Chapter 9

CLOSING ARGUMENT

§ 9.01 INTRODUCTION

Closing argument comes at the end of the trial. It is your final opportunity to address the jury. What should you try to accomplish? Many of you probably view closing argument as an opportunity to sway the jury and win your case with your powers of eloquence and persuasion. Much of the literature reinforces the view that closing argument is directed at those jurors who are thinking of voting against you — if you can only reveal to them the errors of their ways, you will convince them to change their minds and vote for you.

When you think about it, however, this scenario is improbable. After hearing the evidence, most jurors will already be inclined toward one side or the other; truly undecided jurors are rare. If a majority of jurors are inclined to vote against you based on the evidence, you are unlikely to persuade them otherwise, and you will probably lose the case. This should not come as any great shock to you — if your evidence is weak, you *ought* to lose the case. It is unrealistic to think that any amount of clever argument can turn a loser into a winner. On the other hand, if a majority of jurors are inclined to vote in your favor, based on the evidence, then you ought to win the case. Your closing argument can solidify and organize your supporters, arm them with the strongest arguments in your arsenal, help them find your opponent's weaknesses, and energize them to do battle in the jury room. This is the modern view of the role of closing argument:

> A lawsuit, like a chain, is only as strong as its weakest link. Contrary to popular myth, lawsuits are not won, although on rare occasions they may be lost, as a result of a summation. In fact, lawsuits are not usually won or lost during any one phase of the trial. They are generally won or lost on the evidence coupled with the effectiveness of the presentation by the lawyer from the moment he walks into the courthouse until the moment the jury returns a verdict.[1]

Closing argument is not for the purpose of recruiting new troops, but for arming those already on your side. You are the general who provides a battle plan to your troops, who will fight for your side in the jury room war. You should try to accomplish six goals:

- Reiterate your theory of the case and make sure the jurors understand it. The importance of having a clear, simple theory cannot be overstated. It provides direction to your jurors. Whether you have previously done so or not, in closing you must commit yourself to a *single* theory. Alternative theories merely divide your forces into two groups that may start fighting with each other.

[1] Lawrence J. Smith, The Art of Advocacy — Summation § 1.11 (2001).

- Emphasize favorable evidence, but don't waste time with a detailed rehashing of every detail as if the jurors were too stupid to remember anything.
- Rebut your opponent's allegations.
- Suggest specific ways for the jury to resolve conflicts in your favor — both affirmative reasons why your position is right, and negative reasons why your opponent's position is wrong.
- Explain the law and show how the evidence satisfies all legal requirements for a verdict in your favor.
- Most importantly, reduce your case to a good story, including plot, motives, adventure, battles between good and evil, human weaknesses, temptation, drama, and a moral at the end.

NOTE

Can you change a juror's mind? Social scientists who study persuasion and human behavior think not. An argument against a juror's tentative decision may only strengthen that juror's belief as he or she thinks up counter-arguments. The more you try, the more jurors may feel they are being manipulated or pressured to change their views, the more they will tend to react to this threat by rejecting the message. *See* RICHARD E. PETTY & JOHN T. CACIOPPO, COMMUNICATION AND PERSUASION 126–30 (1986); SHARON S. BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL (1981) (detailed explanation of reactance theory). Anyone who has ever tried to persuade a four-year-old child to change his or her mind will understand the problem.

§ 9.02 EXAMPLE OF A CLOSING ARGUMENT

The following example should give you a feeling for the scope and structure of a closing argument. It illustrates most of the points raised in later sections.[2]

> May it please the court; members of the jury.
>
> I have asked my client to leave the courtroom, as I had asked him not to be here during the medical testimony. We listened to the doctors explaining what a dismal future he has. He is going to be in a wheelchair, unable to walk more than a few steps because of his paralysis, a boy with no arms, only grotesque mechanical claws, for the rest of his life. That is a fact, and we have to accept it and base our decisions on it. Ben is only fourteen years old, and still has the hope — the dream of doctors inventing bionic arms that look natural, the dream of being able to run again. I did not want to be responsible for shattering that dream by making him sit here and listen to the brutal facts: He has been sentenced to life imprisonment in a wheelchair for a crime he didn't commit.

[2] Some parts of the argument come from an argument given by James E. Hullverson, reprinted in LAWRENCE SMITH, ART OF ADVOCACY — SUMMATION §§ 9.01 to 9.71 (1978).

There has been a lot of medical and other testimony, and we want to thank you for being attentive. The burden on you is a grave one—to arrive at a fair and just verdict under all the circumstances. I will take a few minutes now to review the case as we see it.

There are three main points to this lawsuit. First, we are not dealing with an ordinary product, we're dealing with electrical power lines. They carry electricity — silent and invisible, but it can blow your arms off or kill you in a split second. Electricity is a dangerous, ultrahazardous force, and the defendant Electric Company should have taken precautions to prevent deadly currents from causing harm. They did not, so you should hold them responsible. Second, we are not dealing with an adult who was injured, but with a boy. Ben was twelve years old when he was crippled. Without any warning sign, he did not have the experience to know the small black wire was dangerous, so he is not contributorily negligent for doing what all young boys do — playing in a field near his home. And the third factor. Ben's injuries are permanent. He has been given a life sentence, without any possibility of parole or time off for good behavior — for which you should award him enough money to last him that lifetime.

How do these factors fit together? As we look at the overall lawsuit, what are the issues? Basically, we're talking about two things: Is the defendant Electric Company liable for Ben's injuries, and if so, what amount of money can compensate Ben for all he has suffered and continues to suffer?

First, let's talk about whether the Electric Company is liable. This boils down to two questions: Was this tragedy foreseeable, and was it preventable? The judge will read you an instruction on the law that says:

> Your verdict must be in favor of the plaintiff, Ben Ice, if you find three things: First, that there was an uninsulated high voltage electric wire on the utility pole, and no warning sign of any kind. Second, that the Wabash Valley Electric Company knew or should have known that young children were likely to climb the utility pole. Third, that the dangerous condition could have been eliminated without placing an undue burden on the Electric Company.

There is no question about the first element. You saw these photographs of the utility pole [attorney places two photographs on easels]. Witnesses pointed out the uninsulated high voltage line [attorney points to photograph], and the guy wire [attorney points to photograph], and you can clearly see for yourselves that there is no insulator on the guy wire and no warning sign of any kind. The parties are not in dispute about whether a dangerous condition existed.

The dispute centers on the second and third elements. Should the electric company have known that the children were likely to climb the pole, and could the danger have been eliminated easily? In other words, if it was foreseeable that twelve-year-old boys like Ben would be tempted to climb the utility pole, then the law requires the Electric Company to try to prevent it and protect them from harm.

How do we know it was foreseeable that children will climb utility poles? You can look to the common experiences of all of us when we were young. We were all probably tempted to climb poles at one time or another. You can look to the testimony of Alan Himmelhoch, the regional supervisor for the Electric Company. He admitted on cross-examination that even he had climbed poles as a child.

But what is the best evidence whether the Electric Company should have foreseen that children would climb poles? It is the National Electric Safety Code which was introduced into evidence. You heard the experts testify that this safety code was prepared by the power companies themselves, and that it sets out the minimum safety standards for the industry. And look at this [attorney holds out a copy of the code]: an entire section in this safety code is entitled, in bold face print, "Guarding Poles: Protection Against Climbing." Do they realize somebody might climb their poles? Yes, they realize it. They spell it out in a book. Not only is it reasonably foreseeable that children will climb utility poles, it is inevitable. Children do not know climbing is dangerous. How many times have they seen westerns on television in which the outlaws climb poles and cut the wires to the telegraph office. They never get electrocuted. It looks safe. And the pole Ben climbed looked just like the ones they climb in the movies. It was foreseeable.

Could this tragedy have been prevented? We are not talking about expensive fences or anything that would place an enormous burden on the defendant. The law only requires the Electric Company to take those safety measures that are easy and inexpensive. But you heard the testimony — it would have cost them three dollars to put an insulator on the guy wire. It would have cost them even less to put up a sign that said "Danger High Voltage," or something like that. I mean, someone could have written it on a piece of cardboard with a magic marker and tacked it on the pole for a few pennies. A few cents could have saved Ben from this terrible accident. The insulator would have made the shock impossible — every expert agreed to that. And a simple sign would have prevented it, because Ben told you he never would have gone up that pole if he had known there was electricity, if there had been a warning. Not only would it have been inexpensive and simple to prevent this tragedy, but also the safety code says that this is the kind of protection that is needed. In that code, in the section on protection against climbing, it says, "On poles carrying supply conductors exceeding three hundred volts" — and remember, these lines carried seven thousand volts — "either guards or warning signs shall be used."

So it was foreseeable that a boy like Ben would climb the pole. It would have been simple and cost only a few cents to prevent it, but the Electric Company ignored the problem. They ignored the requirements of their own safety code and the requirements of common sense, and now the law says they are responsible.

Now, in some cases there is a defense to liability called contributory negligence. The judge will instruct you that if Ben was guilty of

contributory negligence — that is, if he knew or should have known that there was a danger of high voltage, but ignored that danger — then he shares some of the responsibility for his own injuries. In this case, this is not a real defense because there is no evidence to support it. In the first place, how could Ben have known there was a danger of high voltage? There was no warning sign. The expert, the engineer, testified that you can't tell a high voltage wire from a telephone wire just by appearance. Did Ben disregard a known danger? Remember the first time he woke up in the hospital — what did he say? The nurse overheard it, and wrote it down in the hospital record [Attorney picks up hospital record and thumbs through it]. Here it is. He said, "What happened? I was climbing a telephone pole." Ben assumed this was like the poles in the movies, that it carried telephone wires, not high voltage lines. Remember that he was only twelve years old, and didn't have the experience of an adult. The judge will even instruct you that children under the age of fourteen are presumed incapable of contributory negligence. While you or I would look at a utility pole through our adult eyes and see danger, he was just a boy. He was not told there were high voltage lines. He thought it was a telephone pole, and high voltage lines look just like telephone lines. Given what he knew, and what we expect twelve-year-olds to know, he bears no responsibility for his own injuries. If he had just fallen off the pole, that would be his own fault. He could see that danger. But he could not see and could not have known about the seven thousand volts of silent, deadly electricity.

The second issue for you to decide is damages. This is the important thing, in terms of Ben's future. The judge will instruct you that, "If you find for the plaintiff, Ben Ice, it will be your duty to decide what sum will fairly and justly compensate him for the damages and injuries he has sustained and will sustain in the future." There is no simple yardstick by which to measure how much a near fatal electric shock, how much a ten-foot fall, how much a month in the hospital, how much the loss of both arms, or how much life imprisonment in a wheelchair is worth. I will tell you this. If an Air Force pilot were in a fifty-million-dollar fighter jet that developed engine trouble, and the choice were between saving the life of the pilot or trying to save the plane, you can bet that the plane would be ditched — fifty million dollars thrown into the ocean — so the pilot could parachute to safety. We can replace an airplane, but we cannot replace a destroyed, maimed human being. The value of human life far exceeds any sum of money.

So how can you arrive at a fair verdict? We have suggested that $9,896,000 would be fair. However, you the jury have the responsibility and the wisdom to decide what a ruined life is worth. Let me explain why we think over nine million is appropriate, and you can adjust the amount up or down to reflect your own experiences and knowledge of the cost of living.

The law says that Ben is entitled to be compensated for his injuries, and for the effects they will have on his life. The judge will instruct

you that you may take into account the nature, extent, and permanency of the injuries; the reasonable expenses for past and future medical care; the value of any loss of ability to earn in the future; and any pain, suffering, and mental anguish experienced in the past or reasonably certain to be experienced in the future.

There's no question in this case about the nature, extent, and permanency of Ben's injuries. He lost both arms. The doctors testified that his other medical problems — the partial paralysis, phlebitis, and hernia will be with him forever. This isn't like a broken arm that heals as good as new. It is uncontested that he will need a wheelchair and mechanical arms for the remaining sixty years of his life.

What are Ben's reasonable expenses for past and future medical care? It has been stipulated that his medical expenses, including hospitalization, therapy, and the cost of the mechanical arms, have been $200,000 through today. [Writes $200,000 on blackboard.] What about the future? Remember the testimony of Maggie Jones, the hospital therapist. Based on her experience, she testified that mechanical arms last only about eight to ten years each. The doctors testified that it costs about ninety thousand dollars to purchase and attach new mechanical arms. This chart [pointing] prepared by the government, shows that Ben has a life expectancy of sixty years from now. That means he probably will need six more pairs of arms during his lifetime — at ninety thousand per pair, that's five hundred forty thousand. [Writes $540,000 on blackboard.] Plus, — and I won't review all the details here, I'm sure you recall them as well as I do — approximately sixty thousand dollars for incidental medical expenses such as wheelchair repair, the additional hernia operation, and the other medical problems likely to arise that the doctors mentioned. [Writes $60,000 on board and adds.] So we submit that $800,000 is needed for past and future medical care.

