Cheatwood Inn of Court/Judge Jenkins Pupillage Fact Pattern

Gator Beer, a beer manufacturer, kept empty beer cans waiting to be filled at a local warehouse. The empty beer cans were open. Gator Beer wanted to fumigate the warehouse to kill any bugs and hired Bugs are Us to conduct the fumigation. Bugs are Us fumigated the warehouse by using a substance, which contained a chemical called Chloropicrin. Chloropicrin is also used in tear gas.

Subsequent to the fumigation, Gator Beer checked the cans and found that some of the Chloropicrin had leaked into the lining on the inside of the cans. Each can held approximately 11 nanograms of the Chloropicrin, which Gator Beer believed made the cans unusable. Gator Beer then sued Bugs are Us for the value of the cans, which was in excess of $1,000,000.00, and for the resulting loss of sales. Bugs are Us' defense was that the Chloropicrin was harmless. The case was set for trial. Bugs are Us was represented by Mr. Eric "Superstar" Nowak, a hot shot cowboy lawyer. Gator Beer was represented by Ms. Jessica "Awesome" Goodwin, a very poised and skilled lawyer.

Prior to beginning the trial, Bugs are Us filed a Motion in Limine to exclude evidence that Bugs are Us had previously been sued for an incident involving a different manufacturer, Seminole Soda Company. In that case, Bugs are Us fumigated a warehouse owned by Seminole Soda, which also contained open cans. However, unlike the conscientious Gator Beer, Seminole Soda did not check the cans after the fumigation and allowed them to be filled with product and sold to consumers. Some consumers became ill after ingesting soda from the batch of cans that were in the warehouse at the time of the fumigation. The affected consumers reported the matter to the FDA. The FDA investigated the complaints and issued an immediate recall for Seminole Soda manufactured during the dates immediately following the fumigation. The consumers filed suit against Seminole Soda and Bugs are Us. Seminole Soda filed a crossclaim against Bugs are Us. The entire suit was settled prior to trial. Judge Crabtree granted Bugs are Us' Motion in Limine, stating that the incident was too remote in time and its probative value is substantially outweighed by the danger of unfair prejudice.

Gator Beer hired Dr. Cheng as its expert. Dr. Cheng graduated from Shanghai University in China with BS and PhD degrees in biochemistry. He is currently employed by the World Health Organization as an expert in biochemistry. He is most widely known for his role in creating the swine flu vaccine, which has been controversial for significant, and sometimes, deadly side effects. He has also testified as an expert in many forums, including as an expert on behalf of consumers of the lipstick brand, Vavoom, who filed a class action lawsuit alleging that they were poisoned by lead contained in the reddish colors of the lipstick. However, the consumers lost at a bench trial because they were unable to prove that the level of lead in the lipstick was enough to cause any ill effects upon the consumers. At trial, Dr. Cheng testified on direct examination that ingesting 11 nanograms of Chloropicrin would be fatal to many people.

Bugs are Us hired Hoss Beuregard from Arkansas as its expert. Mr. Beuregard earned his undergraduate degree in Farm Studies at Grand Canyon University and a Masters Degree is Veterinary Virology from the University of Quaintsville. Mr. Beuregard had a little problem with plagiarism in graduate school with respect to an article he published on the effects of parasites in goats. He was suspended from the University of Quiantsville for a year, but was allowed to return the following year to complete his degree. There was also some controversy

surrounding pictures that appeared on Mr. Beuregard's Facebook page involving his and Bugs are Us CEO, Beetle Wright's, party antics as members of the fraternity, Alpha Beta Delta, at Grand Canyon University.

Mr. Beuregard testified that it was his expert opinion that Dr. Cheng's assertion that 11 nanograms of Chloropicrin would be fatal, was baloney and that such an amount wouldn't hurt anybody. He testified that he confirmed his expert opinion by experiment when he gave 11 nanograms of Chloropicrin to several animals on his farm and nothing happened to them.

Gator Beer CFO, Tyler Malt, testified, in Gator Beer's case in chief, that Bugs are Us' contamination of the subject cans has caused delays in production of Gator Beer. As a result, Gator Beer has suffered major loss in sales. In fact, Gator Beer may be forced to shut down at least two plants in the Southeastern United States costing the company tens of millions of dollars in lost sales.

On direct examination, Mr. Nowak asked Mr. Beuregard a few questions about what such a minor amount of the substance would do to a person, if anything. Mr. Nowak asked if there was any smell to the substance and handed Mr. Beuregard the glass vial with the Chloropicrin in it. Mr. Beuregard smelled it and indicated that there was no smell or taste. Mr. Nowak then smelled the substance and agreed that it did not have a smell. Mr. Nowak then walks over to the jury, asks them if they want to smell it and hands the first juror the vial. The first juror smells the vial and indicates that he doesn't smell anything. The vial makes its way around to the 6th juror, who states emphatically that she doesn't want to smell it.

On cross examination, Ms. Goodwin asks Mr. Beuregard, "You don't really know whether the Chloropichrin has a taste? You've never tasted it?" Beuregard then says, "That's right—but if it doesn't have a smell, it doesn't have a taste! It won't hurt anybody!" Ms. Goodwin then comments, "But—you've never tasted it!" Beuregard then says, "So what?"

In her cross examination of Beetle White, Ms. Goodwin alluded to another incident Bugs are Us had involving Chloropicrin. Mr. Nowak objected, stating that Ms. Goodwin had violated the Motion in Limine Bugs are Us had filed and the Court had previously granted, and made a Motion for Mistrial. Judge Crabtree denied Mr. Nowak's objection, stating that Ms. Goodwin's question was vague and did not actually elicit the excluded facts. However, he cautioned Ms. Goodwin not to ask anymore questions of that nature as they may violate his Order in granting the Motion in Limine and he would then be forced to grant Mr. Nowak's Motion for Mistrial.

CLOSING ARGUMENT POINTERS

TACTICS, STRATEGY, TECHNIQUES

1. Provide jurors with arguments that are memorable, logical, and easy to articulate so jurors can use the arguments to persuade other jurors.

2. Structure

    a. Argument should be organized—beginning, middle, and end.

    b. State your theme right at the outset.

    c. Tell the story with facts from the evidence; make your second best point first, then discuss any weaknesses, then conclude with your best point.

    d. Appeal to the jurors' logic and common sense and, above all, their emotions.

    e. Remember: Jurors must want your client to win.

3. Be yourself—nothing is more important than your credibility and sincerity.

4. Don't read your argument; use as few notes as possible—best if none at all; rehearse.

5. Use stories and anecdotes.

6. You want the jurors to draw their own conclusions rather than tell them what conclusions to draw. Better to argue, "Mr. Beauregard did not answer questions directly, he did not make eye contact with you when he testified, he squirmed in

his chair when I questioned him on cross examination. You should consider these things when reaching your conclusion as to his credibility" rather than "The only reasonable conclusion you can draw from Mr. Beuregard's demeanor, body language, and evasive answers is that his testimony was not credible."

