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Litigation Video Series

- Closings

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PAPER

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Closing Address

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“An advocate can be confronted with few more formidable tasks than to select his [or her] closing arguments ...”

Robert H. Jackson, chief counsel for the United States of America at the Nuremberg Trial 1946

Introduction

1. The closing address is your final opportunity to give perspective, meaning and context to the evidence introduced throughout the trial. It is the last chance for you to forcefully communicate your client’s position to the jury and convince the jury to bring in a favourable verdict.
1. It is a great privilege to address a jury on behalf of either an individual or the Crown. But as we all know, with great privilege comes great responsibility.
2. I have a number of points, which hopefully will be of assistance to you in carrying out your task.

Respect the Jury

2. The jury sits on a trial at great personal inconvenience – some members are away from their jobs or their tertiary education and often have to work outside court hours to make up for this; others have problems with childcare and getting their children to and from school and all members have personal lives, which they would like to get on with. For all of this, they are being paid a pittance.

Jurors also have been brought up on a diet of spectacular court scenes in movies and on TV as well as in books and media articles.

They want a performance from you. They expect you to be competent, committed and convincing. They hope you will also be charismatic.

If you fail to deliver, it is your client who will pay the price, not you.

So, no pressure then!

Respect the Court

3. The jury will inevitably respect, admire and like the presiding judge.

It is important that you do not put yourself in the position where you are criticised in front of the jury by the judge.

In the case of closing addresses, the most vulnerable areas for being criticised are being wrong on the law, inaccurate in your quotes or putting the evidence unfairly.

It is embarrassing to be criticised in the summing up by the judge. It is humiliating to be stopped in your address and criticised by the judge.

You should also ensure that the judge does not get any surprises in your address. If, for example, you propose to produce a summary of references to the evidence, you should provide a copy to the Crown as soon as possible and raise the issue with the judge well before your address. Judges do not want surprises in front of the jury.

Part of your obligation to the court is that you need to be in a position to close at short notice.

In a short trial, you should have a draft address prepared prior to the trial beginning. In a longer trial, you should have your address prepared by the time the Crown finishes its case. Obviously you can modify the draft as you go along.

Never assume that you will have an opportunity to prepare the address after you have finished your case.

The judge may have told you that he had a lengthy sentencing to do on Friday morning and so you rely on this to think that you will not be addressing until the following Monday. Inevitably, on Friday morning the judge will announce that the sentencing has been adjourned until the following week so that now all addresses can be accommodated that day.

In the same way, fellow defence counsel may tell you that they intend to call evidence. Inevitably at the last minute they do not and again if you are not prepared, you find yourself in a compromised position.

Respect Other Parties

4. There are a number of parties in every trial, each playing their own role. Each person is an important and integral part of the trial. You should ensure that you show respect and courtesy to the escort staff, the court staff and other counsel both in your conduct and your references to them in the course of your address. Always refer to the prosecutor as either your learned friend or the learned prosecutor and address court staff by their roles rather than by their names.

Respect Yourself

5. You are a member of a learned profession. You have worked hard to become qualified and somehow you have managed to get on a legal aid list or join the prosecution. Presumably by addressing a jury, you are now fulfilling your professional ambition. Do not let yourself down. Your reputation is based on your performance in court. Counsel talk amongst themselves, police officers talking amongst themselves, court staff talk amongst themselves and judges also talk amongst themselves. When jurors leave the courtroom they talk amongst family and friends. For your professional reputation, you really do want these people to talk well about you. The only way to achieve this is by delivering on the day.

Preparation

6. The three Ps for jury trials are preparation, preparation and preparation.
Earlier speakers have addressed the issue of pre-trial preparation.

Before preparing your closing address, you should carefully read the transcript. You should also re-examine the exhibits including the photographs. It is extraordinary how often with the benefit of reading the evidence you find helpful information in the exhibits, which you earlier overlooked.

After you have drafted your closing, you should re-check the law to ensure that it is recorded accurately and reflects any recent case law. You should also check and re-check all references to evidence.

Finally, it is good practice to read through your address aloud to make sure it sounds like an address, not a legal opinion.

Presentation

7. You need to present an organised and efficient address.

Always remember you are meant to be convincing with the jury. Talk to the jurors, not at them.

The general practice is to address from a lectern at the end of the bar table. Some counsel address from where they are seated. It is a matter of personal preference but I prefer going to the end of the table and facing the jury directly rather than side on.

