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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2020 Issue

Closing arguments: connecting the dots

YOU MUST TELL YOUR STORY IN A WAY THAT CONVEYS THE EMOTIONAL TONE OF THE TRIAL, KEEPS JURORS INTERESTED AND FLOWS NATURALLY THROUGH LIABILITY TO ASKING FOR DAMAGES

There is a saying in golf that you drive for show, but putt for dough. In trial, the opening is the dough and the closing is the show. Closings rely on the evidence, both direct and circumstantial, that you presented during trial. But if you haven't made your case early on, then by summation not much can be done to save it. A strong closing argument is an important part of your trial presentation, and, let's face it, everyone enjoys a good show.

Closing arguments allow trial lawyers to do what most people think we do all the time – argue. It is technically the only time at trial you can argue, and the ability to argue comes with some advantages. Although you are still constrained by the evidence, closing arguments give you the opportunity to connect the dots and ask the jury to make the inferences you need based on the facts you laid out in trial.

Presentation matters

At its core, every closing argument tells a story. Like every good story, there is a protagonist, an antagonist, a dramatic event, a struggle, and, if you've done your job well, a "betrayal" or a breach of trust. Unlike most stories, however, a closing argument also has a call to action – an "ask" for money. Closing is the time for you to clearly draw the lines between right and wrong. The more defined the lines, the more a jury will be willing to "right" the wrong through a large award of money.

Sensory entertainment

We live in a multimedia world, inundated by flashy content 24/7. Your jurors do, too. No one wants to just sit and watch anyone talk for an hour – no one. People will literally fall asleep. Present your closing visually with a powerful PowerPoint presentation. Use photos, transcripts, evidence, graphics, timelines, videos, music – whatever it takes to make your presentation engaging and interesting. A trial lawyer also needs to master PowerPoint because more than likely, you will be finalizing your rebuttal slides on the fly, while the defense is doing their closing.

Conveying the emotional tone of trial

Like any good movie, there is both a flow and a tone to a closing. In my experience, the flow is fairly consistent from case to case. The tone, however, can vary dramatically and often builds on what happened in the courtroom.

The tone both conveys and validates, through non-verbal communication, what transpired in trial. When executed properly, the tone will lead the jury to the appropriate emotional state.

To find the tone, ask yourself, what is the most honest, emotional core of what happened at trial? Capture that emotion in your closing, but do not overdo it. Your emotive state must be real, but not so overwhelming that it takes the emotion away from the jury. Do not be mad for them – but express yourself in a way that allows the jury to be mad themselves.

The themes that evolved in trial will help you find the right tone in closing. Did the defense take outrageous positions? Did the defense attorney continuously object? Did the defense witnesses lie? Did the defense admit liability and try to look "reasonable"? Is this a shared responsibility type of a case?

You also need to be very aware of people's behavior during trial – witnesses, lawyers, etc. – and if appropriate, comment on it during closing. Maybe the defense made a lot of unmet promises during opening. Point out those broken promises. Ask the jury why they think the defense said those things, even though they knew they could not keep their promise – then tell them that it was to create a false narrative and mislead them into the defense's way of thinking. But now that all the evidence is in, the jury knows what the real facts are and that the defense was not being fair with their view of the case.

Or, an expert witness was direct with the defense lawyer and evasive with you – comment on it. The defense lawyer was unnecessarily aggressive with one of your witnesses – comment on it if it plays into your theme. A third-party witness came to testify in favor of your client with nothing to gain – make sure the jury knows that.

You must be present during the trial to observe these interactions. When the behavior or statements are material, comment on it during closing. But be a fair historian of the evidence – don't embellish or exaggerate. Remember that you are a character in the story, too. Act accordingly. This is another building block for your betrayal story. If you are right, the jury will have seen it, too, and you will gain credibility immediately.

Flow of the closing argument

I frame my closing arguments simply, generally by going over the verdict form. "Ladies and Gentlemen of the jury, when you retire to deliberate you will essentially have two tasks. The first task will be to appoint a foreperson who will guide your deliberations. That person should make sure that everyone gets a voice in the process. Some of you may not like to talk much and some of you may be very talkative. It is important that you all be heard and let the rest of the jurors know your thoughts. The second task will be to answer the questions on this verdict form. Nine of you need to agree to each question, but not necessarily the same nine people. Let me go over the questions now. . . ."