The next thing you may consider is the value of any lost ability to earn a living. The right to work, to support yourself and your family, the right to join a union, the right to a paycheck on Friday, and to building up a pension for retirement, these are all important parts of our lives. Ben's injuries have taken that right away from him, and he should be compensated. We suggest the evidence demonstrates that $2,160,000 is the right figure. Remember the witness we called from the state unemployment office. She was a job counselor. We asked her if there were jobs he could do. He can't walk, carry a package, drive a car, or do physical labor. She said — let me find it, I wrote it down — she said, "No, it would be extremely difficult if not impossible to find a job for a person with Ben's handicaps." I know that we've all seen the ads on television showing a person in a wheelchair with a job. We asked about that, too, and the witness testified that she has never known of a person with handicaps as serious as Ben's who could get and keep a job. No witnesses came forward and said they had jobs for Ben.

If a normal person started work at twenty-two, after college, and retired at seventy, he would work for forty-eight years. Our economics

experts said the average income for college-educated people is $70,000 in salary and another $10,000 a year in retirement benefits — and remember that both Ben's parents were college-educated, so it's reasonable to believe that Ben would also have gone to college. [Multiplies $80,000 × 48 on blackboard.] That comes out to $3,840,000 of work income that Ben cannot earn because the Electric Company decided not to put up a fifty-cent warning sign.

How much should he be compensated for the pain, suffering, and mental anguish? He is going to go through adolescence and not be able to hold a girl's hand, or go dancing, or play sports. He must sit on the sidelines and watch — longing to participate in normal life, and living every minute with the pain and frustration of being unable to do so. What are his realistic marital prospects? Zero. Most of us think of going through life married. Ben has been sentenced to a lonely and unfulfilled life.

What else does he have to look forward to? You heard the doctors testify that he has hernia problems and phlebitis which cause daily pain. He has what they called phantom pains, where he thinks his arms hurt — only, of course, he has no arms. He will go through periods when he thinks full movement is returning to his leg, only to suffer the depressing reality of permanent paralysis. He will be reminded in his dreams of what it was like to be able to walk, run, eat and clothe himself, only to awaken to the truth. The mental suffering he will go through is immeasurable. He cannot even take care of his own bathroom needs or zip his pants. He needs help to eat. He needs help to attach his arms. He will go through life with these burdens weighing heavily on him.

Is it humiliating for him not to be able to hold hands or ask a girl out? Is it embarrassing for this boy not to go to a party because he can't hold a coke? Is it painful each day to lie in bed helplessly until someone comes to reattach his mechanical arms? This is mental anguish and he will have it every day for the rest of his life. He is expected to live for sixty years, imprisoned in the hopelessness and despair of pain and suffering. Would anyone take his place for $10 an hour? Of course not; yet he must live with it 24 hours a day, 365 days a year for 60 years. The law says you must find some reasonable way to give him compensation for his pain and suffering. Even if all you award him is ten dollars an hour, that adds up to [attorney writes $10 × 24 × 365 × 60 on board] $5,256,000.

[Attorney adds up all numbers]. We are suggesting a total amount, then, of $9,896,000 for medical care, lost earnings, and pain and suffering. Considering that he will live with the results of this tragedy for sixty years, it really does not seem that much.

For a few cents, the defendant Electric Company could have prevented it. For a few hundred dollars, they could have put up signs on all the poles in the city. They chose not to. They gambled — gambled with the lives of children — gambled and lost. Now they must pay the gambling debt.

This is Ben's only day in court. This isn't like alimony or child support, where we can come back in a few years because the money's run out and ask for more. Ben cannot work, he cannot get married, he cannot live off his parents forever. He must live the rest of his life on whatever you award him. In the year 2053, he will be 65 years old, on his own, with no job, no retirement benefits. Will he still have enough left from today to support himself for the remaining fifteen years of his life?

I know budget planning for the future is difficult. But we all do it, day to day, and month to month, making sure there's enough money. You are being asked to budget sixty years into the future for Ben. We are confident that you will do so fairly and reasonably. Ben thanks you and I thank you.

NOTE

Other examples. Other examples of closing arguments can be found in PETER C. LAGARIAS, EFFECTIVE CLOSING ARGUMENT (2d ed. 1999); ABRAHAM P. ORDOVER, CRIMINAL LAW ADVOCACY — ARGUMENT TO THE JURY (2001); and LAWRENCE SMITH, THE ART OF ADVOCACY — SUMMATION (2001);

§ 9.03 LEGAL FRAMEWORK

[A] THE RIGHT TO MAKE AN ARGUMENT

Every party in a civil or criminal jury trial has a right to give a closing argument.[3] It is a fundamental part of the due process right to be heard. Most states have a statute that reads something like this:

> ***Scope of argument***. At the close of the evidence, the respective parties, or their counsel, shall be entitled to sum up the facts to the jury. In their addresses to the jury they shall be allowed ample scope and latitude for argument upon, and illustration of any and all facts involved in the cause, and the evidence tending either to prove or disprove the same. They shall not be forbidden to argue the law of the case to the jury, but shall not assume to instruct the jury upon the law in such a manner as to encroach upon the function of the court to so instruct the jury.[4]

[B] CLOSING ARGUMENT PROCEDURE

Closing arguments take place after all the evidence has been presented. The most common practice in ordinary two-party lawsuits is to have three arguments:[5]

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[3] *See, e.g.*, *Herring v. New York,* 422 U.S. 853 (1975) (criminal defendant has sixth amendment right to give closing argument); *Speer v. Barry,* 503 A.2d 409, 411 (Pa. Super. 1985) (civil litigant has right to argue).

[4] Hawaii Revised Statutes § 635–52.

[5] *See, e.g.*, Fed. R. Crim. P. 29.1; Mich. Ct. R. 2.507(E).

- The plaintiff/prosecutor gives the first argument, which must be a full and fair statement of plaintiff's case.
- The defendant gives the second argument.
- The plaintiff gives the final argument. Final argument is not confined to "rebuttal," but may be a full argument covering all aspects of the case.

In multi-party lawsuits, the court may assign the order of argument. If the parties have diverse interests, they all have individual rights to give closing arguments, although the court has the discretion to set the order. If multiple parties have similar interests, the court has discretion to limit the number of arguments.[6] If a single party is represented by multiple attorneys, the court similarly has discretion to set the number who can participate in closing argument.[7]

Trial judges have broad discretion to set reasonable time limits on closing argument. For example, Vermont Rule of Civil Procedure 51(a) provides:

> More than one hour on a side will not be allowed for argument to the jury, without leave granted before argument; and the court may limit argument to less time.

Restricting parties to as few as thirteen minutes each has been approved in simple cases,[8] but time limits must be rationally connected to the complexity of the case.[9] The court need not allow equal time to all parties if the interests of fairness indicate otherwise. For example, when multiple parties are arrayed on one side, and a single party on the other, it is common to allocate more time to the single party.[10] Otherwise, the single party's argument could be overwhelmed by adverse arguments lasting two to four times as long.

[C] THE CONTENT OF CLOSING ARGUMENT

It generally is proper to include three things in your closing argument: discussions of the facts, descriptions of the law and arguments about how it applies to this case, and comments on the justness of the cause. Over 100 years ago, one court wrote:

> The largest and most liberal freedom of speech is allowed, and the law protects [counsel] in it. The right of discussing the merits of the cause, both as to the law and facts, is unabridged. The range of discussion is wide. [Counsel] may be heard in argument upon every question of law. In his addresses to the jury, it is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of parties; impugn, excuse, justify or condemn motives, so far as they are developed in evidence; assail the credibility of witnesses, when it

[6] *See, e.g.*, *John T. Brady & Co. v. City of Stamford,* 599 A.2d 370, 372 (Conn. 1991).

[7] *See, e.g.*, *Williams v. Greenfield Equip. Co.,* 361 S.E.2d 199 (Ga. App. 1987).

[8] *See United States v. Gray,* 105 F.3d 956, 963 (5th Cir. 1997) (only real issue in case was whether defendant had requisite intent to defraud).

[9] *Maleh v. Florida East Coast Properties,* 491 So.2d 290 (Fla. App. 1986) .

[10] *E.g.*, *v. Dallas Ry. & Terminal Co.,* 260 S.W.2d 596 (Tex. 1953) (fifty minutes for plaintiff, thirty minutes each for two defendants).

> is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. 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.[11]

[1] Fact Arguments

Proper argument must be confined to facts introduced in evidence, facts of common knowledge, and logical inferences based on the evidence. If you stray beyond these somewhat vague boundaries, you may commit error.

It is improper to argue or allude to facts not in the record, to misstate a witness's testimony, or to attribute to a witness testimony that was not given.[12] Similarly, it is improper to use evidence admitted for a limited purpose for any broader purpose.[13] For example, if a prior inconsistent statement were admitted over a hearsay objection for the limited purpose of impeaching a witness, you may not argue that the prior statement should be considered as the truth. However, courts usually make reasonable allowances for honest mistakes of memory and ignore misstatements of unimportant facts.[14] If the attorneys disagree on what the testimony was, the court usually will not resolve the dispute, but will instruct the jurors that they must decide what the facts are, based on their recollection (not the attorneys') of the testimony.

You also are permitted to allude to facts that are matters of common knowledge, whether or not those facts were introduced into evidence, and to ask a jury to use that information to arrive at a verdict. For example, an attorney may wish to remind the jury of inflation when arguing what the proper measure of future damages should be. Such an argument usually is allowed, as long as the attorney does not suggest a particular rate of inflation. In criminal cases, prosecutors like to remind the jury about "the problem of gangs and gang violence,"[15] the fact that drugs and crime are a local problem,[16] or that the jury is the voice and conscience of the community.[17] These arguments, too, are permitted as long as the prosecutor does not get too specific. Whether a fact is a matter of common knowledge is left to the discretion of the trial judge.[18]

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[11] *Tucker v. Henniker,* 41 N.H. 317, 323 (1860).

[12] *E.g.*, *People v. Chavez,* 762 N.E.2d 553, 563-64 (Ill. App. 2001) (error for prosecutor to say that defendant drove unregistered car; evidence was that car was registered to someone else); *Commonwealth v. Westerman,* 611 N.E.2d 215 (Mass. 1993) (error to suggest that defendant sold drugs to children based on evidence that only showed possession with intent to distribute).

[13] *E.g.*, *People v. Williams,* 681 N.E.2d 115, 122 (Ill. App. 1997) (hearsay admitted "not for its truth" cannot be used as substantive evidence in argument).

[14] *See, e.g.*, *State v. Forrest,* 670 So. 2d 1263, 1270 (La. App. 1996) (reference to witness who did not testify seemed inadvertent; no error).

[15] *Commonwealth v. Gwaltney,* 442 A.2d 236 (Pa. 1982).

[16] *White v. State,* 726 A.2d 858, 867 (Md. Ct. Sp. App. 1999).

[17] *Brown v. State,* 508 S.W.2d 91 (Tex. Crim. App. 1974).

[18] *See* Ronald Carlson, Argument to the Jury: Passion, Persuasion and Legal Controls, 33 St. Louis U. L.J. 787, 805 (1989).

You also may make reasonable inferences from the facts, as long as those inferences are consistent with the facts.

> So long as no liberties are taken with the evidence, a lawyer is free to draw such inferences as he wishes from the testimony and to present his case in the light most suited to advance his cause and win a verdict in the jury box.[19]

For example, if the facts show that when a defendant was arrested for passing counterfeit bills, he had the counterfeit bills in one pocket and real money in the other pocket, the prosecutor may argue that the defendant had deliberately segregated real from counterfeit bills, which showed his knowledge that the bills were counterfeit.[20] An inference is "reasonable" if it is based on and derived from specific facts. It does not have to be logical or even likely. You may draw any inference you like, however absurd, as long as the facts on which it is based are in evidence.[21]

It is generally improper to insinuate the existence of unproved facts or to invite the jury to speculate about missing evidence.[22] However, in a few situations the law allows you to draw the jurors' attention to missing evidence. In all civil cases, you may point out that a party did not testify or failed to deny conduct or statements attributed to the party.[23] You also may comment on your adversary's failure to produce relevant evidence or call material witnesses that are in the possession of or under the control of the party.[24] In both situations, you may argue that it is reasonable to infer that your adversary did not produce the evidence because it would have damaged his or her case. You also may read portions of the opponent's pleadings and comment upon the lack of evidence to support specific allegations.[25]

In criminal cases, the defendant usually is permitted to comment on missing evidence the prosecutor does not introduce.[26] However, the courts are split on whether it is proper for the prosecution to comment on a criminal defendant's failure to produce witnesses or evidence within the defendant's exclusive control. The majority of courts follow the rule in civil cases allowing comment;[27] others hold that because a defendant has no obligation to present a defense, comment is generally improper.[28] Because of an accused's Fifth Amendment privilege, however, the state is never allowed to comment in any way upon the defendant's personal failure to testify.[29] Comments that the

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[19] *Wagner v. Anzon, Inc.,* 684 A.2d 570, 578 (Super. Ct. Pa. 1996).

