENT

#### *Do Not Place Yourself in the Case*

##### Civil Case

A golden rule argument would argue to the jury that it should calculate damages by placing themselves in the plaintiff's shoes and award the amount they think it would be worth to undergo equivalent disability, pain, and suffering. *Brokopp v. Ford Motor Co.*, 71 Cal. App. 3d 841 (1977).

##### Criminal Case

An improper golden rule appeal to passion and prejudice occurred when the prosecutor asked the jurors to place themselves in the position of an innocent victim who was assaulted with a knife and sustained serious injuries. *People v. Simington*, 19 Cal. 4th 1374 (1993).