

CLOSING ARGUMENT

Prepared by:

Margaret M. Joffe
Deutsch, Kerrigan & Stiles LLP
755 Magazine Street
New Orleans, LA 70123

I. INTRODUCTION

Every trial lawyer has three closing arguments—the one the lawyer planned to give—the one the lawyer gave—and the one the lawyer wished he/she had given. Unless you write out your entire closing argument and read it verbatim to the jury, there will inevitably be differences between the argument you plan to give and the argument you actually make to the jury. It is also inevitable that after you sit down after making a closing argument, and while you are basking in the glow of your own eloquence, certain thoughts will start flickering through your mind and you will say to yourself, “I wish I had said something about that” or “I should have spent more time on that other issue” or “I should have done a better job rebutting that argument.”

No closing argument you will ever make will be perfect, particularly with a worthy adversary emphasizing the weaknesses in your case and the slightest misstatement in your presentation of the case. So you can forget perfection when it comes to closing argument. What you really want to hear from your client when you sit down (and before the jury decides the case) are these two words: “Great job.”

There are no absolutes when it comes to closing argument. Each argument will be different because closing argument is a function of the facts and circumstances of each case and the personality of the lawyer making the argument. What I can do here, however, is offer a few observations and suggestions for your consideration based upon thirty years of experience trying cases.

II. IS CLOSING ARGUMENT REALLY IMPORTANT?

The trial pundits tell us that the vast majority of jurors have already made up their mind about the case by the time the lawyers sit down after their opening statements. Even if the jury consultants are right, it does not follow that you can ignore everything after the opening statement. The presentation of evidence is certainly nothing to be taken lightly. Defense lawyers certainly do not take motions for directed verdict lightly. Similarly, closing argument should not be taken lightly under the theory that the jury has already made up its mind.

Moreover, closing argument is not really an optional event. You will be making a closing argument in every jury trial so why not give a good closing and use it to your advantage. It is your

final opportunity to talk to the jury before they adjourn to decide the case. It is also your best opportunity to talk to the jury because you can now argue your case, rather than simply stating your contentions as you did in the opening statement. As your last chance to persuade jurors to your side of the case, it is obviously important, but if for no other reason, you should regard closing as important because the jurors view it as important, and it comes at a point in the trial when they are looking for direction regarding their decision.

Closing argument is all about credibility, and credibility is the most important element in any trial. The side the jurors find to be most credible is the side that wins. It is essential that you establish credibility with the jury and the court and that you earn their respect. Even prior to voir dire, the jurors will be observing you. You will have opportunities throughout the trial to establish credibility and respect. If you take advantage of those opportunities, closing argument will be the culmination of your efforts to establish credibility and respect. It is credibility that enables you to stand up with confidence at the time of closing argument and tell the jurors why they should decide the case in favor of your client. It is your chance to connect the dots and tie everything together for them. If they believe you and respect you, they will generally find in favor of your client.

Jurors also vote for folks they like. Not only do you want them to like you but you want them to like your client. It is important to personalize your client, particularly a corporate client. The process begins when you and your client walk into the courtroom and culminates in your closing remarks. This is your last chance to place your client in the most favorable light possible.

Simply stated, closing argument is such a significant opportunity, it's too important to screw up. It deserves your very best time and effort.

III. WHAT ARE YOU TRYING TO ACCOMPLISH DURING CLOSING ARGUMENT?

Trial lawyers like to think they can get jurors to change their minds based upon the brilliance and eloquence of the closing argument. For most of us, however, such a lofty goal is rather unrealistic, but we are a stubborn bunch. We like to think we are the equal of Clarence Darrow. There's certainly no harm in trying to work miracles during closing, *i.e.* snatch victory from the jaws of defeat. So, go for it.

The purpose of closing argument is to persuade the jury that the evidence sustains your client's position. A closing argument should not be a summation. A simple recitation of the facts is not sufficient. The closing argument must bring together information from the witnesses and the exhibits in a way that persuades the jury. The closing argument must be logical, believable and legally sufficient.