Some practical matters:

- a) Clear the desk around the lectern. You don't want to knock over a glass of water, lose your papers or have your view blocked by your files.
- b) It is a wise precaution to have your address in a folder. If you have pieces of paper, they can be dropped, get in the wrong order or be mislaid. I also carefully tabulate the notes of evidence if I am going to quote from it and also highlight the passages.
- c) When counsel begin their careers, most are nervous, they grip the lectern and often have nervous gestures such as tapping their feet or legs, playing with pens or pencils, or keeping their hands in their pockets. You should be aware of these mannerisms and try to avoid them.
- d) You should speak slowly, clearly and loudly enough for the juror at the back of the jury box to hear. Imagine how your client feels if the jury asks you to speak up. Even worse imagine what the jury thinks of an advocate who can't speak up.
- e) Have eye contact with the jury. Take the opportunity to look at different members of the jury and try to catch their eye.
- f) You need to use appropriate language. You should avoid legalese, avoid police talk (eg "male Caucasian"), keep away from scientific expressions and never use a long word when a short word will always suffice and will often be more effective. Remember the jury is listening to you, not reading your notes.
- g) Often it is good practice, particularly in long addresses, to tell the jury what you intend to do. For example, you may tell the jury at the beginning that it is likely that your

address will last until after lunch but will finish before the end of the day. You may also tell the jury that you have divided your address into five parts and then list those parts.

This is a courtesy to the judge and the jury and provides a map so that other people in the courtroom know how your address is progressing.

- h) Finally, it is interesting to hear the addresses of other counsel. By all means steal their lines but don't try to imitate them.

Avoid Personal Opinions

- 8. Never tell the jury what you think or believe.

Your opinion is not relevant and not admissible.

Instead of saying "I believe the witness", you should say "it is a matter for you but you may believe the witness and accept their evidence".

Do not Apologise

- 9. You are a highly qualified professional. You do not waste the time of the court or of the jury. You only address on issues that are relevant and helpful. You have nothing to apologise for. The fact that it is 4.55pm and the judge has asked you to close is not your fault and you need not apologise. Also, you should not be apologising for the length of your address or the fact that you need to go into some detail in the address. If it is necessary to make a long complicated address, so be it.

Quotes

- 10. In modern jury trials, the jury is provided with a copy of the notes of evidence when they retire.

You should therefore keep quotes to a minimum.

It is disappointing how often when you look up the transcript, it does not reflect how effective your cross-examination was. This is because a transcript does not capture the mood in the courtroom and does not show the manner in which the questions were asked and answered. Often it is more effective simply to refer to the cross-examination in a general way rather than read from the transcript.

Generally the answers from witnesses do not scan well. Unfortunately this also applies to the questions from counsel. The result is that if you quote the evidence, it often sounds disjointed and incoherent.

If you do quote, please ensure that you do so accurately. In most cases when you quote from the transcript, you should give the judge and the jury the reference by page and line.

Be careful not to be unfairly selective about your quotes because the judge could direct the jury that your quote did not reflect the overall evidence of the witness.

You are In Charge

11. From the moment the judge calls upon you to address until you sit down, you are effectively in control of your own destiny.

You have the full resources of the court at your disposal. Use them.

If you require aids such as PowerPoint, a whiteboard, a DVD player or other equipment, you should arrange this well prior to your address. As a matter of courtesy, please make arrangements with the Registrar as early as possible as there are often other courts wanting to use the same equipment.

If during the course of your address you need something physically done, you need only ask the court staff and they will oblige.

In general, if you want the jury to note something or to look at an exhibit, you need only ask.

In the case of long addresses, the judge often invites counsel to indicate an appropriate time when the adjournment should be taken. You should keep an eye on the clock and, at a time that is convenient to you, advise the court. No doubt the judge will oblige. A word of caution however, the jury will be anxious for the break so my advice is to take the break earlier rather than later.

Structure

12. You must have a structure for your closing. That is, you must have a logical arrangement of topics and know what material you are covering under those headings. There are no exceptions to this rule.

Some of you may have seen counsel such as Kieran Raftery QC addressing without notes. This does not mean he is addressing without a structure. It simply means that the structure is in his head rather than on a piece of paper in front of him. It is impressive to do it without a piece of paper. My advice however is by all means try this at home, but not in front of a jury. You can deviate from your notes but do not try to address without the security of having notes. It is very easy to get stage fright.