7. Practice Tip: Before trial begins, write down your notes for your anticipated closing argument on the left side of a page with a line drawn vertically down the center. During trial, for purposes of your closing, you can make notes on the right side of the page from the opposing counsel's opening statement, from testimony of witnesses, and opposing counsel's closing.

8. Delivery of closing argument: Consider your tone of voice, making eye contact, your body language, the pace of your delivery; do not use word bloat or legalese. For example, don't say "Mr. Beuregard did not appear to have the requisite educational experience to evaluate the substantial deleterious properties inherent in Chloropicrin" rather "Mr. Beuregard did not have the training to understand how harmful Chloropicrin is."

9. Point out and explain weaknesses in your own case.

10. Remember it is an argument not just a summation.

11. Emphasize the strength of your case—present and explain your theme; discuss the demeanor of your witnesses; explain how your case fits in with the instructions the court will give; use analogies.

12. Explain the weaknesses of the opposing party's case. Point out inconsistencies and impeachment of witnesses, describe the demeanor of their witnesses. For example, long silence before answering, did not look jurors in the eye, witness squirmed during cross-examination, contrast of witness demeanor between direct examination and cross-examination, point out failure of proof that may have been

promised in the other side's opening, make a point about missing witnesses or missing evidence to the effect that logically the missing witness would have corroborated the other side's version of the case but their failure to call the witness suggests otherwise.

13. Use of chart showing damages claimed: if you've created or used a chart during the trial make sure it is admitted into evidence; it is better and more credible when you refer to the chart in closing if it has been admitted into evidence; this is better than just putting a dollar amount on the board for the first time during your closing; also the jury may refer to the chart during their deliberations if it is in evidence.

14. Get jurors invested in the argument during the first few minutes; don't waste time with platitudes at the outset.

15. If you intend to use charts or demonstrative evidence during closing, show them to opposing counsel ahead of time and get them approved to avoid embarrassment during closing.

16. In closing, it is important to have a conversation with the jurors rather than lecture to them.

17. When analyzing potentially damaging testimony consider telling the jury "Let's look at it together you and I."

18. Make objections during the opposing counsel's closing only if the argument is clearly improper and prejudicial.

19. Consider use of rhetorical questions as a way to allow jurors to reach their own conclusions and, perhaps, as a way to avoid making improper argument. For example, you may want to argue, "Would anyone want to buy beer in cans treated

with Chloropicrin?" rather than, "Would you buy beer in cans treated with Chloropicrin?"

20. Dealing with experts—use jury instruction which suggests that jury can consider knowledge, skill, experience, training, or education of the witness, and reasons given by the witness for his/her opinion.

21. The court will instruct the jury "Your job is to determine what the facts are. You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence." Make use of this instruction during your closing.

22. Be brief but thorough.

23. Start early in preparing your closing—maybe even at the very beginning of the case.

24. Be prepared—know your case and your opponent's.

25. If defending, consider whether and how to talk about damages. For example, you could introduce your argument on damages by suggesting that the plaintiff's case on damages has holes in it just like the plaintiff's case on liability.

ETHICS AND PROFESSIONALISM ISSUES

1. Improper Arguments.

   a. Golden Rule—you cannot ask the jury to place themselves in the position of a party (or victim). (Consider: "Would you buy beer in cans treated with Chloropicrin?" Does this place jurors in the shoes of a party or a victim?) (Must object.)

   b. Lawyer cannot express his/her personal opinion as to the justice of the cause, credibility of a witness, or whether a party was right or wrong (Rule 4-3.4(e)).

   c. An otherwise improper argument may be okay if it is a legitimate response to an argument of opposing counsel.

   d. Always consider the need for a motion for mistrial—instruction to jury may be insufficient. Generally you must object, and then if the objection is sustained, move for a mistrial before the jury retires to preserve error for appeal. Of course, you run the risk of having the judge grant a mistrial when you may not really want it.

   e. You cannot ask a juror to send a message to the community. (A claim for punitive damages may be exception.) (Must object.)

   f. You cannot appeal to the jurors' fear or sympathy. For example, "Unless you render a verdict against Bugs R Us such contamination will continue and who knows who will be harmed!"

   g. You cannot argue facts not in evidence. For example, you cannot argue what you may have alleged in the complaint if there are no supporting

facts in evidence. You cannot argue, in a case with a child claiming damages for death of his/her father, that the mother is attractive and will likely remarry (Is drinking Chloropicrin from a glass arguing facts not in evidence?) (Another example—"Plaintiff's counsel routinely brings frivolous cases.")

h. You cannot challenge opposing counsel to explain something if this would require opposing counsel to testify in response.

2. Follow the rules, especially rulings on motions in limine.

3. Don't offend anyone. Don't engage in character attacks or name calling or grossly inappropriate language. Don't discuss a party's insurance coverage unless it is material.

4. Make sure you and your client and witnesses dress and act appropriately during your closing and the other side's closing.

5. Be familiar with local rules such as Rule 5.03 of the local rules for the U.S. District Court for the Middle District which provides that you are supposed to stand at the lectern while making closing arguments, that you are not to read or purport to read from deposition or trial transcripts, and that you "shall admonish all persons at counsel table that gestures, facial expressions, audible comments or the like as manifestations of approval or disapproval are absolutely prohibited."

6. Consider the Guidelines for Professional Conduct adopted by all circuit courts in Florida and particularly the provisions concerning Trial Conduct and Courtroom Decorum which include such points as "a lawyer should scrupulously abstain from all acts, comments, attitudes calculated to curry favor with any juror by fawning, flattery, actual or pretended solicitude for the juror's comfort or

convenience or the like"; and a lawyer should not make "any remarks or statements intended improperly to influence the outcome of any case."

CLOSING ARGUMENTS – A GUIDE TO BRINGING IT IN FOR A LANDING

ETHICAL RULES RELATED TO CLOSING

"A lawyer shall not … in trial, allude to any matter the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a civil litigant, or the guilt or innocence of the accused." Rule 4-3.4(e,) R. Reg. Fla. Bar.

"…a lawyer should scrupulously abstain from all acts, comments, attitudes calculated to curry favor with any juror by fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience or the like"; and a lawyer should not make "any remarks or statements intended improperly to influence the outcome of any case."

- Guidelines for Professional Conduct, adopted by all Florida Circuit Courts

"All counsel… shall…
(5) Stand at the lectern while making…closing statements...
(15) In opening statements and in arguments to the jury, counsel shall not express personal knowledge concerning any matter in issue…
(16) Counsel shall admonish all persons at counsel table that gestures, facial expressions, audible comments, or the like…are absolutely prohibited."
Local Rule 5.03, Courtroom Decorum – U.S. District Court - Middle District of Florida

THE DON'T(S) OF CLOSING ARGUMENT

(1) Do not violate the Golden Rule –
A lawyer may not invite the jury to put themselves in the place of a party. Metropolitan Dade Co. v. Zapata, 601 So.2d 239 (Fla. 3d DCA 1992).