[20] *United States v. Tucker,* 820 F.2d 234 (7th Cir. 1987).

[21] *Turner v. State,* 544 S.E.2d 765, 770 (Ga. App. 2001) (arguments may be illogical or absurd).

[22] See, e.g., *State v. Bradford,* 618 N.W.2d 782, 799-800 (Minn. 2000) (improper for prosecutor to speculate about what victim was probably thinking during murder).

[23] *See Alfred v. Demuth,* 890 S.W.2d 578, 581 (Ark. 1994).

[24] *See, e.g.*, *Krupien v. Rai,* 742 A.2d 1270, 1271-72 (Conn. 1999).

[25] *See, e.g.*, *Stevenson v. Abbott,* 99 N.W.2d 429 (Iowa 1959).

[26] *E.g., State v. Perry,* 779 A.2d 622, 627 (R.I. 2001).

[27] *See, e.g.*, *Commonwealth v. Daye,* 759 N.E.2d 313, 326 (Mass. App. 2001) (defendant's failure to call alibi witness he claimed he was with).

[28] *See People v. Davis,* 677 N.E.2d 1340, 1348 (Ill. App. 1997).

[29] *Griffin v. California,* 380 U.S. 609 (1965).

state's evidence has gone "unrefuted" amount to improper comment on defendant's silence if the defendant is the only one who could refute it.[30] Also, if evidence has been suppressed or ruled inadmissible, it is error for either side to comment on or refer to it.[31]

[2] Arguments Concerning Damages

One common inferential argument that attorneys make is that, based on the evidence, a certain amount of damages should be awarded. Many kinds of damages are not susceptible to direct proof and are difficult to quantify in dollars. Especially difficult to articulate are emotional injuries, punitive damages, pain and suffering, and future business or financial losses. Since there is likely to be little direct evidence in the record concerning the value of such intangible harms, attempts by the attorneys to quantify how much the jury should award are rife with possibilities for straying beyond the "reasonable inference" limitation. The basic rule is that the attorneys may suggest specific damage amounts, even for intangible injuries, as long as they derive those amounts from the evidence, but may not base their requests on what their client *wants,* on what similar lawsuits have been worth, nor on their personal opinions.[32]

The most litigated of these issues is the so-called "per diem" argument, in which an attorney attempts to make a concrete estimate of intangible damages such as pain and suffering by breaking down a long period of time into small units — usually days — and asking the jury to assess a dollar amount to that unit, e.g., that it is reasonable to give a plaintiff fifty dollars for every day the plaintiff will have to spend in a wheelchair. The low figure probably will seem reasonable. Then, the attorney shows how many days (based on medical testimony and life expectancy tables) the plaintiff will be confined to the wheelchair and computes total damages on the chalkboard. For example, if a plaintiff had permanent injuries and a life expectancy of thirty years, she would be in a wheelchair for 10,950 days, which, when multiplied by the seemingly small amount of fifty dollars per day, comes to $547,500 in future damages. The courts are divided on whether this is proper argument. While the majority of jurisdictions permit it,[33] others have expressly held it to be improper.[34] Per diem arguments usually are accompanied by an instruction from the court that the monetary amount suggested by counsel is not binding in any way.[35]

Two other damage arguments are generally prohibited. You cannot suggest a figure for intangible damages by telling jurors how much other juries awarded in similar cases,[36] because it is not an argument based on the

[30] *Whigham v. State,* 611 So.2d 988, 995–96 (Miss. 1992).

[31] *See, e.g., Muhammed v. State,* 782 So. 2d 343, 360-61 (Fla. 2001); *Commonwealth v. Grimshaw,* 590 n.E.2d 681 (Mass. 1992).

[32] *See Carchidi v. Rodenhiser,* 551 A.2d 1249 (Conn. 1989).

[33] *See, e.g., Hacker v. Quinn Concrete Co.,* 857 S.W.2d 402, 411-12 (Mo. App. 1993).

[34] *See, e.g., Ramirez v. City of Chicago,* 740 N.E.2d 1190, 1198 (Ill. App. 2000).

[35] *See Giant Food, Inc. v. Satterfield,* 603 A.2d 877, 881 (Md. App. 1992).

[36] *See* Annot., 15 A.L.R.3d 1144.

evidence. So-called "Golden Rule" arguments, in which the plaintiff's lawyer invites the jury to award unto the plaintiff what they would like for themselves, are also improper if they suggest that the jury should base its award on what they would want if they were similarly injured, rather than on the evidence. For example, in *Leathers v. General Motors Corp*,[37] the plaintiff argued:

> Mr Leathers is going to live 26.9 years disabled. I don't know how to put a value on that. It's the loss of your legs, sports, hobbies, and enjoyment of life. 26.9 years are close to 9000 days. How much would it be worth to you? What would you want? $20 a day? $30?

The argument was held to be reversible error.

[3] Arguments Concerning the Law

The rule concerning arguments about the law is simple: you may review and discuss the law and suggest to the jury how it applies to the facts, but you must be accurate. Any misstatement of the law — by omitting part, by including an unnecessary element, or by an explanation that distorts the law — is error.[38] Any "jury nullification" argument suggesting that the jury disregard the law or circumvent an unfair law is similarly objectionable.[39] This includes so-called "Ten Commandments" arguments that the Bible says, "Thou shalt not kill." The defendant is to be tried (in this world, at least) by state law, not God's law.[40]

In general, you must take the law from the jury instructions. You may read from those instructions, but can run into trouble if you try to explain them. Explanations that deviate from those given in the pattern jury instructions are likely to be prohibited.[41] You probably may read from statutes as well, at least if your cause of action is based on a statute, but you would be well advised to seek permission from the court first. You may not read from legal treatises, law reviews, or appellate opinions, nor argue the policy behind the law.[42] You are addressing a jury, not the court of appeals.

[4] Making Emotional Appeals

You certainly are permitted to *display* emotion in closing argument. Indeed, one court commented on an attorney weeping during closing argument by saying that "[t]ears have always been considered legitimate argument before the jury. If counsel has tears at his command, it may be . . . his professional duty to shed them whenever the proper occasion arises."[43] However, you are

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[37] 546 F.2d 1083 (4th Cir. 1976).

[38] *See, e.g.*, *State v. Wilson,* 556 S.E.2d 272, 286-87 (N.C. 2001); *State v. Henry,* 44 P.3d 466 (Kan. 2002).

[39] *See, e.g.*, *State v. Mara,* 41 P.3d 157, 172 (Haw. 2002) (prosecutor crticized "reasonable doubt" standard).

[40] *E.g.*, *People v. Eckles,* 404 N.E.2d 358 (Ill 1980).

[41] *E.g.*, *Commonwealth v. Pagano,* 710 N.E.2d 1034 (Mass. App. 1999) (counsel giving own interpretation of meaning of proof beyond a reasonable doubt may lead to reversible error).

[42] *E.g.*, *DeAngelis v. Harrison*, 628 A.2d 77, 80 (Del. 1993); *State v. Austin,* 357 S.E.2d 641 (N.C. 1987).

[43] *Ferguson v. Moore,* 98 Tenn. 342, 351–52 (1897). *But see People v. Dukes,* 146 N.E.2d 14 (Ill. 1957) (weeping during closing argument was reversible error).

not permitted to appeal to the emotions and prejudices of the jurors. This fundamental rule was stated in *Brown v. Swineford:*[44]

> It is the duty and right of counsel to indulge in all fair argument in favor of the right of his client; but he is outside of his duty and his right when he appeals to prejudice irrelevant to the case.

Therefore, it is generally improper to make the following kinds of arguments:

- Appeals to sympathy, e.g., referring to the tears of the victim's parents[45] or the client's recent heart attack,[46] or suggesting that innocent family members will suffer if an adverse verdict is returned.[47]
- Attempts to arouse racial prejudice or to claim to have been the victim of racial prejudice.[48]
- Appeals to religious prejudice, e.g., anti-Sikh remarks.[49]
- Xenophobic arguments against foreigners.[50]
- Appeals to prejudice against corporations as large, wealthy or unfeeling.[51]
- Raising the relative financial conditions of the parties, discussing the existence of insurance (unless already in evidence), or otherwise arguing that the verdict should depend on ability to pay.[52]
- Asking jurors for vengeance, especially arguments that they should listen to the demands of the community and use this opportunity to get even for all the wrongs done to society, e.g., by linking a defendant to the problem of crime and drugs that is out of control, and suggesting that the community wants something done about the drug problem.[53]
- Asking jurors to make an example of the defendant or send a message to the community.[54]

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[44] 44 Wis. 282, 293 (1878).

[45] *Williams v. State,* 544 So.2d 1114 (Fla. App. 1989).

[46] *Cole v. Bertsch Vending Co.,* 766 F.2d 327 (7th Cir. 1985).

[47] *E.g.*, *Commonwealth v. Fowler,* 725 N.E.2d 199 (Mass. 2000).

[48] *E.g.*, *Moore v. Morton,* 255 F.3d 95, 107 (3d Cir. 2001).

[49] *E.g.*, *Bains v. Cambra,* 204 F.3d 964, 974 (9th Cir. 2000).

[50] *Zakkizadeh v. State,* 920 S.W.2d 337, 340 (Tex. App. 1995).

[51] *E.g.*, *Bellsouth Hum. Res. Admin. v. Colataraci,* 641 So.2d 427, 428-29 (Fla. App. 1994) ("corporate America — the folks that brought you Agent Orange and silicon breast implants").

[52] *E.g. Koonce v. Pacilio*, 718 N.E.2d 628 (Ill. App. 1999) (suggesting defendants had no insurance and would be wiped out by large verdict). *But see Rodgers v. Fisher Body Div., Gen. Motors Corp.,* 739 F.2d 1102, 1105 (6th Cir. 1984) (wealth of defendant is a legitimate issue if case involves punitive damages).

[53] *See e.g.*, *People v. Chavez,* 762 N.E.2d 553, 564 (Ill. App. 2001) ("welcome to the war on drugs").

[54] *E.g.*, *DeJesus v. Flick,* 7 P.3d 459, 463 (Nev. 2000) (send a message to lawyers that try to prevent injured people from recovering).

- Appealing to jurors' fears for their own personal safety or the safety of the community, or suggesting that they will personally suffer (through higher taxes or insurance premiums) if they return a particular verdict.[55]

However, a distinction must be drawn between *improper* emotionalism and the emotions that are an inherent aspect of the case. You do not need to "sanitize" your case and remove the emotional aspects that are a natural part of it. If a child has been killed by a drunk driver, strong emotions are going to be an inherent part of the case, and it is not error to raise emotional issues in that context. For example, in the prosecution of middleweight boxer Hurricane Carter for murder, the prosecutor argued that the African-American defendants had murdered the victim just because he was white, as a payback for the fact that a white man had killed a friend of theirs. He made references to a race war and suggested that these defendants had vowed to kill a white man every time a white man killed a black man. The court held that the possible racial motive in the killing made racial prejudice a central aspect of the case, and therefore a proper subject for argument.[56]

One way lawyers in criminal cases often try to play on the emotions of the jurors is by arguing about the consequences of a conviction. This is improper, regardless of which side is making the argument. The defendant may not tell the jury about mandatory terms of imprisonment or extreme potential sentences, because it may cause jurors to acquit a defendant they like (despite probative evidence) if they think the potential sentence too harsh. Similarly, the prosecutor is not supposed to tell the jurors about the possibility of early parole or pardon, or that a defendant can have the verdict reviewed on appeal, since such statements could result in conviction for an unproved serious crime if the jurors do not want a defendant released early. Such statements also encourage jurors to abdicate responsibility and convict more readily, believing (wrongly) that an appeals court will turn the defendant loose if the defendant should have been acquitted.[57]

[5] Personal Attacks and Comments

The rules of closing argument require that the attorneys remain detached from the cases they argue. The thoughts, motives, beliefs and conduct of the attorneys — both you and your opponent — are irrelevant and outside the proper scope of argument. You may not express your personal beliefs and feelings about the case, nor may you attack or discuss the behavior or motives of the attorney on the other side. Thus, you may not state your personal belief as to the proper outcome of the case,[58] relate personal experiences that bear on the case,[59] assert your personal beliefs about the credibility of witnesses,[60]

[55] *E.g.*, *State v. Finley*, 42 P.3d 723, 730 (Kan. 2002) (protect community from drugs); *Byrns v. St. Louis Co.,* 295 N.W.2d 517 (Minn. 1988) (local taxes).

[56] *State v. Carter,* 449 A.2d 1280 (1980).

