VII
CLOSING ARGUMENTS

§7.1. *Introduction*

Closing arguments are the chronological and psychological culmination of a jury trial. They are the last opportunity to communicate directly with the jury. For that reason, it is imperative that the arguments logically and forcefully present your side's position on the contested issues and the reasons you are entitled to prevail.

As with all other phases of the trial, the arguments must be organized and planned in advance of trial. They should be constructed to parallel both your opening statement and your case in chief. This parallel construction can be achieved only where each phase of the trial is planned as an integral part of the overall trial strategy. Preparing for closings after the evidence is in should then be limited to reviewing the specific evidence you will mention in your argument that supports your points, and deciding how, if you are the party with the burden of proof, you will divide the available material between your closing and rebuttal arguments.

This chapter will discuss organizing and delivering effective closing arguments and present illustrative closing arguments in representative civil and criminal cases.

1. The first minute

The first minute or two of your closing argument should communicate three things to the jurors: your theme, why the jury should find in your favor, and your enthusiasm about your case.

Think back to the themes you first raised in your opening statement. (See §3.2.) Your themes — "cheating," "promises," "police brutality," "revenge," "greed," "pain," "responsibility," and so on — were the anchors around which you constructed your case. These need to be incorporated into your closing argument.

First impressions are lasting impressions. This was true in your opening statement and during your direct and cross-examinations of the witnesses; it will remain true during closing arguments. Hence, your first minute must grab the jurors in a way that will compel them to continue listening.

Example (plaintiff in personal injury):

One second. That's all it would have taken. One second, and none of us would be here. One second, but that defendant couldn't even spare that.

Example (defendant in criminal case):

Once again, an innocent man has been framed, and there's nothing funny about it. And it's got to stop now.

2. Argue!

Argument is not a summation. No one — certainly not the jury — wants to hear a flat recitation of what the witnesses said during the trial. The jurors heard and saw the evidence, and they neither want nor need to have it recited line by line.

Instead, a good argument *argues*. An argument takes your themes, your theory of the case, the supporting evidence, and the law and molds them into a persuasive whole. It is logic and emotion brought together. An effective argument makes the jurors want to do what you want and to feel good about it afterwards. The specific ingredients or effective closing arguments are discussed in the next section.

3. Efficiency

Jurors have limited attention spans. At the end of the trial their attention span is, if anything, shorter because they are tired, have heard the evidence, and are opinionated. Hence, your closing argument must be efficient. Keep in mind that most persons can maintain a high level of attention for only 15 to 20 minutes. Therefore, your argument cannot overload the jury. Instead, it should focus on the themes, the key evidence, and the law, and it should strip away the peripheral information. Key ideas should be repeated, since repetition is so important for retention.

For the lawyer the message should be clear. Most closing arguments should take 20 to 40 minutes. Using more time is counterproductive: Jurors will be overwhelmed by details and will respond by shutting you out. Instead, it is more effective to use fewer, but key, details, stick with your most important points, and do this before the jury wants to tune you out.

§7.4. *Strategic considerations*

Experienced trial lawyers know that effective closing arguments invariably have certain characteristics and techniques that largely account for the argument's effectiveness. These are discussed below.

1. Use your themes and labels

Think back to your opening statement. You selected your themes and labels and wove them into your opening statement. The same thing should be done in your closing argument as well.

Example:

As the plaintiff in a personal injury case in which plaintiff's damages are primarily pain and suffering, your theme might be: *"The only companion Louise Burch has today is her pain."*

Example:

As the defendant in a criminal case, your theme might be: *"The real victim in this case is Bobby Smith. Bobby is the victim of an unreliable identification and a victim of a shoddy police investigation."*

Think back to your labels. Your "labels" were the terms you used to describe the parties, events, and other important things during the trial. Labels were important because they conveyed attitudes and messages. People were called "the plaintiff," "Ms. Johnson," or "Liz," depending on

the message you wanted to send to the jury. A vehicle was called a "car" or a "fancy sports car," again depending on the messages you wanted to send. You need to keep the labels consistent, all the way through your closing argument.

2. Argue your theory of the case

Previous chapters have repeatedly emphasized that you must develop a theory of the case in advance of trial and stick with it throughout the trial. Your closing arguments should present your theory of the case explicitly to the jury, and demonstrate why your theory most logically incorporates and explains both the contested and undisputed facts admitted at trial.

3. Argue the facts and avoid personal opinions

We no longer live in an age where dazzling oratory consistently wins trials. Jurors are too well informed and perceptive to be easily spellbound. They usually follow the court's instructions and decide the case on the evidence. This means that today's jurors are persuaded by facts. The closing arguments that have staying power, that jurors remember during deliberations, are those that argue the facts.

Arguing facts involves more than a simple recitation of the testimony. It involves analysis. Juries decide cases on the basis of impressions — what they think the truth is — based on the way the parties have presented the evidence. Effective trial lawyers selectively pick and emphasize those parts of, and inferences from, the evidence that, when presented as an integrated whole, create an impression that convinces the jury that their side should win.

Refer to specific witnesses and their testimony when arguing the facts. A "fact" becomes a fact only when a jury accepts it as true. Hence, you must tell the jury why something is a true fact by reminding them what witness or witnesses said it, how it was said, and why it makes sense.

Example:

Keep in mind that the defendant was going 40 mph in a 30-mph zone. How do we know this? Well, both Mrs. Phillips and Mr. Jackson told us so. Remember where they were standing? Both were standing right on the corner and saw the defendant's car go by. They were in a perfect position to see how fast he was going. That's why we know he was going 40 mph.

It is improper for a lawyer to directly state his personal beliefs and opinions about the credibility of witnesses or the quality of the evidence presented during the trial. Statements like "I think that" or "I believe that" are objectionable. These phrases are both improper and unpersuasive and are best eliminated entirely from your trial vocabulary.

4. Use exhibits

Successful courtroom techniques maximize the use of exhibits and other demonstrative aids. Chapter V reviewed how to use exhibits in your case in chief. Do not forget these techniques now. Closing arguments should use at the appropriate places those exhibits admitted in evidence that corroborate and highlight the main points of your argument.

Exhibits do more than augment the closing arguments. They also provide refreshing breaks. Psychological studies have shown that the average person is able to devote his uninterrupted attention to one topic for only a few minutes. Accordingly, any argument that drones on for 10 or 15 minutes on any one point, regardless of how effective its content is, will lose the jury. Exhibits, in addition to their obvious value as a tool of persuasion, can provide that refreshing change of pace that recaptures the jury's attention.

In closing arguments, however, exhibits are the same double-edged sword they are during witness examinations: They both attract and distract. Accordingly, keep the exhibits you intend to use during closings out of sight until you need them, and after showing them to the jury put them out of sight. Doing this will make the exhibits supplement your argument, rather than distract and detract from it.

5. Use instructions

Closing arguments that selectively utilize instructions have a greater impact on the jury. By suggesting that the court's instructions of law as well as the facts support your side, a doubly effective argument can be fashioned. If, for example, you are arguing that a witness should not be believed because he was impeached, tell the jury that the court will instruct them that a prior inconsistent statement can properly be considered in determining a witness' credibility. Argue your facts, then argue that the law permits or even approves your interpretation of those facts. The key to utilizing this technique is to follow your factual argument immediately with the corresponding instruction so that the association is firmly fixed in the jury's mind.

How the jury is actually instructed and how the lawyers can use the instructions vary widely. Some judges only read the instructions; others both read and give them to the jury. Some judges require that lawyers quote verbatim from any instructions they use, while other judges disapprove of direct quotes and require that instructions be paraphrased. Learn what your judge's practices are.

Instructions frequently woven into the closing arguments include those covering the elements of claims and defenses, burdens of proof, credibility of witnesses, and definitions of critical legal terms.

6. Use rhetorical questions

Since the jury cannot ask questions during the trial, having unanswered questions can be a very frustrating experience. Experienced lawyers recognize this and try to anticipate those questions the jurors would probably ask if they could.

Example:

As plaintiff in a personal injury case, you might argue: "*You're probably saying to yourself: Mr. Jones, that's a lot of money you're asking for. Why should we award him $300,000? You're right, of course. That is a substantial sum of money. But in this case Jane Smith's injuries have been devastating.*" Then argue that the amount requested is the bare minimum necessary to adequately compensate the plaintiff for his injuries.

Rhetorical questions can also be used effectively to challenge your opponent with difficult or unanswerable questions. If he fails to answer these questions, the jury will undoubtedly remember it.

Example:

As the prosecutor in a criminal case, you might argue: "*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.*"

7. Use analogies and stories

Analogies and stories, if short and pertinent, can be effective in defining and crystalizing an idea in the jury's mind. They must be short, because the time for arguing is limited, and pertinent, because a story told for its own sake, without making a point, is counterproductive.

