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PRIMER FOR CLOSING ARGUMENTS

DO'S

There are some basic components of a well-written closing argument:

- Argue the evidence of your case, but highlight the important components don't waste time on every single piece of evidence —you don't want to bore the jury.
- Use a chronology/timeline, and make sure to have evidence to support every event on your chronology/timeline.
- Use demonstratives to keep the juror's attention & emphasize key evidence.
- Argue the theme of your case.
- Use "pull out quotes" to highlight critical language in documents.
- Argue the jury instructions—pick the top 5 or 6 & explain them to the jury.
- Tell the jury how to answer the Verdict Form.
- Ask the jury for a specific amount of damages.
- Before asking for damages, argue liability & causation.

During closing arguments, counsel may display and discuss tangible objects involved in the transaction (real evidence) that have been admitted into evidence.1 He may use those objects to illustrate and support his argument. Counsel may also use tangible objects created for the trial to help illustrate and augment testimony (demonstrative evidence).1.50 They may be graphs, charts, diagrams, models or pictures. He may also use visual aids created specifically for the closing argument, such as a diagram on a blackboard, or a list of the elements of damages in a personal injury case. He may use his own hands or other parts of his body for the purpose of illustrating his argument. Also, there is no prohibition against using any other object in the courtroom for illustrative purposes. The ultimate question that a court must resolve, is whether the use of the object will unfairly introduce new evidence or is it being used merely for the purpose of fairly illustrating the argument. If the court determines that the use of the physical objects or visual aids will be of assistance to the jury, rather than mislead or confuse them, the court will in its discretion ordinarily permit its use.2 However, a jurisdiction may have a statute or case law prohibiting or restricting the use of certain evidence during closing arguments.3

3 Lane Goldstein Trial Technique § 23:35 (3d ed.)

Counsel may during his closing argument read portions of documents that have been admitted into evidence. Such documents may include letters, contracts, leases, rules and regulations, standards, hospital and medical records, etc. Portions of such documents may even be photographed and enlarged for the purpose of making it easier for the jury to view during the arguments.1

3 Lane Goldstein Trial Technique § 23:36 (3d ed.)

Generally contents of books, articles, and printed material of various types that have not been admitted into evidence cannot be read to the jury or quoted during closing arguments. Unless they have been admitted into evidence, the great weight of authority, holds that counsel may not discuss their contents. An exception may arise with reference to passages out of the Bible, Shakespeare or the like that are a matter of "common knowledge."1 Factual data appearing in printed material cannot be "introduced into evidence" for the first time during closing arguments.

3 Lane Goldstein Trial Technique § 23:37 (3d ed.)

The best way to avoid misconduct in closing argument is to prepare and craft the close in a careful manner. A primary function of a good close is to pinpoint for the jurors specific items of evidence which compel a favorable result. If you have properly prepared, those items of evidence are readily identifiable in the record (along with all reasonable inferences arising from that evidence) because they are either items that: (i) you selected in advance to prove your themes, or (ii) opposing counsel selected to prove his themes, but which had the unintended consequence of defeating his case and bolstering yours. Accordingly, there should be no necessity to risk "misstating the evidence."

Second, by hewing to the exact terms of instructions settled by the court, objections of misstating the law are obviated.

Third, a delivery which reflects the commitment and sincerity of counsel accomplishes more (with perfect safety from objection) than any "vouching for witnesses," expressing personal opinions, attacking the court or counsel, or employing inflammatory language.

The most important objective of an effective closing argument is to portray the evidence succinctly and clearly, in the most favorable and logical fashion possible in order to convince the jury of the merit of your client's position. Interruptions by opposing counsel based upon your improper conduct not only disrupt the flow of your closing argument, but also risk conveying a message to the jury that you are not playing by the rules. A sustained objection directed to your own conduct can undermine the credibility of your entire closing argument and the position of your client.