The closing argument should parallel the way the case has been handled throughout. The final address should therefore be consistent with the general trial strategy that has been pre-set and reinforced in the opening statement, the cross-examination and the defence evidence.

The address can be divided into four parts. The introduction, the general legal principles, the argument and the conclusion. The length and the complexity of these parts obviously depend on the trial itself.

Introduction

The first issue is how are you going to begin your address?

It is a matter of style rather than form but in general, the different approaches reflect the length of the trial.

The first is the classic approach and is particularly suitable for longer trials. You begin by commenting on the length and complexity of the trial, acknowledging the personal sacrifices the members of the jury have made by sitting through the trial and thanking them for their conscientious attention throughout the trial.

The second approach is to comment on the immediate circumstances surrounding your address and emphasise the importance of the address to your client.

The third approach is to simply get on with it.

General Legal Principles

The next stage of the introduction is to go through the general legal principles. These include the onus and standard of proof, prejudice and sympathy and, where appropriate, legal concepts such as parties, inferences and circumstantial evidence.

Obviously the onus and standard of proof are very important. In a long trial you should address these issues both in your opening and your closing. In a very short trial, you may only wish to address these issues once, which would be in the closing.

Issues of prejudice and sympathy are case-dependent. If there is an obvious issue of prejudice such as the charges being related to child abuse, this should be confronted in your address.

Argument

This is the section which covers the argument or submission you are putting to the jury. In essence, you are refining the legal issues and highlighting evidence, which supports your argument.

Ultimately you need to deal with each charge separately.

You need to begin by setting the scene. This may only take a few sentences.

You then turn to the charge itself.

This is easiest done by reference to the charging document, a copy of which the jury will have.

You can ask the jury to pick up the document and then read the charge aloud. You should identify the legal issues which are not in dispute and the ones which are. For example, it may be that identification, date and place are not in issue. The only issue may be, for example, intent.

If you have a copy of the judge's question trail, this can assist in identifying the issues.

You should then take the jury through the Crown evidence highlighting matters of inconsistency and unreliability.

This evidence should then be contrasted with the defence evidence or if there is no evidence, the cross-examination and/or conflicting evidence from other witnesses.

You must confront the weaknesses of your case.

No doubt the Crown has already pointed them out in their closing and the jury is waiting for you to respond.

For example, if your client has made admissions, which he now wishes to retract, this must be confronted and dealt with. Under no circumstance should you ignore the weaknesses of your case. Sometimes you can even turn a weakness into a strength. For example, a witness may not be able to recall a lot of detail, but the explanation may be that they were so traumatised by the events, they can no longer recall rather than it being an example of unreliability.

Conclusion

The concluding remarks are crucial. They should encapsulate your argument and forcefully submit to the jury that the only appropriate verdict is the one you are seeking.

Let me give you a prosecution example. This is taken from the concluding remarks of the address in the Charles Manson “Helter Skelter” murder trial after Mr Manson and others were charged with the murder of Sharon Tate and six other victims:

“Under the laws of this state and nation, these defendants were entitled to have their day in court. They got that. They are also entitled to have a fair trial by an impartial jury. They also got that. That is all they are entitled to. Since they committed the seven savage senseless murders, the people of California are entitled to a guilty verdict. Thank you.”

In essence, in most cases what you want to tell the jury is that although there is some evidence against your client, it is not enough for them to be satisfied of guilt beyond reasonable doubt. How you say that is a matter of style.

If at the conclusion of your address, you suddenly realise that you have missed a reference to some aspect of the evidence, please do not be tempted to add an addendum. This would undermine the impact of your address. The piece of evidence is probably not nearly as important as you think it is and besides, the chances are if it is important, the jury will be well aware of it.

Summing Up

13. Following your address, the judge will sum up.

If you have issues about any aspect of the summing up, you should raise them with the judge immediately after the jury has retired.

It is not your problem whether the judge wishes to bring the jury back or even accept your concerns. It will however be your problem if the matter is raised in the Court of Appeal and you have failed to raise the issue at the time.

Postscript

- 14 Always remember, you are under scrutiny by at least one member of the jury at all times during the trial. They notice everything about you.

Many counsel during addresses of other counsel and/or the judge's summing up work on their computers. It may be you are doing important work, but be aware it looks as if you are bored and disinterested in the proceedings. Even worse, to some jurors it looks as if you are being rude to the judge and disrespectful to the