[57] *E.g.*, *Caldwell v. Mississippi,* 472 U.S. 320 (1985).

[58] *E.g.*, *State v. Singh,* 793 A.2d 226, 245 (Conn. 2002).

[59] *E.g.*, *State v. Pearson,* 943 P.2d 1347, 1352-53 (Utah 1997) (prosecutor's personal experience with guns).

[60] *State v. Singh,* 793 A.2d 226, 239-40 (Conn. 2002).

or claim that you are impartial.[61] Neither may you criticize your opponent's trial performance,[62] attack his or her integrity, or accuse the opposing attorney of fabricating evidence or suborning perjury.[63]

Name calling and other forms of personal attacks on the parties themselves are also technically improper unless connected to specific impeachment evidence. This error probably is committed most often by prosecutors, who seem unable to resist making derogatory remarks about defendants. For example, in the trial of Oliver North, the Independent Counsel analogized him to Adolf Hitler.[64] In other cases, it has been held to be error for a prosecutor to sarcastically refer to defendants as "four innocent bastards,"[65] or call a defendant a "liar" 40 times when he had not testified.[66] The rule is not strictly enforced, however, and courts have found that calling the defendants "scum,"[67] "drug lords,"[68] and "cockroaches"[69] was not error. In civil cases, counsel appear to act with greater decorum, and name calling is less common. However, in one case a lawyer referred to the adverse party as "a cheapskate, a scheming low-down pup, cheating and swindling, stealing and waiting like a snake in the grass." The error was found harmless.[70]

[6] Use of Visual Aids

Closing argument is not limited to words. You are permitted to use all kinds of visual aids to help communicate your theory. You may demonstrate how you think something happened, using furniture and other readily available props to assist you.[71] You may use and refer to the exhibits introduced, such as photographs of the crime scene.[72] You may create new diagrams, drawings or computer simulations, to illustrate what you think the evidence shows, clarify a dispute, emphasize certain facts, or calculate damages. You can do mathematical calculations on a chalkboard to compute damages based on admitted evidence of life expectancy.[73] You can outline the elements of a cause of action or the questions in a special verdict and list what you believe to be

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[61] *See Commonwealth v. Lindsey,* 724 N.E.2d 327 (Mass. App. 2000) (prosecutor claimed impartiality and "we have no interest in punishing an innocent man").

[62] *Commonwealth v. Grandison,* 741 N.E.2d 25 (Mass. 2001) (opponent's motives for engaging in cross-examination); *Commonwealth v. Bourgeois,* 465 N.E.2d 1180 (Mass. 1984) (criticizing opponent for objecting).

[63] *See, e.g.*, *State v. Rosas-Hernandez,* 42 P.3d 1177, 1184 (Ariz. App. 2002) (calling opponent's opening statement "a lie").

[64] *United States v. North,* 910 F.2d 843 (D.C.Cir. 1990).

[65] *United States v. Doe,* 860 F.2d 488 (1st Cir. 1988).

[66] *Floyd v. Meachum,* 907 F.2d 347 (2d Cir. 1990).

[67] *Lindsey v. Smith,* 820 F.2d 1137 (11th Cir. 1987).

[68] *United States v. Castro,* 908 F.2d 85 (6th Cir. 1990).

[69] *Bowles v. State,* 737 N.E.2d 1150 (Ind. 2000).

[70] *Dudar v. Lewis,* 282 S.E.2d 194 (Ga. 1981).

[71] *Price v. Commonwealth,* 59 S.W.3d 878 (Ky. 2001) (lawyer could straddle a chair with arms akimbo to illustrate typical motorcycle riding style, but could not involve party, witness or victim in the demonstration).

[72] *E.g.*, *Parrish v. State,* 514 S.E.2d 458, 466-67 (Ga. App. 1999).

[73] *E.g.*, *Cabnetware v. Birmingham Saw Works,* 614 So. 2d 1034, 1038 (Ala. 1993).

the decisive evidence or the necessary result.[74] Whether you will be allowed to use special props that were never introduced into evidence, to illustrate your argument, *e.g.,* borrowing a police officer's gun to show how it was brandished, is a matter of judicial discretion.[75]

[D] PROCEDURE FOR OBJECTING

Improper argument or conduct by your opponent always is subject to an objection. While the court may stop such an argument sua sponte,[76] the primary burden for objecting falls to the attorneys. An objection, accompanied by a motion to strike the offending argument, usually is the preferred procedure. As a general rule, all objections should be timely and must state clearly the grounds on which they are based. Failure to make a prompt, specific objection can amount to a waiver of that issue should you try to raise it on appeal.[77]

If your opponent's argument both is improper and impairs your client's ability to receive a fair trial, you can move for a mistrial. A mistrial is usually difficult to obtain for three reasons. First, most errors are deemed cured when the judge sustains your objection and instructs the jury to disregard the improper argument.[78] Second, if the improper argument is withdrawn by your opponent, any error usually will be cured.[79] Third, judges are loathe to order an expensive retrial of an entire case just because a lawyer gets carried away and makes a few inappropriate remarks in argument.

NOTES

1. ***Judicial enforcement of rules of closing argument***. Although it is common for some judges to allow attorneys to do whatever they want during closing argument, others take the rules seriously. Justice Peter W. Agnes, a Massachusetts Superior Court judge, issues all trial attorneys the following order:

ORDER RE : CLOSING ARGUMENTS

"A lawyer is a representative of clients, an officer of the legal system, and a public citizen having a special responsibility for the quality of justice."
Mass. R. Prof. Conduct Preamble

For nearly twenty-five years, the appellate courts of Massachusetts have consistently declared that they will not tolerate misconduct during closing

[74] *E.g., State v. Tims,* 693 P.2d 333, 336-37 (Ariz. 1985).

[75] *Compare Peoples v. Commonwealth,* 137 S.E. 603 (Va. 1927) (borrowing a police officer's revolver that had not been introduced was permitted to demonstrate impossibility of suicide) with *State v. Mayfield,* 506 S.W.2d 363 (Mo. 1974) (improper to brandish shotgun that had not been introduced during trial).

[76] *See, e.g., Commonwealth v. Thomas,* 511 N.E.2d 1095, 1100 (Mass. 1987).

[77] *See Spikes v. State,* 545 S.E.2d 410, 413 (Ga. App. 2001). Cf. Minn. Dist. Ct. R. 27(e) (objection still timely if made at the end of an argument).

[78] *See, e.g., State v. Mason,* 550 S.E.2d 10, 17 (N.C. App. 2001).

[79] *See, e.g., King v. State,* 877 S.W.2d 583, 585-86 (Ark. 1994).

arguments. These Guidelines are designed to assist counsel in observing the rules regarding closing arguments in order to avoid prejudicial error and the potential for disciplinary sanctions. These Guidelines are not intended to prohibit counsel from employing enthusiastic rhetoric, strong advocacy and excusable hyperbole.

Guidelines are appropriate because reliance on curative instructions to correct an error in a closing argument may not always be adequate or sufficient. Counsel shall review the following Guidelines prior to delivering closing arguments. Counsel shall observe these Guidelines in delivering their closing arguments. Unless otherwise noted, these Guidelines apply with equal force to prosecutors and defense counsel in criminal cases, and counsel for the plaintiff and the defendant in civil cases. Counsel are invited to seek clarification from the Court with regard to anything contained in these Guidelines.

Guidelines

1. Counsel may state and comment on the evidence and any reasonable inferences that may be drawn from the evidence.

2. Counsel may only refer to facts that are in evidence, and counsel may not misstate the evidence. However, with prior approval of the court, the defendant may argue that an inference against the Commonwealth should be drawn from the absence of certain evidence. Counsel should not comment on the defendant's decision to not contradict testimony or to not introduce evidence. Also, in certain limited circumstances and with prior approval of the court, either party may argue that an adverse inference should be drawn against a party for the failure to call a witness.

3. Counsel may not express a personal belief or disbelief in the credibility of a party, the victim in a criminal case, any witness, or the justice or rightness of their case. Thus counsel should avoid use of "I believe," "I think," "it's my opinion," etc. Likewise, counsel should refrain from statements that suggest a witness does not have a bias, interest, or motive. If the evidence supports such a characterization, counsel may state the evidence. Counsel may not "vouch" for a witness by suggesting or implying that counsel has knowledge independent of the evidence before the jury that supports the credibility of the witness.

4. Counsel may not appeal to the sympathy, prejudice and passions of the jurors. Thus, counsel may not ask the jury to put themselves in the position of a party in a civil case or the victim in a criminal case. Generally, counsel should refrain from any reference to racial, ethnic, or religious prejudice. Counsel shall avoid using derogatory terms when referring to the defendant, a witness, or opposing counsel and shall not make any disparaging comments about a person's occupation or counsel's performance in court.

5. Evidence admitted for a limited purpose may not be used generally as substantive evidence, and care should be taken not to misstate the purposes for which evidence may be used by the jury.

6. Counsel should seek guidance from the court before making any reference to or use of any document, photograph, or tangible thing that is not in evidence

or has been marked for identification only. Also, counsel should seek guidance from the court before making any references to television programs, films, or material in newspapers, magazines, or books.

7. Counsel shall not misrepresent the law. Counsel should seek guidance from the court before making any statements about the law that may be applicable in the case.

8. In a criminal case, the prosecutor may not comment, either directly or by implication, on the defendant's failure to take the stand during the trial, or on his or her silence in circumstances in which there was no obligation to speak.

9. In criminal cases, reference to the consequences of the verdict or to the impact of the verdict on society, the victim, or his or her family are not permitted. Likewise, it is improper for the defense to suggest that a conviction of the defendant will disadvantage a child, a spouse, or another family member or friend.

10. Neither the prosecutor nor defense counsel shall address the subject of sentencing or punishment without express approval of the court.

2. *Scope of final argument.* The final argument generally is limited in scope, but it is more than just a two-minute rebuttal of the defendant's argument. The boundaries of final argument are determined by the issues raised in *both* preceding arguments, and the trial judge ultimately has the discretion to expand them even further. You are not supposed to introduce new issues in final argument that could have been raised (but were not) in your first argument, and also were not raised by the defense in their argument. *See, e.g.*, *Tune v. Synergy gas Corp*., 883 S.W.2d 10 (Mo. 1994). If the court does allow the plaintiff to raise new issues during final argument, fairness requires that the defendant be given a chance to reply. *See Knight v. First Guaranty Bank*, 577 So. 2d 263, 271 (La. App. 1991). Courts tend to be liberal in their findings of what constitutes proper scope of final argument. As long as no completely new issues are raised, you may bring up new lines of argument, new illustrations and exhibits, and additional details.

3. *Making up fictitious evidence.* Attorneys often make up fictitious conversations that could have happened but about which there is no testimony. As long as this is clearly being done for purposes of argument and is not a distortion of the actual evidence, a court has the discretion to permit it. Consider the following argument, in which plaintiff's attorney put a Pepsi-Cola box in the witness chair during closing argument and said:

> Please testify, Mr. Pepsi-Cola Box. What is this box going to say? I don't know how old I am. I was born somewhere between 1936 and 1954. I was put together by Traub Box Company. I had metal bands and nails. I was loaded on a truck, pulled off other boxes, put on other boxes, put on rollers, [and] put on lines. One day, while I was working for Pepsi-Cola, carrying around 50 or 60 pounds, I lost one of my nails. I was all right. I was kept in service. At Christmastime, do you know what happened to me? I was hit, then I lost another nail. Although I lost another nail, I was still used. In 1959, I lost another nail. Sometimes I had to sit out in the rain, sometimes I had to sit out in the

> snow. [W]hile I was sitting there, my bottom was rotting out. Then I was delivered to a little grocery store in Murray Hill. A couple of days later a man tried to lift me up and finally the accumulation of all these years took its toll .

Would you permit it? The court in *Cusumano v. Pepsi-Cola Bottling Co.*, 223 N.E.2d 477 (Ohio App. 1967), did not. It held that it was error to allow the plaintiff to make the argument. *See also State Dept. of Corrections v. Johnson*, 2 P.3d 56, 65-66 (Alaska 2000) (fictional account of hypothetical injury to plaintiff's wife was error).