Example:

In a criminal case where the prosecution has had to call an unsavory witness, you might make the following argument: "*If you find a maggot in your food, you throw it all away. The prosecution here wants you to ignore the maggot and eat the rest of the plate anyway.*"

Example:

If your case involves largely circumstantial evidence, you might make the following argument: "*Imagine you're at home just before going to bed. It's clear outside. The next morning you wake up, look outside, and see that the lawn is covered with snow. You didn't actually see the snow fall, but there's no doubt that it did.*"

In both cases you can use the analogy or story to make a point and then continue by showing the jury why it has significance in this case.

8. Argue strengths

Argue your strengths, not your opponent's weaknesses. Successful arguments are those that have a positive approach and concentrate on the evidence produced at trial that affirmatively demonstrates your party should prevail. Jurors soon realize that arguing extensively your opponent's weaknesses occurs only when you have little good to say about your own case. Negative arguments often create negative impressions and should be avoided. This is particularly important for the prosecution in a criminal case because of the prosecution's high burden of proof.

9. Deal candidly with weaknesses

While your closing argument should positively argue your strengths, this does not mean that you should entirely avoid weaknesses. Every trial will have some weaknesses. If it did not, the case would have been settled before trial.

Confronting weaknesses has two advantages. First, your weaknesses are your opponent's strengths. By addressing them first, you can in part deflate his later argument so that the jury does not hear those points for the first time from your opponent, the way he wants them argued. Take the wind out of his sails by raising his points first, and they will sound hollow and tired when he argues them. Second, the jury will respect your honesty and candor when openly and candidly discussing those weaknesses. Since your credibility as an advocate is critically important, this consideration should not be downplayed. Remember that jurors, like everyone else, are influenced by whom they like. Make sure that's you and your party.

Example:

Folks, I have a problem here. You're undoubtedly going to say: "Mr. Jones, you're asking us to give your client $150,000. Isn't that an awful lot of money?" You're right, of course. That is a great deal of money to ask. But this is the kind of case where that kind of verdict is both reasonable and necessary. I propose that we

review each element of damages and see why this is the minimum amount Frank Johnson is entitled to.

10. Force your opponent to argue his weaknesses

For the same reasons that you want to concentrate on your strengths, force your opponent to argue his weaknesses. A common method is to ask rhetorical questions during your argument that challenge your opponent to explain his weaknesses.

Example:

If, as the defense has been claiming all along, the collision happened the way the defendant said it did, why isn't there any corroboration? Wouldn't you expect that of all the people who witnessed the collision, they could find one person who would back them up? I'm sure Mr. Smith, when he argues, will answer this question that we've all been asking and wondering about.

When it is your opponent's turn to argue, he may take the bait and attempt to answer the question, thereby arguing a weakness and creating a negative impression. A few well-selected questions can often produce this desired effect.

11. How do you deliver your closing argument?

How should you deliver your closing argument? The simple answer is: in whatever way persuades the jurors to decide in your favor. What things are the jurors looking for?

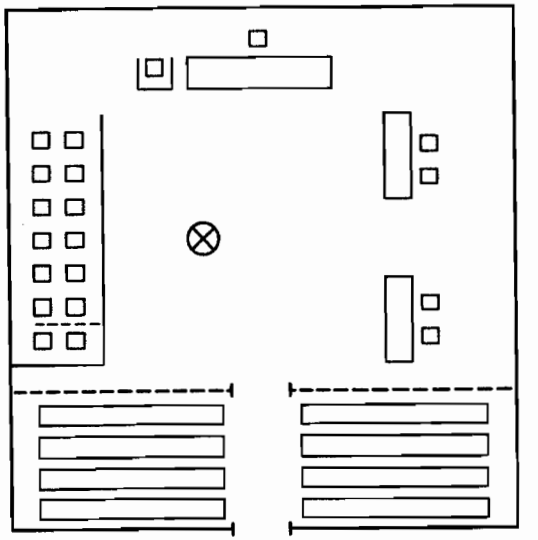
First, the jurors are looking for conviction. They are looking to see which lawyer *really believes* his side should win, as contrasted with the lawyer who is merely making a closing argument because it's expected. Therefore, your most important concern is to present your closing argument in a way that demonstrates your total conviction in your case and your unwavering commitment to your side. The delivery style that accomplishes this is as varied as trial lawyers are numerous. Some are emotional and passionate, others quietly compelling. However you do it, one thing is clear: The jury must feel that you firmly believe in your case.

Aside from projecting conviction, there are several things you need to consider that will improve the persuasiveness of any argument. First, unless restricted to a lectern, closing arguments are usually made directly in front of the jury box, approximately halfway from either end. You should stand close enough to maintain eye contact with each of the jurors, yet not so close that they feel uncomfortable. You should ordinarily stay several feet from the first row of jurors, so that those wearing bifocal glasses have no difficulty seeing you, moving closer only when necessary to show exhibits to them. Many courtrooms have lecterns, and some

judges require you to make your arguments from the lectern. If you wish, or are required, to use it, make sure that the judge will allow you to move it to the location you want. However, don't use the lectern unless required, because it places a barrier between you and the jury.

Example:

In the following schematic diagram of a courtroom, you would normally make your closing arguments near the area marked "X."



Presenting an effective closing argument involves both a physical and verbal style. They must be harmoniously combined to continuously project the belief that your side, based on the evidence, is entitled to win.

Your physical, or nonverbal, style must support your verbal presentation. First, maintain periodic eye contact with each juror, but neither single out any one juror or ignore others. This is most effectively done by directing an idea, in one or two sentences, to a specific juror, then directing your next point to another juror. Maintain eye contact with the juror you are talking to. Doing this will make each juror feel that you are individually talking to him.

Second, control your body movement so it reinforces your speech. Stand straight, with your feet planted firmly, and lean forward slightly. This stance is positive and authoritative. Avoid wandering around constantly, since this merely serves as a distraction. However, changing your position from time to time can effectively signal that you have completed one topic and are moving to another.

Third, use gestures that reinforce your points. Such gestures are those that draw jurors' attention to your face, since this is where the words are coming from. Accordingly, the gestures must be from the upper body, which include facial expressions, head and shoulder movement, and hand gestures that are above waist level. Avoid tapping feet, moving legs, slouching, playing with objects in your pockets, or using your hands while they are down at your sides, since these are all lower-body movements that distract jurors from concentrating on your speech.

Your verbal style must also be appropriate for persuasive speech. A closing argument is not an opening statement, which is basically informational speech. A closing argument must be forceful. A safe approach is to view a closing argument as a discussion with the jury, in the same manner you would present your views on an important issue to a gathering of neighbors at someone's house.

Use plain, forceful, and active language, avoiding either slang or formal, stilted language. Jurors expect lawyers to use good English. Keep your sentences short and your structure simple, since this is much easier to follow and understand.

Also, vary your verbal style to support your arguments and maintain juror interest. Good, persuasive speakers have learned to control and use the variables that make up speech. These include loudness, pitch, speech rate and rhythm, pauses, silence, articulation and pronunciation. Each of these can and should be used and modulated to keep your speech patterns forceful and interesting.

Making effective closing arguments is an acquired skill. There is no such thing as the right way to make a closing argument. Every trial lawyer through experience learns what kind of presentation he is comfortable with, that seems natural for his personality and style, and that appears to work for him. Accordingly, do not try to copy or imitate another lawyer's style. That style will only work for him. Learning from others is important, but always adapt what you learn to your own individual style. Only the delivery style that you feel comfortable with will be effective with a jury.

§7.5. *Contents and organization of effective closing arguments*

In opening statements, lawyers use a common approach — engaging, forceful storytelling — to introduce the jury to the case. In closing arguments, however, lawyers use numerous approaches, styles, and techniques to convince the jury to return a favorable verdict. The ways are limited only by lawyers' imaginations, and good trial lawyers are imaginative and creative.

Nevertheless, effective closing arguments almost invariably contain several components. Except for the introduction and conclusion, trial lawyers commonly vary the order in which these components will be used during the closing argument. These include the following:

1. introduction
2. issues
3. what really happened and proof
4. basis of liability/nonliability or guilt/innocence
5. damages (in civil cases)
6. instructions
7. refuting the other side
8. conclusion

1. Introduction

Most trial lawyers today avoid the traditional introductory comments — thanking the jurors for their attention, or acknowledging how their lives have been disrupted by serving as jurors — and get immediately to the argument. This is because the modern approach recognizes the reality of the jurors' minds at this stage of trial: Jurors are tired, have heard the evidence, and are opinionated. Hence, jurors want to hear what you want, and why your are entitled to what you want. They want to hear it clearly, efficiently, and in a way that captures and holds their attention.

Hence, effective introductions today get immediately to the point, putting an important theme or fact immediately before the jurors. The traditional beginning — "May it please the court, counsel, members of the jury" — is still used in some places, but has been abandoned in others.