Closing arguments should be prepared in advance and should usually follow a structure that parallels the opening statement and your case in chief. Mauet, Fundamentals of Trial Techniques

§7,3 (2d Ed. 1988). The final argument must complement the picture begun during the opening statement, and, must reflect and encompass the evidence in the case.

The purpose of the closing argument is to assist the jury in analyzing, evaluating and applying the evidence. *United States v. Siegel*. 587 F.2d 721, 726 (5th Cir. 1979). The closing argument is counsel's second chance, "last chance," best chance to persuade the jury how the evidence supports the client's view of the case. La. Code of Civil Procedure art. 1632(4).

Closing argument provides an opportunity to utilize your credibility in an effort to persuade the jurors to your side of the case. When you stand up to give your closing, jurors will fall into one of five possible categories:

Category #1 - jurors who will definitely decide the case for your client

Category #2 - jurors not totally committed, but leaning toward deciding the case for your client

Category #3 - jurors who are truly undecided

Category #4 - jurors not totally committed, but leaning toward deciding the case for the other side

Category #5 - jurors who will definitely decide the case against your client.

You might conclude that you don't need to do anything for the jurors in Category #1 because they have made up their mind in favor of your client. If that's the way you think, you probably don't need to be trying cases and you probably haven't tried very many. Although trial lawyers profess to have great insights into the minds of jurors, we really don't know with certainty whether jurors have made up their mind or even which way they are leaning. We have all been surprised to find out that a key juror we thought was on our side actually turned out to be the most vocal proponent for the opposition during deliberations.

Even if you think you know that a juror is on your side, you should not take any juror's vote for granted. Nothing feels worse than finding out that one of your jurors was so persuaded by your opponent's closing that he or she changed their mind and voted against you. When you stand up to make your closing argument, you should give top priority to retaining the votes you have or think you have. This means furnishing jurors in Category #1 with facts, law, argument and other tidbits, which reinforce their view of the case and predisposition favorable to your client. If you accomplish this objective, you not only retain the vote of those jurors, but you furnish them with the ammunition to persuade the uncommitted jurors to your side of the case.

With respect to jurors in Categories #2, #3 and #4, closing is an opportunity to persuade those jurors to decide the case in favor of your client. Obviously, the jurors in Category #4 are somewhat

less likely to end up in your column than the jurors in Categories #2 and #3, but it is the side which successfully persuades the jurors in Categories #2, #3 and #4 that ends up winning the case. Again, the objective is to furnish facts, law, argument and other tidbits, which will cause these jurors to commit to your side of the case.

What about jurors in Category #5, *i.e.*, those who have made up their mind to decide the case against your client? Trial lawyers are forever optimistic that they can change the minds of those jurors. We know it happens because we've seen "Twelve Angry Men." While it is unrealistic to expect that we can work miracles in every case, it is certainly worth the effort in addition to addressing the needs and concerns of the jurors in Categories #1, #2, #3 and #4.

In jurisdictions requiring unanimous jury verdicts, the plaintiff can only prevail if all jurors decide the case for the plaintiff. Consequently, the defense can at least get a hung jury and mistrial if only one juror holds out for the defense. This underscores the importance of retaining the votes of the jurors in Categories #1 and #2. In jurisdictions which permit less than unanimous verdicts, the possibility exists of persuading enough jurors to your side of the case that you either get a favorable verdict or deny your opponent a verdict. From the defense point of view, a good closing can often reduce the award of damages, even if the uncommitted jurors ultimately vote for the plaintiff.

Simply stated, it is important to make every effort to persuade jurors to your side of the case and that is the principal objective of closing argument.

IV. PREPARATION FOR CLOSING ARGUMENT

1. Opening Statement.

If you have properly prepared the case for trial, you should be able to give most of your closing argument at the time you stand up to give your opening statement. The closing argument quite often begins along the following line:

At the beginning of this case, when I made my opening statement, I told you there were three important issues for you to decide in this case. One, whether Dr. Quack committed malpractice when he tried to take care of Mary Sue on June 1, 2000. Two, whether Dr. Quack's malpractice resulted in Mary Sue's permanent paralysis. Three, how much money is Mary Sue entitled to receive from Dr. Quack because his malpractice will cause Mary Sue to spend the rest of her life paralyzed.