4. *Arguments concerning matters outside the record that affect plaintiff's compensation.* A number of factors indirectly affect how much compensation a plaintiff will actually receive. For example, since damages received as a result of personal injuries or in wrongful death cases are not subject to income taxes, 26 U.S.C. § 104(a)(2), a defense attorney may wish to point this out to the jury in an effort to reduce the final award. In most jurisdictions, however, it is not proper to do so. *See Dunn v. St. Louis-S.F. Ry.*, 621 S.W.2d 245 (Mo. 1981). The plaintiff may wish to ask the jury to take into account the effect of inflation when computing damages for future loss, in hopes of increasing the size of the verdict. Many courts also prohibit this argument although there is a growing trend toward allowing it. *Compare Wood v. Browining-Ferris Indus.*, 426 S.E.2d 186, 188 (Ga. App. 1992) (argument not permitted) *with Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982) (argument permitted if based on expert testimony about wage trends). The plaintiff's attorney may not ask the jury to award his or her own fees and court costs in addition to the damage award, no matter how much these costs will otherwise reduce the client's actual recovery; *see Cole v. Warren Co. Sch. Dist.*, 23 S.W.3d 756, 760 (Mo. App. 2000); nor may the defense attorney comment on the large fees the plaintiff's attorney is charging. *See Stoner v. Eden*, 404 S.E.2d 283, 284 (Ga. App. 1991). Finally, the "collateral source rule" prohibits a defense attorney from pointing out that someone else has already paid for the damages. It is common for some of the plaintiff's losses to have been paid by an insurance company, or for a plaintiff to have been taken care of by relatives. The defendant cannot argue that such payments should reduce the overall amount of damages. E.g., *Cates v. Wilson*, 361 S.E.2d 734, 739-40 (N.C. App. 1987).

§ 9.04 ETHICAL CONSIDERATIONS

The Rules of Professional Conduct contains three general provisions relevant to closing argument. Rule 3.3 prohibits a lawyer from "mak[ing] a false statement of material fact or law to a tribunal," and Rule 3.4 prohibits a lawyer from "stat[ing] a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused."[80] Rule 3.4 (c) states that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal," which includes the rules governing closing argument.

[80] *See also United States v. Collins,* 78 F.3d 1021, 1039-40 (6th Cir. 1996) (unprofessional to express personal opinion on veracity of witness).

It is therefore unethical to:

- Allude to facts beyond the record
- Distort or embellish the testimony
- Invite speculation about unproved facts
- Mention insurance or argue that someone else has already paid plaintiff's hospital bills
- Distort or misstate the law
- Make a jury nullification argument encouraging the jury to ignore an unpopular law (including the parole laws)
- Appeal to emotion, passion or prejudice that is not an inherent part of the case
- Ask the jury to put themselves in your client's position
- Suggest that the jurors will be personally affected by the verdict, *e.g.*, through higher taxes or insurance premiums
- Suggest that the court of appeals will correct any mistakes the jury makes

The ABA Standards for Criminal Justice address the ethics of closing argument in more detail:

Standard 3-5.8 Argument to the jury

(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

(e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds.

Standard 3-5-9. Facts outside the record

It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

The ABA Standards for Criminal Justice concerning defense argument are similar. Standard 4-7.8 contains one further restriction: It is unprofessional conduct for a lawyer "to attribute the crime to another person unless such an inference is warranted by the evidence."

§ 9.05 PREPARING CLOSING ARGUMENT

[A] CONTENT OF CLOSING ARGUMENT

A closing argument is not a spontaneous outpouring of emotion and off-the-cuff eloquence. To give a good argument requires careful and thorough planning. Since some of the argument you will give will depend on the course of events at trial — the strength of your opponent's evidence, testimony unexpectedly excluded, or the success of trial motions — you cannot prepare your entire argument in advance, although you can prepare most of it. After all, your closing argument is simply an oral presentation of your theory of the case which you developed long before trial. It may therefore be valuable to review the section on developing a case theory in Chapter 2. In general, a good case theory (or a good closing argument) has the following characteristics:

- It clearly tells the jury what verdict you want and why
- It is logically based on the evidence
- It is consistent with common sense
- It accounts for all of the important evidence
- It concentrates on the most important items of evidence
- It avoids legal technicalities as much as possible
- It explains both why you are right and why your opponent is wrong
- It uses specific evidence and specific legal principles, not generalizations
- It suggests reasonable ways to resolve disputes
- It appeals to the jury's sense of fairness and justice
- It is entertaining and incorporates visual aids

Good argument is not just oratory; nor is oratory necessarily good argument. Your goal is not to win an academy award for your dramatic performance, but to present your theory of the case to the jury so that they understand it and remember it. Whether you will give an effective closing argument is largely determined in advance as you decide how to organize and phrase your presentation. As you undertake this task, you might consider the following principles of effective argument:

- ***Keep it simple***. Simple does not mean simplistic; it means uncomplicated. Concentrate on the real disputes, resist the temptation to offer several alternative theories, and avoid becoming bogged down in reviewing uncontested or trivial matters. Experiments by social

psychologists indicate that about seven points are all you can argue persuasively. After that, arguments become confusing.[81]

- ***Be specific***. Facts are more important than generalizations or rhetoric. Be specific about the important factual points, and the details that corroborate them. Don't just say you have proven that the goods were delivered, remind them which witnesses testified to the delivery and show them the warehouse receipt.
- ***Be explicit.*** Psychologists have demonstrated that an argument is more persuasive if the desired conclusions are explicitly drawn than if you leave it up to the jury to draw its own conclusions.[82] Although in theory jurors might hold more strongly to a conclusion they reach on their own, if you do not suggest a conclusion, the juror may reach a conclusion you do not like.
- ***Be organized.***
- ***Keep to your theory of the case***. If a fact, law or argument is not necessary to your theory of the case, do not mention it.
- ***Use visual aids***. Presumably, you introduced exhibits during trial for a reason. Use them! But do not limit yourself to exhibits already introduced. Charts can be prepared specifically for closing argument, and arguments can be illustrated on the chalkboard. The uses of descriptive exhibits are as varied as your creativity. You can list the elements of a cause of action, summarize evidence, calculate damages, draw a sketch of an intersection, and so on. The only requirement is that your exhibit be supported by the evidence. Some attorneys prefer the apparent spontaneity of chalkboards; others prefer charts prepared in advance because they cannot be erased by your opponent and you cannot make an inadvertent error on them.
- ***Support your positions with jury instructions***. Rather than just summarize all the law at one time, weave instructions into the fabric of your argument. If you are arguing that a witness is not credible because the witness made a prior inconsistent statement and is the plaintiff's friend, that would be a good time to read the jury instruction that prior statements and bias may be taken into account in determining credibility.
- ***Use the theme from your opening statement.***
- ***Personalize your client and depersonalize the adverse witnesses.*** You should make conscious efforts to personalize your client by referring to him or her by name and telling the jury personal things about your client's life. Similarly, you should depersonalize the other side's witnesses, e.g., by referring to the adverse party

[81] *See* Daniel Linz and Steven Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 LAW & PSYCHOLOGY REV. 1, 28–29 (1984).

[82] Carl Hovland and Wallace Mandell, *An Experimental Comparison of Conclusion-Drawing by the Communicators and the Audience*, 47 J. ABNORMAL & SOCIAL PSYCHOLOGY 581 (1952); Bernard Fine, *Conclusion-Drawing, Communicator's Credibility, and Anxiety as Factors in Opinion Change*, 54 J. ABNORMAL & SOCIAL PSYCHOLOGY 369 (1957).

generically (e.g., the defendant, the corporation, the deceased) or with negative labels (e.g., the toxic-waste company). Don't get carried away, though. Many courts do not allow you to call your own client by a first name or nickname, nor to call the opponent a scurrilous name.

- ***Use analogies to common experiences***. If you think a jury may have difficulty understanding a legal concept, try to analogize it to some common experience. The classic example is the explanation of circumstantial evidence: Suppose you got up one morning and saw a foot of snow on the ground that was not there when you went to bed. You can be certain it snowed during the night even though no eyewitness saw it.
- ***Be positive***. Spend your time arguing your own case, not your opponent's. Emphasize your strengths and concentrate on your main points. Discuss your opponent's case only to the extent necessary to refute it briefly.
- ***Admit your weaknesses***. Every case has weaknesses. You should confront those inherent in your theory, admit them, and deal with them as best you can. The jury is probably already aware of them from the evidence, and your opponent is sure to bring them up, so you cannot make them go away. Therefore, you might as well at least earn points for candor and honesty. However, the dividing line between a candid discussion of your weaknesses and a defensive argument that focuses on your opponent's evidence is a fine one. It is not necessary to confront every piece of contradictory evidence. Rather, you should discuss and explain away the major weaknesses in your own theory.

[B] LENGTH

Hugh Head, a Georgia trial attorney, has written that the one mistake that leads to the most lost lawsuits is talking too long:

> Mark Twain has a funny story about the preacher who was so spellbinding that he resolved to contribute all his money to the cause. The minister kept on, and he thought he would give him all his folding money. A few minutes later, he was down to all the loose change. The good pastor then kept on so long that finally Mark Twain vows he stole a quarter from the plate when it was finally passed around. Few souls are saved, in church or court, after twenty minutes.[83]

Lengthy closing arguments can result in a number of undesirable consequences: your major point may become lost in a mass of trivial issues, the jury may become bored and stop listening, arguments may become disorganized, or you may even raise doubts about your own case.

What is the correct amount of time to spend on closing argument? The answer obviously will vary with the complexity of the issues you must discuss. Some writers have suggested absolute time limits for all arguments, ranging

[83] Hugh Head, *Arguing Damages to the Jury*, TRIAL, Feb. 1980, at 28, 30.

from twenty minutes to an hour. Such suggestions are important only because they demonstrate a near uniformity of opinion that relatively brief arguments are better than lengthy ones. While you should not be afraid to discuss the important issues fully, you should also be unafraid to sit down when you are finished. Taking unnecessary time simply to repeat arguments or to argue trivial or uncontested matters can only weaken your presentation.

[C] ORGANIZATION OF A CLOSING ARGUMENT

There are probably as many ways to organize arguments as there are attorneys who give them. No one method of organization is categorically better than the others. In the next few pages, one method is suggested that emphasizes simplicity and clarity of organization. It is a good starting point for beginners, especially those who doubt their natural eloquence. Another organizational scheme is included in the notes following this section for comparison.

[1] Introduction

Every argument starts with introductory remarks of some kind. The standard advice is that you should begin by thanking the jury for their patience and explaining the purpose of a closing argument. Many trial practitioners use these somewhat insincere, canned openings as crutches to ease themselves over those first tense moments. The usual opening remarks often sound like this:

> If Your Honor please, distinguished defense counsel, ladies and gentlemen of the jury. It is now my privilege to present what is known as a closing argument. This is my opportunity to discuss with you the evidence in this case and the law which will be given to you by the court. But first, Jane Porter and I want to thank you for your services as jurors. You have been taken away from your own personal affairs to do your civic duty, and I know it has been an inconvenience to sit patiently through days or tedious testimony. Without your conscientious service, trials like this would not be possible in our democracy. The burden on you will now become even greater. You must judge what is right and wrong, and decide whether Jane will recover any monetary damages from the defendants to compensate her for her crippling injuries.

This kind of introduction is safe and inoffensive, but is also boring, insincere and misleading. Endless repetition of platitudes is boring. Even if you think thanking the jury is important, to do it first is so obviously currying favor that it cannot help but sound insincere. The introduction is misleading because it does not seem to acknowledge that there is a great battle raging between the two sides over millions of dollars.

It makes more sense to use your introductory remarks to further your case! Our advocacy strategy was to take advantage of the principle of primacy whenever we had the chance. You can set the mood, state your theme, summarize your theory and emphasize an important piece of information all in your first sentence or two while you have the jurors' attention. For example:

> During the four days of testimony concerning the injuries to Jane Porter, there have been a few times when certain events provoked a laugh — we all laughed. There was nothing wrong with that. For the law deals with love and laughter, and the events that affect lives. Laughter is one part of life. And perhaps, in a case like this, laughter was necessary for the momentary relief it provided from the catastrophe that has occupied our minds for four days. But now the time for laughter has passed, and we are confronted with a more difficult aspect of life — the suffering of Jane Porter, who because of the paralysis caused in the accident, will never love or laugh again.[84]

[2] Brief Summary of Case

After the introduction, you should tell the jury *briefly* your theory of the case: who did what to whom and why. This should not take more than a few lines. This is not the time to go into detail, discuss specific witnesses, or resolve conflicting evidence. You simply should tell the jury, painting as vivid a picture as possible, your basic theory. For example:

> Jane Porter is now paralyzed, and will remain so for the rest of her life. Her prospects of ever again leading a normal life were shattered when a drunk college student ran a red light and smashed into Ms. Porter's car.

[3] Identifying the Issues

The next step is to identify the issues and focus the jurors' attention on the important ones. You do not fool the jury by pretending there are no issues and disputes, and that your case is clear cut. The jurors know we wouldn't be here at trial if that were the case.

Your description of the issues must be credible. It is not enough just to tell the jury what the issues are. They might not believe you — after all, your opponent may focus on other issues, and the court's instructions will not tell them which issues are truly important. You must have a simple, clear explanation of *why* these are the issues.

One method of accomplishing this goal is to summarize the issues based on the instructions or verdict form they will receive. For example:

> The judge will instruct you that you should return a verdict for Jane Porter if you believe four things: first, that the defendant either drove at an excessive speed or was intoxicated; second, that his conduct was negligent; third, that Jane Porter sustained injuries as a result of such negligence; and fourth, that the truck driver was operating the Ajax Company truck within the scope of his employment by Ajax. These are the issues you must decide.