Example (plaintiff — civil):

May it please the court, counsel, members of the jury. On June 15, 1991, Joan Carter's young life ended when that defendant, drunk and speeding, ran a red light, crashed into her car, and crushed the life out of her body. Her husband, and her children, are here today asking that you do to her, and her family, justice.

Example (defendant — civil):

This is a case about failing to take responsibility, and about a person — the plaintiff — who wants to be rewarded for failing to follow his doctor's orders.

Example (plaintiff — criminal):

Being attacked in your own home is everyone's worst nightmare. Fortunately, it's only a nightmare for most of us. For Bob Martin, old, sick, and alone, it was a nightmare that became a reality during the evening of June 1, 1991.

Example (defendant — criminal):

This case is about a tragedy. That's because when the police fail to do their job, when they fail to do a thorough investigation, when they take shortcuts, the wrong person can stand accused of a crime he didn't commit. That's a tragedy, and it's a tragedy that started for Bobby Abrams at 8:00 that August night.

These kinds of introductions grab the jurors' attention, telling them that what you are about to say will be exciting and worth hearing. They say: Stay tuned, there's more coming. Accordingly, the quick, forceful introduction is becoming the standard way in which effective trial lawyers begin their closing arguments.

2. Issues

Somewhere, usually just before or just after dealing with the facts, you should state the issue in the case. You should state it in a way that the answer should be obvious, and then answer it anyway.

Example (plaintiff — civil):

Folks, there's only one issue in this case. It's simply this: Was that defendant negligent when he drove his car and crashed into Mr. Smith's car? The answer is obvious: That defendant was negligent, that defendant was the only one who was negligent, and that defendant's negligence was the only cause of Mr. Smith's injuries.

Example (defendant — civil):

Plaintiff claims the only issue is whether Frank Johnson was negligent. That's not really the issue here. The real issue, the only real question you need to decide is: Did that plaintiff cause his own injuries? The evidence shows that the plaintiff was negligent, and that he injured himself through his own fault.

Example (plaintiff — criminal):

What's this case all about? It's simple: did that defendant intentionally, and without provocation from anyone, shoot and kill Bobby Jackson? The answer: of course! That defendant did precisely that, and that's why he's guilty of murder.

Example (defendant — criminal):

The prosecution would like you to believe that the only issue is whether Frank shot and killed Jackson. But that's not the issue here. There's not even a dispute over whether that happened. The real issue is: Did the prosecution disprove, beyond a reasonable doubt, that Frank was not entitled to defend himself against Jackson's assault? They haven't been able to disprove this, because it's simply true. It's perfectly clear here that Frank shot and killed Jackson because Jackson was about to attack him with a knife. That's not a crime. That's justified self-defense.

After stating the issue, you can then easily continue into your discussion of the facts in the case.

3. What really happened and proof

Most trials are ultimately a contest to determine whose version of a disputed event is more likely true. Inexperienced trial lawyers frequently make two interrelated mistakes: They spend too much time reviewing undisputed facts, and too little time arguing why the jury should accept *their* version of the key disputed events. Hence, you need to ask yourself: What are the key factual disputes in the case? How can I get the jury to accept my version? Once you have focused on the critical facts, you need to *argue* that you have more, or more credible, evidence so that the jury must resolve the dispute in your favor.

Think broadly about the kinds of proof you can marshal to win the war over the disputed facts. These should include the following:

1. client's testimony
2. other corroborating witnesses
3. exhibits
4. admissions from opponent's witnesses
5. common sense and human nature
6. probabilities and improbabilities
7. pleadings and discovery

The following are illustrations about how you can argue various things that may be in dispute. A common approach is to begin by telling the jury what really happened, from *your* perspective, and then move immediately to all the sources that make your version of what happened more plausible than your opponent's.

Example (plaintiff):

What happened on December 13, 1991, as John Smith was driving south on Clark Street? He could see the intersection of Main Street ahead . . . .

Example (defendant):

December 13, 1991, started out as an ordinary day for Bob Jones. After a normal day at the office, he was going home to have dinner with his family. Up ahead was the intersection with Clark Street, which he had driven through numerous times. He could see . . . .

Both sides, in other words, want to create their picture of a disputed event that is more believable, and therefore more likely true, than the other side's. Both sides then need to bring out the facts that support their version.

Example (prosecution):

That tavern was well lighted. There were lights over the bar, lights over the front entrance, lights in the street that shined through the plate glass windows in front, and lights from the jukebox, neon signs, and candles on the tables. There was more than enough room for the patrons to see, observe, and identify the robbers.

Example (defense):

That bar wasn't well lighted. It was pretty much like any neighborhood bar. Successful bars create moods, mostly through dim lighting. This bar was no exception. It had only a few dim lights spread around the room. This is hardly the kind of lighting you would want to have when correctly identifying the robbers is critical.

When referring to witness testimony, identify that witness to the jury and build up that witness' credibility.

Example:

You remember Ms. Williams. She was standing right on the southwest corner of Main and Clark and saw the whole thing happen.

Example:

Remember Dr. Good? He was the distinguished doctor with the silver hair. What are his qualifications? He's a board-certified specialist in orthopedics, the chief orthopedist at Rush Hospital. He's treated hundreds of fractures just like the one involved here.

Example:

Mr. Roberts has no ax to grind here. He doesn't know any of the persons involved in the crash. He just happened to be there and told us what actually happened.

Re-create for the jury the actual testimony of your key witnesses, bit by bit.

Example:

Remember when I asked Ms. Andrews . . . ? Remember her answer? She said . . . . What was the last question I asked her? . . . Her answer to that question was . . . .

Argue that your witnesses are the most reliable ones the jurors heard.

Example:

Isn't that the way it must have really happened? Who was in a better position to see what really happened? Who was the only witness who was looking at the intersection before the cars actually collided? Who was the only person who saw the entire collision from beginning to end?

Exhibits should always be used to corroborate important points. Take the exhibit out when you want to use it, make the point, and then put it away when done.

Example:

What else proves it happened this way? Take another look at the diagram we used, Plaintiff's Exhibit #4. As you can see, the light is a three-second yellow light. According to all the witnesses, Mr. Black's car was only 30 to 40 feet from the crosswalk when the light turned, and he was only going 25 mph. It's obvious that the light was yellow when he drove into the intersection, and he had every right to be there.

Example:

Take a look at the insurance policy itself. It's in evidence — Defendant's Exhibit #1 — and you will be able to take it to the jury room later. Look particularly at page 4 of the policy. Right here it says that . . . .

Admissions during trial from your opponent's witnesses can be particularly persuasive sources of proof. After all, if the opponent admitted something that helps you (and hurts the opponent), it's very likely to be true.

Example:

Throughout this trial we've been saying that the defendant was in a hurry, and that his carelessness caused this collision. The best evidence we have comes

from the defendant's own mouth. Remember when I asked him: "Didn't you have a meeting in your office scheduled for 9:00 A.M.?" "Wasn't it an important meeting?" "You didn't want to be late for the meeting, right?" Remember when he admitted all those things? Well, that crash happened at 9:00 A.M., two miles from his office. Was he in a hurry? Of course! The defendant's own testimony proved it.

Common sense, human nature, probabilities, and improbabilities can all be persuasive sources of "evidence."

Example:

Does it make sense that a 68-year-old woman would get on a bus that way? Wouldn't she be extremely careful every time she got on a bus and climbed the steps? Isn't that particularly true for a woman who has arthritis?

Example:

The plaintiff wants you to believe that Mr. Johnson would risk the lives of himself, his wife, and his children, by making a left turn in front of oncoming traffic, just to save a few seconds. Does that make any sense?

Finally, look to the pleadings and discovery for admissions that will make important points. Answers to the complaint, admissions in depositions, interrogatory answers, and responses to requests to admit facts are all potent sources of proof.

Example:

Remember when the plaintiff during trial said he saw the child running across the street, and he tried to brake, but couldn't stop in time? However, the truth came out during the plaintiff's deposition, when I asked him: "Did you see the child before you hit him?" And his answer was: "No, he came out of nowhere." Isn't that the more likely truth, the only truth that explains why the defendant didn't stop his car for that little boy?

The artistry of good closing arguments is to weave all these kinds of supporting "facts" together into a coherent argument, that reinforces your key points, and makes the jury accept *your* version of what really happened.

4. Basis of liability/nonliability or guilt/innocence

Immediately following their argument on what happened and why the facts compel the conclusion that it happened the way you claim, many lawyers will sum up the liability argument.

Example (plaintiff):

So what did the defendant do that was negligent here? He failed to keep a proper lookout for others. He failed to yield the right of way. He failed to drive with a speed that was safe for the weather that night. All this was negligence, and it also violated the rules of the road.

Example (defendant):

Members of the jury, the plaintiff did not look to see whether other cars were coming. He did not come to a complete stop at the intersection, but rolled ahead, assuming that the light would change sooner than it did. It's obvious that the plaintiff was negligent and that his own negligence was the real cause of this accident.