In Cummings Alabama, Inc. v. Allbritten, 548 So.2d (Fla. 1st DCA 1989) Asking the jury to "… to analyze what they did and to judge them in light of what you would have done as reasonable people, in the circumstances they were in, given their job and their role, Cummins Alabama at the time" was not a violation of the Golden rule because it couched it in the terms of a reasonable person and because an objection and motion for a mistrial was not made by opposing counsel. Id.

However, in Bocher v. Glass, 874 So.2d 701 (Fla. 1st DCA 2004), the court held that an attorney violated the golden rule by asking the jury to imagine a button in front of one juror that would bring the plaintiffs' son back and a button in front of another juror which would give the plaintiffs six million dollars. The attorney argued that the plaintiff would walk by the money button and push the button that would bring their son back. Id. at 703. The court held that while this argument did not ask the jury to stand in the Plaintiffs' shoes, its purpose was to suggest that the jury imagine themselves in the place of the plaintiffs and its effect was to inflame the passions of the jury by "inducing fear and self interest." Id.

(2) Don't discuss a party's insurance coverage, unless it is an issue in the case.
Insurance coverage amount should not be brought to attention of jury. Allstate Ins. Allstate Ins. Co. v. Wood, 535 So. 2d 699 (Fla. 1st DCA 1988). An attorney violated this rule when the attorney stated "[y]ou are not to worry whether the defendant will have to contribute a dime of money." Nicaise v. Gagnon, 597 So.2d 305, 306-07 (Fla. 4th DCA 1992).

(3) Don't Introduce New Evidence.
Attorneys must confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and evidence. Knoizen v. Bruegger,713 So. 2d 1071 (Fla. 5th DCA 1998). Consistent with this, an attorney may not show the jury an exhibit during closing that was not admitted into evidence. Maercks v. Birchansky, 549 So.2d 199, 200 (Fla. 3d DCA 1989) (violated when held up a bag of cancelled checks which had been excluded from evidence).

(4) Don't Contrast Wealth of the Defendant with the Plaintiff's.
A Plaintiff's attorney improperly violated this rule when arguing that his client had "basically sacked his entire life savings" to make the investment at issue in the case. The court held this argument violated that rule. Batlemento v. Dove Foundation, Inc., 593 So.2d 234 (Fla. 5th DCA 1991).

(5) Do not vouch for a witness or advocate personal beliefs. This rule is violated every time an attorney says "I think" or "I believe", however courts do not place form over function. Tucker Ronzetti and Janet L. Humphreys, Avoiding Pitfalls in Closing Arguments, Florida Bar Journal, 36-37 (Dec. 2003). Look closely at your argument and eliminate the language if possible. Id. Also, an attorney may not personally endorse a witness' credibility during closing argument. Id.; see also Cohen v. Pollack, 674 So.2d (Fla. 3d DCA 1996) (an attorney may not state a personal opinion regarding the truthfulness of a witness).

(6) Do not use "Us" versus "them" arguments or appeal to the conscious of the community. "'This us-against-them plea can have no appeal other than to prejudice by pitting "the community" against a nonresident corporation. Such argument is an improper distraction from the jury's sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial....'" S.H. Investment and Development Corp. v. Kincaid, 495 So.2d 768 (Fla. 5th DCA 1986) (citing Westbrook v. General Tire and Rubber Co., 754 F.2d 1233, 1238-39 (5th Cir. 1985)). An attorney violated this rule when the attorney told the jury that they had the opportunity to "speak with a voice so loud and strong… that it will reach from here to … those corporations in New York City…." Id. at 771. A plaintiff may also not ask the jury to be the "conscious of the community and to send a message with its decision. Maercks, 549 So.2d at 199.

(7) Don't write checks that the evidence can't cash. Statements of defense counsel suggesting perjury and collusion on the part of the plaintiff and his witnesses, which remarks were not based on the evidence, were improper. Griffith v. Shamrock Village, 94 So.2d 854 (Fla. 1957).

(8) Don't go overboard. Where an attorney likened plaintiff to Job (bible) and likened plaintiff's sufferings to those of Job, the court found that such remarks were sinister and prejudicial. Eastern Steamship Lines, Inc. v. Marital, 380 So. 2d 1070 (Fla. 3d DCA 1980).

(9) Don't talk about how much you like the jury. Counsel's comments that he "liked the jury when he picked them and he likes them now are inappropriate and should be met with rebuke. Kelley v. Mutnich, 481 So.2d 999 (Fla. 4th DCA 1986)..

(10) Don't Offend Anyone.

THE DO(S) OF CLOSING ARGUMENT

(1) Preserve your Objections. By waiting until the end of a closing argument to object and move for a mistrial, a party fails to preserve the issue for appellate review. R.J. Reynolds Tobacco Co. v. Lyantie Townsend, 2012 Wl 447282, *1 (Fla. 1st DCA 2012). Lawyers have a duty to object to improper comments made during closing arguments, and the failure to raise a contemporaneous objection constitutes waiver. Fravel v. Haughey, 727 So. 2d 1033 (Fla. 5th DCA 1999). However, the Florida Supreme Court has held that a party may ask the trial court to wait to rule on the motion for mistrial until the jury completes their deliberations without waiving the timely made objection and motion for mistrial. See Ed Ricke and Sons, Inc. v. Green, 468 So. 2d 908 (Fla. 1985).

(2) Connect the Dots. The purpose of a closing argument is to present a review of the evidence and suggestions for drawing reasonable inferences from the evidence. Fleurimond v. State, 10 So. 3d 1140 (Fla. 3d DCA 2009).

(3) Prepare, Prepare, Prepare. Start early in preparing your closing –at the very beginning of the case.

(4) Stress the theory of your case. "If the glove doesn't fit…"

(5) Structure your Argument. Have a beginning, middle, and an end. State your theme at the outset. Tell a story with the evidence. Make your second best point first, then discuss any weaknesses, then conclude with your best point.

(6) Use Stories and anecdotes.

(7) Let the jurors draw their own conclusions rather than telling them what conclusions to draw.

(8) Don't Read your argument, rehearse and use as few notes as possible.

(9) Follow the Rules. Especially the Motions in Limine. Ed Ricke and Sons, Inc. v. Green By and Through Swan, 468 So. 2d 908 (Fla. 1985).

(10) Be Brief, But Thorough.

