

Closing Argument: Connecting the Dots for the Jury



by Maureen A. Howard

A common error made by unseasoned attorneys when giving closing argument is retelling the “story” of their case. Storytelling is best used in opening statement, not closing argument. By the time the jurors hear closing argument, they are well acquainted with the story, because they have heard two opening statements and all the evidence.

Closing argument, as the name suggests, is instead the time to argue. This means that in addition to revisiting the theme(s) presented in opening statement, a lawyer may use rhetorical questions, draw conclusions and inferences from the evidence, discuss the credibility of the witness, examine the plausibility of testimony, use analogies, and refer to stories from film and literature. Most importantly, a lawyer must walk the jury through the key jury instructions.

When a lawyer stands to address the jurors in summation, jurors expect her to explain the law and the evidence to them — to give them tools that will help them do their job. They do not want a recap of the evidence; they want to know what the evidence means for them as fact-finders. An attorney who fails to meet this expectation risks losing the jurors’ attention and misses an opportunity to prepare a “shadow advocate” to argue her case in the jury deliberation room.

If a lawyer has presented her case well, there will be at least one juror who has tentatively concluded the attorney’s client should win before the lawyer addresses the jury in closing argument. The lawyer’s job is to confirm this fledgling conclusion and equip that juror (or jurors) with the tools to persuade the other jurors during deliberation. In doing this, the lawyer creates a shadow advocate able to reiterate and clarify her points to the other jurors.

Unlike opening statement, where the structure is usually chronologically driven to maximize storytelling, the structure of closing argument is very much guided by the jury instructions. The lawyer must review key instructions with the jury and explain how the evidence meets, or fails to

meet, the various elements of the claims or defenses. This review is best arranged topically, not chronologically or by witness.

In reviewing the evidence, a lawyer should walk the jurors through the key instructions to ensure the jurors understand what the law requires (or allows) and how, when applied to the evidence, the law leads unequivocally to a verdict for her client. This “connect the dots” approach may seem overly simple, but it is well advised.

Closing argument is the time to connect the dots for the jury by walking them through the jury instructions and explaining why the evidence supports a verdict for your client.

Remember that jurors are unlikely to ask questions of the court during deliberation; even if they do, the judge will not allow the attorneys to clarify their arguments. Thus, it is important to identify any potential areas of confusion in advance and take particular care in explaining those points during summation.

The importance of explaining what the jury instructions mean cannot be overstated. I have observed more than 50 mock trial jury deliberations and have interviewed jurors post-verdict in more than 30 real cases. A common occurrence during deliberation (which may or may not be outcome-determinative) is that jurors misunderstand a portion of one of the instructions. Juror misunderstanding happens even though those of us on the Washington State Pattern Jury Instruction Committee try our best to draft standard instructions in clear, understandable language. But some legal concepts can be confusing to jurors, even when instructions are clearly drafted. When such mis-

understandings occur, jurors may apply the wrong law to the facts. During one mock jury deliberation I observed, the jurors misunderstood the three alternative prongs of a “to convict” instruction as requiring them to find all three prongs had been proved by the prosecutor beyond a reasonable doubt. The three prongs were set forth in the disjunctive (X, Y, or Z) and not the conjunctive (X, Y, and Z) so that the jury needed to find only one of the three alternatives was proven, not all three. In that mock trial, the misunderstanding was fatal to the prosecution’s case: the jury returned a not-guilty verdict.

Visual aids provide a great assist when reviewing instructions with the jury. Visual aids are particularly helpful because the jury receives the instructions aurally before deliberation, and yet Americans are accustomed to receiving information visually. When choosing visual aids, a lawyer need not use a high-tech PowerPoint presentation — posterboard works just fine. Nor does the lawyer need to set out the instruction word for word. It is very effective to write out just key phrases or short summary phrases as a visual assist. A lawyer can summarize (and shorten) instructions as long as she does not misstate or mischaracterize the law. A lawyer who has any doubts about her summary should run her visual aids by the judge in advance.

My advice to a lawyer who elects to set out the entire instruction in a visual aid is to think about breaking it into manageable chunks and presenting each section in a different “frame,” whether on poster board or in a PowerPoint presentation. This makes it easier to keep the font large enough that the jury can actually read it. It also limits the amount of information presented to the jury at one time. Too much information can overwhelm the jurors and cause them to tune out. A visual aid crammed with information and printed in font that is too small to read is not much of an aid!