5. Damages (in civil cases)

Plaintiffs in civil cases usually argue liability first, then damages. The idea is that you first convince the jury that the defendant is liable, then move to the damages that plaintiff is entitled to recover. This ends your closing argument on an emotional high point, reviewing the injuries and damages the plaintiff suffered and now has to live with.

In contract cases the damages that a plaintiff is entitled to are often apparent. Compensable losses, caused by the other party's breach, usually will be spelled out in the damages instruction, and evidence of those damages usually will come from concrete sources such as bills, checks, and other documents. Arguing damages then involves mentioning the permissible damages and showing the proof of those damages.

In tort cases, however, the intangible nature of damages such as pain and suffering make it more difficult to name a dollar amount for such damages. Most plaintiff's lawyers will first usually describe the impact the event has had on the plaintiff's life and then discuss the dollar amounts to which the plaintiff is entitled.

Example:

Before this collision Bob Smith was a healthy man. He was a successful businessman, moving up within the company. He enjoyed outdoor sports, camping, hiking, working around the house, the kinds of things most of us enjoy. What happened to Bob after the collision?

(Symptoms) *The car crashed into Bob's right side and he was knocked to the pavement. He felt a stabbing pain in his right leg. He couldn't move, and just lay there. Finally, someone called for an ambulance . . . .*

(Diagnosis) *Dr. Good arrived at the hospital a short time after Bob got there. He examined Bob in the emergency room and ordered X rays. Those X rays showed that . . . .*

(Treatment) *Bob was in that hospital for 12 days. His cast was not removed for 5 months. During that time, he couldn't use his leg or exercise in any way. He couldn't work. All he could do was wait. Finally, when the cast came off, the doctors started Bob on the therapy program. Every day, four times a day, Bob would . . . .*

(Prognosis) *What is Bob Smith's condition today? He used to enjoy outdoor sports, camping, and hiking. Today he can't. He used to be able to do gardening and chores around the house. Today he can't do that either.*

(Damages) *Members of the jury, the law says that if someone is injured because someone else was negligent and caused the injuries, that person is entitled to be compensated. There are several things we need to consider.*

In personal injury cases the following are usually considered permissible damages. Keep in mind, however, that jurisdictions vary both on the terminology used and whether each item is a separate element of damages. The safe approach is to use a large courtroom chart that lists the proper damages elements according to the damages instruction the judge will later give the jury. The damages elements may include the following:

a. medical expenses
b. future medical expenses
c. lost income
d. loss of future income
e. nature and extent of injuries
f. physical disability and disfigurement
g. pain and suffering
h. future pain and suffering

Many plaintiff's lawyers tell the jurors what amount they are asking and then justify it by discussing each of the permissible elements. Jurors may resent your withholding the final figure by discussing the elements first, particularly when the amount is large.

Compute each element of damages precisely. The standard approach is to use a large chart, which lists the permissible elements of damages, and put dollar figures next to each element as you discuss them. This tells the jury that you have been careful and thoughtful.

Show how the damages you are asking for will help the plaintiff. Jurors will usually be more receptive to awarding large verdicts if they see how the money will help the plaintiff deal with her future.

Example:

For future medical expenses, we ask that you give Mrs. Jones $48,200. Why that amount? You heard how she will need a wheelchair for the rest of her life. Her life expectancy is 30 years. A wheelchair today costs, as we learned, more than $700 and lasts only about five years. That means she will need more than $4,200 just to have a decent wheelchair for the rest of her life. But that's only the beginning. She will need weekly physical therapy. That's going to cost at least $30 for

each session, or $1,500 each year. That's why her medical expenses for the future will add up to at least $48,200.

Most lawyers usually begin by discussing the out-of-pocket damages such as medical expenses and lost income; next, they move on to future losses such as future medical expenses and future lost income; then they end with the intangible elements such as disability, disfigurement, and pain and suffering. The thinking is that the last elements are the emotional high point of the damages and should be argued last.

Example:

Finally, folks, we need to talk about the kind of life Fred Woods has today, and will have for the rest of his life. In a land of normal people, what does it mean to be able to stand, walk, and lead a normal life like anyone else? What does a life feel like when it is restricted to a wheelchair? We suggest the sum of $150,000 is the least we should do to compensate Fred for what he has lost, and will never regain over the next 30 years of his life. If that figure is too low, it is your right and duty to change it. If the defense says it's too high, let the defense tell you why only $5,000 per year is too high. Whatever you do, however, keep one thing in mind. This is the one day, the only day, in Fred Woods' life where he can come before you and get justice for what happened to him.

Many jurisdictions ban making what is usually called a "per diem argument." This prevents plaintiff's lawyer from arguing that the jury should give the plaintiff a given amount, say $20 per day, for the rest of plaintiff's expected life. (More creative lawyers asked a set amount for each hour, minute, or even second of the plaintiff's life!) The effect of the argument, when the amount requested is multiplied by the plaintiff's actuarial life expectancy, is that the plaintiff is usually seeking an extraordinary amount. Most jurisdictions, however, permit asking for a certain amount and justifying it by showing that it is only a small amount for each year the plaintiff will probably live. For instance, plaintiff's lawyer may argue that for pain and suffering the plaintiff should receive $50,000, which is only $5,000 annually for the 10 years plaintiff is expected to live. The advantage of such an argument is that it shows the jury a rational reason for the damage request.

What should the defendant do? In civil cases where both liability and damages are in issue, the defendant has to decide when to argue damages. There are three approaches.

First, the defense might decide to argue only liability, with the thinking that the liability argument will be stronger if damages are not even mentioned. This is good if the jury accepts the damages argument. If it doesn't, the risk is that the jury, having heard only the plaintiff's damages request, will give the plaintiff everything requested.

Second, the defense might decide to argue liability first, then damages. This works well if the liability argument is weak and the real point

is to hold down damages; the main part of the argument thus will focus on showing how exaggerated and unreasonable the plaintiff's request is.

Third, the defense might decide to argue damages first, then liability. This works well if you want to discuss damages but want to end up on a high note, your liability argument. The key is to plausibly discuss damages first, yet argue that there is no liability.

Example:

Plaintiff is asking for $220,000. It's clear from the evidence that plaintiff caused his own injuries, so he's not entitled to recover anything from us. However, since plaintiff talked about damages for so long, we have an obligation to look at their claims to see if they hold up.

After discussing how the plaintiff's damages claims have been exaggerated and are unsupported, you can then return to the liability issue.

Example:

It's totally unreasonable for them to ask for $220,000. However, as we discussed before, that's not even the real issue here. The real issue, the only issue, is: Was the plaintiff negligent? The answer to that question must be: yes.

In cases involving comparative negligence, where the possibility of the jury deciding the defendant was at fault is substantial, the defense may take another realistic approach and argue that if the defendant was negligent, so was the plaintiff, and that the jury should apportion liability accordingly.

Example:

You may decide that Mr. Williams was at fault here. If you do, we accept your decision. But keep in mind that the plaintiff was also at fault here. It wouldn't be fair, and it wouldn't be right under the facts, to put the blame on Mr. Williams and none on the plaintiff. The plaintiff, after all, was obviously negligent too. So if that is your decision, the only fair thing to do is find each of them 50 percent responsible.

This kind of argument will almost guarantee that the jury will find the defendant at fault. If, however, you can get the jury to accept the idea that the plaintiff deserves part of the blame, you will have effectively reduced the damages the defendant will have to pay. In addition, the jury may respect your candor in acknowledging that the defendant bears some responsibility for what happened, and will be more willing to accept the other things you will argue, such as exaggerated damages.

6. Instructions

The key instructions the court will give the jury should be incorporated into your closing argument. Instructions usually given to the jury include:

a. burden of proof
b. elements of claims, damages, and defenses
c. definitions of important legal terms
d. credibility of witnesses
e. the use of common sense and experiences in life
f. the point that sympathy should not be considered

Effective closing arguments tie specific instructions to specific points in the argument. For example, in criminal cases defense lawyers almost always use the burden of proof instruction when arguing that the prosecution has failed to prove its case beyond a reasonable doubt. In both civil and criminal cases plaintiffs commonly refer to the elements instruction for the claims to demonstrate that they have in fact proved what the law requires them to prove.

Jurisdictions differ on how you can use instructions during closing arguments. Most allow you to read verbatim from the instruction and even show the instruction to the jury, like any other exhibit in evidence, during the argument. A few jurisdictions do not permit you to read verbatim but do allow you to refer to specific instructions and paraphrase them.

The key to effective use of instructions is to use the instruction in conjunction with the point you are making.

Example:

Can you believe what Mr. Watkins said? He's a good friend of the defendant. On top of that, he's a convicted felon. We can't afford to trust him. And it's not just my saying so. Judge Hawkins, when she instructs you on the law, will tell you that the testimony of a person who has been convicted of a crime should be taken with particular caution.