It is impermissible for counsel to–

Refer to evidence outside the trial record (or misstate facts in the record), *see United States v. Young*, 470 U.S. 1, 18 (1985); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE 3-5.8 and 4-7.8;

Imply that he or she has knowledge of facts outside the trial record, *see Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974) ("It is totally improper for . . . to argue facts not in evidence."); *United States v. Trujillo*, 376 F.3d 593 (6th Cir. 2004);

Vouch for the credibility of a witness using evidence outside the record (*i.e.* personal belief), *see United States v. Young*, 470 U.S. 1, 18 (1985); *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993) ("Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony."); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE 3-5.8(b);

Infer that evidence against the defendant's credibility suggests the defendant's guilt, *see United States v. Clark*, 535 F.3d 571, 573 (7th Cir. 2008);

Make remarks attempting to place the jurors in the role of the victim (the "Golden Rule"); *see United States v. Palma*, 473 F.3d 899, 902 (8th Cir. 2007) (holding it a violation of the golden rule for the prosecutor to suggest that jurors themselves were direct victims of defendant's crimes of financial fraud against the government);

Refer to a defendant's Fifth Amendment right against self-incrimination, *see* U.S. CONST. amend. V; *United States v. Hills*, 618 F.3d 619, 622 (7th Cir. 2010);

Use abusive references to opposing party or counsel, *see United States v. Young*, 470 U.S. 1, 18 (1985); *United States v. Holmes*, 413 F.3d 770, 775 (8th Cir. 2005) (noting that prosecutors "may not inject their own testimony nor cast aspersions upon the defendant through offhand comments, suggestions of conspiracy with defense counsel, nor personal attacks upon the integrity of defense counsel").

Appeal to the jurors' passions, prejudices, fear, race, religion, ethnicity, or socio-economic class, *see, e.g.*, *Viereck v. United States*, 318 U.S. 236, 247-48 (1943) (noting that prosecutors may not make comments calculated to arouse the passions or prejudices of the jury); *United States v. Newton*, 369 F.3d 659, 681 (2d Cir. 2004) (holding that closing argument asking if the jury would trust defendant with children was improper); *United States v. Jackson-Randolph*, 282 F.3d 369, 376 (6th Cir. 2002) ("This court has already recognized that prosecutorial appeals to wealth and class biases can create prejudicial error, violating a defendant's right to due process of law under the Fifth Amendment.").

Use personal opinion, *see United States v. Young*, 470 U.S. 1, 18 (1985); *United States v. Brown*, 508 F.3d 1066, 1075 (D.C. Cir. 2007) ("Neither counsel should assert to the jury what in essence is his opinion on guilty or innocence."); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE 3-5.8; ABA MODEL RULE OF PROFESSIONAL CONDUCT 3.4(e);

Reference information ruled to be inadmissible, *see, e.g.*, *United States v. Fletcher*, 322 F.3d 508, 516 (8th Cir. 2003) ("It is a well-established principle that the government must not urge a jury to convict for reasons other than the evidence properly before the jury.").

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Anatomy of a Trial

A Handbook for Young Lawyers

PAUL MARK SANDLER

WITH COMMENTARY FROM JUDGES MARVIN E. ASPEN, MARVIN J. GARBIS, PAUL W. GRIMM, MARK A. DRUMMOND, AND W. MICHEL PIERSON

CHAPTER 9

TYING IT ALL TOGETHER— CLOSING ARGUMENT

The purpose of the closing argument is to incite jurors to render the decision you request. It is not about impressing listeners with your eloquence. According to the apocryphal tale, when listeners heard Demosthenes, they would remark, "What a pretty speech." After hearing Cicero, they would remark, "Let us march." A closing argument should provoke the jury to march into the jury room and render a verdict for your client.

The challenge of closing argument is not merely to summarize what you have proved, but to *unify*, to gather together disparate facts and testimony and present a cohesive narrative pointing jurors to one inevitable conclusion. During the trial, evidence often appears disconnected. Facts and documents rarely surface according to the precise chronology and structure you would like because the case must be presented witness by witness. Closing argument is your chance to bind the facts together and tell a story. They don't teach storytelling in law school, but the skill is essential to courtroom advocacy, particularly closing arguments.

Too often advocates approach closing argument as logicians. Logical reasoning should indeed be at the heart of every closing argument, but it is not an end in itself. All good stories appeal to our emotions, and so do good closing arguments. At the crux of strong closings are adroit, controlled appeals to both logic and emotion. Pulling off such appeals effectively rests on the power of your delivery.

Delivery, Delivery, Delivery

At no stage of the trial is your delivery more important than in the closing argument. Blending the substance of your argument with a compelling delivery requires attention to various classical rhetorical elements discussed earlier in this book, including *ethos*, *pathos*, *logos*, figurative analogy, rhetorical questions, diction, and nonverbal communication. Marshalling these various tools to present cohesive arguments is truly an art form. Some of the most outstanding examples of the art have been handed down from antiquity. Aristotle's *Rhetoric*, the oratory and writings of Cicero, and the work of Quintilian remain invaluable teaching tools for advocates today. Consult these sources and others as you hone your advocacy skills.

This chapter will first consider some of the key elements of effective closing arguments, drawing on examples from the *Rosen* case to illustrate. I will then point out the most important legal rules concerning closing and finally discuss how to structure this final presentation before the jury.

The Power of Pathos

Cicero said it well: "Mankind makes far more determinations by hatred, or love, or desire, or anger, or grief, or joy, or feelings . . . than from regard to truth, or any settled maxim or principle. . . . "[1]

In appealing to the heart of your listener, you should consider the listener's feelings and his or her likely reaction to what you say. This is much easier said than done.

It can be difficult to rise above the moment and take into account the full narrative arc of your case and the emotional state it has provoked in the jurors. We are prone to assume too much in our favor. Take a step back. Acknowledge that certain appeals along the way may have missed their mark, and that jurors' minds have strayed or been persuaded in part by your opponent. Acknowledge that at this juncture jurors may feel conflicted, confused, or anxious as they approach the moment where they must finally act. As advocate, you want to meet jurors where they stand to help provoke an emotional response most advantageous to your client.

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1. 2 Cicero, *De Oratore* XLII (Harvard Univ. Press 1988).

Which is not to say you should overtly manipulate their feelings. Hyperbole or injurious language in a direct effort to incite the listener can prove harmful. The power of understatement is far more potent. Instead of describing in gory detail the terrible injuries the plaintiff received as a result of the defendant's negligence, discuss in a factual manner the client's limitations that resulted from the injuries. Allow the jury to draw its own conclusions by the way you summarize the nature of the harm. In other words, don't hit the listener over the head with a two-by-four. Allow the audience to be emotionally engaged, not manipulated.

> It can be difficult to rise above the moment and take into account the full narrative arc of your case and the emotional state it has provoked in the jurors. We are prone to assume too much in our favor. Take a step back.