I also told you at the beginning of the case that the answer to Questions #1 and #2 would be "yes," and that the amount of money required to care for Mary Sue would be substantial. You have now

heard the evidence. Now you know that (1) Dr. Quack did commit malpractice, (2) Dr. Quack's malpractice did result in Mary Sue's paralysis, and (3) Mary Sue's future care will cost over \$47 million dollars without any consideration for her pain, suffering and loss of enjoyment of life.

Trial preparation involves investigating facts and identifying issues and themes, which will be developed at trial. You should know what the evidence will be before you stand up to make your opening statement and you should know what themes you want to develop during the trial. It is these key facts and themes, which should be emphasized in the opening statement and tied back in for the jury at the outset of the closing. Unless you have misread the case entirely, you can generally use the outline of your opening statement at the starting point for your closing argument outline.

2. Trial Notes.

No matter how well you know the case, it is important to listen to the evidence as it comes in and pay close attention to any statements made by the court or opposing counsel in presence of the jury. What's important is not what you know about the case, but rather what the jurors actually hear during the trial.

Most lawyers take fairly detailed trial notes. These notes should be reviewed carefully to identify arguments, issues and evidence (both favorable and unfavorable) which need to be on a checklist to be addressed during closing argument. In addition to a review of your own notes, it is advisable to set down with your client and co-counsel and ask them what evidence, issues and themes they think need to be addressed during closing argument. If there are spectators who have observed a substantial portion of the trial, make a similar inquiry of them. Get as much input from others as possible because everyone will view the case from a slightly different perspective.

I strongly suggest that you keep a separate set of notes specifically for points to be made during closing argument. During the trial, witnesses will invariably say stupid things. For example, assume Dr. Quack testifies as follows:

Wednesday was tough day. We got a late start in the O.R. and I had three surgeries scheduled prior to seeing patients in the office starting at 1:00 p.m. Mary Sue's operation was the third of the morning. The first two had taken a little longer than usual because of complications. Then, I had to see 30 patients in the office before I finally got to go home for a cocktail and dinner. It was a hell of a tough day.

Pay attention. Write down Dr. Quack's exact words and use them against him during closing argument. For example, you might say something during closing along the following line:

You remember a couple of days ago when Dr. Quack testified that the day of Mary Sue's surgery was a "tough day" for him. He got a late start that day. He had to cram Mary Sue's operation in between his other operations, and is 1:00 p.m. office appointments. Then, he had to see 30 patients before he finally got his cocktail on what he called "a hell of a tough day." While that may be a "tough day" as far as Dr. Quack is concerned, I suggest to you that Mary Sue is really the one who knows about "tough days," and Mary Sue will have nothing but "tough days" for the rest of her life. You saw the day-in-the-life video of a typical day for Mary sue. Ladies and Gentlemen, that's a "tough day" and I think you'll agree that it's a little tougher "tough day" that the "tough day" described by Dr. Quack.'

Similarly, the court and counsel make comments in the presence of the jury that can be used during closing, including statements made by opposing counsel during his/her portion of the closing argument. Make a note and make the other side pay for stupid arguments and statements. You should have quite a list of closing argument points at the end of the trial. Go through the notes but be selective about what you use. Use the points that really hit home and make sure the points fit well with the emotions and dynamics of the trial.

3. Script vs. Outline.

Every lawyer prepares for closing argument a little differently. Some write out the closing argument word-for-word. Others use the barest of outlines. Some prepare a script and then reduce it to an outline. While there is comfort and security in utilizing a script, it certainly cuts into any spontaneity and emotion. It is much easier to listen to someone who is talking to you than it is to listen to someone who has his/her head down reading to you. Try to work from an outline, rather than a script.