Example:

Judge Hawkins will instruct you that you should consider any bias and interest of a witness when you judge the credibility of that witness. Why is that instruction so important here? The plaintiff's case depends almost entirely on the testimony of John Roberts, the plaintiff's friend and business partner. Doesn't it make sense that Roberts would, and did, shade his testimony to help the plaintiff? After all, if he helps the plaintiff he helps himself.

Example:

The court will tell you that if you find that we were not negligent, then you are not to consider damages because there will be no reason to do so. That instruction ties right into what this case is all about. The plaintiff has not shown that we did anything wrong. Therefore, you will not need to discuss their claimed damages at all.

Example:

The key word in this case is "know." Did Bobby know there were illegal drugs in the truck when he drove it across the border? Her Honor will tell you that the prosecutors must prove, beyond a reasonable doubt, that Bobby knew the drugs were there. Did they? Of course not. There's been absolutely no evidence proving this.

7. Refuting the other side

Almost all jurisdictions give plaintiff the right to make both a closing argument and a rebuttal argument. Plaintiff in those jurisdictions has a choice to make: Should he anticipate the defendant's closing argument, or save any refutation for his own rebuttal argument?

Many lawyers mention the defendant's likely claims in the closing argument. The logic is that the jury will not hear the defendant's arguments for the first time from the defense. By anticipating the defense's arguments, you can raise and refute them before the defense has a chance to argue. Psychological research has shown that persons are more resistant to counterarguments if they have been given reasons to resist them beforehand.

Example:

What has the defense been claiming here? They want you to believe that Mrs. Smith was in such a hurry that she made a left turn in front of oncoming traffic. They also want you to believe that she made that left turn without even checking for oncoming traffic. But those claims don't hold water. That's because . . . .

The defendant, of course, arguing second and not having a rebuttal argument, must spend more time on the plaintiff's claims and refute them during the defense's closing argument.

Example:

What does the plaintiff claim happened? They would have you believe that Mr. Jones drove into the intersection after *the light had turned red. Well, let's go back to the corner of Main and Clark Streets and see whether that holds up.*

8. Conclusion

The end of your closing argument should smoothly and efficiently conclude your argument. It should remind the jury of a key theme or other important point. Most effective conclusions today end crisply and dramatically so that the last phrases linger tellingly in the air.

Example (plaintiff — civil):

Above all, remember this. This is Bob Smith's only day in court. This is the only time he can come before a jury and receive proper compensation for the injuries the defendant caused. This is the only time he can receive justice. We are confident you will give him that.

Example (defendant — civil):

Folks, my company, the Ajax Insurance Company, doesn't pay cheaters. Never have, and never will. The plaintiff tried to cheat us by making a fraudulent claim on a fire insurance policy. That's wrong, and that's cheating. Don't let him get away with it here.

Example (plaintiff — criminal):

When that defendant took his gun and shot an unarmed man, a man who was doing absolutely nothing wrong, he intentionally snuffed out the life of another human being. Members of the jury, that's what the crime of murder is all about.

Example (defendant — criminal):

Folks, the prosecution has failed miserably here. They failed to prove Frank was there. They failed to prove that he had anything to do with that robbery. Because of that, let Frank go. Let him go back to his job, his family, and his life. Why? Because it's the right thing to do.

§7.6. *Rebuttal*

Plaintiff, who ordinarily has the burden of proof, in most jurisdictions has the right to argue first and last; that is, plaintiff has the right to make a closing argument and, after the defense has argued, a rebuttal argument. How should plaintiff best utilize this advantage? Two questions are involved. First, how should plaintiff apportion his ammunition between the closing and rebuttal? Second, how should time be apportioned between the two?

Plaintiff should fully cover all the key points in the closing argument and resist the temptation to save all the best arguments for rebuttal. "Sandbagging" has dangers. First, it will make the plaintiff's closing argument weaker, something to be avoided at all costs. Second, defendant, sensing that the plaintiff has sandbagged, can waive his closing argument, preventing plaintiff from arguing in rebuttal. Third, defendant can make a narrow closing argument involving one or two issues, again preventing plaintiff from arguing the unmentioned issues in rebuttal. (For example, defendant might argue only liability, preventing plaintiff from arguing damages in rebuttal.) Knowing how strictly the court will sustain scope of rebuttal objections is obviously important. Finally, keep in mind that the jury is tired and will tune you out and become hostile if the rebuttal argument drags on or simply repeats old arguments.

Apportioning the time between the opening and rebuttal arguments is usually left up to plaintiff. (Some judges, however, limit the time the parties may argue so plaintiff must plan and reserve enough time for the planned rebuttal.) Most plaintiffs will use two or three times as much time on the closing argument as on rebuttal. This will allow for a full closing argument yet reserve enough time for an adequate rebuttal. For example, a plaintiff might use 20 to 30 minutes for closing and 5 to 10 minutes for rebuttal.

The rebuttal argument, like all parts of the trial, must be planned in advance. Here, coordination between the closing and rebuttal arguments is important. Decide what arguments, stories, analogies, or other routines each will use. Make sure neither argument steps on the other's toes so that the rebuttal will be fresh for the jury. Put yourself in the defense's shoes. What points would you probably argue if you were representing the defendant? What are your best responses to those likely arguments?

Just as there is no single "right way" to organize and deliver a closing argument, experienced trial lawyers vary greatly in the way they organize and deliver rebuttal arguments. Nonetheless, many structure their rebuttal along the following lines:

a. introduction
b. your strongest points
c. defendant's contentions and your refutation
d. conclusion

Notice the emphasis on *your* strong points. Many trial lawyers make a serious mistake during rebuttal: They merely respond to questions raised during the defense's closing argument. This usually makes the rebuttal argument sound defensive, negative, and passive, which is exactly what the defense wants to accomplish. A clever defense lawyer during his argument will throw out a series of questions and challenge the other side to answer them during the rebuttal. Resist the temptation. Use your rebuttal to hit your best points in a fresh way. Periodically weave in selected defense contentions you have anticipated when your refutation is strong. Above all, keep the rebuttal active and positive.

§7.7. *Examples of closing arguments*

The following closing arguments are from the same cases as the opening statements examples in Chapter III.

1. Criminal case (murder): *People v. Sylvester Strong*

(The defendant, Sylvester Strong, has been charged with murdering Shelley Williams on April 25, 1991. The prosecution claims that the shooting was in retaliation for a prior incident. The defense claims the shooting was justifiable self-defense.)

Closing argument — prosecution

May it please the court, counsel, ladies and gentlemen of the jury.

(Introduction)

The introduction here is done simply.

At the beginning of the case, during the opening statements, we said that this was a case of murder. What has that evidence turned out to be?

We now know that the defendant, Sylvester Strong, shot and killed the victim, Shelley Williams, on the 2300 block of Bloomingdale Avenue on April 25, 1991. We know that the victim was completely unarmed when he was shot, and we know that he was shot two times in the back, the second shot coming when he was lying face down on the sidewalk, helpless and unprotected. In short, we have shown, and the defense concedes, that Sylvester Strong killed Shelley Williams; and the only remaining question is whether that killing is a murder as well!

(Issue)

The issue is stated as positively as possible.

How did Shelley Williams come to die so tragically? Shelley, his mother, Rosie Garrett, and various other family members and friends were in two cars, returning from the north side of Chicago. As the cars turned from Winnebago on to Bloomingdale, the first car, driven by Shelley, stopped. He saw the defendant, Sylvester Strong, riding down Bloomingdale on a bicycle. Shelley got out of his car and walked

(What happened)

Notice that the narrative of the occurrence closely parallels the prosecution's opening statement. This always reinforces the impression that you have delivered on the

over to where the defendant had stopped and started talking to him. Shelley stopped and talked to the defendant because he had heard that the defendant had sworn at his mother at a party the previous day. Shelley motioned to his mother, who had parked at the corner, to get out and come over. This she did. Shelley then asked her: "Is this the boy that cussed you out?" She answered, "Yes, it is." Shelley told him to apologize directly to his mother.

representations you made during the opening statement.

Suddenly, George Howard, the defendant's brother-in-law, ran up to them, with a handgun. He fired two shots in the air. The defendant then grabbed the gun from Howard, saying: "Give me the gun — you're not trying to shoot him." The defendant then pointed the gun at Shelley, who said: "I don't want to fight," while waving his arms. Shelley backed up, and the defendant fired the first shot, hitting him in the arm. Shelley turned to run, and the defendant fired the second shot, hitting him in the back. Shelley fell, face down, on the sidewalk, next to a fire hydrant by the corner of Bloomingdale and Winnebago. That's when the defendant walked over and fired the third shot into the back of a helpless and unarmed victim.

Note also that the narrative is done in an active, "you are there" style.

The defendant then ran westbound on Bloomingdale. Rosie yelled for someone to stop him. Clarence Williams, the victim's brother, jumped into the victim's car and drove down Bloomingdale to cut the defendant off and keep him from escaping. Clarence jumped out of the car, and kicked the defendant in the head to keep him from running away.