Best overall discussion: Steven Lubet: *Modern Trial Advocacy*: *Analysis and Practice* (3rd Ed. 2004)

DON'T'S

There seem to be some pretty common prohibited activity during closing statements:

- waive closing argument
- misstate the evidence or law
- vouch for a witness or comment on credibility of a witness
- state personal beliefs
- appeal to prejudice or bigotry
- appeal to emotion, sympathy or passion
- attack a judge's ruling on evidence
- use improper language that excites prejudice or passion
- invoke the "Golden Rule"
- comment on privilege
- exceed the scope of rebuttal by bringing up new theories of the case, sandbagging
- use legalese
- read the closing argument
- object during closing unless it's really, really objectionable
- wait until the last minute to write your closing argument

It is improper to discuss "evidence" that has never been offered. It is also improper to discuss offered "evidence" that has been excluded.1

The nature of the "evidence" and the surrounding circumstances will determine whether or not such discussion is prejudicial error.2 A prompt curative instruction from the court may remove prejudice.3

3 Lane Goldstein Trial Technique § 23:26 (3d ed.)

The scope of closing argument is within the discretion of the trial court, and rulings thereon will not be disturbed absent a gross abuse of discretion.[1] Closing argument must be confined to the evidence adduced at trial and the reasonable inferences that can be drawn from that evidence.[2] Counsel may not express personal opinions concerning the evidence or witnesses.[3] Counsel may not make arguments that appeal to the prejudices of the jury,[4] nor inject collateral issues into closing arguments.[5] Prosecutors may not comment on the post-advisement silence of a defendant.[6]

H. Patrick Furman, Avoiding Error in Closing Argument, Colo. Law., JANUARY 1995, at 33

Clearly, counsel may argue whether a witness has passed the credibility test[8] and may tell the jury that the jurors make the determination of whether a witness is credible.[9] However, the right to comment on the credibility of witnesses is not unlimited. Counsel may not argue credibility in terms that reflect their personal opinions.[10] This rule is particularly strict for prosecutors: "Expressions of personal opinion as to the veracity of witnesses are particularly inappropriate when made by prosecutors in criminal trials."[11] Thus, a statement that a witness

"lied" during his or her testimony has been held inappropriate,[12] as has a statement that a witness was "honest."[13]

H. Patrick Furman, Avoiding Error in Closing Argument, Colo. Law., JANUARY 1995, at 33

Closing argument should be confined to issues relating to guilt or innocence.[16] It is improper for counsel to inject collateral issues, such as sympathy for a defendant or fear about the general crime problem, into closing argument. For example, it has been held improper for either counsel to ask jurors to "stand in the shoes" of a witness, victim or defendant.

H. Patrick Furman, Avoiding Error in Closing Argument, Colo. Law., JANUARY 1995, at 33

Arguments drawn from matters of common knowledge, matters about which the court will take judicial notice and well-known historical facts are proper.[1] They may be used for the purpose of explaining, supporting and emphasizing the evidence. There need not be formal evidence presented in order to justify such argument.

3 Lane Goldstein Trial Technique § 23:15 (3d ed.)

It is generally improper for counsel to argue facts that are a matter of his own personal knowledge or opinion.[1] Similarly, counsel may not mention his personal beliefs regarding the strength of the evidence.[2] As a matter of fact, most State Codes of Professional Responsibility provide that an attorney shall not assert his personal knowledge of the facts in issue, except when testifying as a witness.

3 Lane Goldstein Trial Technique § 23:16 (3d ed.)

Counsel should suppress exhibitions of personal animosity.[1] Personal attacks on opposing counsel are perhaps the most common breach of this rule.[2] Charges that opposing counsel manufactured evidence, suborned perjury, was untruthful or engaged in other unethical behavior are highly improper and are generally considered by courts to be incurable.[3] In determining whether counsel's remarks constitute reversible error, courts consider: (1) the degree to which counsel's remarks have a tendency to mislead the jury; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.[4] Attacks on opposing counsel's tactics or strategy are usually permissible.[5]

3 Lane Goldstein Trial Technique § 23:17 (3d ed.)

It is highly improper for counsel in his argument to the jury to misstate the law.[5] However, a misstatement concerning the law may be cured by an appropriate instruction to the jury.[6] Furthermore, the court can exercise its discretion in limiting closing arguments to prevent counsel from arguing abstract legal propositions.[7] It is the court's responsibility to instruct the jury as to the applicable law.[8]

3 Lane Goldstein Trial Technique § 23:20 (3d ed.)
Counsel has the right to state to the jury the propositions of law upon which he relies and to predicate his argument on such propositions. Consequently, it is reasonable to assume that instructions given or to be given by the court may serve as a basis for his argument.[1] Counsel cannot argue the law based upon instructions that have been refused.[2] The risk that the court may refuse the instructions and impliedly condemn the argument is eliminated by a conference and a ruling on the instructions before the argument.

