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Delivering a powerful closing argument

TELLING YOUR STORY USING DEMONSTRATIVES AND EVIDENCE

Delivering a powerful, engaging closing argument is the final step in the trial towards achieving justice for your plaintiff. You have spent days, weeks or even months admitting your exhibits, calling your witnesses, and now you get to look the jurors in their eyes and explain to them how the pieces of evidence fit together, why it matters, and what they can do about it.

By the time you get to closings, you have hopefully built up and banked credibility with your jurors. The goal going into closing should always be to stand on that credibility and implore the jurors to go into the jury deliberation room and take over the fight for your plaintiff.

An effective closing will streamline and sequence the important evidence for the jurors to consider in determining liability and damages. Weaving together the exhibits, depositions and trial testimony throughout your closing argument is an effective tool to keep the jurors engaged, reinforce your arguments, and put the finishing touches on your trial prior to turning the case over to the jurors.

No two closing arguments are the same. Each case has its own unique facts and defenses. The temptation going into closing argument is always to refute all of the misrepresentations or misstatements of fact that the defense has put forth in the trial. This is often an exercise in making yourself feel better. Spending too much time refuting the defense's version of the facts is risky. Jurors are incredibly smart, and they understand that defenses and misrepresentations are part of a defense trial strategy. Jurors can see through defenses. Quickly moving through defenses or choosing the most important or damaging ones to address in closing is the best practice. It saves critically important, often limited closing argument time, which is better spent focusing on the important liability facts and arguing damages.

Below are key legal and strategic considerations for preparing and presenting your closing argument.

Jury instructions must be finalized before closing arguments

All CACI jury instructions, special jury instructions and verdict form(s) should always be finalized before closing argument pursuant to Code of Civil Procedure section 607a. "Before the commencement of the argument, the court, on request of counsel, must: (1) decide whether to give, refuse, or modify the proposed instructions; (2) decide which instructions shall be given in addition to those proposed, if any; and (3) advise counsel of all instructions to be given." (Code Civ. Proc., § 607a.)

It is the duty of trial counsel to request that instructions be finalized before argument.

Even when closing arguments happen before the jury instructions are read, instructions and verdict forms should be finalized *before* closing arguments start. You cannot tell the jurors how the law applies to the facts of your case, or how to fill out the verdict form unless you know what instructions will be given.

If issues arise during closing, necessitating further or revised instructions, further or revised instructions may be proposed to the Court and read to the jurors after closing arguments. (*Ibid*.)

Time limitations on the length of closing arguments

It is within the trial court's discretion to limit the time allowed to each side for closing argument pursuant to L.A. Sup.Ct. Rule 3.181. The trial court will typically look to counsel for estimates regarding how long they would like to argue. It is up to plaintiff's counsel to apportion time between closing and rebuttal. In giving an estimate to the court, you should be realistic with the time needed to cover liability and damages, but also reasonable in the amount of time that jurors will pay attention to your argument. Defense counsel will be allotted the same amount of time for their closing argument as plaintiff is allotted for closing argument inclusive of rebuttal.

Wide latitude afforded to counsel to argue their case

Trial counsel is afforded "wide latitude" to argue the facts of their case, and to focus on those issues which they deem important. "Vigorous argument" is allowed (and often expected) during closing argument. Lawyers are not required to be "polite" in their argument. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795.)

What "argument" looks like varies greatly from case to case and attorney to attorney. Closing argument does not require you to raise your voice or become emotional. In certain cases, you may want to express outrage or emotion, especially where the liability or injury warrants it. No matter how you approach closing argument, you should leave space for the jurors to get upset and feel protective of the plaintiff. A juror's own feelings about righting a wrong or injustice will directly impact their verdict, including their damages award.

Reasonable inferences are allowed; personal opinions are prohibited

Reasonable inferences drawn from the evidence are permissible in closing argument. "[I]t is the privilege of an attorney to draw any inference with respect to the facts or the credibility of witnesses of which the evidence is reasonably susceptible." (*McCullough v. Langer* (1937) 23 Cal.2d 510, 522.)

However, trial counsel cannot express their personal opinions about the strength of the other side's arguments, or credibility of witnesses. Rather than saying "I think" or "I believe," arguments should begin with "the evidence and testimony have proven…" and "it is indisputable from the evidence that…" As a practical matter, be alert and object to any arguments by opposing counsel that begin with a personal statement regarding what they *believe* or what they *think* happened.

Display and explain the law

The trial judge will instruct the jury on the law, but the law's application to your case should be covered in your closing argument, particularly where there are disputes about whether the facts of the case meet the requirements of the law. (*Cassim*, 33 Cal.4th at p. 795.)

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Many jurors will not understand the jury instructions. They will want and appreciate your input on how the (important) jury instructions apply to the facts of the case. You should display the key jury instructions to the jurors in closing. Simply incorporating them into your PowerPoint slide deck and addressing them as you discuss the parts of the verdict form where they apply can be helpful. For example, if causation is a significant issue in your case, you should show the jurors the applicable CACI instructions, and explain, line by line, how the defendant's action caused your plaintiff's injury.

