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Opportunity, challenge in closing arguments

By: F. Dennis Saylor IV and Daniel I. Small January 11, 2018

Our next set of columns covers the topic of closing arguments. We'll start by turning things over to Dan for some overall observations, with our next column featuring Judge Saylor doing the same.

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You've done it. You've made it through the evidence and now comes one of the most exciting and challenging parts of any trial: the closing argument. A seemingly endless stream of TV shows and movies portray this moment with great drama. The lawyer, standing in the well of the court, faces jurors and vehemently tells them why justice demands a verdict for his client. He's turning the tide, winning the case.

Indeed, closing arguments are important and often dramatic. They allow the lawyer room for persuasion, passion and drama. More than 150 years ago, the New Hampshire Superior Court described the lawyer's freedom in closing argument this way:

"His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination." *Tucker v. Henniker*, 41 N.H. 317, 323 (1860).

However, with this drama comes danger. The nature and freedoms of closing argument can tempt counsel in ways that can diminish its impact. That dichotomy begins with the very title: closing argument. It is, in fact, in some ways both, and in some ways neither.

Closing: This is, indeed, your opportunity to close the case, your chance to pull the disparate strands of evidence together and weave a clear and compelling picture. It is, without a doubt, an important moment in any trial.

However, lawyers being lawyers, we tend to think of the word "closing" as the vehicle for tying up every loose end and following every rabbit trail. Think of how the word is used and implemented elsewhere in the law. A closing binder in even a moderately complex financial transaction can be an enormous compendium. The goal is to anticipate and cover every detail, every contingency.

At trial, that can be a terrible mistake. The great latitude you are given in closings means that it is easy to lose your message. Don't wallow in detail, and don't get distracted.

Whether limited by the court, or by a realistic view of the jury's patience, you have a very short period of time in which to highlight what's important in the evidence, and explain why that evidence requires the conclusion you want the jury to reach.

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Argument: Of course, you are an advocate and you want to win. You must believe in your cause. Be passionate, even angry or emotional, if appropriate. But in closing, you are not there to "argue" with anyone — not opposing counsel, judge or jury.

The dictionary defines "argument" as a heated exchange of opposite views. Nowhere in that definition is "changing anyone's mind." Indeed, we all know from our own lives that the more heated an argument becomes, the less likely anyone is really listening.

The point is not argument, but persuasion. The dictionary defines "persuasion" as causing people to believe something. That's the goal, not conflict. Focus on the facts, not anger. Be the honest tour guide who takes the jury by the hand and leads it on the correct path through the evidence, not the bully who tries to push jurors through by force.

Don't focus on opposing counsel or other complaints; focus on the facts. Maintain your own credibility by being a credible and knowledgeable guide.

The reality is that the myth of jurors changing their minds based solely on the sheer power of counsel's closing argument is largely just that: a myth. If a juror has really made up his or her mind, even the most impassioned closing is unlikely to change it.

Rather, focus on the members of the other two audiences — those who are already leaning your way, and those who are undecided.

For those jurors leaning your way, give them the evidentiary ammunition and well-supported theories to take back with them into the jury room for deliberations. For those undecided, help them to see the light, and to see you as a credible guide, an advocate they can trust and respect, because you trust and respect them.

So it is that even the phrase "closing argument" reflects some of the many challenges of this last phase of the trial. In the next several columns, we will address in more detail the process of preparing, organizing and delivering a closing argument.

But first and foremost, remember what you're there to do: tell a compelling story, based on the facts, that leads the jury to your theories of the case and to the right conclusion.

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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