Some courts permit the use of PowerPoint presentations. If you want to utilize PowerPoint, make sure the court will permit its use before you show up to make the closing. You can use a PowerPoint slide to highlight the issues in the case or the themes developed during the trial. You can walk through the testimony of the witnesses by listing the witnesses and commenting on their testimony. You can highlight important exhibits. You can review timelines. If you represent the plaintiff, you can summarize testimony respecting damages and assist the jury in calculating an appropriate damage award. Combining PowerPoint (or hand-written notes on a flip chart) with blow-ups of key exhibits can be very effective. More importantly, such items provide you with something of an outline to keep you on track during closing argument.

4. Rehearsal.

Some lawyers stand in front of the mirror and deliver their closing argument multiple times. Not a bad idea, but some of us simply cannot do that unless ordered to do so by the client of the jury

consultant. We tend to think out loud to ourselves. Whatever method you use, it is important to have the structure, content, key phrases and flow of the argument engrained in your brain so that it all comes out when the time comes. It is always a good idea to try out your analysis of the case and the key points of your closing on others. Kids are actually the best resource. If you can explain to a child of less than 10 years of age what the case is about and why you should prevail, then you can be fairly certain that you have reduced your argument to a level which can be understood by most jurors. It is amazing the questions you get from kids, which would never have occurred to you, but which need to be addressed before you present the case to the jury. The more feed back – the better. For example, if you are representing Dr. Quack and describe Mary Sue’s present condition to your spouse, and your spouse starts crying, you know you have a problem.

V. CLOSING ARGUMENT FORMAT

1. Tell a Story.

The trial pundits tell us that the most persuasive way to present your case is by telling a story. Stories generally follow chronological events. Telling a story full of facts and emotion is particularly advantageous to the plaintiff. A well-told story is both interesting and easy to follow. You look folks in the eye when you are telling them a story. If you decide to tell a story, just make sure you know how to end the story before you get started. Nothing is worse than a story with a weak climax.

2. Focus on Issues.

Some cases are not particularly suited to the story format. For example, if you represent Dr. Quack, you will probably have heard all about how little Mary Sue was skipping down the sidewalk after school when she tripped and hit her head. She was on her way to a Girl Scout meeting where she was to receive an award for having sold the most Girl Scout cookies in Troop 249. Fortunately, Mary Sue’s preacher and Sunday school teacher were driving by and saw her fall. She was rushed to Dr. Quack’s hospital around the corner. Dr. Quack said everything would be fine. Dr. Quack decided to perform brain surgery. As he was hurrying to finish the operation in order to get to his office where 30 patients were waiting on him, Mary Sue had a seizure and Mary Sue can no longer talk, walk, feed herself or care for any of her bodily needs. Her mind is alert but her body is paralyzed and she will be like this until the day she dies.

After Mary Sue’s story, it might be difficult for the jury to warm up to a story on behalf of Dr. Quack. Thus, the emphasis during Dr. Quack’s closing argument might focus on the medical causation issue, *i.e.*, “Is Mary Sue’s unfortunate condition the result of something Dr. Quack did or is it the result of an unexpected, unpreventable blood clot which hit Mary Sue’s brain while Dr. Quack was operating?” Dr. Quack’s lawyer may have an easier time focusing on the medical causation issue, rather than trying to tell a story to equal the story available to little Mary Sue’s lawyer.

3. Question/Answer Format.

Another fairly effective way to present closing argument is by posing questions, which are of interest to the jury, and providing the jury with answers based on the evidence and law in such a way that the answers are favorable to your client. The use of questions gives the closing argument structure and assists in getting both you and the jury through the argument. For example, you could pose such questions as: Why are we here? What are you supposed to decide? How do you go about deciding a case like this? How much money should you award Mary Sue?

4. Anticipation/Attack.

While most of the closing should be devoted to emphasizing the strengths and logic of your own case, there should be a section in the argument where you attack the other side and point out the weaknesses in their case. Additionally, if you have a “soft spot” in your case, you can be fairly certain that your opponent will say something about it, so it pays to anticipate and prepare the jury by framing the issue in your own terms and providing the best available response.