Figurative Analogies

Figurative analogies are a powerful way to achieve this end. Unlike literal analogies, which compare cases that are similar in relevant characteristics, a figurative analogy is a kind of story, sometimes a metaphor, developed to compare unlike characteristics. Everyone enjoys a story. Listeners, judges, and juries often create their own narratives in making decisions. A figurative analogy in a closing argument can help the listener accept your points as the narrative of the case, thus allowing him or her to subconsciously come to the conclusion you desire.

When a listener believes he or she has come to a conclusion independently, your argument and case theory become more acceptable. When you use a figurative analogy, it is important that you relate the facts of your case to the analogy's elements. Frequently, analogies are left undeveloped; hence, their full effectiveness is lost.

A number of tried-and-true figurative analogies are passed among trial attorneys. Don't be shy in using such material. Defense counsel relied on one familiar analogy in the *Rosen* case to illustrate the concept of reasonable doubt and bring up the subject of holes in the government's case:

> Let's assume you go home tonight and you have a box, and you put a cat in the box and a mouse. You close the lid. You come back an hour

> later, the mouse is gone. One could firmly believe that the cat ate the mouse. What if you come back later and you put the same—it has to be the same cat this time. You put the cat in a box and the mouse, close the lid, come back an hour later again, and there are holes in the box. No longer would you firmly believe the cat ate the mouse. And I want to talk to you now about some of the holes in the government's case, about the burden they failed to meet.

Such analogies can hold the jury's attention and encourage your audience to envision the case in terms that are favorable to your client. The parallels between the case and the analogy may surprise the jurors and cast the decision in a new light. A figurative analogy is a general comparison, a broad-brush image of the case that will remain in the jurors' minds and hopefully shape the decision in your favor.

You may want to deploy an analogy to counter a specific witness's testimony. In *U.S. v. Rosen*, the prosecution's case relied in part on the testimony of James Levin. In closing argument, the defense took special time to attack him. He had admitted on cross that at one time in the recent past he had stated that the charges against Rosen were "BS." The defense took some liberties with this slang as it developed the following analogy:

> There was a fellow, every week he took his great-uncle to a restaurant. His uncle loved beef stew, and it was his favorite meal, and it was the nephew's favorite night. And they [went] to a wonderful new restaurant, advertis[ing] the best beef stew in the world. [T]he great-uncle puts his fork into the beef stew when it is served. He tastes it, and the meat is rancid. Now what is he required to do? Poke around and find some beef that's really good, credible, tasteful, or send it all back? And that's what he did: He sent it back.
>
> And as far as Jim Levin is concerned—I am not trying to be cute; I am trying to illustrate a point—he should be sent all the way back home. You should believe nothing of what he said. And instead of saying BS for what he said it stood for, I say "BS" to you—beef stew—as far as Mr. Levin is concerned, because his testimony totally lacked credibility. Not only did he admittedly cheat the school system in Chicago, defrauded them, inflated bills—but he lied blatantly on the witness stand. He lied about everything he said David said.
>
> He admitted to you—it's like he came here and said, "Hello, I am one of the biggest liars and frauds and cheats in my community. I duped

> everyone, and now I am going to tell you something, so believe me." It's not because he pled guilty and had a criminal deal with the government that should cause you to be suspicious. It's because, we use the term, the cut of his jib: how he acted and conducted himself on the witness stand and what he said to you about himself. "I am a fraud. Don't believe me."

Notice how this analogy seeks an emotional response from the jury. The key image of the beef stew tale is that of the outraged uncle rejecting a rancid meal. Counsel thus encourages the jurors to reject Levin with a sense of moral disgust. Figurative analogies that arouse visceral responses are likely to stick in jurors' memories.

Rhetorical Questions

Like a figurative analogy, a rhetorical question can help engage the listener and give each one the independence to reach his or her own conclusion. Consider this rhetorical question used by the *Rosen* defense in closing argument:

> I commented about the role of Peter Paul and Aaron Tonken, and I told you they aren't here, and you know that as well as I do. You saw the video. You have heard the evidence about where they live now, what they are. I wonder why they didn't call them?

The defense desired the jury to conclude that the government should have called the witnesses but did not because the witnesses would not have helped the prosecution.

Here is a second example concerning the event planner and prosecution witness Bretta Nock: "Do you think that when the agents visited Bretta Nock she had any concerns about herself? Do you think that based on the evidence Bretta Nock had any issue to deal with?"

One of the defense's key assertions was that Nock was responsible for giving Rosen accurate cost figures, and that she failed him in this regard. Thus, when the government interviewed her so many times, she would render testimony to protect herself.

Rhetorical questions such as these help make the jurors feel that they are thinking for themselves and arriving at conclusions independently. In planning a rhetorical question, be sure it does not highlight a weakness in your own case or raise issues that you did not intend to

address. In other words, don't structure a rhetorical question so that opposing counsel can answer it in a way that is consistent with his or her case. The thought-provoking rhetorical question must be used carefully to invoke the conclusion you desire.

Nonverbal Communication

Perhaps no aspect of your closing argument influences your delivery and overall *ethos* more than nonverbal communication. How you dress, use of eye contact, variations in the tone and volume of your voice, and use of space can have a huge impact on the audience.

In the closing argument, strive to match nonverbal cues with your message. Nothing can be more disconcerting to a client, judge, or jury than an advocate who cracks a smile or rolls his eyes when his argument should be deadly serious. Similarly, if you argue passionately for your cause but the jury observes body language conveying hostility between you and your client, the perceived discrepancy will greatly diminish your appeal.

Your client's body language also matters. An apocryphal trial tale illustrates how subtle nonverbal cues can influence a jury. A trial lawyer during closing argument passionately argues reasonable doubt in a murder case: "Ladies and gentlemen you must have reasonable doubt. The state has not even produced the body—no *corpus delicti* as the saying goes. As a matter of fact, in 30 seconds the so-called decedent will walk right through the courtroom door." Counsel then looks in the direction of the doors and glances at his watch. After the passage of 30 seconds, he says: "Well, you looked, and that proves you have reasonable doubt." The jury then deliberates and promptly returns a verdict of guilty. Stunned and on the verge of tears, the defense attorney asks the jury: "How could you not acquit on the basis of reasonable doubt? All of you looked at the doors." The foreman responded: "Yes, this is true. We all looked, even you did, but your client did not."

Diction

As you present your closing argument, rely on vivid language that most powerfully and effectively communicates the message you want your listener to receive. Do you want to characterize the event as an automobile accident or an automobile collision? In general, the Harry Truman approach of plain speaking is advisable.

Sometimes lawyers will attempt to sabotage words used by the opposing side. In the opening statement in the *Rosen* case, the defense called Aaron Tonken and Peter Paul "concealers," saying they concealed the true costs of the event from the defendant. In closing, the prosecutor turned the word against Rosen: "Ladies and gentlemen, the evidence is overwhelming. David Rosen is the true concealer in this case."