Even though the judge will say something similar, I preface my closing this way to: 1) emphasize the importance of full participation; and 2) highlight the fact that only nine people need to agree

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on each question – and not necessarily the same nine. This second point is important. Many jurors may be with you 100% on liability but have reservations about damages. Highlighting this process lets the jurors know that they can move on from liability and be free to disagree on the amount of damages later.

A significant part of the presentation then focuses on the evidence, starting with negligence. I show the most relevant jury instructions, with highlighted terms, in my closing PowerPoint. At a minimum, I use the instructions for burden of proof, negligence, negligence per se (if applicable), causation, and multiple causes. I let the jury know that they will have the instructions with them and that they can refer to them during the deliberation and I identify their CACI numbers so they can jot them down. The time I spend on that portion of the closing is directly proportional to the length of the trial. Long trials require a more thorough recap of the evidence.

Question 1: Negligence

In discussing negligence, much like in the opening, I first focus on what the defendant did wrong. If you follow the "safety rules" type of opening, go over all the safety rules that the jury has now heard about from your experts. Explain why these rules are important. Explain how not following those rules led to the injuries in this case – or worse. Highlight all the defendant's conduct that constitutes negligence and how that conduct deviates from what normal, reasonable people do.

Analogies are powerful and best used during closing. But like everything else, the analogy must fit the case. The analogy you use must fit one of your themes. Don't use an analogy that you read in someone else's closing unless it truly applies to your situation. You may remember the famous and effective argument, "if the glove doesn't fit, you must acquit" – which is a clever take on the "fits like a glove" analogy. It worked for that case but it may not work for your premises-liability case.

I am a proponent of getting daily transcripts for longer trials, so I can display direct quotes from key witnesses. But less is more; do not show pages and pages of transcripts as your point will get lost. Find one or two quotes that will most resonate with the jury and support your theory of the case. Whether or not transcripts are used, I meticulously go over the evidence that proves the negligence (or another tort) of the defendant. Make use of the admitted evidence that best makes your points.

CACI No. 430: Substantial factor

After reviewing all of the evidence of negligence, I display the verdict form on the PowerPoint with a checkmark in the "yes" portion of question 1 and move on to substantial factor. I cannot stress enough how important this next part is.

Most lawyers do not spend nearly enough time explaining the substantial-factor jury instruction and how the jury is supposed to apply it. You may have the strongest case of liability, but if you do not get the concept of causation through to the jury, you will lose nonetheless. Many lawyers make it past question 1 only to get defensed at question 2 (present company included).

My discussion begins with the language of the instruction itself. Most defense lawyers talk about how causation relates to how the negligence caused the accident. But if you read the instruction carefully, it states, "[a] substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm." The operative words are "substantial factor" and "contributed to the harm."

As to "substantial factor," I explain it like this: "When the instruction talks of a 'substantial factor," it does not mean 'a lot.' It just means 'of substance' and we know that because the instruction later says that it 'must be more than a remote or trivial factor.' So, if something is more than remote or trivial, then it's 'substantial' under the definition of the jury instruction. A good example is a line of dominoes – how long is that line of dominoes between the conduct and the harm? Is the conduct a couple dominoes away from the harm or is it 10, 20, 30 dominoes away?" If the conduct is a couple dominoes away, then you can convincingly argue that you have met your burden.

As to "contributed to the harm," hopefully you set this up in trial – and if you are very thoughtful, during expert depositions. Your experts should have been asked if the crash/fall/other negligence contributed to your client's harm. The defense experts should have been boxed-in during their deposition and made to admit that the negligent conduct contributed to the harm your client suffered. Not the injury, not the accident, not all the medical care, but the harm.

Injured plaintiffs often have preexisting conditions that were worsened by the crash/fall/other negligence. Make sure you get around the preexisting conditions by, preferably at the time of the defense expert deposition, having asked the defense expert if the crash/fall/other negligence contributed to the harm your client is currently suffering (use the jury instruction language in your deposition). They will typically hedge but you can generally get them to admit that the crash/fall/negligence was a non-trivial, non-remote contributing factor to the present harm. These admissions will help you prove causation and get past question 2.