For example, the defense in Dr. Quack’s malpractice case might attack the plaintiff’s expert as follows:

Then there is the testimony that plaintiff presented from Dr. Hired Gun. Well, there is always a Dr. Hired Gun in these cases. Otherwise, they would never get to court in the first place.

But, compare the credentials of Dr. Hired Gun with the credentials of Dr. Nobel Prize in Medicine, the expert who testified on behalf of Dr. Quack. Which of the two do you think is more of a witness than a practicing doctor? Ask yourself why the plaintiff had to go all the way to New York to find Dr. Hired Gun, when Dr. Nobel Prize in Medicine practices neurosurgery right here in Atlanta, Georgia.

In anticipation of such an attack, Mary Sue’s lawyers might say something along the following line:

You may hear some criticism of Dr. Hired Gun, who was kind enough to review this case for us and come down here from New York to give us his independent assessment of this case. You may wonder why we went to New York instead of asking a local neurosurgeon to provide expert testimony. Well, the answer is fairly simple. We wanted an independent opinion from an outsider, rather the opinion of one of Dr. Quack’s fellow neurosurgeons in the Atlanta

area, and Dr. Hired Gun has been kind enough to provide us with that opinion.

Statements of your opponent also provide a fertile area for attack. While lawyers know they should never promise anything in the opening statement that they cannot deliver during trial, there is usually something of a disconnect between what a lawyer says he/she will prove and what is ultimately proven by the evidence at trial. Such failures of proof need to be highlighted for the jury, as they will undercut the credibility of your opponent.

When you are attacking and challenging your opponent's position, be very careful about the tone of the attack. The tone needs to be consistent with your personality. Some of us are naturally more aggressive than others and can get away with a more aggressive attack. If you are not particularly aggressive, don't fake it because the jury will spot it and you will destroy your credibility. Simply stated, be yourself and not some one else.

Nit-picking or caustic attacks are generally not appreciated by jurors. Think twice before you rant and rave about how Dr. Quack is a lying S.O.B. Dr. Quack may very well be a lying S.O.B. , but its better that the jurors come to that conclusion on their own, rather than having you tell them. You can remind them of the facts and suggest the conclusion that Dr. Quack is lying to protect himself but leave the ultimate conclusion to the jury. You never know, but you may be attacking a witness that some of the jurors really like, which is not a good thing for your case.

VI. ARGUING LEGAL PRINCIPLES DURING CLOSING

Most judges confer with counsel regarding jury instructions prior to closing argument. Consequently, you should be in a position to know before closing exactly what the court will charge with respect to various legal issues. It is important to review the jury instructions and reference the more significant legal principles by using the exact words the judge will later use to state these legal principles. Also, use the interrogatories with the jury and tell them how it should be completed! This makes you look like you know the law, and it also tends to support the conclusion that the law is favorable to your side of the case. Here are a few examples:

1. Burden of Proof.

Both sides usually discuss the court's instruction on the burden of proof. The plaintiff wants the jury to know that "preponderance of the evidence" is a lesser standard than "beyond a reasonable doubt." The plaintiff generally references the scales of justice and argues that the preponderance of the evidence is satisfied if the evidence tips the scales ever so slightly in favor of the plaintiff. It does not require that the scales be drastically one sided, but simply inclined ever so slightly in favor of little Mary Sue. That is, 51% and 100% are the same when it comes to meeting the preponderance of the evidence standard. The defendant, on the other hand, usually emphasizes the word "preponderance," which sounds like a lot, and generally argues that there is no evidence to support plaintiff's allegations—much less than a preponderance of the evidence.

2. Sympathy.

Corporate defendants generally cite the court's instruction that the case is to be decided based on the law and the evidence and should not be influenced by sympathy or prejudice for or against either party. This is particularly important where the plaintiff is a very sympathetic plaintiff. The plaintiff, on the other hand, often tells the jury that "Mary Sue does not want sympathy—she knows that everyone is sorry about what happened to her while she was on Dr. Quack's operating table. What Mary Sue wants is fair compensation for the injuries she has suffered because of Dr. Quack's malpractice."