The prosecution's language with regard to the jury was highly respectful. He repeatedly referred to them as "ladies and gentlemen," and was always using the phrase, "I submit to you" as he made his assertions. This stylistic decision helped convey to the jurors the seriousness of their task and projected high respect for the rule of law. By contrast, the defense emphasized the human and emotional and relied on a more folksy approach: "And then you have to ask yourself, wearing the hat of common sense, well, maybe he made a mistake. Maybe he was rushing around. Maybe it happened. But does it look from the evidence or the facts there that he intended to do it?"

An overstylized performance can be just as damning as a dull one. Shakespeare knew this well. Before your next foray on the stage of justice, consider Hamlet's wise counsel to the Players:

> Speak the speech, I pray you, as I pronounced it to you, trippingly on the tongue; but if you mouth it, as many of our players do, I had as lief the town-crier spoke my lines. Nor do not saw the air too much with your hand, thus; but use all gently, for in the very torrent, tempest, and (as I may say) whirlwind of your passion, you must acquire and beget a temperance that may give it smoothness. Oh, it offends me to the soul to hear a robustious periwig-pated fellow tear a passion to tatters, to very rags, to split the ears of the groundlings, who for the most part are capable of nothing but inexplicable dumb shows and noise. I would have such a fellow whipped for o'erdoing. Termagant. It out-herods Herod. Pray you, avoid it.[2]

General Rules

The law on closing provides wide latitude for delivery of the closing argument, but limitations apply. Here are some cardinal rules.

2. William Shakespeare, *Hamlet*, act 3, scene 2.

You must confine your argument to the facts of the case and reasonable inferences from the evidence. For example, you cannot tell the jury what a nonwitness might have said on the stand but you can make inferences about his or her absence from the trial. Hence, in closing arguments in the *Rosen* case, neither prosecutor nor defense counsel inferred what Peter Paul or Aaron Tonken would have testified since neither man was called as a witness. The defense, however, inferred that the government should have called the men as witnesses but did not because they would not have helped the prosecution:

> I commented about the role of Peter Paul and Aaron Tonken, and I told you they aren't here, and you know that as well as I do. You saw the video. You have heard the evidence about where they live now, what they are. I wonder why they didn't call them?

Similarly, you may not refer to excluded evidence or facts not established. For example, Reggie, a prosecution witness, had worn a "wire" and covertly taped a conversation with Rosen on behalf of the government. This fact was in evidence, but the tape was not. Rosen's defense counsel stated to the jury in closing argument: "I would have liked to introduce the wiretap to you, but it was prohibited by the Rules of Evidence." The prosecution objected, and the judge properly sustained the objection, telling counsel to refrain from comment on evidentiary rulings. Had the defense referred to the wiretap without the matter having been in evidence, the mistake of the defense would have been far more serious.

Another rule prohibits you from misstating the evidence. Though this rule may be self-evident, breaking it is easy to do when you are caught up in the exuberance of persuasion. When your opponents object on the basis that you are misstating the evidence, the court may caution the jury that it is entitled to use its recollection of the facts and not accept counsel's rendition. Consider the following colloquy from the defense's closing argument in the *Rosen* case:

> I asked Mr. Reggie in court about an incident of impersonating a police officer and asked if he put this light on the top of his car, and what did he say? He was a commissioner himself of police.

The prosecutor objected, and the court instructed the jury:

> [L]adies and gentlemen . . . as I instructed you in the jury instructions, if there is a different recollection you have, yours controls. Lawyers are expected to account for the evidence in a fair-minded way and [are entitled] to draw reasonable inferences from that. You will be the judges of just what he said and whether he said what counsel has just referred to.

This kind of slip damages an advocate's *ethos*. The ease with which one can misstate or mischaracterize evidence reinforces how important it is to truly master the evidence, to internalize it to the point where mistakes are unlikely.

Any personal attacks during closing argument should be calibrated to the specific situation and individual. Beware of petty or brazen insults, particularly in civil disputes. Calling a defendant a "pig" for wanting more alimony, for instance, could turn off many jurors. Though closing argument is often the place where you want to express forcefully your views of a particular individual, you must maintain control and speak with integrity and professionalism.

Speaking of professionalism, you may never personally attack opposing counsel. For example, you cannot suggest that "counsel should be ashamed of his client" or "ashamed of himself." You would be better served by complimenting opposing counsel on presenting his or her views well before carefully dismantling his or her case. You cannot appeal to passion or prejudice that is not based on the evidence. To do so would be in bad taste. It would also precipitate a sustainable objection.

As you strive to persuade the jurors to see the case through your eyes, you may be tempted to say something like this: "Put yourself in this man's shoes! How would you feel if you were suddenly accused of a crime you did not commit?" But such statements, often referred to as "golden rule arguments," are prohibited. You cannot ask the jurors to put themselves in the place of any of the parties to the case. You are also prohibited from calling a juror by name. In closing argument, you often want to connect in a powerful way with the jurors, but rules such as these force you to find more inventive ways of doing so.

Furthermore, you may not directly express your personal belief or opinion during closing argument. In criminal cases, the ABA Standards for Criminal Justice and the Model Rules of Professional Responsibility provide that neither the prosecutor nor the defense counsel should express

personal belief about the truth or falsity of testimony, or about the guilt of the defendant. That does not mean you cannot impress upon jurors that you feel very strongly about your case. It is often merely a matter of semantics and delivery. Instead of stating, "I believe the evidence proves guilt," state, "The evidence shows. . . ," and do so in such a way that it communicates your personal conviction. You may also vouch for the credibility of witnesses without explicitly injecting your personal opinion. For example: "You saw Rosen on the witness stand and listened to his testimony. . . . You observed his demeanor. You could see he was telling the truth."

You are also permitted to argue the law, particularly the law upon which the judge instructs the jury regarding burdens of proof. However, whether you can read or recite general law to the jury is not uniformly agreed upon. When in doubt, the best practice is to seek advance court approval. In the *Rosen* case, defense counsel stated during closing:

> But my job is not to prove to you David's innocence, although the evidence cries out for that. I want to invite your attention to another instruction of the judge's, and that is about reasonable doubt. There is no question that the government has the burden of proving its case beyond a reasonable doubt.

In criminal cases the definition of reasonable doubt is strictly defined. Therefore, you may not be able to explain the meaning of doubt as you would wish. Many courts prohibit arguing "reasonable doubt to a moral certainty." Some courts will not allow counsel to define reasonable doubt at all, but only permit repeating the judge's definition recited in the jury instructions. Most courts, however, will permit counsel to discuss reasonable doubt as it relates to their case as long as they do not attempt to define it.

