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Focus, organization in closing arguments

By: F. Dennis Saylor IV and Daniel I. Small February 22, 2018

The purpose of a closing argument is to persuade. It's not to show off, or tell stories, or listen to the sound of your own voice. Remember what you're there to do.

The closing argument is your final, and least restrained, opportunity to persuade the jury, but your time is brief and therefore precious. In a very short period of time, you need to summarize the evidence (or absence of evidence, as the case may be) and explain why that evidence requires the conclusion you want the jury to reach.

Nothing is nearly as important as the facts. You need to organize them and present them in the most compelling way you can. You can overcome a host of other problems if the jury thinks the facts are on your side.

Lawyers are permitted great latitude in closings (although, of course, there are limitations — not everything is allowed). In practice, that means that there are nearly limitless ways in which you can waste time or distract from your message. Don't lose your focus.

And don't think of it as "argument." You're not there to argue. You're there to persuade.

Organization

The time available for closing argument is almost always limited and almost always insufficient to touch on every issue. Your argument should be tightly organized and planned well in advance. It should have a sensible structure, including a beginning and an end. Your words should be chosen with great care, with careful attention to pacing and delivery.

Way too many closing arguments are way too disorganized. Some are so disorganized it's bizarre. It's as if it never occurred to the lawyer that he or she would have to say something at the conclusion of the trial. I have heard lawyers say things like:

I had another dozen or so points I wanted to make, but I'm running out of time so I'll have to stop here.

I don't have time to talk about the other exhibits, but you'll have them with you in the jury room. You should read them and form your own conclusions.

Oh, and another thing, I forgot to mention …

One wonders what effect such statements have on the client sitting there at the table. And certainly the effect on the jury can't be positive.

No doubt the following factors contribute to disorganized closings:

1. Procrastinators run out of time to prepare. The conclusion of a trial is normally a period of hectic activity for the lawyers, including motions for directed verdict and finalizing of jury instructions (often with related legal research). And the schedule of trials is not always predictable; sometimes they end earlier than expected. Lawyers who believe there will be time to prepare for the closing at the end are often caught short.
2. Because closing arguments have so much to address in such a limited time, any flaws in organization or preparation are likely to be exposed.
3. Trials are dynamic, and therefore unanticipated matters arise. Not everything can be planned out beforehand.
4. Lawyers don't practice their closings.
5. Lawyers stubbornly insist on doing closings without outlines, scripts or even notes.

Guiding the decision

Remember what the jury has to decide. Jurors will have a form with them in the jury room; the form will ask them to make specific decisions. The purpose of your argument is to guide them to the right decisions. You don't have to read the form aloud, or go through it question by question, or follow its every word. But don't ignore it, either. The whole point of the trial is to get the jury to fill in the right answers on that piece of paper.

Many lawyers say that the most effective way to persuade jurors is to let them reach the desired conclusion on their own; in other words, to give them the facts that compel that conclusion, but not the conclusion itself. The theory (I think) is that the jurors will feel more receptive to your argument and more vested in the outcome if they're allowed to reach the decision themselves, not have it forced on them.

That may well be true, but it strikes me as a very dangerous approach. I would not assume that the jury will reach the conclusion that you want just because you think it's compelled by the facts. Even if you think it's obvious, the jury may not.

In my opinion, you should tell jurors what you want them to do. Tell them thoughtfully, intelligently, even matter-of-factly. Don't bludgeon them. But tell them.

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.