

ADVOCACY 608B

Closing Argument

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Closing Argument

Discussion:

- ❖ Is it important?
- ❖ Some judges have said they've never changed their minds about a case as a result of closing arguments : I doubt this is, and it certainly should not be, so.
- ❖ Nevertheless, many counsel treat closing argument cavalierly, "wing it", improvise, speak "extemporaneously"
- ❖ Why waste the last opportunity you will have to convince the Court (or win it over, or win it back) you are right?

Closing Argument

THINGS TO REMEMBER:

- ❖ You can only argue based upon the evidence actually adduced at trial - you cannot introduce evidence through your closing address.
- ❖ Avoid personal expressions - as usual no one cares what your personal opinion/feeling are.
- ❖ Avoid inappropriate appeals to sympathy or outrage.
- ❖ In Jury cases you cannot refer to general damages (ie. amounts).

Closing Argument

Vincent Bugliosi – Prosecutor of Charles Manson

- ❖ Writes out closing, through dozens of drafts, before trial begins.
- ❖ During trial, makes only the changes necessitated by the evidence
- ❖ Usually in a jury trial. Essentially delivers a rehearsed speech, every word of which is scrutinized etc.
- ❖ Wouldn't work with a judge, especially one who intervenes with questions.
- ❖ In judge case, have to be able to deal with issues, evidence, facts, conflicts of testimony.
- ❖ Typical: but what about estoppel, I'm concerned with the representations made by your client.
- ❖ Have to be able to deal with everything then, not say: I'll be coming to that in 5 pages.

Closing Argument

Structure of Closing Argument:

1. An opening
2. A statement of the points in issue
3. Issue No. 1
 - a. Review applicable evidence
 - b. Review law related to that evidence
 - c. Conclusion on the issue
4. Issue No. 2
5. Issue No. 3
6. End to your closing address

Show the judge your structure — the roadmap for your argument — by telling them how you have structured it.

Start with your strongest point in each issue, where you have more than one argument on the issue. Present your argument before dealing with an argument on that point that you anticipate the other side will make.

At the end of each issue, let the judge know you're moving onto the next item.

Closing Argument

Written or Oral?

- ❖ **Written:** complex cases, copious evidence ONLY as a supplement?
 - Danger: judge doesn't get an issue in the way you present it in writing, no chance to question you, you have no chance to ensure you've made your point successfully
- ❖ **Oral:** simpler, more emotional cases or an advantage over other counsel.

In any case, submission of briefs of law for the court appropriate.

When? Better to give authorities at beginning of case.

Closing Argument

Preparation

- Should be able to prepare most of the closing argument before the case begins.
- Theory of the case known, your evidence known, your plan known.
- Adapt it, supplement or delete based on the evidence.
- There is something to be said for preparing your final argument before the trial begins - this helps you focus one final time on what must be proven and entered in evidence.
- Thus, prepare at least an outline of your final argument prior to trial. Put the final touches on after the evidence is in. For a lengthy trial, revise your final argument continually as the trial goes on as it will likely be impossible to recollect accurately all the evidence at the conclusion in order to finally marshal together the evidence for finalizing the form of your closing.
- The court will almost always allow an adjournment between the close of evidence and the making of final argument to allow time to put the final argument together.
- In relatively minor/run of them Criminal cases it is normal, however, to launch right into final submissions following the close of the evidence for both Crown and Defence.

Closing Argument

Content

- State and stick with your theme.
- Develop your legal theory/framework.
- Show how evidence leads to the facts you want found by the Court.
- Show how those facts lead to legal conclusions.
- State verdict you want in precise terms.
- Address costs even if just to defer opportunity to make submissions.

Closing Argument

Methods

- ❖ Tie in to your legal & motivational theme.
- ❖ Use exhibits, photos, charts, diagrams, summaries.
- ❖ Make it as "listenable" as possible.
- ❖ Appropriate humour O.K., but don't overdo it.
- ❖ Once again, develop your own style, that you are comfortable with.
- ❖ Identify what it is you are talking about ("I'd now like to turn to the evidence with respect to who had the green light").
- ❖ Use analogies (ensure they are sound), parallels, illustrations, even/parables/etc. to make your points.

Closing Argument

Questions

- ❖ ALWAYS, ALWAYS be prepared to and deal with any questions from the bench right away.
- ❖ Argue your strengths forcefully.
- ❖ Explain your weaknesses. Do not hope they go unnoticed.
- ❖ Argue your adversary's weaknesses. Make the judge/jury aware of them and force your opponent to try to explain.
- ❖ Where you will not have an opportunity to rebut, anticipate your opponents arguments and explanations and rebut them in advance. Anticipatory rebuttal is very effective:
 - eg. If the Defendant, as his counsel will surely argue, truly thought the work would be done for free, why did he sign a formal contract and promise to bring a deposit in the next day? Keep this question in mind while listening carefully for my learned friend's explanation of this evidence.