If the jurors are on the plaintiff's side, they will want to know how to legally get to a verdict in favor of the plaintiff. Conversely, ignoring the jury instructions in closing argument can signal to the jury that the law is not on the plaintiff's side and a smart defense lawyer can manipulate that to their advantage.

Use timelines, exhibits, and demonstratives

Incorporating visual aids into your closing argument is important to keep the jurors engaged. Timelines, exhibits, demonstratives, and testimony, when sequenced correctly, can be incredibly persuasive. This is a great way to let the facts and evidence "argue" the case for you.

A key objective in any closing argument is making sure that the jurors understand the applicable timeline of events. This can be a timeline related to liability or damages. For example, in a sexual-abuse trial the timeline of liability facts will likely focus on what perpetrator's co-employees or supervisors knew or should have known about the perpetrator's conduct, before and during the abuse of the victim. Laying out the timeline in a clear, simple way can be incredibly helpful to jurors, especially where defense counsel has undertaken to confuse and manipulate the timeline to their own client's advantage.

Before the start of the trial, you should create a draft timeline that you will eventually finalize and display to the jurors in closing argument (or earlier depending on what the trial court allows). The timeline should simply and succinctly lay out the sequence of occurrences in your case that most closely aligns with your liability and/or damages theories. You should refer to this timeline throughout trial and in the examination of witnesses, to make sure that you are collecting the evidence you need to build out a compelling and supported timeline to display to the jurors in closings.

A PowerPoint slide deck of the timeline can be effective and will provide the flexibility needed to change and edit the timeline on the fly, depending on what evidence and testimony comes in throughout the trial. Alternatively, a timeline displayed across posterboards can also be compelling but provides less flexibility and presentation in front of the jurors can be clunky at times.

Your most important and compelling exhibits should be displayed to the jurors during closing. If you have created a closing PowerPoint, or better yet, a digital timeline to display during closing, you should incorporate the exhibits into that timeline.

If you plan to read exhibits to the jury, you should make sure that the jurors can see the exhibit and follow along. Highlight the important portions of the exhibits to direct the jury's attention.

Large physical blow-ups of the exhibits on posterboard can also be an effective way to display them to the jury.

Visual aids, including demonstratives specifically created for closing, generally do not need to be admitted into evidence prior to displaying them in closing. L.A. Superior Rule of Court 3.181 requires that certain demonstratives be shown to opposing counsel prior to using them in closing: "A graphic device (e.g., chart, summary, or model) which is not in evidence and is to be used for illustration only in argument must be shown to opposing counsel before commencement of the argument. Upon request by opposing counsel, it must remain available for reference and be marked for identification." (L.A. Sup.Ct. Rule 3.181.)

However, if the demonstrative is simply a slide deck, timeline, or some other summary or compilation of your arguments and/or testimony or things *already in evidence*, you might not need to show it to opposing counsel prior to closing arguments. These demonstrative aids will not be admitted into evidence.

Certain demonstratives may be admitted into evidence at the judge's discretion provided they "accurately depict an expert opinion" and "the expert opinion must fairly represent the evidence, the trial court must provide a proper limiting instruction, and the animation must be otherwise admissible under Evidence Code section 352." (*People v. Caro* (2019) 7 Cal.5th 463, 509.) To admit a demonstrative into evidence, you need to lay the foundation for the demonstrative with an appropriate witness during trial. For example, an expert doctor can testify about a medical drawing and lay the foundation that it is an accurate and fair representation of the plaintiff's injuries.

Using trial testimony during closing argument

You do not need the trial court's or opposing counsel's permission to display any part of the trial testimony to the jurors during closing argument. Reading trial testimony during closing is effective, but can be boring. The better practice is to display the testimony electronically during your closing and incorporate it into your closing timeline.

In preparation for closing, you should keep note of the testimony that you would like to display to the jurors, and order transcripts from the reporter as soon in advance as possible. Keep note of the date, time of day, the lawyer who was questioning the witness and any other information that can help the reporter pull and finalize the correct testimony.

Using deposition testimony during closing argument

Video-deposition excerpts are incredibly effective to show jurors the demeanor of the witness and highlight key portions of testimony.

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You are allowed to display any admitted deposition testimony, whether video or transcript, in closing argument. To do this you must offer the testimony into evidence during the trial. For all witnesses, deposition transcripts may be read or played if the testimony is offered to impeach their testimony at trial. And pursuant to Code of Civil Procedure section 2025.620, subdivision (b), an adverse party's deposition may be used for any purpose at trial.

Natalie Weatherford of Taylor & Ring, *Los Angeles, handles all types of personal-injury cases focusing on sexual-abuse, sexual-assault and sexual-harassment cases involving children and adults.*