In civil cases if you are arguing for damages, know whether the law in your jurisdiction allows a per diem argument. This type of argument presents a method of calculating damages for pain and suffering based on a specific dollar amount per day, month, or year. The jury is asked to consider what one might pay to be free from pain for a day and use that amount of money as a basis to calculate the plaintiff experiencing pain and suffering over an extended period of time.

For example. in the *Maffei* case counsel for plaintiff argued as follows:

. . . So I ask you to consider the total of $684,382 as the compensatory damages for Mrs. Maffei based upon what happened to her husband.

There's another category of damages, which we call noneconomic damages. And you have within your discretion to award for emotional distress, pain, and suffering.

And you can and should consider Mrs. Maffei's mental anguish, emotional pain and suffering, loss of society, loss of companionship, loss of marital care, loss of attention, loss of advice or counsel.

That number can be as high as a trillion, which would be ridiculous, or it can be low as a zero, which I suggest to you would also be ridiculous. Somewhere in between is the proper amount.

I am not going to suggest to you a particular figure. That is within your discretion. Because in your role as a jury you, in a sense, wear an invisible robe because you're the judge of this case.

However, I'm going to suggest to you as follows, that if you were to examine her pain and suffering every day and consider, if some people go to a dentist for root canal work, they may pay seventy-five dollars for a day to be free of pain. Everyone is different.

But you can understand that if one would pay seventy-five dollars a day to be free from pain and Mrs. Maffei's mental anguish continues day by day by day, week by week by week, that you might want to consider the example I just presented to you as a frame of reference for rendering to her an adequate award for her pain and suffering. And you should also consider that Ms. Maffei said to you very candidly, she feels she is on the upswing. And that's good.

So in terms of a specific dollar amount that you should give for her emotional suffering, use your discretion wisely to render a fair award. You are the judges, you are the jury. And I respectfully suggest to do what is right and what's fair, to give Mrs. Maffei an adequate award for the loss of her husband.

I also remind you that Mr. Maffei himself cannot speak to you. But his wife is here to speak for him. He suffered as well, pain and suffering. And he is entitled too. He had a horrible day; he's no longer here. And we're talking about someone's life, someone who deserved your full and careful attention, as you are giving it.

You may and should, when appropriate, use demonstrative aids to advance your argument. As discussed in the chapter on opening statements, visual aids are often integral to a winning argument. This is especially true with complex subject matter that can be easily understood when mapped out visually. At the conclusion of *U.S. v. Rosen*, which revolved around various details about specific expenditures, defense counsel relied upon budget documents presented to the jury with an Elmo projector. Similarly, you may want to refer to the verdict form and review it for the jury and argue how the facts of the case apply to the instructions. Show the verdict form to the jury on the projector as you present your explanation.

These and other rules pertaining to the closing argument should be kept in mind when you plan your presentation. In your final words to the jury, you want your *ethos* to continue to rise. Objections from opposing counsel and judges will throw you off your stride and possibly diminish the jurors' view of your case.

ARRANGEMENT

When planning your closing, arrangement of your points is key. Because we remember best what we hear first and last, the closing argument, like the opening statement, should be delivered with an impressive introduction and conclusion and with a strong grasp of tone, style, and language. Use the same principles in developing your closing argument as you did in your opening statement.

While there are many ways to structure closing arguments, every closing must have a beginning, a middle, and an end. This arrangement can be augmented as follows: introduction, where you capture attention and restate the theme; argument, encompassing: assertion (where you state a major proposition or claim), presentation (where you justify assertions with evidence, logic, and emotion, as well as refute opposing points), and conclusion; and a peroration.

Introduction

The introduction of your closing argument should make a powerful impression on the jury. Here is the time to reorient the jury to your theme and reestablish shared values. Just as with the opening statement,

the first five minutes of the closing argument are crucial. Do your best to capture the attention of the jury from the very first words.

There are a number of ways to begin. You can leap into the main point of your case without a buildup. For example: "In this case an innocent man who loved his wife dearly is now falsely accused of hiring someone to kill his wife. Let me tell you about Donald Patapsco." You could also begin by asking a question or by telling a story. The use of humor and suspense can help captivate your audience. However you choose to begin, speak with an engaging, personable style that feels comfortable to you.

If you are speaking second, a reference to the previous speaker may be a helpful transition, and you may need to "break the spell" created by the first speaker. A dramatic statement, a compelling question, or an appeal to the listener's sense of importance can help shift attention to your case.

Here are excerpts from the government's and the defense's introductions in their closing arguments in *Rosen*. Observe that the prosecutor, in describing what the case is about, seeks to raise the stakes beyond Rosen's alleged wrongdoing:

You can leap into the main point of your case without a buildup. You could also begin by asking a question or by telling a story. The use of humor and suspense can help captivate your audience. However you choose to begin, speak with an engaging, personable style that feels comfortable to you.

Thank you, your Honor, counsel. Ladies and gentlemen, let me start by thanking you all for your service. You sat through a lot to get you to this stage, and if you can believe it, my job now is to try and make things a little simpler for you.

So, ladies and gentlemen, let me just tell you that this case is about one thing: This case is about the public's right to know. The case is about the public's right to know who is paying how much to their elected officials.

The case is about the public's right to know how much Peter Paul is paying to a national campaign. The case is about the public's right

to know how much Aaron Tonken is paying to a national campaign finance director.

Ladies and gentlemen, this case is about the public's right to know the truth, and the defendant, David Rosen's, continued and intentional obstruction of that public right.

And what is this case not about? Well, the case is not about sloppy or negligent record-keeping. The evidence is clear that David Rosen knew what was and what wasn't being reported to Whitney Burns, and he knew he was feeding specific lies to Whitney Burns.

The case is also not about anybody's responsibilities except the defendant's. All the attempts to blame the contributor is a transparent dodge, and the evidence shows that all of the talk of Peter Paul and Aaron Tonken and Bretta Nock concealing is without any support in the evidence.

Next, the case is not about exact numbers, because you don't have to know whether this cost $1.1 million or $1.2 million to know that it was a lot more than half a million, and you don't have to know the exact number to know that any number of types of costs were left out, never reported as required.

So, finally, ladies and gentlemen, despite all the difficult testimony that you heard and that you sat very patiently through, let me relieve you and say this case is not about benefits. This case is not about whether the campaign benefited from the defendant's lies. The question of benefits in this case is only one of motive. And, ladies and gentlemen, the government does not have to prove motive to you.

The question of benefits is not part of the government's proof, and it's not something that you need to wrestle with to determine that David Rosen is guilty beyond a reasonable doubt of causing Whitney Burns's reports to be false.

I'll say it again: Motive is not an element of the government's case. We don't have to prove any benefit to the campaign or anyone. But motive is helpful to understanding the big picture, and the bottom line is that the evidence shows and the defendant finally admitted on cross-examination that there were clear potential benefits to Hillary Clinton's campaign for underreporting soft money in-kind contributions. But, still, that's not what this case is about.

