SOME THOUGHTS ON CLOSING ARGUMENTS IN CRIMINAL CASES
By Richard Guerriero

Preliminary Comments

My thoughts on closing arguments in criminal cases are those of someone who has been a criminal defense attorney most of his career. In addition to that limited perspective, I believe that there is no one “right way” to try a case and, thus, no one “right way” to give a closing argument. For those reasons, rather than trying to present the definitive method of making a closing argument in any case, my aim is only to describe, generally, how I prepare and deliver a closing argument. Hopefully, these ideas will help you think about how to do your own closing arguments. I would note that everything constructive that I have to say I have learned from someone else, including, I am sure, many who are attending this training.

Goals

In my opening, I tell the story of my client’s innocence based on the facts that I expect to develop during the trial. I explain to the jurors how they will learn about those facts from particular witnesses, documents, or other evidence. During the trial, through cross-examination, and sometimes through my own witnesses, I establish the facts that support my theory of defense. I try to develop themes within those facts. While I am building my case, I also attempt to undermine the facts the government needs to prove its case. If I am doing a decent job, when both sides have rested, the jury will already be able to finish the sentence, “the defense lawyer says the defendant is innocent because....” In other words, the jury had better know my story at that point if I am going to have any chance of a favorable verdict.

With my story told and my facts developed, my goals in closing argument are to:

- Show the jury that the facts I described in my opening were delivered during the trial;
- Solidify the views of those jurors who are on my side or leaning my way;
- Give those favorable jurors tools to defend against attacks from other jurors and to attack the arguments of the prosecutor;
- Make sure the jury understands how the facts fit into the legal basis of my defense – what element(s) of the crime cannot be proved, or why the conduct was justified and, thus, not criminal; and

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• To the extent there was confusion over any evidence or issues during the trial, explain those matters to the jury in a way that will help them decide the case in my favor.

Throughout the case, and culminating with the closing, I worry most about the following:

  Do the jurors think I am honest?

  Have I clearly identified my defense?

  Have I established the facts which support my defense?

  Will the jurors think that the verdict I am asking for is just?

  Do the jurors think I have been fair to them, to the witnesses, to the prosecutor, and to the judge?

  How do the jurors perceive my client? How have I treated him in front of the jury? How has the judge treated him? How has the prosecutor treated him?

  How do I deal with the fact that most jurors think that my client would not be sitting in court if he had not done something wrong?

As to all these questions, I make myself answer them honestly as a non-lawyer juror would answer.

Structure

  I do not usually proceed chronologically or even worry much about retelling my story. My “story” of the case is important, of course, but the jurors should already know it. Instead of repeating my story, I structure my argument to emphasize my key points.

  I typically use one of two formats for closing. Either I plan to build up to my best point at the end of the closing, or I plan to start strong and end strong. My personal preference is to start strong and end strong, but in a case where there are more emotional factors than normal, I might use the buildup format.
Structure of a “Buildup” Argument

- Introduction – X is innocent. He is innocent because [theory of the case]. He is innocent because [key theme, maybe key fact(s)].
- First point – small but important point with indisputable supporting facts.
- Second and stronger point, with supporting facts.
- Third / additional point(s) – all stronger, with supporting facts, all building towards the final point.
- During the points leading up to the last point, insert discussions of the law, a quick “thank you,” and my responses to the prosecution’s anticipated arguments.
- Strongest point with supporting facts, delivered with detail and emphasis.
- Conclusion which folds together best points with most memorable facts and themes.

Structure of a “Start Strong and End Strong” Argument

- Introduction – X is innocent. He is innocent because [theory of the case]. He is innocent because [key theme, maybe key fact(s)].
- One of the two strongest points with supporting facts – usually I want to lead with a point supported by facts the prosecution cannot dispute.
- In the middle are all the other points, in a logical order.
- During the points leading up to the last point, insert discussions of the law, a quick “thank you,” and my responses to the prosecution’s anticipated arguments.
- Next-to-last, the other of the two strongest points – often the one with emotional appeal, with supporting facts, delivered with emphasis and detail.
- Conclusion which folds together best points with most memorable facts and themes.

