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CLOSING ARGUMENTS: SOME THOUGHTS TO LEAVE THE JURY WITH

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I. OVERVIEW

The following thoughts on creating an effective argument are a combination of those elements that I have used and others that have been espoused by trial lawyers across the state in papers, in lectures, in conversation and from actual courtroom arguments. Some of the examples included in this paper have even proved to be successful!

II. THEORY AND PURPOSE OF CLOSING ARGUMENTS

Argument is the last chance for the trial attorney to persuade the jurors of the case's merit. (Persuasion is the obvious goal, and one of the benefits is that you do not have to pay court costs!) Trial lawyers train all their lives for closing arguments and rousing finales are the epitome of our art. Effective arguments draw from a wealth of life's experiences, ranging from powerful sermons to anecdotes learned at a grandfather's knee. A pithy phrase gleaned in a bar room conversation can combine with the facts of the case to galvanize the jury into an efficient engine of justice.

The order and timing of argument are the two strongest features of its effectiveness; those two elements are also its weakest points. One must remember that by this stage of the trial, jurors are tired of sitting in the courtroom, bored with technical evidence, and ready to be relieved of their duties. The task for the attorney of capturing, holding, and focusing the jury's attention becomes a formidable one.

There are as many theories about the best way to argue a case as there are numbers of attorneys. As one begins to analyze various arguments, however, many elements appear to be fundamental, and are then bolstered by the individual's own sense of style and methods of embellishment. The late Warren Burnett, a veritable high priest of the English language said "[p]lagiarize with enthusiasm, plagiarize without shame. A phrase, a description, a metaphor, perhaps an entire speech, presented by the lawyer appropriately might be just what is needed to move a juror to your side of the case."

III. GROUND RULES FOR SUCCESSFUL ARGUMENTS

A. Reinforce Positive and Negative Points

Argument is the time to reemphasize the positive points of your lawsuit and the negative aspects of your opposition's case. It is not necessary or advisable, to repeat all (or even a majority) of the testimony elicited during trial. It is important, however, to reinforce crucial facts and the conclusions to be drawn from those facts. Your attitude and your belief in these conclusions is important in arming your jurors to carry the day in the jury room.

B. Explain the Burden of Proof

During argument, the preponderance of the evidence concept as defined in voir dire

should be explained and the pivotal facts introduced into evidence should be recounted, reminding the jury that as promised during voir dire, your client has shown that the greater weight and degree of credible evidence is resting on his or her side of the scales of justice. In Texas, the court's charge will define "preponderance of the evidence," but it is helpful to explain the definition. One technique of illustrating this concept visually is to create a large chart with a replica of the scales of justice. The scale will be tipped by the side which has the greater weight and degree of credible evidence. On each side of the balance list each credible witness that added weight to that side of the scale. (Often, an adverse witness can add weight to your side of the scale.) The chart allows the jury to see that even if the scale is tipped ever so slightly, that side should be the one who is favored in the verdict. This is a device that has been used in courtrooms across the country for many years because of its simplicity and success.

Another key in explaining the burden of proof is to separate civil from criminal standards. The following argument might be used for that purpose:

> My opponent told you in voir dire that he used to be a prosecutor. When he was prosecuting for the state he had to prove beyond a reasonable doubt that the individual had actually committed the crime he was accused of. That is because life and liberty were at stake. Let me remind you, though, I haven't tried to meet that burden on behalf of the plaintiff. The law says that all I had to do was put on the greater weight and degree of credible evidence. Each time you saw a witness you could judge him for yourself. You could make your own determination after the cross-examination as to whether the witness was credible or not. Since we're talking about money in this case, not life and liberty, and since my burden is not the one defense counsel used to have when he was a prosecutor, you can answer each and every issue of the charge the way we've asked you to – on behalf of the plaintiff – even though you might have mixed emotions about your answer.

C. Answer the Issues

Go over the court's charge and suggest how each issue should be answered. As discussed later, there are certain parameters, but the jury must understand the questions to be answered. After explaining the purpose and issues of the charge, it is often a good idea to have the actual issues reproduced on large charts with answer blanks. The charge is one of the most important parts of the trial and yet, is one of the most difficult aspects for the jury.

There is seldom a great deal of time between the charge conference and arguments. It is possible, however, to anticipate a good portion of the charge. Those portions can be reproduced and enlarged in the same format that will actually be used. When arguing the charge, the key definitions can be shown to the jury and the issues can be individually addressed and answered appropriately.

D. Emphasize the Jury's Role

The importance of the jury's duty and the finality of the verdict must be made clear.

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