It often helps if you translate legalese into plain English. To the previous paragraph, you might add:

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[84] Suggested by JAMES JEANS, TRIAL ADVOCACY 486 (2d ed. 1993). *See also* L. Smith, *supra* note 1, at § 1.21 ("In the Bible it is stated that there is a time for joy and a time for sorrow").

> In other words, we must prove four things: 1) the truck driver was either speeding or drunk; 2) the truck driver was negligent; 3) Jane was hurt; and 4) the truck driver was working for Ajax.

Some attorneys would put these simplified legal concepts on a chart, displayed in front of the jury.

The next step is to focus the attention of the jurors on the contested issues. This is done by eliminating the issues that are uncontested or only tokenly contested. For example:

> We don't have to worry about two of these issues — the fact that the truck driver was driving the truck as part of his job with Ajax is not contested. You heard the manager of Ajax testify that she personally told Jones to make this delivery. We also introduced the truck driver's employment contract (holding it up) signed by the president of Ajax. Therefore, it is clear from the evidence that he worked for Ajax and was making a routine delivery when the wreck occurred. The second issue also is not contested — if the truck driver were speeding or drunk while driving through city streets crowded with cars and pedestrians, his conduct was unreasonable and therefore negligent. That leaves two issues for your consideration.

Next, you should refine your definition of the issues by being detailed and specific. Does the dispute over intoxication concern whether the truck driver had been drinking at all, how much he had been drinking, or whether he was under the influence? Does the dispute over damages concern an allegation of a preexisting condition, a disagreement about the permanency of the injuries, or a question of how to value pain and suffering? Again, by a process of eliminating the uncontested facts, you can help the jurors (and your own argument) focus on the heart of the lawsuit. For example:

> The first issue is whether we have proved to you that the Ajax truck driver was drunk when he crashed into Jane Porter's car. There is no argument about the fact that the truck driver had been drinking in a bar only one hour before he smashed into Ms. Porter's car. The truck driver admitted on the stand that he stopped at Nick's Grill to drink beer at about 2:30 p.m. The issue before you is how much he had to drink, and how that alcohol affected his ability to drive.

[4] Order of Issues

If there is only a single issue, you can proceed directly to a discussion of it. If there are multiple issues, you should make clear to the jury the order in which you will discuss them. In general, it is better for a plaintiff to discuss liability first and damages last. A defendant in a civil case often reverses the order, discussing damages first and concluding with arguments against liability. It would be difficult to do it the other way. If, after you conclude that there is no basis for liability, you say: "But, in case you find liability, damages are very small," it weakens your argument against liability.

In criminal cases (and civil cases presenting only liability or only damage issues), it is usually advisable to discuss the issues in the order in which the jury will hear them in the instructions. However, you always must be careful

to avoid an order that weakens a dispositive argument. If your primary argument is followed by a more technical argument, such as that your opponent has failed to prove some other element, it may appear that your main argument is not strong enough to entitle you to a verdict.

Wrong. The evidence clearly establishes that the defendant was not even in Chicago when the alleged crime occurred. But even if you do not accept his alibi, the state failed to prove armed robbery. They did not show that a weapon was involved. They never produced it.

Right. The defendant is charged with armed robbery. You might ask why, since no weapon was introduced, and the state never proved that one was involved. But you do not have to worry about it, because the defendant was not even in Chicago when the incident occurred.

[5] Resolving the Issues

The main body of your argument should be allocated to a resolution of these issues, one by one. This is the time to review the evidence — but only that portion that concerns the contested issue under discussion. There is never any need for a lengthy, boring recitation of the testimony of every witness, and rarely even any reason to repeat the story you told in opening statement. If you have tried your case properly, the jury knows the facts by now. You need only briefly summarize the evidence on both sides of each contested issue to make the conflict clear, and then resolve the dispute in your favor.

If the issue is a factual one involving conflicting evidence, there are a number of ways to resolve it. Some are more effective than others, and you often will be able to combine two or more. You can argue that a conflict should be resolved in your favor because your version of the facts is:

- Consistent with physical evidence that is impervious to human manipulation, like skidmarks.
- Consistent with laws of physics.
- Supported by the greater quantity of evidence and corroborating witnesses.
- Consistent with common sense about how people behave or whether events can happen by coincidence.
- Supported by the more credible witnesses, who were unbiased, had good eyesight and hearing, are of good character.

Similarly, you can argue that your opponent's version is less likely because it is inconsistent with physical evidence, uncorroborated, inconsistent with common sense, and testifiued to by witnesses who lack credibility.

The most effective way of resolving disputes in testimony is to show that your version is consistent with, and your adversary's is impossible to square with, uncontroverted physical evidence. For example, if there are 250 feet of skidmarks, a car had to be going fast before the brakes were applied, no matter what any witness says. This can often be effectively combined with the laws of physics — if witnesses disagree about how long it took a person to walk thirty feet, you can demonstrate that if he or she was walking at three miles

per hour, it would take that person almost seven seconds to travel that distance.

Probably the second most effective way to resolve a dispute is to show that your version is corroborated by many witnesses and exhibits, while the other side's case rests only on one or two witnesses. The more witnesses there are, the less likely that any one could be mistaken. It is especially helpful if you can show that even witnesses called by your opponent corroborate important parts of your own case.

Arguments about the quantity of evidence often can be combined with a discussion of the burden of proof. The defendant can argue that its version of the case is supported by more evidence, and that the law of burden of proof says that the plaintiff's failure to produce the greater weight of evidence means the jury must decide against her. Plaintiff can argue that she has produced more evidence, and that is all the law requires. She need not negate all of the defendant's evidence entirely.

In the absence of physical evidence or corroborating witnesses, the argument most consistent with common sense and everyday experience is likely to prevail. Your version of the event should be both possible and probable. For example, the prosecution could negate a self-defense claim by pointing out that the defendant had taken a gun with him when he went to see the victim — something he was not likely to do unless he intended to use it.

The least effective method of resolving a factual dispute is to attack the credibility of your adversary's witnesses. Jurors do not readily believe that a witness would lie under oath unless that witness had a strong motive to do so. A good friend called as an alibi witness might lie for the defendant; a roll-over witnesses who is avoiding a long jail term by testifying might lie for the state. But you need a strong motive consistent with common sense to succeed in such an attack. Prior convictions (except for perjury), prior inconsistent statements, or biases and prejudices standing alone are not likely to be enough to convince a jury that the witness has lied. If you need to attack credibility, it is probably better to develop an argument that a witness was mistaken because of an inadequate opportunity to observe the events than to suggest that the witness is a liar.

These methods often can be combined into an effective argument, as in the following example:

> The second issue I mentioned was whether the Ajax truck driver was speeding when he crashed into Ms. Porter's car. You will recall that when the truck driver testified, he said he was going twenty to thirty miles per hour. The only other eyewitness was Ms. Brown, the lady walking her dog. She estimated that the Ajax truck was going about fifty. How do we decide whom to believe? Let's look at the evidence. Remember the testimony of Brian Weiss of the highway patrol. He measured over eighty feet of skidmarks. He testified to you that a truck going only thirty miles an hour would come to a complete stop within sixty feet. Did the Ajax truck come to a complete stop? No. It skidded another twenty feet and then (holding up a photograph of the truck) was still going fast enough to smash in the front end. Also, do not forget

> Ms. Porter's testimony. Although she did not see the Ajax truck bearing down on her, she felt the force of the impact. She said that she was thrown clear across the seat and hit the door handle on the other side of the car. Remember, too, that the truck driver's own boss testified that the delivery was supposed to be made by 3:00. The wreck occurred at 3:05, so the truck driver was already late. Which testimony makes more sense: that the driver would be driving five to fifteen miles per hour *below* the speed limit when he was late, or that he would be going faster than usual? The only evidence that he was driving slowly comes from the truck driver himself. Not only does he have a motive to claim he was going slowly, but his ability to estimate his speed accurately probably had been impaired by his drinking.

Many cases also will present issues of how to apply the facts to the law; e.g., whether the defendant's conduct was unreasonable enough to amount to negligence. Making this kind of decision is the ultimate function of the jury. In one sense, there is little you can say beyond an argument such as:

> We submit that it is not reasonable to drive fifty-five miles per hour on a narrow road in the pouring rain, even if that is within the speed limit.

However, you can employ a number of techniques that will make this kind of argument more effective. The most important is to translate the legal concepts into easily understood words and compare those words to common everyday life events. Through one or more such analogies, you can compare the facts of this case to a common event that clearly fits within the legal definition of the cause of action or defense. For example:

> The judge will instruct you that the defendant is negligent if he failed to use that degree of care that an ordinarily careful and prudent person would use under the same circumstances. That means you must measure the truck driver's conduct not against the way you drive, but against the way you expect your sons and daughters to be taught in drivers' education. His conduct must be measured against what a reasonable and careful driver, such as a parent taking his or her children to school, would do. Such a careful person might drive more slowly on narrow roads than on interstate highways. Such a careful person would certainly slow down in dense fog regardless of the speed limit, because it is not safe to drive fast when you cannot see. The careful driver would slow down if the roads were covered with ice. Similarly, if some other condition made it difficult to see and made the roads slippery, a careful driver would slow down. A hard rain presents just such a situation — obscured visibility and a slippery road. The truck driver's failure to slow down to a reasonably safe speed was therefore negligent.

Arguments about the value of intangible damages, such as pain and suffering, are difficult to formulate for similar reasons. This is also one of the ultimate functions of the jury. Trying to articulate the monetary value of pain may seem almost impossible, so many lawyers mistakenly do not even attempt it. They choose instead to review the facts, make the pain as vivid as possible, suggest a number, and trust the jury. The challenge is to make your number

reasonable. The same two techniques can help: translating the instruction into ordinary terms, and then using analogies and comparisons. For example:

> The judge will instruct you that Jane Porter is entitled to reasonable compensation for her pain and suffering. How do you decide what is reasonable? Look around you at ordinary life, at the conduct of everyday affairs. What is the effect of pain? One effect is that it prevents Ms. Porter from getting a good night's sleep. She testified that she cannot sleep because of the pain. Her husband, Frank, testified that she tosses and turns, and often cries out at night. He told you about seeing the tears of frustration in his wife's eyes as another sleepless night goes by. Ms. Porter testified it was like trying to sleep in your car — you cannot get comfortable, your muscles cramp. What do reasonable people do when traveling? Instead of trying to sleep in their cars, they check into a motel. They recognize that a good night's sleep is worth something. It has a value — about eighty dollars for a night at the Holiday Inn. So I suggest that eighty dollars is a reasonable amount to award Ms. Porter for each night when the pain prevents her from sleeping. Since the evidence showed that she has not been able to get a single good night's sleep since the accident — that is two years and fifty-six days, or 786 days — she should be awarded $62,880 (doing calculations on the blackboard).

In arguing damages, it is particularly important to request a specific amount, and to base that amount on reason and common sense. You are not doing your job if all you can tell the jury is that they must decide an amount. If you, an experienced lawyer, cannot think up an amount, how do you expect the jury to do so? Your adversary will probably step into this void and suggest an amount quite different than what you wanted, which will be the only estimate the jurors have in front of them. It is also helpful after establishing the various components of damages, to compute them on the chalkboatd so the jury can clearly see the total request.

[6] Conclusion

The final part of your argument should be a strong statement of your position. Who did what to whom, why did they do it, why is it legal (or illegal), and why does it entitle you to a verdict in your favor. Keep your summary *brief* and stick to your own case. Don't rehash both sides of the argument or end on a defensive note, because that gives too much credit to your adversary's position. Make clear to the jury exactly what verdict you expect them to return. If they made any promises to you in voir dire, remind them of that. If the case involves damages, repeat the specific amount you expect. Then, conclude with a dramatic finish that sums up the central theme of your argument and the justice of it. Thank the jury on behalf of your client, and sit down. For example:

> Two years ago, Jane Porter was wheeled into my office, laboring under the burden of having been paralyzed in an accident. For these past months, I have helped her carry some of that burden, but my task is now completed. The burden is being passed to you, the jury. Nothing you can do will totally lift the weight from Ms. Porter's shoulders. You

cannot give her back the use of her legs. No matter what we do, she cannot walk out of this courtroom and down the stairs, cannot get into her car, press the gas pedal and drive home, as you and I will do. She has already been sentenced to life imprisonment in a wheelchair by the stupid, careless act of a drunken truck driver. But you do have the power to help her. How many of us have read of the heroic acts of ordinary people who help strangers who are in trouble, and wondered whether we would have had the courage to do the same? This is your opportunity. Ms. Porter came into this courtroom a stranger in a strange land, and put her future in your hands. She will have to live the rest of her life with the result of your decision. We are confident that you will return a verdict for the plaintiff, Jane Porter. We have shown that $2,500,000 will reasonably compensate her. On behalf of Ms. Porter and myself, we thank you for your patience and attentiveness, and for your willingness to undertake the awesome responsibility placed upon you. She will spend the rest of her life in a wheelchair. We are confident that you will not leave her impoverished as well.