In making the argument, I aim for a clear and logical structure. For each part, I state the point I want to make. Then I identify each fact or set of facts that support that point. When necessary, I explain the logical connection between the facts and the point I am making. Finally, I state the facts in summary fashion and repeat the point. Then I transition to the next point, as explained below.

Introduction and Conclusion

At the beginning and end of my argument, I want the jury to feel that I am credible and that my factual arguments are well grounded. However, in my effort to be compelling, I know I can overdo it. I worry that an overly dramatic
beginning or ending will undermine my credibility with the jury. I also try to avoid appearing to have a “know it all” or “I told you so” demeanor, for the same reasons.

To balance out these concerns, I might start by describing a particularly favorable scene from the events involved in the case and then restate why my client is innocent. For example:

We began this trial by going to the house where Mr. Jones lived. You saw the common room where the computer sat on the desk. You saw the rooms where other adults, like Mr. X, lived. You heard that there were parties at the house. You heard the common room was open to anyone. You heard guests even stayed overnight and slept in that common room where the computer was located. Then, when we came back from that house, you heard from the very first witness in this case that the computer’s password was “1, 2, 3, 4.” [pause] There are at least half a dozen adults who could have used that computer. Any one of them could have downloaded child pornography on the computer. Two of them were never even found by the police. For certain, somebody did download child pornography to that computer, but it was not Mr. Jones.

Similarly, I might describe that kind of scene in my last remarks, and ask the jurors to keep the scene in mind when the prosecutor points at my client and says he is guilty, or when they retire to the jury room.

_Dealing with Weaknesses; Anticipating the Other Side’s Arguments_

I fear a prosecution closing in which the prosecutor is able to point to an important fact and say about the defense, “they never talked to you about that!” Although many prosecutors will then add, that’s because “they’re afraid to talk about it,” that comment is hardly necessary.

Closing argument must address the opponent’s best arguments. If anything, I want to get to the discussion of the weaknesses in my case before the prosecution so that I can put my “spin” on their facts. If I ignore the prosecution’s strengths and my weaknesses, then I am signaling to the jury that I do not have an answer to those points.

As far as structure, I deal with weaknesses in my case in the middle of my argument. I do not want to emphasize the other side’s good points too much, so I do not want to discuss those points at the beginning or the end. Also, I do not want to give the appearance that I think their arguments are strong. Putting the discussion in the middle of my argument accomplishes both of those goals.
Delivery

Of course, it is not enough to make the key points in a logical and compelling format. I have to do it without sounding like a robot and without boring the jury to sleep.

Use an Outline – Do Not Read

I wish I could say that I have never read any part of any closing argument. That’s not true. What I can say is that, except for quoting from documents, it’s not the best thing to do. I do not think jurors listen to lawyers who read closing arguments. To the best of my ability, I give my closing from an outline. That’s not to say I don't write out and revise the entire argument. However, once I have done that, I outline what I have written. I bring the outline, not the written argument to the podium. If I have really prepared the way I like to prepare, I find that I do not look at the outline more than a few times.

A Conversation About the Facts, Not a Lecture About Conclusions

People don’t like to be told what to believe. Jurors are more likely to agree with my story if I present a case that lets them reach the conclusion on their own. For that reason, the more I lecture to them and tell them what to think, the worse I’m doing. As much as possible, I want the closing to feel like a conversation with jurors rather than me talking at them. I try to think about jurors’ likely questions and comments while I am giving the closing. One device is to ask questions or make comments out loud, as if they were coming from the jurors. This can be very effective but it is also easy to overdo it. A solution is to simply ask those questions and make those comments in your head. Sometimes, during a strategic pause, the question or comment will be obvious to everyone, so you do not even have to say it out loud. In general, I try to focus on key facts and events, so that the jurors get to the conclusion before I say it.