Other people, including the defendant's wife, who was armed with a baseball bat, came to the scene. Rosie took the bat away from her, then started beating the defendant with it. We don't deny that one bit. She kept on hitting the defendant, who had just shot her son to death, until the police arrived.

Not contesting that the defendant was beaten is probably the better approach, since it prevents the defense from making a big issue out of it.

Shelley Williams was taken to a nearby hospital, but it was too late. The three gunshots had done their job. Shelley Williams was dead by

the time he reached the hospital. The autopsy later showed that the fatal shot entered Shelley's lower back, traveled in an upward direction, piercing the lungs so that they filled up with blood, and pierced his heart as well.

That, in a nutshell, is what our evidence has proved here. That evidence has proved, beyond a reasonable doubt, that on April 25, 1991, the defendant, Sylvester Strong, intentionally shot and killed the victim, Shelley Williams, with a handgun, and that there was absolutely no justification for the shooting. That is why this evidence has proved that the defendant is guilty of murder.

(Basis of guilt)

This summary closely parallels the elements of murder.

How do we know it really happened this way? Remember when Rosie Garrett testified? What did she tell us? She told us she'd been following her son's car to Bloomingdale Avenue, when she saw her son Shelley stop his car, get out and walk over to the defendant, who'd been riding down the street on a bicycle. She saw them talking, then Shelley motioned for her to join them. When Shelley asked her if this was the man who had previously insulted her and cussed her, she said, "Yes." Shelley then demanded that the defendant apologize directly to her. What else did Rosie Garrett tell us? Suddenly George Howard appeared and fired a gun two times into the air. The defendant then grabbed the gun from him, yelling: "You're not trying to shoot him — give me the gun!" Rosie Garrett then stood there as the defendant, methodically and deliberately, fired three shots into her son, killing him on the spot. What did Rosie do next? Realizing that the gun was now empty, she grabbed a baseball bat from Sylvester's wife and, seeing the defendant trying to escape, did what any reasonable person would have done under the same circumstances. She ran to where the defendant was and started hitting him with the bat to keep him from getting away, until the police arrived a couple of minutes later.

(Corroboration)

The corroboration takes the essential parts of the important witnesses and repeats the testimony. This should be done by referring directly to the heart of the witness' testimony.

Who else told us it happened this way? Clarence Williams, the victim's brother, who graduated from high school, enlisted and served in

Using rhetorical questions is often an effective way of

the Army in Vietnam, and, since his return, has been working as a master mechanic for General Motors, also testified. Everything he saw and heard corroborated Rosie Garrett. Of course, since he remained by his car, he couldn't hear all of the conversation between Shelley, his mother, and the defendant. However, he could see that Shelley did nothing to provoke the defendant, and could see that neither Shelley nor his mother was armed in any way. What he told us he saw next was that George Howard came up, fired a handgun into the air, the defendant grabbed it and emptied the gun into his brother's back. Seeing the defendant running away, he jumped into the car, chased the defendant, and cut him off a short distance away. He then kicked the defendant to keep him from getting away until the police came. Folks, everything Clarence Williams told us about that day supports, is consistent with, and corroborates, Rosie Garrett's testimony.

introducing a new topic.

Who else testified? Remember Willie Williams? He was only an acquaintance of the victim, not a family member, who happened to be with them that afternoon. He doesn't have any axe to grind here. He's not biased in favor of any side here. He simply told us what he saw that day to the best of his memory. What did he see? Since he had run a short distance away when the first shots rang out, he was a little further away than the others, but he did turn to see the defendant pull the trigger of the gun three times, shooting the victim three times, the last time when he was lying helpless on the sidewalk.

What about the other witnesses? All of them — the police officers who arrived at the scene, the ballistics expert who confirmed that this handgun matched the bullets removed from the victim's body, and the pathologist who performed the autopsy and learned that the fatal shot pierced the victim's lungs and heart — as well as the exhibits admitted in evidence, all of these are consistent with the eyewitness.

Corroboration by exhibits, physical evidence, and expert testimony should always be mentioned.

Now, you're probably going to ask yourself, why did this shooting happen? What motive was there? It's clear that the defendant shot and killed Shelley Williams because he got angry when forced to apologize to Rosie Garrett and, as so often happens, a gun was nearby. Please keep in mind, however, that we are not required to prove a motive for the shooting. The Court will instruct you on this point later. All we are required to prove, and we have proved, is that the defendant shot and killed Shelley Williams, he intended to do it, and was not justified in doing it.

A weakness in the case is that there is no apparent motive in the case sufficient to cause a murder. The best the prosecution can do is to suggest one, then remind the jury that the law does not make motive a required element of murder.

What would the defense have you believe? The defendant claims that on the day before, April 24, there was a party where he and Rosie Garrett had words. He, however, would have you believe that Rosie Garrett, not he, was using all the foul and insulting language. He claims that after the police arrived and broke up the argument, Rosie and some others said they would come back tomorrow and finish it. What does he say about the 25th? The defendant would have you believe that he was merely riding his bicycle down the street when he was confronted by Shelley, who immediately started swearing at him. He claims that George Howard came by, and suddenly everyone was getting out of the two cars with baseball bats and two-by-fours. They surrounded him, and for no apparent reason, started beating him. He claims he was already bloodied and couldn't really see because of all the blood in his face, when he heard the gunshots and somehow got the handgun from George Howard. He then claims that he fired blindly, solely to get this armed mob off him.

(Other side and refutation)

Note that the other side's contentions are stated to make clear that you don't believe they are true. Using the "he claims that" types of predicates clearly establishes that.

They also called Ada May, the defendant's mother-in-law. Her recollection, to no one's surprise, was exactly consistent with the defendant's when it came to the argument the day before. As far as the 25th is concerned, she really couldn't remember any details, although she was sure, again to no one's surprise, that she saw Rosie Garrett beating the defendant with a baseball bat.

We have, then, a classic case of testimony that, as far as what happened on April 25 is con-

Credibility of witnesses, where you

cerned, is contradictory, and it's your duty to decide where the truth lies. In other words, you've got to decide which witnesses are telling the truth. When you decide on the credibility of the witnesses, the court will tell you that you should consider their demeanor while testifying, gauge it against other testimony, measure it against your common sense and experiences in life, and see if the witnesses have any bias, interest, or motive that could affect their testimony.

have two diametrically opposed versions of the facts, must be argued. It's always effective to refer to the credibility instruction the court will give.

The witnesses we called were all hardworking, decent people who told you what happened. Their testimony was consistent on every important fact. They all said that the victim was completely unarmed when he was shot. They were not contradicted in any way during the cross-examinations. Finally, doesn't what they say make sense? Doesn't it square with your experiences in life? The *only way* the victim could have been shot the way he was — once in the arm, and twice in the back — is if it happened the way our witnesses say it did. It is totally impossible for the defendant, shooting "blindly" as he would have you believe, to just happen to shoot *only* the victim, and just happen to shoot him twice in the back. Not only does the physical and medical evidence contradict the defense, but the only witness who testified directly to this version of the events was the defendant himself. When you consider the credibility of his testimony, keep in mind that, if ever a man had a motive to distort the truth and fabricate a story, it's got to be the defendant in a criminal case charged with murder.

Common sense should always be argued, since this is probably the single most important basis for the jury's decision on who is telling the truth.

Where the defendant testifies, his obvious bias should be pointed out.

Finally, there's one witness the defense simply can't get around, and that's Arthur Anderson. Mr. Anderson, you'll remember, is a friend of the *defendant*. If his testimony was going to be slanted toward anyone, it would be toward the defendant. Yet, what did he testify to? He told us he was on the street and saw the defendant with some other people, then saw George Howard run by with a gun and fire it. What did he see next? He saw the defendant grab the gun and say: "Give me the gun — you're not trying to hit him," then aim the gun at

Showing that a witness who would be expected to testify favorably to the defense actually supported the prosecution's version of the facts is usually very persuasive. When this happens, the element of support in the testimony must be driven home.

Shelley Williams and pull the trigger. He saw Shelley backing up, waving his arms and turning, and the gun went off a second time. He then saw the defendant walk over to where Shelley had fallen and put the third shot in his back. Immediately afterwards he saw the defendant run past him, and noticed that *at that time* there was absolutely no blood on his head, face, or clothes.

So there you have it. When the defendant's own friend comes into court and, under oath, tells you what he saw, and his testimony totally contradicts the defense, you know for certain which side has been telling the truth.

The court will instruct you that, under our law, a person commits the crime of murder when he: first, performs an act or acts which cause the death of another; second, intended to kill or do great bodily harm to another; and third, was not justified in killing the other person under the circumstances.

(Instructions)

The prosecution should usually tell the jury what the elements of the offense are, and argue that he's met each of the requirements.