[D] SPECIAL PROBLEMS FOR PLAINTIFF

Plaintiffs (and prosecutors) usually have the opportunity to argue first and last. If you represent a plaintiff, how should you allocate your time? Most attorneys recommend that you allocate about two-thirds of your time to your first argument. If you waive or give an abbreviated first argument, you sacrifice the psychological advantage of getting the first word. You also cede control over defining the issues to your opponent. If the defendant raises only a single issue, you may be precluded from raising new issues in final argument. This does not mean that you should shortchange your final argument. If you do, you have sacrificed the psychological advantage that comes from getting in the last word.[85]

The second problem facing the person who argues first is whether to anticipate the defense argument. You cannot ignore conflicting evidence, but you have a choice whether to deal with them in your first argument or your concluding argument. It is probably best to steer a middle ground, dealing with the large, obvious facts that seem to contradict your theory in your opening argument, but not trying to anticipate all the details of your opponent's case. Experiments by psychologists have shown that if you forewarn jurors that the defendant is going to try to persuade them, and then refute a weakened version of the defense argument, you can to some extent inoculate them against your opponent's position.[86]

[E] SPECIAL PROBLEMS FOR DEFENDANT

If you represent a defendant you will have only one argument, so your concerns will be slightly different than the plaintiff's. However, you still have

[85] *See, e.g.*, Chester Inkso, E. Allan Lind and Stephen LaTour, *Persuasion, Recall and Thoughts*, 7 Representative Research in Social Psychology 66 (1976).

[86] *See* Linz & Penrod, *supra* note 85, at 17–27; Steven Penrod et al., *The Implications of Social Psychological Research for Trial Practice Attorneys*, in Psychology and Law 448–49 (D. Muller et al., eds., 1984).

to allocate time. How much time do you spend refuting the plaintiff, and how much in stating your own case? It is generally a better tactic to stick mostly to your own case — stay on the offensive. This strategy assumes that you have a plausible case, of course, and are not so desperate that your only argument is that the plaintiff or prosecutor has failed to meet the burden of proof.

You must accomplish two things in your one argument: refuting the plaintiff's case and offering your own theory. The usual order of an argument is to offer your own positive case first. Beware of the temptation to attack the absurd arguments of your opponent first thing. It is especially important to avoid disrupting the natural organization of your argument by responding to individual silly remarks, lies and exaggerations made by the plaintiff during the opening argument. If they are relevant to your theory, you will get to them in due course, and can better refute them at that time.

How many issues should you raise? Some trial practitioners advise defendants to place as many issues as possible before the jury. The more arguments you have that there are disputes and unresolved problems, the more likely it is that you can convince a jury that the plaintiff has failed to carry its burden of proof. The problem with this approach is that the underlying argument — plaintiff failed to prove its case — is your weakest possible theory of the case. Do you not have *anything* positive to say about your own case? Is your client so obviously guilty that he or she could not even manage to take the stand and deny responsibility? In most cases, you will have something stronger to say —a particular reason why you are entitled to a verdict. As soon as we posit this scenario, the justification for a "shotgun" defense disappears. You would not want to risk burying your one good issue in a mass of unimportant ones.

Since you do not get another chance to speak, it is important that you anticipate plaintiff's final argument. If you know the case well, you know the points at which your opponent is likely to attack. You can warn the jurors of the coming assault, point out why it is not valid, and ask them to remember your argument since you cannot speak again.

[F] WRITING IT ALL DOWN

Despite the fact that you know your theory well, most lawyers find that preparing either a detailed outline or a full version of their arguments in advance of trial is the most effective method of preparation. It forces you to think through exactly how you are going to present each argument, and to place them in some kind of logical order. A few practice rounds in front of friends, colleagues or a video camera will help improve your ability to deliver it. When you are satisfied with your argument, you might want to reduce it to a simple outline form to make sure you will not end up reading your argument to the jury.

This initial outline is not the final version of the argument you actually will deliver. Some changes inevitably will be necessary based on the testimony at trial and the statements made by your adversary. It is therefore a good idea to leave some working space on your outline to be filled in during the second stage of preparation.

NOTES

1. *Other organizational schemes.* The organizational model suggested in this chapter is not the only alternative available, although it is a good place to start. An alternative models is suggested by RALPH MCCULLOUGH & JAMES UNDERWOOD, CIVIL TRIAL MANUAL 654–60 (2d ed. 1980):

- Brief opening remarks designed to get jurors' attention
- Discussion of the burden of proof, especially by a plaintiff who needs to overcome the jurors' belief that civil cases must be proved beyond a reasonable doubt
- Definition of the issues, narrowing them down as much as possible, and giving the jurors a logical and easy-to-understand analysis of each
- Brief summary of the sequence of events from your perspective, told in narrative fashion like a story
- A recap of the important testimony from important witnesses, being careful not to rehash everything said by every witness
- Discussion of why your witnesses are credible, being candid about their weaknesses
- Brief summary and refutation of the evidence introduced by your opponent, including any necessary attacks on the credibility of your adversary's witnesses
- Discussion of the law as it applies to the case, paraphrasing any difficult passages
- Discussion of damages
- Conclusion that ends with a strong point, a summary of your main argument, and an emotional appeal

2. *Should you ask rhetorical questions?* Some writers suggest that it can be an effective technique to use rhetorical questions. For example:

> In this case, the evidence showed that the defendant *just happened* to be one block from where the robbery occurred moments earlier, *just happened* to have a nickel-plated revolver on him, *just happened* to have $47 in his pocket, and *just happened* to be wearing a red velour shirt. If he's so innocent, I'm sure his lawyer will have a great explanation for how all these things *just happened* at the same time when he argues to you.

THOMAS A. MAUET, TRIAL TECHNIQUES 411 (5th ed. 2000). This is a risky tactic. The question probably is either irrelevant to your opponent's theory, or your opponent in fact has an answer! For example, the defense attorney might respond to Mauet's argument as follows:

> As I understood the prosecutor's argument, he said that if we could explain the coincidence of four pieces of incriminating evidence, it will prove Sammy's innocence. Why is it, the prosecutor asked in incredulous tones, that Sammy just happened to be one block from the robbery

with a nickel-plated revolver on him, with $47.00 in his pocket, wearing a red velour shirt? Clever questions are not evidence, however. The evidence explains each of these items. Sammy is mildly retarded, as everyone in the neighborhood knows. When Jack Ripple went to rob the grocery store, he took Sammy along. Sammy was happy to have anyone befriend him. Ripple told Sammy to wait for him, and then went to rob the store. Things went bad, and Jack needed to get away. He ran back and asked Sammy to hold some things for him — a gun, some money, and a red sweater. Sammy was happy to do this for his new "friend." Ripple then ran off down Fifth Street (where, you will remember, the ski mask was found) and disappeared. He left Sammy holding the bag.

[G] PREPARATION DURING TRIAL

Most of your closing argument can (and should) be prepared in advance. However, there always will be a few unanticipated events that occur during trial. If you have a good working outline, it can be supplemented by a few notes as the trial progresses.

- During voir dire, the jurors may make statements or express concerns that provide ideas about how to phrase an argument, whether a particular point needs to be emphasized, or what kinds of analogies to draw. For example, if several jurors have young children and express concern about danger in the city schools, you may want to make a slight modification in your argument to work in a reference to your own client as a "a parent who has to worry about her children's safety every day," or to change your "safe streets" argument[87] to one that reminds the jury that the problems of crime are so great they are even threatening the schools.
- During opening statement, you can note any overstatements or exaggerations made by your opponent. These can be used later to argue that the other side has failed to prove their case. The standard argument goes something like this: "The prosecutor promised at the start of the trial that he would produce an eyewitness who could positively identify the defendant. He did not produce any such witness — only old Mr. Johnson who admitted he couldn't see very well. By his own admission, the prosecutor's case hinged on this testimony, and it did not measure up. He has failed to prove the most important part of his case beyond a reasonable doubt."
- During the examination of witnesses, you can note the exact words used by a witness at a critical time, so that they can be quoted accurately. If any evidence is unexpectedly excluded, that too should be noted so that you do not inadvertently refer to evidence outside the record.
- Witnesses may unexpectedly give more favorable testimony than anticipated. If you believe the new evidence is genuine, you will

[87] A "safe streets" argument is the standard rhetoric by prosecutors reminding the jury that crime is running rampant and they need to do their part to help make the streets safer by removing this particular miscreant from society.

want to incorporate it into your closing. However, you should be cautious. It is improper to capitalize on suprisingly favorable evidence that is the result of confusion or simple misstatement by the witness, but probably is not true. Trials are not games.[88]

- If the court grants judgment as a matter of law on an issue, or if your opponent concedes it, whole sections can be eliminated from your argument.

Often there will be (or you can request) a recess between the conclusion of the evidence and closing arguments. This will give you time to make sure that you have all materials ready — notes, exhibits, charts, and so forth — and to make necessary rearrangements and modifications in your argument.

§ 9.06 CONDUCTING CLOSING ARGUMENT

[A] MANNER AND STYLE

We have said throughout this book that style is largely a matter of individual personality. Nowhere is this more true than closing argument. You will be most effective if you are yourself, whether that means quiet reasoning, a sense of humor, or lofty rhetoric. If you try to adopt some artificial style that you saw in a movie, you will probably appear insincere and uncomfortable. The jurors may interpret this as discomfort with *the merits* of the case you must present.

Nevertheless, within the boundaries imposed by your own natural style of speaking, there are some suggestions you should consider:

- Informality is usually better than formality.
- Maintaining a courteous, professional demeanor is usually better than sarcasm, anger, or any other childish outburst. Try not to be rude, abrasive, or obnoxious.
- Histrionics should be used sparingly. You are likely to be more effective if you adopt a friendly, conversational manner than if you attempt to mimic the dramatic techniques of Hollywood lawyers. However, this does not mean you should never use dramatic techniques, only that you should save them for the most important points in your argument.
- When the facts are emotional, you should display an emotional reaction yourself. If you represent a client who was paralyzed in an automobile accident, or are prosecuting a rape case, don't talk about the victim's plight in dry, matter-of-fact terms. Let your voice express your sympathy and your outrage.
- Be careful about using exaggeration and hyperbole. Remember that your personal credibility is on the line, and if you say outrageous things that are not true, the jury will believe you less.

[88] *See People v. Olivero,* 710 N.Y.S.2d 29, 30 (App. Div. 2000); *People v. Kopczick,* 728 N.E.2d 107, 113 (Ill. App. 2000).

- Notes should be used as minimally as possible so that your overall presentation is extemporaneous and conversational. Above all, do not read your closing argument.
- Maintain eye contact with the jury. Look from juror to juror during your argument, not at your notes or the floor. If looking directly at jurors makes you uncomfortable, look between two jurors.
- Avoid standing behind a lectern. If you need the security of a lectern, try standing beside it rather than hiding behind it.

Philip Corboy, former president of the ABA Section of Litigation, summarizes these suggestions as the five C's — five distinctive characteristics you must display in closing argument: courtesy, competence, credibility, charisma, and caring.[89]

[B] SPEAKING RATE

How quickly or slowly should you speak when presenting a closing argument? The traditional advice given by trial practitioners (and their mothers) is to speak slowly and distinctly. You don't want to sound like a fast-talking used-car dealer trying to put something over on the audience. Surprisingly, there is some evidence that the traditional view may be wrong. Psychological experiments have shown that listeners rated fast talkers as more intelligent, more objective, and more persuasive than either normal or slow talkers, and that listener comprehension was not adversely affected.[90] There are two probable explanations for this. First, jurors can think faster than you can talk. The slower you talk, the more "spare" time jurors have to think of other things. Reactance theory suggests that one topic they will tend to think about when you are trying to sell them something, is all the counter-arguments. The less time you give them to think about alternative explanations, the better. Second, if you talk faster, jurors have to work harder to keep up with you. This cognitive activity tends to implant your argument in their minds. To put this in perspective, think about which professors are more boring — the lively fast talkers, or the ones who speak slowly!

[C] CHOREOGRAPHY

Unless you are in a courtroom where you are required to argue from a fixed position, you can make some choices about where to stand, when to move, and whether to use a lectern. In the typical courtroom there is a great deal of flexibility, and no two lawyers will choreograph their closing arguments in exactly the same way. In the last analysis, your argument probably will be most effective if you are comfortable, regardless of the general suggestions below.