Making the Points Stick

We want our best points to be understandable and memorable. There are some often used tools to accomplish those goals.

Trilogies: Phrases like “red, white, and blue,” “the good, the bad, and the ugly,” or “life, liberty, and the pursuit of happiness,” stick in our brains for some reason. Using trilogies in your arguments can have the same effect as long as they seem natural and are not forced.
Metaphors: Phrases such as “the fog of alcoholism,” “the home that was a prison,” etc., can be effective for labeling a situation or person. Take care that such phrases cannot be turned against you.

Analogies: The idea is to take a familiar situation that makes an indisputable point and compare that to your case so as to compel a similar conclusion. Although analogies can be effective, I find they are often too complicated and distracting.

Alliteration: Some writers encourage the use of this device but I fear it can be too cute or worse. An example might be to call a witness a “sneaky snitch from Salisbury.” Jurors will probably remember that it was said, but it smacks of name-calling which might be perceived as unfair. On the other hand, the “worried wife,” or the “big, brute of a bouncer,” might be okay.

References / Quotes: A quote commonly used by defense attorneys is Ronald Reagan’s “trust but verify.” We use it because it’s a reasonable request and it came from a conservative president that most people liked. There are countless other quotes that are useful, but I would not advise using more than one quote in a closing.

Paint a Picture: I like to choose an important scene from my case, such as the scene at the moment of my best fact. Then I pick out details from that scene that relate to the case and describe the scene with those details. I try to “paint a picture of the scene” in a way that favors my case. This is the most difficult but the most effective part of an argument. If I can incorporate facts that the jurors accept as true into my picture of an important scene in the case, I have a better chance of getting the jurors to agree with me about the conclusion to be drawn from those facts. The difficulty, of course, is choosing words which sway the jurors to my side while remaining true to the facts.

Chapter Headings and Transitions

When changing from one point to the next, I signal to jurors that I am changing topics. In general, this involves signaling that the first topic is ending - perhaps by briefly summing up, then pausing, then signaling the beginning of the next topic. This helps to make my arguments clear and to show the logical connections between them.

The easiest way to signal a transition is to give the parts of the argument “chapter headings.” I pause after the first point, then say “Now let’s talk about [the next point].” If I can tie the closure of the first point and the beginning of the second point together, so much the better. For example, after going
through the facts which show that defendant Jones was excluded from all the meetings relating to an alleged drug conspiracy:

From these facts you can see that James Jones was never informed of, much less allowed to attend, any of the meetings where the conspirators planned the crime. That shows that he was not part of the conspiracy and that he is innocent. [pause]. Now there are other facts that also show he was not part of the conspiracy. When the conspirators distributed the money from the sale on such and such date, James Jones did not get a dime. So let’s talk about who got money from the drug sales and who didn’t [then go into those facts relating to the second point].

*Making the Client Part of the Closing*

Making the client part of the closing can be very effective if the client’s appearance and demeanor are likely to produce a sympathetic reaction. Sometimes I have clients who look good but, for a variety of reasons, I would never advise them to testify. In those situations, if I am comfortable with the client and vice versa, I will go over to my client at some point and involve him in the closing by simply by standing by him, or putting my hand on his shoulder. When I do that I am inviting the jury to look at him. With any luck I’m inviting the jury to see the family and friends behind him. It does not matter that much what I’m saying at this point. What I want to convey to the jury is that the defendant is a real human being, with a life, with a family sitting in the rows behind us, and that he is trusting the jury to treat him fairly. When a victim’s family is available, prosecutors achieve the same effect when the jury sees the victim surrounded by family watching the closing argument. Of course, if the defendant or victim, or their families, are threatening, or otherwise may have a negative impact on the jury, you do not want to direct the jury’s attention there.

*Photos, Documents, Audio, Video, Physical Evidence, Charts, Etc.*

Jurors can be greatly swayed by a photograph, or the recorded sound of someone’s voice, or even the appearance of physical evidence. I think the primary reason is that jurors draw their own conclusions from such evidence. When they see it or hear it, they have a reaction. In addition, there is the fact that different people have different learning styles. For some jurors, the most effective presentation is visual or physical, rather than spoken words.