I cannot overemphasize how important it is to thoroughly explain the concept of substantial factor to the jury. Remind the jury that they have taken an oath to follow the law, and the law is very specific on this topic. Alert the jury that the defense will try to mislead and confuse them by saying words that are not mirrored in the jury instruction. The instruction is your ally here; the more you focus your attention on it, the better your chances.

CACI No. 431: Multiple causes

"Multiple causes" is another relevant instruction I always spend a good amount of time explaining. The concept is, just because someone or something else may also be at fault, that does not exculpate the defendant. The defense cannot escape liability for its own conduct by pointing the finger at someone, or something, else.

The jury must understand that if they allocate responsibility, question 2

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(causation) is not that time. If *anything* the defendant did was a substantial factor in causing harm, the jury must answer "yes" to question 2 and decide percentages later. Remind the jury that the instructions tell them they have to answer the questions in order and that is the law and they must follow it. They will get a chance to assign responsibility later.

This instruction is particularly relevant in cases with multiple defendants or an empty chair, due to settlement or some other reason. Your task in these cases is to convince the jury that the remaining defendant is responsible for the most significant share of the blame. Pointing out the ways in which that defendant most contributed to the harm should be a central point in your closing – but you will not get to percentages if the jury answers "no" to question 2.

Causation is really the time to connect the dots. Demonstrate the connection between the defendant's conduct and the harm to your client. Some cases are a lot easier than others. But in all cases, it should be attended to with great care and effort as it is one of the most likely ways a plaintiff can get defensed.

Damages

If you have done a good job presenting the evidence of negligence and substantial factor, the damages portion should be easier. Theoretically, damages stand on their own and are based only on your client's injuries. Practically, though, the more reprehensible the defendant's conduct, the more likely you are to get full justice for your client. Therefore, take great care to highlight the wrongfulness of the conduct as it will help your damages arguments.

Economic damages

When arguing for economic damages, you must convey to the jury that this is your client's only chance. There is no second trial, many years in the future, to get the money he or she needs for the treatment he or she may require. Today is the day! It would not be fair for your client to rely on anyone else or the government to pay for the services that he or she will need that were caused by the defendant. Full justice requires him or her to be paid in full for what he or she will need.

The jury must also understand that whatever money they award for medical care will be used to pay past bills and future bills. They need to understand the concept of present value. If you have a life care plan, hopefully your economist explained that in order for the money to last, it needs to be invested. Reiterate that point on closing to drive home that your client will not have access to that portion of the money for things unrelated to medical bills.

If relevant, address the concept of liens and attorney referrals at this point. Don't shy away from it. Explain that your client did not have a choice, but the defense says "lien" like it is a bad word. It is not. The defense also said that you referred the client to some of the doctors, and somehow they think that's bad. It is not.

Tell the jury that as an attorney, it is your job to make sure your client is taken care of and that you do that willingly. As a lawyer, you have the ability to help people who are hurt and have no other choices but to incur these bills, and you wear that hat proudly. You are glad that there are doctors who are willing to care and help people who were hurt because of someone else's negligence and are willing to wait years without getting paid for their services. Your client and those doctors should not be punished for doing what the defense was never willing to do here – which is to take care of the person they hurt.

In most trials, the defense will have put up a witness claiming that your client should only get bills paid at the 50th or 75th percentile, or some other fraction of what is reasonable. Graphically explain to the jury what that means – that your client will only be able to pay for the bottom 75% of physicians – essentially making the most capable doctors out of reach. This point works well with the theme of cheap justice. Not only was the defense unwilling to pay for your client's past medical care, not only was the defense unwilling to care for your client's future care, but they are now saying that your client should only have access to cheap care – after three years of fighting. Highlight the unfairness of that argument.

Explore this theme in greater depth if the defense has admitted liability and is trying to act like the "good guy." Variations of the following can be impactful: "So the defense says . . . I hit you, I know it's my fault, I haven't wanted to pay for any of the care until a jury told me to, and now that I'm about to have to, I only want to pay for cheap medical care – not the full range of services that will ensure that you get back to full health. Is that how someone who is sorry really acts? Is that what taking responsibility looks like?"