3. Inferences.

The court generally explains to the jury what may be inferred from the evidence and what may not be inferred. For example, in medical malpractice cases it is typical for the judge to instruct the jury that the mere fact that the plaintiff has sustained injury or suffered an unfavorable outcome does not provide a sufficient evidentiary basis from which the jury may infer negligence on the part of Dr. Quack. Rather, Dr. Quack can only be found legally responsible if his/her care and treatment failed to meet the standard of care exercised in the medical profession generally, and if such care caused injury to the plaintiff. There will be a patient with a bad outcome in every medical malpractice case, so the defense needs to make sure the jury understands that a bad outcome is not enough to support a finding of liability.

4. Speculation.

The courts generally instruct jurors that they are not permitted to engage in speculation or conjecture regarding various issues in the case, such as medical causation, the standard of medical care or damages. Expert witnesses must provide such evidence. Jurors are not permitted to substitute their views or speculate about such matters. While it is the defense that reminds jurors that they are not permitted to speculate, the plaintiff often preempts such an argument by telling the jurors that they cannot speculate and that they need not do so in this case because of the independent expert opinion of Dr. Hired Gun.

VII. OTHER CONSIDERATIONS TO THINK ABOUT.

1. Length of Closing.

A federal judge in Atlanta often reminded lawyers prior to closing argument that: "Few souls are often saved after the first ten minutes of the sermon. After that everybody is asleep." Most jurors have short attention spans. Consequently, shorter is better than longer when it comes to the length of the argument. Others let the lawyers agree on a time for each side. In some instances, judges allow the lawyers to go on as long as they want to argue. Make sure you know what the time parameters are for your closing and make sure that you can cover everything that you need to cover within the time permitted, but remember – short and simple.

2. Logistics.

Consideration needs to be given to courtroom logistics. Will the court permit you to walk around in front of the jury box, or will you be confined to the podium. If you are permitted to walk around, will the jury be able to hear you or do you need to request a hand held microphone? Where will the PowerPoint screen go and can the jury see it? Are you going to use blow ups of exhibits and how will they be displayed for the jury? There are a number of logistical decisions, which must be made consistent with the court's preferences and requirements. Make sure you know what is allowed and what is not allowed before you stand up to close. For example, if you have a transcript of testimony, some courts will permit you to read it to the jurors, but other courts will not permit it. You need to comply with the court's directives so make sure you know what they are before you stand up. It is no fun and it does your client's case no good to be admonished by the court during closing argument.

3. Sequence of Argument.

Generally, the plaintiff is entitled to address the jurors first and last because the plaintiff bears the burden of proof. The defense closing is generally sandwiched in between plaintiff's opening and concluding remarks. In some jurisdictions, the plaintiff may waive the opening and save all of his/her ammunition until after the defense has made its argument. In such jurisdictions, the plaintiff must decide whether to waive the opening remarks and rely exclusively on rebuttal. Most plaintiffs make opening remarks, but the defense must be prepared for those instances when the plaintiff waives opening remarks and the closing arguments begin with the defense presentation.

Some jurisdictions require that the plaintiff make an opening argument or the concluding argument will be limited to rebuttal. For example, Local rule 39.3 of the U. S. District Court for the Northern District of Georgia provides as follows:

The party bearing the burden of persuasion at trial shall be entitled to open and close the arguments to the jury. If the party waives the party's right to make an opening argument, the party's rebuttal argument is limited to those matters argued by the opposing party and that party's opposing argument.

You need to find out whether the plaintiff is required to open in full on both the facts and the law, whether the plaintiff can waive opening argument, and if so, what effect that has on the scope of the plaintiff's final rebuttal argument.