I try very hard to be conscious of the effects of non-testimonial evidence. Such evidence can be both useful and dangerous. In a trial last December, I had the same photo on the screen for most of my opening and closing. I did that because it was a police photo which, standing alone, proved a great part of
my case. The prosecution could not dispute it. Everything the prosecution had to say about the photo was in the form of “yes, but.” My client was acquitted, in large part, I think, because most jurors never got past that photo in their thinking. On the other hand, I have had more than one murder case in which the prosecutor stood in front of the jury and racked the slide of a firearm, or held up a weapon to show its size. Those very effective moments for the prosecution are generally not good moments for the defense.

There are many possible uses of non-testimonial evidence. I may use the evidence in my closing to emphasize that it is an important part of my case. Or I may use the evidence because I think it is confusing or hard to understand and needs explanation. Or I may simply want to show the jury that I am not afraid of some piece of evidence that the government touts as an important part of their case. In the latter situations, I try to find a way to embrace that evidence, use it, and show how it fits into the story of my client’s innocence.

In addition to the evidence from the case, it is always possible for me to make my own “evidence” simply by writing on a white board or presenting a chart or other illustrative materials. As mentioned above, this helps reinforce my points and provides a chance for visual learning.

**Thanking the Jury and Commenting on the Trial Process**

Lengthy explanations of the trial process and extended thanking of the jurors for their service are unpersuasive, in my view. I know many well-respected and successful New Hampshire trial attorneys who disagree with me. I actually had an argument with one attorney about this issue during a trial skills training CLE. Nonetheless, I simply do not think much time should be spent on these efforts. With that in mind, there are a few areas which I do address.

For no other reason than that it is expected, I will pause to very briefly thank the jury for their service, usually as an aside when I am talking about some complicated aspect of the case. I rarely say more than, “thank you for your patience and efforts in this case. It is obvious you see the importance of the case to Mr. X.” This satisfies the requirement of common courtesy. However, other than avoiding the appearance of being rude, it adds nothing to my case so I make it quick. Jurors do not acquit criminal defendants because of the defense lawyer’s gratitude.

I tell the jurors that the prosecutor not only gets to talk first, but he or she gets the last word as well. I usually say that as the lead-in to the first of my efforts to anticipate and counter the prosecution arguments. I ask the jurors, as part of their duty to fully consider the case, to keep my arguments in mind when listening to the prosecutor. I will also tell the jurors that, if the prosecutor makes an argument I did not make, to try to think of their own
counter-arguments, again emphasizing their duty to presume innocence and to test the evidence by debating it. I do not see any benefit in going further to explain why the prosecutor gets the last word. That does not help my case and I don’t accept the usual explanations anyway.

I never say, “my arguments are not evidence,” or “the prosecutor’s arguments are not evidence,” or “the closing is my chance to sum up our case for you,” or “my role in the case is ....,” or the “judge’s role in the case is ....,” or anything like that. Again, those discussions add nothing to my case. In fact, I think they may indicate to the jury that I’m afraid to talk about the facts so I’m giving them a civics lecture instead. There’s just no point and, besides, the jurors hear all of those explanations from the judge, ten times over, anyway.

Lastly, if the case involves a specialized verdict form, then some time must be spent on that. I like to have a blowup of the form. An electronic projection works okay but for this particular item, I like the physical prop. I think it helps make my points to have a big marker so I can physically show the jurors how I am asking them to mark the verdict form.

Miscellaneous

Reasonable Doubt

I depend heavily on the reasonable doubt instruction and on the role of reasonable doubt in the case, but I think the best way to raise a reasonable doubt is to argue my client’s innocence. In most cases, I do not believe it is helpful for the defense to talk about reasonable doubt. To me, a reasonable doubt argument sounds like the lawyer is saying the defendant might be guilty but the government cannot prove it. I do not think that persuades many jurors. Jurors do not fear convicting a guilty person where the evidence is weak. Jurors fear convicting an innocent person.