We have demonstrated, with convincing, credible, and consistent witnesses, that the defendant, Sylvester Strong, killed the victim, Shelley Williams, that he did so intentionally, and that by no stretch of the imagination was this a legitimate self-defense situation. These witnesses have demonstrated each of these propositions beyond a reasonable doubt. Accordingly, we ask that you return the only verdict that this evidence supports and fairness demands, a verdict finding the defendant, Sylvester Strong, guilty of the crime of murder. Thank you.

(Conclusion)

Closing argument — defense

Your Honor, Mr. Sklarsky, ladies and gentlemen of the jury, good morning.

(Introduction)

Before I make any comments about the evidence in this case, Sylvester Strong and I would like to thank you for being jurors in this case. We realize you have made a sacrifice in your businesses, you have left your homes and

The defense's introductory remarks are often longer than the prosecution's. The defense often stresses

loved ones, and you left your other obligations, but we realize the reason you are doing this is not only because it's your recognition of civic duty, but because you want to make sure that justice is properly administered in our courtroom.

Folks, at the beginning of this case, when his Honor, Judge Cousins, was questioning you, he asked you whether you would follow the law, whether you would be fair, and whether you would hold the prosecutors to their burden of proving Sylvester Strong guilty beyond a reasonable doubt. There was a lot of talk about that and each of you indicated and promised that you would hold the prosecutors to their burden. Judge Cousins also asked you whether you would presume Sylvester innocent throughout this entire trial and through your deliberations and presume him so unless the State was able to prove him guilty beyond a reasonable doubt. All of you indicated that you presumed him innocent. Additionally, ladies and gentlemen, you were asked to use your common sense and experiences in life in evaluating the testimony of the witnesses. Based upon your responses: "Yes, I can follow the law," "Yes, I will hold the prosecutors to their burden of proof beyond a reasonable doubt," "Yes, I will presume the defendant innocent unless he is proven guilty beyond a reasonable doubt," you were selected as jurors in this case. We are calling upon you now, ladies and gentlemen, to abide by those promises that you made.

that each juror promised to follow the law when the jurors were selected, and calls upon them to adhere to their promises.

Let's now look at the evidence and see why the prosecutors failed to prove Sylvester Strong guilty beyond a reasonable doubt. As we told you at the beginning of this case, we do not contest the fact that Shelley Williams was shot and killed, an unfortunate thing that has happened, and nothing that I can say, nothing that anyone in this courtroom can do can change this. That fact, however, is not the issue in this case. The issue here is: Was Sylvester Strong justified in defending himself under the circumstances that existed on that day? Our answer, ladies and gentlemen, is that the evidence

(Issue)

The defense should put the issue in terms of the prosecutor's

indeed shows that the State failed to prove Sylvester Strong guilty beyond a reasonable doubt, because they did *not* prove, beyond a reasonable doubt, that when he shot Shelley Williams he did *not* reasonably believe that it was a necessity to defend himself against death or great bodily harm.

burden of proof, since this is the easiest statement of the issue to answer.

The answer should emphatically and immediately follow the statement of the issue.

Now why do I say this? Ladies and gentlemen, basically it comes down to whose account of the incident you believe. Do you believe the version provided by Rosie Garrett, Willie Williams, Clarence Williams, or Arthur Anderson on that stand, or do you believe the defendant and Ada May Howard? We have diametrically opposed versions in this case as to what happened.

(Other side and refutation)

Since the prosecution has the burden of proof, the argument addresses the prosecution's witnesses *before* arguing the defense version of what happened.

The four occurrence witnesses — we call them occurrence witnesses because they are supposed to have been on the scene and observed the occurrence — were Rosie Garrett, Willie Williams, Clarence Williams, and Arthur Anderson. They would each have you believe that before April 25, the date of the shooting, there had been absolutely no threats, no threatening gestures made by members of the Williams family directed to members of Sylvester's family.

Rosie Garrett, the first occurrence witness, testified that on April 25, at the corner of Bloomingdale and Winnebago, she observed her son Shelley talking with Sylvester Strong. She claimed that the only thing that happened before the shooting was that Shelley asked her if Sylvester was the person who cursed her. She said Shelley got out of the car and told Sylvester, "I want you to apologize." So Sylvester apologized. Shelley then said, "No, don't apologize to me, apologize to my mother." As Sylvester was turning to apologize to his mother, according to Rosie Garrett's testimony, that is when George Howard came running down the street and shot in the air. She then claims that Sylvester ran over to George Howard, grabbed the gun, saying, "You are not trying to hit him," and started shooting. Rosie Garrett

claims that just before the shooting there was no fighting, no cursing, no argument, everything was peaceful, low tones of voice, not yelling; just a quiet, peaceful conversation.

Clarence Williams also got on the stand. He said the same thing, nothing happening, no argument — in fact, he couldn't hear what was being said because the tape deck in the car was playing. He also claims that, for no apparent reason, George Howard ran down the street firing the gun. He claims that Sylvester then, again for no apparent reason, grabbed the gun and started shooting. And he claims that only after the shooting stopped did anybody on the street lay a hand on Sylvester Strong, and that was when Clarence caught him down here by the end of the street with the car and kicked him in the face.

Now, ladies and gentlemen, if you believe the version of what occurred on the day of April 25 given by Rosie Garrett, given by Willie Williams, given by Clarence Williams, given by Arthur Anderson, you would have to believe the following: That when George Howard ran down the street and fired the shots, he was firing them because he was berserk, because there was absolutely no reason at all to fire.

Arguing that the prosecution's witnesses are incredible because their testimony is illogical and does not provide a commonsense explanation of the subsequent shooting is an effective approach.

Their witnesses would have you believe there was only peaceful conversation, no fighting, no hitting; not a darn thing happening to Sylvester when, for no apparent reason George Howard went berserk, and then Sylvester went berserk as well. We then got two berserk individuals in the street, just shooting up everybody for no reason at all. If you believe that, I say convict the man of murder. This simply defies common sense, and everybody in this courtroom knows it.

Let's look at some of the other things, ladies and gentlemen: You remember when we went through the addresses of all of the individuals? Did you notice how they all *just happen* to be from outside of this neighborhood? Doesn't it seem just a little suspicious that all these

friends of Shelley Williams decided to be on Bloomingdale at the same time? Incidentally, they *just happened* to catch Sylvester out there in the street around the time Ada May said Shelley Williams would come over there to finish the mess that occurred the night before. Don't these coincidences alone create a reasonable doubt in your mind about whether their witnesses are telling the truth?

Take a look at the photographs of this street. The officer said that the distance between where the shots were fired, and where he saw Sylvester being beaten, was only around 100 feet. Other testimony showed there was nothing wrong with his legs and feet. The testimony also was that Clarence got into the car, drove down the street, and cut Sylvester off. If that's all true, then why couldn't he get more than a hundred feet away? There had to be something wrong with him or he would have gotten much further. Doesn't this prove that Sylvester was attacked *before* the shots were fired? Isn't the fact that he managed to get only one hundred feet explained *only* by the fact that he was already injured, and couldn't run very well?

Just as the prosecution used the available physical evidence, presenting the same evidence to contradict the prosecution is always a good tactic.

The issue in this case is *why* Sylvester Strong shot that gun. That is the *only* issue; and the *only* one that can tell us the reason for the shooting — why he shot — is this man, Sylvester Strong. He is the only one that can tell us what was going through his mind. The issue, stated in legal terms, is whether he reasonably believed, under the circumstances that existed at the time of the shooting, he would sustain great bodily harm or death to himself if he didn't defend himself. Shelley Williams can't testify to that, Clarence Williams can't testify to that, and Arthur Anderson can't testify to that. Only Sylvester can, and we heard him tell us what he felt when he fired those shots.

Since the prosecution had more occurrence witnesses, pointing out that only the defendant can testify directly on the issue of intent is an effective argument.

How many shots did he fire? He testified that he just kept on shooting. *Why did you shoot? Because they were trying to kill me. When did you shoot? When they were coming at me, trying to get*

me. The only person who could testify as to his intent is Sylvester himself.

I have only a few moments left, so we must go on. The prosecutor talked a lot about the entrance of the bullets, and said that two of the bullets entered Shelley Williams' back. He wants us to believe that Sylvester Strong should be convicted simply because two shots entered Williams' back. Well, it's not as simple as that.

(What happened)

Having refuted the prosecution witnesses, the argument now gives the defense version of what happened.

Just for a moment, put anyone else in that same situation. A mob has surrounded you. They are armed with bats and two-by-fours. You instinctively fire your gun. Do you stop to see whether the first shot hits anyone? Do you stop to see if anyone is turning while you shoot? *Of course not!* You would fire that gun as fast and as often as you could. Isn't that exactly what a reasonable person would have done under these circumstances? Well, that is exactly what happened, and only what happened, here. The question is whether, when the first shot was fired, Sylvester Strong reasonably believed that he was justified in defending himself. If so, it does not make any difference where that first shot or, for that matter, any other shots actually struck.

