

## In closing arguments, don't forget 'The Ask'

By: F. Dennis Saylor IV and Daniel I. Small ◉ April 8, 2018

Many thousands of words have been written about the best way to make a winning closing argument. But apart from some universal truths — such as the proposition that you ignore the evidence at your peril — there really isn't just one "best" way.

Every case is different, and for that matter, so is every court and every lawyer. An argument or style that might work brilliantly in one context might prove disastrous in another.

Nonetheless, we're going to wade into this thicket with some comments of our own. We'll start by turning things over to Dan to talk about what he calls "The Ask."

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It's time for closing argument, and so it's time to ask for what you want. In a quote attributed to Mahatma Gandhi (among others), "If you don't ask, you don't get."

But have you given enough thought to what you're really asking for, how you should ask for it, and what you should *not* ask for?

### 1. Don't ask for more than you need

Justice Blackmun wrote in *Daubert* that the Federal Rules of Evidence are "designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes." *Daubert v. Merrell Dow*, 509 U.S. 579, 597 (1993).

Winning at trial is hard enough; don't set the bar higher than it needs to be. Don't ask for more than you need to win the case.

Here are some common traps:

#### 1. Angels and demons

There may be cases in which your client is an angel and the other side is a demon. But that's rare. Litigation involves human beings, and humans are almost never that simple or one-dimensional.

Chances are, your client is not perfect, and his or her actions were not perfect. Don't try to hide or avoid those imperfections. You want to portray your client as favorably and sympathetically as you can, to make the jury want to rule in his or her favor. That doesn't mean that the jury has to be convinced the client is an angel. Don't make that the standard. Real human beings, warts and all, can also be sympathetic.

Similarly, you may need the jury to find that the other side did something wrong. But do you really need it to find that the other side is a demon? Maybe they just made a mistake, yielded to temptation, had a lapse of judgment. It's hard to convince people that someone is really that bad. And if you take on that burden and fail, you're just hurting your case.

#### 2. Impeachment

You caught a witness for the other side in a prior inconsistent statement, or something worse. But don't get too caught up in your own success.

No matter how convinced you may be, it's hard to convince others that someone is deliberately lying. Most people are slow to come to that kind of judgment and are willing to give some amount of benefit of the doubt.

Unless you really need a witness to be seen as a liar, and you're very sure that you've proved it to all, don't take on that burden.

### **3. Broader issues**

Trials often touch on broader societal issues. But you're not there to address or cure society's ills; you're there to win a specific result for a specific client. If you happen to do some good as a side effect, congratulations. But too often when lawyers try to turn their case into a cause, they make it more difficult for themselves — and their client.

Do you really need to prove that "all big companies lie" or that "all doctors are greedy?" Somebody on the jury might strongly disagree with that and be turned off by your argument. That same juror might nonetheless be willing to accept the fact that this particular company or this particular doctor made a mistake.

It can be tempting to broaden the case. Sometimes a broad charge helps to make the narrow one more credible. But again, don't take on more of a burden than you need to win the case. There is a time and place for addressing and curing societal problems —but the trial of your client's matter is not likely to be it.

#### **1. Do ask for what you want**

In some cases, the decision you want from the jury is fairly simple and straightforward — for example, "not guilty." But often it's more complex, more nuanced and more problematic. Ask for what you want, carefully and clearly.

#### **1. Consequences of the case**

What is it you and your client actually want the decision to be? What does it really mean to "make my client whole" or "do what is right"? Think about what the consequences should be if you win, and what the consequences would be if the other side wins. Then make both things clear.

#### **2. Verdict forms**

In some cases, the verdict form is only a few simple lines, their meaning apparent to all. That's what most jurors are expecting: up or down, yea or nay. But often it's not that simple. In even a moderately complex case, the verdict form can go on for pages and pages. How is the jury supposed to know what is right, and what you really want, unless you tell them?

Take the time to walk through the verdict form and to explain it. It may be a good outline to the jury of your closing argument.

#### **3. Money**

In most civil cases, the remedy is money. Don't be shy or uncomfortable asking for it. Of course, it cannot really make your client whole. But it's all we have and all the jury is allowed to award. For the defense, it also can't make the plaintiff whole, and it's not right to award it out of sympathy. Either way, don't be afraid to talk about it openly.

Lawyers get caught up in the excitement of closing argument: the facts, the witnesses, the right and wrong. But don't forget "The Ask." Don't ask for more than you need, and do ask for what you want.

*Previous installments of Tried & True can be found [here](#). Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.*

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10 Milk Street, Suite 1000,

Boston, MA 02108

(800) 451-9998