There are many, many lawyers who disagree with me on this. I have even violated my own rule in some cases. Neither of those points changes my opinion.

Jury Instructions

Although I do not like to talk much about the law in my closing argument, there are some beneficial ways to use jury instructions. First, by identifying which particular elements of the crime(s) are at issue in my case, I can focus the jury on our defense. Second, using the jury instruction, or a part of the instruction, as a visual, can help break up the argument and make my points more engaging and memorable.
It is important to get the instruction exactly right. If I state the law incorrectly, even by a little, I open the door for the prosecutor, or the judge on his or her own initiative, to correct me in the middle of my argument. Bear in mind, that you do not have to be wrong by much to have this happen. For both the defense and the prosecution, the last thing you want is for the other lawyer to correct you on the law in front of the jury. You are the lawyer and your credibility is on the line. If the jurors think you do not know the law, they may doubt everything else you say.

Getting Ready and Staying Ready

My method of preparation, given the enough time and resources, follows a talk/outline/write/re-outline/presentation format.

First, I say or think the words I would speak in the closing. During the entire time I am working on the case, I test out arguments I might make, ideas I might use, phrases, etc. I say those aloud to myself and others and then write or dictate notes for my file on closing argument. I try to “talk first and write second” because if I start my effort by writing I used words and phrases which are too formal, not conversational. These notes I gather for the closing are also connected to the chapters of cross I prepare for each witness. At the end of each chapter of cross-examination for each witness, I should be able to identify the point that the cross makes which I will use in my closing.

When I have most of the pieces of the argument in notes, I put that together into an outline, roughly following one of the structures outlined above. From that outline, I write out the entire text of my argument. This is the most time-consuming part of the process. I rewrite the text until I am happy with it. I then outline the written argument onto one page. If it is too long, I will make a two-page outline and staple it to the insides of a manila folder that I can fold open on the podium. That final outline is what I bring to the podium. I do not bring the full text.

Of course, there are adjustments to my closing during the trial. Facts that I hope to establish may disappear. Facts that were unimportant may become important. I have to adapt to those changes. To that end, I try to note the following during the trial:

- Facts which have been established or not established, so I can change my argument accordingly;
- How key facts were established so that I can name the witness, document, recording, etc., in my closing;
- Good quotes from witnesses (a memorable quote from a witness not only drives home the point I am making but it supports my credibility with
the jury by showing that facts I anticipated in the opening were established);

- Quotes from witnesses which help the other side and which I need to somehow undercut or defuse (it’s common to repeat a watered down version of the quote then talk about impeachment evidence for that witness);

- Areas of questioning ignored by the prosecution (if the prosecution fails to deliver on promised facts, or facts that a reasonable juror would anticipate, I can capitalize on that); and

- Particularly emotional points during the trial (either to use to the benefit of my case or to blunt if they hurt my case).

The bottom line is that I cannot just “stick to the script.” I have to pay attention to what actually happens during the trial and adjust my closing to fit what the jurors have heard.

I practice the closing by saying it out loud. I practice it in pieces and I practice the entire closing. I practice it by myself and I practice it in front of others. I say to my partner, or my assistant, or my wife, or my kids, or my dog, or my car radio, or a tree, “hey, what do you think if I say ….” I want to know what it sounds like to me and to others before I say it to the jury. I try to always remember that the way something reads on paper is not always the way it will sound to the jury.

Lastly, I practice the closing because practical problems do come up. I have to be reminded that I get thirsty when I talk for a long time. I have to relearn, in every case, that the closing I think is a “thirty-minute closing” is really a seventy-five-minute closing. I still have to remind myself, after all these years, to keep my hands out of my pockets. I have to remember to slow down, both in general and when making my strongest points. I need to test my technology and illustrative exhibits (ever had a projector fail during your closing?). Most of all, I practice because it helps me convince myself that I can win the case and gives me the confidence I need to have in front of the jury.