While jury instructions provide a skeleton for closing argument, a lawyer must resist falling into the mode of a professorial automaton reviewing instruction

after instruction. A dry, clinical review of the instructions will fail to engage the jury. Instead, a lawyer should bring all aspects of persuasive speaking to her summation, including her discussion of the jury instructions: eye contact (keeping eye contact with the jurors, not with the visual aids), purposeful movement about the courtroom (if allowed), complementary hand gestures, and variation of speech to augment content and keep the jurors' attention. Silence can also be an effective way to highlight an important point just delivered to the jury.

Remember, too, to use the words of a speaker and not those of a writer. If a lawyer chooses to write out her closing argument, she should reduce it to bullet points

and practice it using everyday language and cadence. The written word, while frequently more elegant, can hit jurors' ears as stilted or artificial, which undercuts an advocate's credibility in the courtroom.

A couple of final reminders of what to avoid during summation:

- Do not vouch for witnesses.
- Do not misstate the law.
- Do not misstate or mischaracterize the facts.
- Do not refer to facts or exhibits not in evidence.
- Do not violate the "golden rule" — i.e., do not ask jurors to put themselves in the position of a party or the victim in a criminal case.

In short, closing argument is the time to connect the dots for the jury by walking them through the jury instructions and explaining why the evidence supports a verdict for your client. In doing this, a lawyer must always remember to use persuasive rhetorical devices to motivate the jurors to want to return that verdict. ♦

"Off the Record" is a regular column on various aspects of trial practice by Professor Maureen Howard, director of trial advocacy at the University of Washington School of Law. She can be contacted at mahoward@u.washington.edu. Visit her webpage at www.law.washington.edu/Directory/Profile.aspx?ID=110.

Seeing the Forest Through the Trees: Closing Argument and Jury Instructions

by Thomas M. O'Toole, Ph.D., and Jill Schmid, Ph.D.

In 1950, Max Klein and Dan Robbins invented and developed the widely popular paint-by-number kits. These kits introduced everyday people to the unfamiliar world of artistic expression by providing them with the precise roadmap and tools to produce magnificent works of art. Previously, this feat was inaccessible to a large segment of the population due to the level of talent and sophistication required. But with paint-by-number kits, it was no longer necessary for amateur artists to understand the complicated world of color mixing and technique. Instead, they were provided with simple "shortcuts" that allowed them to produce a work of art they could feel good about.

Closing argument is like a paint-by-number kit. Similar to the amateur artists of the 1950s who lacked painting talent and knowledge, jurors often lack the professional background and industry tools to sort through the complex information and legal instructions they are bombarded with over the course of a trial. Jurors have not studied law and are not allowed to research case law when uncertain about the meaning of a word or phrase. And the human brain is simply not programmed to accomplish the task that is requested of jurors in the manner often expected. For example, jurors are provided a fraction of the time given to

attorneys and judges to make sense of a vast amount of case-related information. To compound this issue, research in behavioral neurology has demonstrated that the human brain is incapable of processing more than seven pieces of information at any given moment. Additionally, studies on retention rates show that after three days, humans retain only 10 percent of the information verbally presented.

Consequently, attorneys can expect that, by the time for closing arguments, jurors are overwhelmed and underprepared for what will take place in the deliberation room. This means the burden lies on the attorney to provide jurors with the proper tools for sorting through the vast amount of case facts and effectively arguing for his client during deliberations. Like paint-by-number kits, an effective closing argument can provide jurors with the shortcuts to accomplish the task at hand, while still providing jurors with confidence and psychological satisfaction. With this in mind, here are 10 tips for developing a persuasive closing argument.

1. Entertain your audience. Like it or not, the human brain takes a break roughly every 10 minutes. There is nothing you can do to stop it. It happens, and the burden is on you to recapture jurors' attention. Variety in the style of presenta-

One attorney we worked with set five colored file folders at his table during his closing argument, each representing one of the five key issues he would discuss.



tion is one of the simplest ways to accomplish this. Simple, periodic shifts from PowerPoint to video clips to exhibits on projectors and graphics printed on large boards in the courtroom cues the neurons in the brains of your jurors to refocus on, and make sense of, these environmental changes.

2. Organize with transitions. If jurors' brains are going to demand a break, attorneys can take control of the process by providing them structured transitions. One attorney we worked with set five