(Instructions)

The defense will naturally stress the self-defense instructions, particularly the burden of proof's being on the prosecution.

Judge Cousins will instruct you that a person is justified in using deadly force when that person reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself. Isn't that what really happened here? Isn't that what Sylvester Strong must have been thinking when he fired that gun? Under these circumstances, surrounded by an angry mob, isn't what Sylvester Strong did exactly what any other reasonable person would have done if faced with the same situation? *Of course it is!* Because what he did was reasonable, Sylvester is simply not guilty of any crime.

The court will also instruct you that the prosecution has the burden of proof in this case, and that this burden of proof never shifts to the defendant. Although we presented evidence in this case, we are not required to prove

anything. *We* do not have to prove that Sylvester Strong was justified in defending himself as he did. It is the *prosecution* that is required to *disprove* this proposition, and they have to *disprove* it beyond a reasonable doubt.

Who among you can't say that you have a reasonable doubt whether Sylvester reasonably defended himself here? Of course you have doubts! You have got to have doubts about that. If nothing else, the evidence you heard here is filled with doubt.

(Conclusion)

There is nothing wrong in having an emotional conclusion to your argument, if it is appropriate to the case and is done in good taste.

This case will be over soon. I have tried my best to show you what really happened on Bloomingdale Avenue during the afternoon of April 25, 1991. I have tried my best, but my job is done. This case now rests in your hands. When this case is over, you, I, and probably some others, will from time to time think back and reflect on this case. It may be in the morning during a spare moment. This case may suddenly come back to you at night when you are trying to fall asleep. Wherever you think of this case, you are probably going to ask one thing: Did I do this defendant, Sylvester Strong, justice? If you have doubts about this case, have them now. For him there is no tomorrow, no second chance. Ask yourself those hard questions now, because for him tomorrow is too late. If during your deliberations you keep that in mind, we are sure that you will return a verdict of not guilty.

Challenging the prosecutor to answer a difficult issue can be an effective approach. However, make sure the prosecutor does not have an obvious good answer he can use.

Now, ladies and gentlemen, I only have this one chance to talk with you. When I am finished, the prosecutor will have a second chance to get up and make what is known as a rebuttal argument. I don't have a chance to talk to you after him and rebut anything he might tell you. I am confident, however, that since you heard the evidence, you will be able to come up with an answer for anything he might tell you. When he gets up, ladies and gentlemen, ask him to explain to you how it was so unreasonable for Sylvester to defend himself under these circumstances. Have him explain to you why, when surrounded by an armed, angry mob, Sylvester was not entitled to protect him-

self and save his own life. Have him tell you what would have been more reasonable here. If you have a doubt as to what the right thing to do would have been, then you can't say that what Sylvester did was not reasonable.

Ladies and gentlemen, we say again that the prosecution has not proved beyond a reasonable doubt that when Sylvester fired that first shot, he did not reasonably believe it was necessary to do so to defend himself. The prosecution has utterly failed to prove that issue beyond a reasonable doubt. Because of their failure, we ask you to return the only verdict this evidence demands. Let him go free. Let him return to his job, his family, and his friends. Find him not guilty.

Rebuttal argument — prosecution

Your Honor, ladies and gentlemen of the jury.

(Introduction)

About what happened on Bloomingdale Avenue during the afternoon of April 25, 1991, there can be no doubt. We presented four credible, consistent eyewitnesses, all of whom told you the same thing. I'm not going to review their testimony again. Suffice it to say that all of them told you Shelley Williams was merely insisting that the defendant apologize to his mother for swearing at her; George Howard arrived and fired two shots in the air; the defendant grabbed the gun, saying, "Give me the gun — you're not trying to shoot him"; he aimed the gun and fired the first shot, hitting Shelley in the arm; as Shelley turned and ran, the defendant shot him in the back; Shelley fell face down, and took the third shot in his back, too. That, in a nutshell, is what four decent persons told you, under oath, happened.

(Your strongest points)

The rebuttal cannot be negative in tone. Accordingly, get right into your strongest ammunition and hit hard.

Mr. Hill makes much of the fact that there were inconsistencies in their testimony. Of course there were! There always are minor inconsistencies. That's because every witness to an event sees it from his own vantage point, remembers it with different degrees of recall, and testifies about it, using his own verbal style

(Other side's contentions)

Note that the defense's arguments are woven into the middle of the rebuttal. This keeps your refutation from creating a negative atmosphere.

and expressions. You ought to be suspicious of testimony that is perfectly identical because it usually means that the testimony is rehearsed. That obviously didn't occur here, because each eyewitness simply told you what he saw, in his own unique way.

What Mr. Hill *didn't* talk about is more revealing. He spent almost no time talking about the testimony of the four witnesses to this crime that we presented. Instead, he spent most of his argument talking about the defendant. Why do you suppose he decided to do that? Could it be that he wants you to forget that four persons saw the defendant shoot an unarmed, defenseless man three times, twice in the back? Could it be that by constantly talking about the defendant he's trying to appeal to your emotions and get you to ignore the evidence?

(Refutation and other strong points)

In the same vein, use your refutation to again raise the strongest parts of your proof.

Mr. Hill also chose not to talk about the significant corroboration of these witnesses. Remember Dr. Ibram, the pathologist, who told you about the autopsy he performed on the body of Shelley Williams? He told you that he found three bullet wounds in the body. One was in the arm, and two were in the back. Aren't his findings completely consistent with and corroborative of the eyewitnesses, all of whom told you they saw Shelley Williams raise his hands to protect himself when the first shot was fired, saw him turn and run when the second shot was fired, and saw him fall, after which the defendant deliberately put the third shot into his back?

Since shooting a man in the back is such a repulsive fact, cutting against the defendant, you can hardly mention it too much!

There's something about physical evidence that's impossible to ignore. It never lies, never forgets, and never disappears. It simply always is there, to prove which side is telling the truth. In this case, what does the physical evidence, the location of the bullet wounds, show? It conclusively proves that the way the four eyewitnesses told you this crime happened is true.

What about the defense they presented here? There's an old saying: "The defense doesn't have to prove anything, but if they decide to call witnesses, they'd better make sense and

wash with the other evidence." That, needless to say, is hardly what happened here. The defendant's testimony made no sense, and it was flatly contradicted by the four eyewitnesses.

The defendant claims he was surrounded by an angry, armed mob that beat him with baseball bats and two-by-fours simply because he didn't apologize to Rosie Garrett. Does that make any sense? Your common sense and experience in how life works tells you it didn't happen that way. The defendant claims that he somehow managed to grab George Howard's gun and fired it blindly to get the mob off him. If that's so, isn't it simply amazing how all three bullets ended up in only one person, and two of the shots ended up in his back? Now that's truly amazing! Finally, the defendant tells you that he was bleeding profusely from the face and head, fell down repeatedly, and staggered the one hundred feet to where he was when the police arrived. If that's so, wouldn't you expect to see blood spots and blood smudges all along the path he took down Bloomingdale? Of course you would — if his story is in fact true. But what did Officer Genowski tell you? When he arrived at the scene, he saw the defendant on the ground, and there was blood at that spot. He then walked over to where Shelley Williams was lying, and saw blood there as well. He then checked the sidewalk and street between those two places, and did not see any blood anywhere else. That's absolutely positive proof that the defendant's story is not true. Again, it's the physical evidence that conclusively proves who's telling the truth here.

There's nothing wrong with employing sarcasm and showing disbelief in appropriate situations.

Note that the prosecutor, through the use of sarcasm, leaves little doubt that he thinks the defendant is lying, but he never says it directly. Instead, he lets the jurors reach this conclusion on their own. This is the better approach.

What this case comes down to, then, is whom you decide to believe. Are you going to believe Rosie Garrett, Clarence Williams, Willie Williams, Arthur Anderson, and the physical evidence as presented through Dr. Ibram and Officer Genowski? Or are you going to believe the defendant's story? There's no middle ground in this case.

(Conclusion)

Since you have four eyewitnesses to the defense's one, this should be repeatedly stressed.

Mr. Hill in his closing argument asked the prosecutor to tell you what would have been

Since the defense made the argument,

the reasonable thing to do. The reasonable thing for the defendant to do would have been simply to say, "I'm sorry," apologize to Rosie Garrett, and walk away. That's what a reasonable person would have done. But not the defendant. That's not the way he does things, and that's why he's in this courtroom today.

you're entitled to respond to it directly, under the "invited reply" doctrine.

We proved that the defendant shot and killed Shelley Williams, that he fired that gun intending to kill or cause bodily harm to Shelley Williams, that the defendant was in no way justified in doing what he did; and we proved it beyond a reasonable doubt. In short, ladies and gentlemen, what the defendant did on the afternoon of April 25, 1991, is what the crime of murder is all about. Thank you.