

Massachusetts Bar Association Continuing Legal Education Closing Arguments Seminar

Closing Arguments – From the Defense

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The closing argument presents the last opportunity for defense counsel to address the jury. At this point in the trial, they have heard all of the evidence, and will soon be instructed on the law of the case by the trial judge. As defense counsel, in Massachusetts, you speak first. You should use this to your advantage. The following practical considerations may be helpful in efficiently and effectively persuading the jury that your client deserves a verdict in his, her or its favor.

Notes Are Not a Crime

Always remember that jurors are taking valuable time from their lives to listen to you during the whole trial, including during the closing argument. Many attorneys rely, by necessity, on notes when examining witnesses or addressing jurors. If you are one of them, do not be ashamed. When initially addressing the jury, either in your opening statement or closing argument, explain to them that your use of notes will make your comments more orderly and, more importantly, more succinct. Then refer to your notes as sparingly as possible.

Thank the Jurors for Their Time

While this practice may seem somewhat “old school,” jurors deserve and appreciate having their efforts recognized. In addition, plaintiff’s counsel will inevitably thank the jurors during his or her closing argument, so you may as well do so before he or she does. An effective way to do this is to point out to the jury that they probably did not expect to be hearing about whatever accident or event you are defending (rather, they were hoping for a sensational murder trial). You can then, in a professional way, somewhat downplay the significance of the event at issue in this trial while emphasizing to the jury that the case is important to all parties, especially your client who is being sued for it.

Remind the Jurors of Their Role and the Role of the Trial Judge

To intelligently argue a case to a jury you, as defense counsel, must explain your memory of the facts and your understanding of the law. Before doing so, tell the jury that it is their collective memory of the facts that controls. Additionally, tell the jury that it is the trial

judge's instructions regarding the law that controls. Explain to them that if your rendition of the facts does not completely coincide with theirs, they should substitute their memory. Also explain that if your version of the law is at any way at odds with the trial judge, he or she is absolutely right.

Refer To Your Opening Statement

In your opening statement, you will have outlined the important areas of disagreement in the case, i.e., the defendant was not at fault and should not be blamed, or, the plaintiff was not really injured or, if injured, not as seriously as alleged. You should refer to those points repeatedly in your closing argument. Highlight the testimony of favorable witnesses and utilize any favorable exhibits. Tell the jury that in your opening you said that Mr. "so and so" was going to say "thus and such" and remind them that he did exactly that. Also and perhaps more importantly, if any of the plaintiff's promised evidence was not forthcoming, emphasize that as well.

Explain the Burden of Proof

Even in civil cases, the burden of proof is the friend of defense counsel. You should remind the jurors that in Massachusetts one cannot find "for the plaintiff" but rather, in order for the plaintiff to recover, the jury must find "against the defendant." This is a significant difference and must be stressed. The dramatic TV scene with a jury finding for a plaintiff is not the way it works in a Massachusetts Superior Court. In addition, with respect to questionable issues on liability or damages, you should argue to the jury that if they cannot "figure it out," the plaintiff has failed to meet his, her or its burden, and the defendant must prevail. Put simply, there are no ties in Superior Court.

Deal With Sympathy

All decent human beings, presumably including the jurors, feel sympathy. You should acknowledge this and not shy away from it. Explain to the jury that sympathy is a noble virtue, but that it has no place in the deliberating room. The jurors took an oath to follow the law, and they will be instructed to not allow sympathy to come into play. Tell them that you have no doubt that they can and will abide by this instruction.

Try to Use the Judge's Words

Before the closing argument, you will likely have had an opportunity to discuss the trial judge's proposed jury instructions during a charge conference. You should attempt to determine as best you are able exactly how the judge will explain the applicable principles of law to the jury. When addressing them during your closing, you should use, to the extent you

can, the same vocabulary you expect the judge to use. For example, if you learn that the judge defines negligence in a certain manner, use that definition yourself. During the jury instructions, the more often you sound like the trial judge the better.

Use Exhibits

While jurors pay close attention to live testimony, if they have something in their hands while deliberating it may be much more persuasive. If you have favorable exhibits, use them during your closing. Photographs are particularly impressive. If you have good ones, take them out of the power point, blow them up, put them on poster board and get them into the jury room. Medical records often also contain unexpected, but favorable items. You should review the medical records submitted by the plaintiff carefully. Sometimes, explanations as to how the accident happened, while arguably inadmissible, will actually be put into evidence by the plaintiff. Should that occur, you are free to comment about them. It is sometimes effective to resist the temptation to present either the plaintiff or another witness with these types of notations during cross-examination and, rather, simply to refer to them during the closing. For example, if the plaintiff has described the accident to an emergency room physician in a different way than he or she has testified, you can read that record to the jury and argue that the earlier version is more credible.

Explain Agreements

Many times you will enter into agreements with plaintiff's counsel with respect to the admissibility of certain evidence. This often occurs with medical bills and records. If you have agreed to the admissibility of those documents, you should explain to the jury exactly what the agreement was. Tell them that in order to save them time you conceded that the doctors and other medical personnel would have testified to the fair and reasonable value of the medical services rendered. Emphasize, however, that you did not agree that the defendant owes the plaintiff for those services.

Explain Surveillance

Jurors may be somewhat justifiably, at first blush, offended by your use of surveillance materials at trial. You must diffuse this offense by explaining that the plaintiff has sued your client, wants to be paid by your client and was untruthful to boot. Explain that the surveillance was performed in public places only, and acknowledge that we all have certain privacy rights.

Refer to the Special Verdict Slip

Prior to the closing, you will have had the opportunity to review the special verdict slip which will be presented to the jury. Use the verdict slip while making the closing argument. Go through each question and explain why they should all be answered in the defendant's favor.

Remind the Jury of the Bottom Line

All civil suits are about money. Do not be reluctant to remind the jury of that fact. If appropriate, use the financial interest of the plaintiff to question his or her credibility. It may be appropriate to argue that no one should leave the courthouse in a better position than before the accident occurred. On the other hand, if some award is justified and the parties just cannot agree on value, ask the jury to be fair. Explain to them that being fair to the plaintiff will result in fairness to the defendant.