Psychologists have experimented on the persuasive effect of arguments delivered from different distances. The results of one experiment indicated that distances between the speaker and listener of more than twelve feet were

[89] Philip H. Corboy, *Final Argument: Earning the Jury's Trust*, TRIAL, Feb. 1992, at 61.

[90] Linz & Penrod, *supra* note 85, at 43–45 (1984); Stephan Peskin, *Non-verbal Communication in the Courtroom*, TRIAL DIPLOMACY J., Fall 1980, at 4–5.

the most effective for more formal one-way persuasion.[91] Other experiments have found that the most comfortable distances for less formal conversations are between four and eight feet — anything closer than four feet may cause the listener anxiety.[92] Where you choose to stand may therefore depend on your style. The more conversational and informal your argument, the closer you can be; the more formal or theatrical, the farther away you should be. It is also a good idea to stand out in front of the jurors, rather than at a sharp angle. You want to see the jurors' reactions, and you want them to be able to see you comfortably.

A second consideration in choreographing your closing argument is how much movement is appropriate. Some trial practitioners recommend that you stand still; others suggest that you change positions when you change topics. Some occasional movement is probably preferable, as it will help prevent monotony. All trial lawyers agree that random, nervous pacing is distracting to the jurors and should be avoided. Interestingly, there is some experimental evidence indicating that distraction is not necessarily bad. A moderate level of distraction may actually increase the persuasive impact of an argument because it tends to inhibit the natural tendency of listeners to think up counter-arguments. This is an extension of the principle underlying the suggestion that you talk faster rather than slower. Of course, the level of distraction must not be so great as to prevent the jury from understanding your argument.

Your decision on whether to use a lectern should be made against this background. Some writers have simplistically formulated general rules about the use of lecterns, usually that it presents a physical obstacle to communication and should never be used. Although in general lecterns are obstacles to be avoided, there may by reasons for deciding to use one occasionally. If you are nervous, tend to pace rapidly, or cannot stand still, a lectern may help anchor you. If it gives you a feeling of security and an unobtrusive place to put your notes, making you more confident, then the benefits might outweigh the costs. If you do use a lectern, do not forget the importance of occasional movement. If you can get out from behind it periodically, your argument will appear more spontaneous and less like a lecture.

[D] COPING WITH SURPRISES

Your opponent's closing argument inevitably will contain surprises. The two most common are the making of improper or unexpected arguments, and the way in which charts are used. Coping with the unexpected can be difficult. It often involves split-second decisions on whether to alter your own planned presentation. Bearing in mind that an unplanned argument is more dangerous than the one you carefully prepared in advance, you probably should be conservative in making impromptu changes. The tactical considerations for coping with some common surprises are discussed in the following sections.

[91] Stuart Albert and James Dabbs, *Physical Distance and Persuasion*, 15 J. PERSONALITY & SOCIAL PSYCHOLOGY 265 (1970). *Cf.* EDWARD HALL, THE HIDDEN DIMENSION (1966) (ten to sixteen feet).

[92] *See* Carol Lassen, *Effect of Proximity on Anxiety and Communication in the Initial Psychiatric Interview*, 81 J. ABNORMAL PSYCHOLOGY 226 (1973).

[1] Improper Arguments

If your opponent makes an improper argument, you have four possible responses:

- Do nothing
- Object
- Respond to it in a later argument
- Retaliate in kind

If you are going to object, you must do so immediately. The window of opportunity in which to make a timely objection is a narrow one. Despite the fact that some lawyers consider it a matter of courtesy bordering on obligation not to interrupt, if you try to save objections until the close of your opponent's argument, you will usually have waived the objection. It has become pointless anyway, because the jury has heard the full improper argument.

Reasons to do nothing

- The improper argument is trivial.
- The argument is unimportant to your theory of the case.
- You have already made several objections and you sense that the jurors are growing impatient.
- Your opponent is exaggerating or misstating the evidence. It is unlikely that the judge will remember precisely what the witnesses said, and he or she will probably overrule you, instructing the jury that their recollection of the testimony controls. If you will have a further opportunity to argue, you can more effectively point out the exaggeration yourself.

Reasons to object

- You have already given your last argument and will not have the opportunity to retaliate or respond.
- The improper argument concerns a misstatement of law.
- Your adversary is committing serious error that will prejudice your client: asking the jury to speculate, quoting damage verdicts from other cases, making a direct appeal to emotion or prejudice, or commenting on suppressed evidence or the defendant's silence.

If you do object, you may choose to make a "speaking objection" in which you not only state the legal grounds, but also point out (for the jurors' benefit) the unfairness of your opponent's tactics. This may be a good tactic if your opponent misstates facts and you have no further opportunity to argue. For example, if the plaintiff tries to get a large verdict by referring incorrectly in rebuttal to your small business client as a "million dollar corporation," a simple objection would only highlight the remark and might leave the jurors with the impression that you are trying to hide the wealth of your client from them. In such a situation, you might object by saying: "I object, your honor. Acme Industry is a small family-owned business with limited assets. The statement made by counsel is false and prejudicial."[93]

[93] J. Jeans, *supra* note 88, at 495.

On the other hand, if you will have the opportunity[94] to make further argument, and the improper remarks were not trivial, then you should consider waiting and responding during your own argument. In general, you should choose this option only if your opponent misstates the evidence. Other kinds of errors deserve prompt objection.

One common method of responding is to repeat your opponent's words, contrast them with the actual testimony, and point out how the other lawyer was trying to exaggerate the testimony in his or her own favor, impliedly admitting that the real testimony was too damaging. Such a response might sound like this:

> My opponent said something very interesting. I wrote down the exact words so that I would not misquote him. Mr. Noble said, "the evidence shows that Brett Nelson had one or two drinks." Was that the evidence? If you recall, Ms. Short testified under oath that the defendant had four drinks — not one or two, but four. She served them herself. Why is the defendant so interested in bringing down the number of drinks? It's because he knows, and we all know that the defendant should not have been driving after consuming four drinks.[95]

One final tactical response to improper argument advocated by some trial practitioners is to retaliate in kind during your own argument. If your opponent makes an improper emotional appeal, you may consider retaliating with an emotional appeal of your own. For example, if a plaintiff improperly refers to the large assets of the corporate defendant (an improper argument), you could retaliate as follows:

> Counsel mentioned that I represent a million dollar corporation and implied that you should somehow penalize us on that account. If he would have been fair in characterizing Acme Industry, he would have told you that we employ hundreds of employees and contribute over half a million dollars in wages each month into this community. He would have told you there are over 10,000 stockholders — widows, retired folks, working people — who have their savings invested in this company. And yet these are the persons he wants to penalize.[96]

However, retaliation is an ethically dubious practice and a dangerous tactic, because you cede the high ground if you stoop to your opponent's level. It is usually better advice that the more unfair your opponent becomes, the more fair and dignified you should be — pointing out the improper tactics, but not stooping to using them yourself.

[2] Rhetorical Questions and Challenges

One fairly common tactic, usually used at the end of an argument, is to pose rhetorical questions or challenge the opponent to confront some particular issue. If this is done to you, how should you respond? In most cases, the challenge should be ignored. Give your prepared argument. It would obviously

[94] Even if you have no formal opportunity, you may always ask the judge for a few minutes' surrebuttal to correct an erroneous statement by your adversary.

[95] Adapted from ALAN MORRILL, TRIAL DIPLOMACY 97–98 (2d ed. 1972).

[96] J. Jeans, *supra* note 88, at 495.

not be a wise idea to throw out your prepared argument and try to improvise an argument based on issues suggested by your adversary.

However, sometimes you may feel that you must respond to such a challenge. If so, how you go about it like this:

> Members of the jury, I don't know whether counsel is deliberately trying to divert me from discussing our case and our evidence or not. He wants me to answer a whole series of questions which he knows would take up much of my allotted time. If I had the time I could answer each and every question as I am sure you can from the testimony that you have heard. For instance, he asked me to answer this question. (Repeat the question and then answer it using the evidence favorable to your side. . . .) I could take each and every one of these questions and answer them in the same way to your satisfaction. However, first I am going to deal with the real issues and important evidence in this case. And I know you will find the answers to just about all of his questions in my comments.[97]

The other option is to write down the questions, plug them into your outline, and answer them as they come up naturally in your argument. If your closing argument is well prepared to cover all the relevant issues, then you can incorporate responses to challenges in the order that you have chosen, placing them in the context of your broader theory of the case. This method also helps you to decide which questions to answer. If you did not think the topic was important enough to be included in your argument, then there is little reason to waste time responding to it.

[3] Plaintiff Waives or Gives a Short First Argument

The defense is put in a difficult tactical position if the plaintiff or prosecutor does not give a complete first argument. One response is for the defense to proceed as if a full first argument had been made, presenting the defense theory and rebutting the obvious issues plaintiff would have raised. This tactic is appropriate when the defense has a strong affirmative case.

Three other responses are possible. If there are weaknesses in the prosecution's case, or if the evidence is confusing, you may waive your own closing argument (with the remark that the prosecution's weak case and absence of argument does not merit a reply). This leaves the prosecutor without the ability to argue, since there is no argument to rebut. A modified version of this tactic would be to limit your argument to a single favorable issue, thereby cutting the prosecutor off from arguing his or her strong issues. Remember that final argument is supposed to be limited to those issues raised in the previous arguments. The third alternative — probably the most common — is to object to the plaintiff's tactics (in open court if possible, so the jury understands the unfairness) and request leave to argue briefly in surrebuttal on any issues the plaintiff raises for the first time in final argument.

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[97] Fred Lane, Lane's Goldstein Trial Techniques § 23.106 (3d ed. 1984).

[E] CHARTS

Two kinds of exhibits may be used by your opponent during closing argument: exhibits introduced during trial, and new demonstrative aids used to clarify the argument itself. Exhibits of this second type — charts of the elements of a cause of action, damage computations, lists of witnesses and corroborating evidence, and so on — are unpredictable. Your adversary may use none or many; they may be carefully prepared posters or hastily drawn sketches on the chalkboard. Frequently, such visual aids present no special problems, because they are incorporated into your opponent's argument and removed when he or she has finished.

There will be times, however, when your opponent will try to gain a tactical advantage by leaving a chart in the jurors' sight after he or she finishes argument. As you rise to give your argument, a visual reminder of the opposing argument may still be on an easel or chalkboard. It is probably safe to say that you should not allow it to remain. One option is simply to remove it. If your opponent has left a list of damages on the blackboard, you can erase them; if he or she has left a chart on an easel, you can take it down and give it back. However, unless you replace it with a chart of your own, such an action may look defensive (as indeed it is) to the jurors. You may appear to be afraid to let them measure your own argument against your adversary's.

Another possibility, especially if your opponent uses the chalkboard, is to incorporate such a chart into your own argument by showing where it is in error and making graphic corrections. You can make the argument you have prepared, and whenever you reach a point where you dispute the information in it, you can erase it and replace it with your own characterization.

NOTES

1. ***Should you use notes?*** Most experienced trial lawyers (to which group you do not yet belong) minimize their use of written notes, believing that jurors react negatively to closing arguments that appear to be read. The advice may be less valuable to a beginner. In your first few trials, you probably will be more confident if you speak from notes despite their marginal interference with eye contact and spontaneity. However, try not to read your notes verbatim, especially during the introduction and conclusion. Jurors remember best what they hear and see first and last, and the impression you convey during those times will be a lasting one. Consider JAMES JEANS, TRIAL ADVOCACY 496–97 (2d ed. 1993):

> An ideal summation could be characterized as structured spontaneity. However it is quite a trick to develop your forensic ability to that degree which accommodates both features. Usually a choice must be made — shall I sacrifice some organization in order to enhance the spontaneity of my argument or shall I sacrifice some spontaneity in order to enhance the organization? Whether you use notes will depend on the choice which you make. If you find that notes are necessary then use them judiciously. Confine them to topic sentences or simply stated points you wish to cover. And don't feel confined to a legal size pad. Paper pads come in all sizes and you might find you function best

with a six by four pad or three by five cards. As a rule of thumb, the less apparent the notes, the better.

2. *Ridicule and sarcasm.* Is there a place in closing argument for ridicule or sarcasm? Some trial practitioners say flatly to avoid it. *E.g.*, Hugh Head, *Arguing Damages to the Jury*, TRIAL, Feb. 1980, at 28, 29. Others encourage the use of scorn, ridicule, and vehemence, especially in final argument. *See* Craig Spangenberg, *Basic Values and the Techniques of Persuasion, Litigation*, Summer 1977, at 13, 16; Vogel, *Final Argument*, in CIVIL LITIGATION AND TRIAL TECHNIQUES 678 (H. Bodin ed. 1976) (ridicule of the contentions of an adversary or the unreasonable testimony given by witnesses may be effective as long as it does not become vituperative or inflammatory). The danger is that the jury may not agree with you that the other side's argument was so implausible that it deserved ridicule, in which case you may be the one who seems out of line to the jury.

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