4. Splitting Closing Argument.

In most jurisdictions, the court will permit at least two attorneys to participate in closing argument for each side. You need to decide whether or not it is wise to split the argument. What often happens is the first lawyer takes up more than his/her allotted time and adversely impacts the

argument of his/her co-counsel. Unless there is some clear subject matter delineation and strict adherence to time allotments, it is generally preferable for one lawyer to present closing argument. The jury pundits have also suggested that the lawyer who makes the opening statement should be the lawyer who makes the final argument.

5. Legal Do's and Don'ts.

Make sure you know what you can do and what you cannot do during closing argument. For example, you cannot argue issues or evidence outside the record. If you do so, your opponent may object, or even worse, the court may admonish you for making an improper argument. The Canons of Ethics preclude you from stating your personal beliefs or vouching for the credibility of your client or your witnesses. There is often a fine line between arguing your client's cause passionately and injecting inflammatory and prejudicial issues into the case. Be aggressive, but be certain you know where to draw the line.

6. Damages.

Plaintiffs will always want to talk about damages—probably by utilizing various charts containing damage calculations. The defense, on the other hand, must make a conscious decision as to whether to argue damages because any argument respecting damages tends to undercut the defense argument on liability.

Nevertheless, the defense in some cases simply must say something about damages in an effort to hold the number down in the event of a plaintiff's verdict. This is best done somewhere in the middle of the closing and sandwiched in between a strong start and a strong finish. Any discussion about damages should be prefaced by a comment to the effect that you feel obligated to comment on damages because the opposition has devoted so much time to damages. You can point out that the court will instruct the jurors that they should not infer that the plaintiff is entitled to damages just because the court charges on the law of damages. Point out that there is only one trial and it involves both liability and damage issues so you are required to comment on damages in representing your clients, even if damages should not be awarded because there is no liability.

Generally, any defense comment should be short and specific. For example, you can usually point out several areas where the plaintiff's damage calculations are either excessive or based upon unrealistic assumptions or speculation. If you convey to the jurors that the amount of any damage award should be substantially less than the plaintiff's request, they you have basically done all you can do without admitting liability and trying the entire case on damages.

7. Special Verdict.

Special verdicts or special interrogatories are often submitted to jurors for decision. You should know whether such a verdict will be used in your case and the contents of any verdict form

to be submitted to the jury. Whether you represent the plaintiff or the defendant, you should walk the jury through the special verdict form and tell them exactly how they should complete the form and why. Otherwise, the jury may be at a total loss when they receive the special verdict form. This is your chance to provide guidance as to how the jury should complete the form.

8. Nerves and Anxiety.

A certain amount of nervousness is healthy and makes for a better closing argument. What you should avoid at all costs is becoming so nervous or anxious that you become paralyzed by fear. You are the lawyer that tried the case, and you are in the best position to make the closing argument. Think about the fact that thousands of other lawyers have made closing arguments and survived and about half of them even won their case! If you are going to compare yourself to others, there will always be some that would make a better closing argument and there will always be some who would make a worse argument. All you can do is the very best that you can do. So, get up there and simply do your best.

9. Trial Transcripts

Perhaps you should consider ordering an expedited copy of the trial transcript of a key witness so that you will be able to quote verbatim from the transcript in closing.

VIII. OBJECTIONS DURING CLOSING

Objections require careful pre-closing analysis and good instincts. We have been taught that it is impolite to interrupt, and it generally doesn't do much good because few objections during closing get sustained. Moreover, the objection serves to draw even more attention to the objectionable, unflattering remarks of your opponent. Nevertheless, it is your responsibility to preserve errors for appeal, which must be done by objection. Try to anticipate objections that might come up and decide what you will do. Consider asking the court if you can approach the bench so that the objection or motion for mistrial can be made outside the hearing of the jury. If you handle the objection by a side bar at the bench, make sure the court reporter is set up and taking down the objection or motion for inclusion in the record. If things go your way at the bench, as the court to admonish opposing counsel for making improper remarks and instruct the jurors to disregard the remarks of counsel.