Highlight your cross examinations of the defense medical experts. If they work primarily for the defense, charged a lot of money for simply reviewing records, minimized your client's injuries to any extent, unfairly maligned your client, focused on irrelevant pre-existing conditions, showed a lack of knowledge of the file, spent 10 minutes with your client, or any other issues you were able to draw out, call it out. Point out that the defense experts do not have a patient/doctor relationship with your client, which allows them to say whatever they want without any repercussions.

Noneconomic damages

There is no magic formula for noneconomic damages. Ideally, you have discussed the concept during jury selection and now you get to address it head-on. Once again, the CACI jury instruction is a good starting point for discussing noneconomic damages.

CACI No. 3905A lists 10 different categories of noneconomic damages. Lay them out and explain how each one of them applies to your client with facts from the case: Physical pain – relate that concept back to the actual testimony about pain. Do that for every category. And for each category, put up a number for past and future. This ties the "ask" to something concrete and supported by the evidence.

The most universally useful category of noneconomic damages is probably the

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"loss of enjoyment of life" category. I explain that "enjoyment" is the part of life we all work for. One may love a job, but ultimately, we work so we can do the things we *really* enjoy – like family, friends, hobbies, sports, vacations, health, etc. Nobody wants to spend years going to the doctor's office and dealing with pain.

I also discuss suffering in the context of it being the worst thing one can do to another human being. Making another human suffer intentionally is considered cruelty and, potentially, torture – some of the most reprehensible conduct one can do to another human being.

Making damages relatable

Trial lawyers have used various images to help conceptualize damages: the plane, the artwork, etc., which can be powerful when they fit your case. The value of a unique piece of art is a good fit for a wrongful death case, for example. You can talk about why art is so valuable – there is only one in the world, it inspires people, because it's part of a legacy. Just like the decedent. But talking about $450,000,000 artwork on a torn rotator cuff case is not a good fit. Nor is a billion-dollar airplane in a three-epidural case.

What you are trying to convey is the value of the impairment to your client. First, you need to establish a narrative, through your client and other collateral witnesses, about what your client cares about – or about what someone in your client's shoes typically cares about. Once you have done that, you can use graphics to express relevant analogies.

In a recent case, my client suffered an ankle injury that significantly reduced her ankle's range of motion and caused pain and swelling. She was in her early twenties. I came up with a list of about 30 things someone her age is likely to want to do in life, but will be unable to (or able to, but with pain). I presented the list in a question format, line by line, as follows: "Maria, let's go to the beach; Maria, let's go out after work; Maria, let's go dancing; Maria, why aren't you wearing heels to your wedding; mommy, carry me; Maria, help me care for your dad." For every question I posed, I answered what she will answer in response because of her injury – mainly, "no, I can't." I told the jury that this was the list that I came up with but that I am sure that they came up with some of their own. This approach allows the jury to fill in the blanks and makes your client's pain relatable.

In another case I tried involving a traumatic-brain injury, the defense doctor had been a ringside doctor at various professional boxing matches. So, I created a slide showing the prize money for various boxing matches, including some he worked at, and called it the price of a knock-out. I then highlighted that all of these boxers knew exactly what they were in for and knew exactly how much they would get paid. My client did not get this benefit and yet he still has to endure the same consequences.

Another concept I use is what I call the test of time. If you are seeking future noneconomic damages, the length of your client's expected life is a great tool. Twenty years ago, the average house in Los Angeles County cost X. Today, it costs Y. What will it cost in 20 years? The value of money decreases over time, but the amount the jury awards today needs to stand the test of time and still feel like justice 20 years from now. Framing damages this way conveys that, in order for this verdict to do justice, in 20 years the client needs to be able to look back and say to himself/herself, "yes, that was enough."

Other useful strategies include figuring out the dollar-per-hour value of the noneconomic damages you are asking for and relating it to the "job of living with pain" (or whatever injury your client has). Express that your client, if given the choice, would have never taken that job willingly.

The important point is, whatever analogy you use, it must be relevant to the case and the evidence you presented. Otherwise, it will come across as canned and will likely not be well received.

Concluding remarks

In closing, I make sure to empower the jury and impress upon them that their job is a serious and important one that will affect one person's life forever. In no other forum will they make such an important decision for someone other than themselves. I tell them I appreciate their time without pandering or being too flowery about their service. Most of them did not want to be there to begin with and probably felt like they did not have a choice. Be respectful but do not ignore that reality. Hopefully you have given them a good case and they feel righteous about their verdict.

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