3 Lane Goldstein Trial Technique § 23:21 (3d ed.)

Most courts take the position that it is improper to address jurors by their name or to otherwise single them out.[1] Such conduct may impair the juror's obligation to remain independent in his judgment. The error may be harmless, especially where the court has instructed the jury to disregard counsel's reference and where counsel is admonished by the court that such remarks are improper. Of course, the error may be waived by opposing counsel if he fails to make a timely objection.

3 Lane Goldstein Trial Technique § 23:22 (3d ed.)

The general rule is that it is improper to appeal to the sympathy of the jury.[1] They must not be diverted from determining their verdict on the basis of the facts. For example, it is improper for counsel to suggest that the jury “place themselves in the plaintiff's shoes” in determining an award for damages.[2] However, some jurisdictions may give the court discretion to admit such arguments.[2.50]

3 Lane Goldstein Trial Technique § 23:23 (3d ed.)

There is a great frustration when an attorney believes his opponent's objection was sustained improperly. The temptation is to refer in closing arguments to the objection, thereby implying that supporting evidence was kept from the jury. However, it is improper to comment upon an opponent's objections that have been sustained. It is also improper to suggest that the court erred when it overruled one of counsel's objections. Counsel must not complain about any of the court's rulings in closing arguments.[1]

3 Lane Goldstein Trial Technique § 23:25 (3d ed.)

Requesting the jury to respond to special interrogatories must be handled very delicately. In many jurisdictions, it is proper to urge the jury to answer the interrogatories in a specific way.[1]

3 Lane Goldstein Trial Technique § 23:29 (3d ed.)

However, it would be improper to inform the jury that they should harmonize the answer to the interrogatory with a specific verdict.[2] That is, it is improper to advise the jury of the effect of specific answers to the interrogatories.

3 Lane Goldstein Trial Technique § 23:29 (3d ed.)

In a personal injury action, any comment deliberately made to inform the jury that the defendant is insured for the accident will likely constitute reversible error.

3 Lane Goldstein Trial Technique § 23:31 (3d ed.) Or that the Plaintiff was insured.

Unless the wealth or poverty of party litigants is in issue, there should be no reference to their financial status.[1] Contrasting the financial status of the parties will have a tendency to encourage jurors to possibly favor one side or the other. As to whether there is prejudicial error in connection with an improper argument dealing with the financial status of the parties rests largely in the discretion of the trial court.[2] The trial court may correct such improper argument by instructing the jury to disregard such statements.

3 Lane Goldstein Trial Technique § 23:32 (3d ed.)

Requesting jurors to put themselves in the position of a party is commonly known as a “Golden Rule” argument, and this is generally considered improper.[1] This may be done by asking them “what would you want if it were your arm?” or “what would you have done if the plaintiff darted out in front of your car?” An improper “golden rule” argument can also be implied, even if the argument does not directly ask the jurors to place themselves in the victim's position.[2]As with the prosecution, it is improper for the defendant's attorney to ask the jurors to imagine themselves in the defendant's position.[3]

3 Lane Goldstein Trial Technique § 23:33 (3d ed.)

When your opponent transgresses, consider whether making an objection is worth the risk of being overruled (which has the obvious impact of suggesting to the jury that your opponent has correctly stated the evidence). If you have your turn coming up, it may be wiser simply to show the jury—with specific testimony or exhibits—how unfairly counsel has presented the case to them.

4 Bus. & Com. Litig. Fed. Cts. § 42:11 (3d ed.)

Coreas v. U.S, 565 A.2d 594 (D.C. Ct. App. 1989) (where prosecutor sandbagged defendant by bringing up new theory during rebuttal, resulted in reversal).