Examples of Improper Arguments

1. "Unit of Time – *Fontenot v. Dual Drilling Co.*, 179 F.3d 969 (5th Cir. 1999) (reversible error not to give cautionary instruction, even absent objection)
2. "Golden Rule" – (improper as to damages, but may be permitted as to negligence) *Burrage v. Harrell*, 537 F.2d 837 (5th Cir. 1976)

3. “Conscience of Community” or other appeals to passion or prejudice. *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233 (5th Cir. 1985) *Whitehead v. Food Max*, 163 F.3d 265 (5th Cir. 1998)
4. Improper injection of counsel’s personal beliefs or opinions – *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261 (5th Cir. 1994)
5. Improper reference to missing evidence or extraneous matters – *Caparotta v. Entergy Corporation*, 168 F.3d 754 (5th Cir. 1999)
6. “Do Unto Others”? (argument that might be objectionable on its face may be valid if it is retaliatory or in answer to some argument made by opposing counsel) – *Hall v. Texas & New Orleans Ry. Co.*, 307 F.2d 875 (5th Cir. 1962)

When counsel indulges in improper conduct, opposing counsel should object promptly and obtain a ruling on the objection.

When an objection is sustained, the court should order the objectionable portion stricken and direct the jury to disregard such argument. *Ashley v. Nissan Motor Corp.*, (1975, La. App.) 321 So.2d 868, cert. denied, (La.) 323 So.2d 478; *Viator v. Gilbert*, (1968, La. App. 4th Cir.), 206 So.2d 106, amd., 253 La. 81, 216 So.2d 821; *Walker v. Associated Press*, (1996, La. App. 2d Cir.), 191 So.2d 727, revd., 251 So. 772, 206 So.2d 489 and revd., 389 U.S. 28, 19 L.Ed.2d 28, 88 S.Ct. 106, rehearing denied, 389 U.S. 997, 19 L.Ed.2d 500, 88 S.Ct. 462, La. Code of Criminal Procedure, arts. 770, 771. Normally, such action by the court will eliminate any error. But the error is not removed if it reasonably appears that the improper argument has influenced the verdict. La. Code of Criminal Procedure, arts. 770, 771; *State v. Gaspard*, (1974, La.) 301 So.2d 344.

IX. CONCLUSION

There are many decisions to be made in connection with any closing argument. While experience gives us some guidelines, the preparation and delivery of a closing argument is essentially an art form. There are no absolutes and pretty much everything is left to the judgment of the trial lawyer. That is what makes closing argument such an exciting part of any trial.

Most of us became trial lawyers because we had some thought that we have the flair to be a Clarence Darrow. While that’s generally not the case, closing argument is fun and exhilarating. So, get prepared, relax and enjoy it. Maybe you will turn out to be a Clarence Darrow after all.

POSTSCRIPT

If you are still a “Doubting Thomas” about closing argument, I suggest you ask Jonathan Benedict and Michael Skakel for their views. Here’s what the AP and NY Times had to say about the June 7, 2002 verdict in the Martha Moxley murder trial:

The verdict was a huge victory for the lead prosecutor, Jonathan C. Benedict ... who had seemed to be struggling to keep the jury’s attention until Mr. Benedict’s dramatic closing argument on Monday.

One of the alternates, Anne Layton, said prosecutor Jonathan Benedict’s closing argument was powerfully persuasive. “He really connected the dots and I think he did an incredible job,” Layton said.

In fact, the jury made the unusual request Thursday of asking to rehear part of the closing argument, but the judge refused.

In his closing argument, Benedict played the taped interview, using Skakel’s own words to put him at the scene. [Skakel said he went to the Moxley home, threw rocks at Martha’s window to try to get her attention, then masturbated in a tree and ran home] As he spoke, a picture of a smiling teen-age Martha Moxley was projected onto a courtroom screen. The portrait dissolved into a grim crime-scene photo.

Credits: The author wishes to give credit to the following who wrote previous seminar material on closing arguments, portions of which are included in this paper with permission:

Brian Meissner, Developing the Evidence to be Used in Closing Arguments and

Dow Kirkpatrick, II, Closing Arguments.