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The basic rules for closing arguments

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There aren't many legal rules governing closing arguments — but there are some. From time to time, overenthusiastic, inattentive or unhappy lawyers will cross the line and break one of those rules, and risk serious consequences to their cases.

Here are the most basic rules:

1. **Don't misstate the evidence.**

You can argue the evidence, the reasonable inferences from the evidence, and the credibility of the witnesses. You can point out (with certain limitations applicable to prosecutors) the absence of evidence as to different issues. But you cannot argue "facts" that were never admitted into evidence.

Similarly, you cannot misstate the evidence. If the only evidence about the date of a meeting was that it occurred in December, you can't argue that it occurred in January.

You'd be surprised how often lawyers do that, even if much of the time it's trivial. For example, disorganized lawyers may lose track of what's in evidence and what's not. Lawyers sometimes assume that if the point involves background facts or relatively minor points, it doesn't matter. And lawyers sometimes think that their own question is enough to put a fact in evidence, even if the answer doesn't actually do that.

Suppose, for example, this was an exchange with a witness: Q: *"It's true, isn't it, that Bill Smith was at that meeting?"* A: *"I don't remember that."* You can't later argue (at least based on that alone) that Smith was at the meeting.

2. **Don't express personal opinion.**

You cannot explicitly inject your own credibility or personal opinions into a closing argument. (*"I personally believe that there is no doubt as to the defendant's guilt."*).

Likewise, you cannot vouch for a witness. (*"The witness is a policeman, well-known to those of us in the law enforcement community for his honesty and professionalism."*)

The safest and most prudent thing to do is never use the words "I," "me," "my" or "myself." It's not about you; it's about the evidence.

3. **Don't make inflammatory appeals.**

You cannot make an inflammatory appeal to the jury's passions or prejudices. For example, a prosecutor in a drug case should not argue about the evils of drug trafficking. (*"These illegal drugs are ensnaring our children and destroying our community."*) Whether drug trafficking in general is a bad thing does nothing to establish whether the defendant on trial is guilty of the charges against him.

Inexperienced lawyers learning trial advocacy for the first time do that with some frequency. But sometimes more experienced lawyers — particularly those who believe they are on the side of the angels — do it, too. It doesn't matter how important it is to punish polluters or stop unlawful discrimination; the case is about the evidence, not some broader societal goal.

4. **Don't raise forbidden topics.**

You can't talk about, or even hint at, topics that the jury may not consider. For example, you cannot raise the topic of possible punishment in a criminal case. (*"Think carefully before you send this man to a certain prison term."*) Nor

can you raise issues that the court has excluded. And don't edge right up to the line, either, unless you are 100 percent confident that what you're doing is proper.

5. **Special limits for prosecutors.**

Prosecutors are not permitted to comment, in any way, on the defendant's failure to take the stand. That includes indirect comments, such as saying, *"That evidence stands uncontradicted"* when, in the context of the case, the defendant is the only witness who could contradict it.

Prosecutors likewise cannot suggest in any way that the defendant had a burden to put forward evidence. Again, that includes indirect as well as direct comments. (*"How does the defendant explain [X]?"*).

Twice in the last year or so, Judge Saylor has heard a prosecutor say something to this effect: *"There is no evidence that the defendant is not guilty."* If that isn't improper, it's awfully close.

Probably 95 percent of the mistakes made by prosecutors in closing argument come in rebuttal, when they are responding (often in anger or frustration) to something defense counsel just said. If you're a prosecutor, take a deep breath before responding. And don't say something stupid that will lead to a reversal.

In short, don't undercut your closing argument, and risk reversal or worse, by doing something improper or objectionable. Follow the basic rules.

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.