Closing Argument

HANDLING QUESTIONS:

- ❖ Invariably, in a Bench trial, the Judge will interrupt your final argument with questions.
 - a) Do not get mad at the Judge for interrupting your eloquent speech - the Judge has simply honed in on a point which he/she believes is important.
 - b) Unfortunately, you may not agree that the point is all that important. Worse, it may well be important but you haven't a clue as to how to deal with it (ie. you just don't know the relevant law).
 - c) Calmly, coolly, and without seeming impatient, hear the Judge out in their question to you and then respond:
 - i. directly to the question if you can.
 - ii. if you can't, by trying to persuade the judge that the question they've raised is relatively unimportant in comparison to a different point which you then proceed to deal with.

Closing Argument

HANDLING QUESTIONS:

- d) Understand, however, that most Judges aren't asking you a question just for the hell of it - they truly believe that the point is important and relevant. Therefore, it is very important that you pick up on the "vibes" coming from the Judge by virtue of the question they are asking - sometimes it is a hint that they are satisfied with your position on a particular matter - more often it is a hint that they find something lacking in your position on a particular point.

On that basis, pick up on the hint and react accordingly - go back over areas you may have thought were clearly covered in order to convince the judge or perhaps suggest that the Judge may have misunderstood your argument earlier as it relates to that point.

Closing Argument

Law

Do not assume that the judge knows the applicable law. Have it ready, and even if the judge indicates he/she is aware of it, give a brief summary and copies of the precedents. Some times judges think they know the law from a prior case, but are unaware of a more recent C.A. of SCC decision, or a change in legislation, or forget an applicable exception.

Closing Argument

Order of presentation

8.10(1) Unless the Court directs otherwise, the order of presentation at a trial is as follows:

- (a) the plaintiff may make one opening statement and, subject to clause(b), must then adduce evidence;
- (b) the defendant may make one opening statement either immediately after the plaintiff's opening statement and before the plaintiff adduces evidence or at the conclusion of the plaintiff's evidence;
- (c) when the plaintiff's evidence is concluded, the defendant may make an opening statement if the defendant has not already done so immediately after the plaintiff's opening statement, and the defendant must then adduce evidence, if any;
- (d) when the defendant's evidence is concluded, the plaintiff may adduce evidence, if any, to rebut the defendant's evidence;
- (e) when the defendant's evidence and the plaintiff's rebuttal evidence, if any, are concluded, the plaintiff may make a closing statement, followed by the defendant's closing statement, after which the plaintiff may reply;**
- (f) if the defendant adduces no evidence after the conclusion of the plaintiff's evidence, the plaintiff may make a closing statement, followed by the defendant's closing statement, after which the plaintiff may reply.**

Closing Argument

This was from a Judge who set out his “The Ten Commandments of the Closing”

1ST COMMANDMENT: Be Brief

- To get the Court’s attention be brief [this was in a particular context].

2ND COMMANDMENT: Start with Outline and Time Estimate

- Give the Court an outline right at the beginning and also a time estimate of how long it's going to take.

Closing Argument

The Ten Commandments of the Closing

3RD COMMANDMENT: Follow the Plan and identify for the Court each new subject as you move to it.

4TH COMMANDMENT: Be Realistic

- Don't simply give the Court all of your strengths, everything that's on your side. In reviewing the evidence, spend most of your time on the problem areas.

Closing Argument

The Ten Commandments of the Closing

5TH COMMANDMENT: Never Use More Than Three Cases

- For this judge, he preferred only three.
- Go with the principal cases, and perhaps one case you think particularly applies to your specific circumstances.
- Highlight the good parts you want the Court to read.

6TH COMMANDMENT: Have four copies of everything to be filed or relied upon.

Closing Argument

The Ten Commandments of the Closing

7TH COMMANDMENT: Do not assume too much judicial knowledge

- This is delicate, but do not assume too much judicial knowledge. The judge is dealing with absolutely every area of law, and you may have a new judge.
- The suggestion is to use the phrase, "As Your Ladyship is well aware", which is a clear signal to the Court that it should be writing it down.

8TH COMMANDMENT: Do Not Rebut Opposing Counsel

- Do not rebut opposing counsel's argument before they are made.

Closing Argument

The Ten Commandments of the Closing

9TH COMMANDMENT: Reply, Don't Repeat.

- In your reply, don't repeat what you've already said, it might tick off the Court.

10TH COMMANDMENT: Close with a Nice Summary

Closing Argument

Sample Closing.....



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