> And so, ladies and gentlemen, since we've discussed what the case is not about, let's get back to what it is, and let's talk about the story that the evidence told throughout the case.
>
> And we're going to do that by asking three questions: First, what [did] the defendant do? Second, why did he do it? Third, why does it matter?
>
> First we'll talk about what the defendant did, what were the lies; and after that we'll talk briefly about why he did it, the motives that help you understand the bigger picture.
>
> And, finally, we'll talk about why all of this matters. How did it affect the very function and role of the Federal Election Commission? And that's when we'll come back to the public's right to know. What did he do? Why did he do it? Why does it matter?

This is a strong, concise, and effective introduction. The prosecutor grabs the jurors' attention by lifting the case high above the nitty-gritty details. In saying that the case is about the public's right to know, he appeals to the jurors' patriotism and sense of civic duty. They are being called upon now to protect something precious to the republic, and that is no small thing. Also notable is the way the prosecutor adroitly anticipates the opponent's line of attack. He attempts to immunize his case by repeating that the case is not about motive, which is precisely the issue the defense will soon seize at the beginning of its closing argument. Finally, the prosecutor does a fine job of outlining the story he is about to tell, relying on three central questions. The use of questions engages the jurors in the process and acknowledges that they, too, are thinking through these problems.

Like the prosecutor, the defense begins by thanking the jurors for their service. (This is a common practice, though a judge will sometimes instruct counsel not to thank the jury, reserving that pleasure for the court.) Unlike the prosecution, the defense turns this expression of gratitude into an elaborate appeal to their sense of patriotism and civic duty, commenting on their duty to protect the innocent from oppression:

> May it please the court, members of the jury, good afternoon. As you know, I represent David Rosen, and I want to echo the words of Judge

Matz and the prosecutor about thanking you for your patience. Serving on a jury is one of the most important public services any citizen can give. The right to trial by jury is so precious to our society, it's been mentioned no less than four times in the text of the United States Constitution.

We have a jury of citizens in criminal trials to prevent oppression by government officials and because we have citizens, such as you, serving on juries as the last check and balance in government. The government cannot be unrestrained in its power over all of us. It's very, very vital that we preserve trial by jury, and that's why everyone thanks you and that's why we stand when you come and go, out of respect for you and the vital role that the citizen plays in cases just like this.

Now, in a short time you will take this case with you to the jury room. You have been sitting here for about three weeks in what, up until now, has been a silent role in a somewhat unique criminal trial. Soon, you will render a verdict which will be fair, just, and equitable, and it's my purpose at this time, to the extent the court allows me, to proceed to review with you the salient materials of evidence superimposed by the instructions that the judge has given.

And first I ask you this; what is the issue in this case that you, the jury, will decide?

Is David Rosen charged with stealing money that belongs to others? No.

Is he charged with inflicting physical harm or violence? No.

Is he charged with causing innocent people to suffer economically or lose their jobs? No.

As the judge has instructed you, he is charged with causing false information to be filed before the Federal Election Commission. He has been charged with willfully, knowingly, and deliberately making false statements and that he had knowledge of these statements and intended to do it.

In other words, he sat down one day and said, "Okay, I am 33 years old. I have a very important job. I am afraid that I could get fired and, let's see, I think I'll risk my whole career, my family, and jeopardize everything. I'm going to lie. I am intentionally going to deceive people," so for what? He's scared for his job?

> First of all, Mr. Ickes came from Washington to tell you he had no reason to be. Secondly, even if he were, many people sometimes are concerned for this or that. There is no evidence here that he had such a concern.
>
> So when you go to the jury room, do put the hat of common sense on and think about what it is, having met this gentleman who is courageous, who is truthful, who has suffered for years with this sword of Damocles over his head. And he comes to trial and he takes the witness stand, and he doesn't have to do that. And I told you in opening statement he would answer every question posed to him, and he did, and you could see the cut of his jib. . . . [T]he government says don't buy what he is selling. I say buy it lock, stock, and barrel, because what he is not selling but advocating is the truth, the whole truth, the simple truth, and nothing but the truth. And imagine, imagine we are talking about an event that occurred August the 12th of 2000. Where were you? Where were we on that date? Who did we talk to a week before? What meetings did we attend? Oh, Mr. Madden, who didn't take notes and who came forth and said he had a meeting, "Well, gee, do you remember the day of the meeting?" "No." Recollections do differ.
>
> And I say this to you: When you evaluate the evidence, there is a little story that I once heard, and I think it's applicable. There was a lawyer who said to a friend of his, who was a jurist, "You know, I've got a tough case tomorrow. It's not before you. We're friends. Give me some advice. How do I proceed if the facts are against me?" The judge said, "Well, that's easy, argue the law." "Well," he said, "Suppose the law is against me." The judge said, "That's easy, argue the facts." And then the lawyer said, "Well, what if the law and the facts are against me?" And the judge said, "Well, then you pound the table." And in the closing argument we have heard [from the prosecution], it was table-pounding.

When the prosecutor stands up for closing argument, he states that the case is about the public's right to know. The defense seeks to deflate this balloon by zeroing in on the specific charge, invoking as he does so the judge's instructions. Such rephrasing of the central question is the main purpose of your introduction. As in politics, who wins or loses the argument is often a matter of who best frames it.

Also of note in the above passage is the use of sarcasm. In focusing on the question of motive, a weak point in the government's case,

counsel ridicules the proposition the jurors are being asked to accept—that Rosen, who had nothing to gain by lying, nevertheless did so, placing his livelihood and reputation at risk. Counsel then segues into the other main pillar of its case: the defendant's credibility and character, as presented during direct examination. In doing so, the attorney slips into the royal "we," seeking to place himself and the jurors in the same figurative "boat" as they consider the evidence together. Encouraging this fictive partnership can be helpful, particularly in a conversational closing argument such as this one.

Note, however, that defense counsel's introduction lacks a helpful road map such as that provided by the prosecution at the close of its introduction. Letting the listeners know where you intend to take them focuses their attention and helps them mentally organize the disparate facts according to the argumentative blueprint you've designed. While the prosecution's closing argument was orderly, precise, and professional in tone, the defense's closing was effusive, emotional, associative, and colloquial. Valuable lessons can be taken from both approaches.

The *Maffei* Case

Let's examine how counsel in the civil case introduced their closing arguments. You will recall that this medical malpractice suit led to a complex trial involving many technicalities. The challenge facing the lawyers at closing, then, was to distill all the evidence into a persuasive argument without getting bogged down in specialized language.

Here is how the plaintiff's counsel began his closing:

> *Mr. Sandler*: May it please the Court, ladies and gentlemen of the jury, you have been sitting here over a week, actually a full week, in which you have been in a very silent mode. You have been patiently listening, working with the schedules, taking it all in, thinking to yourself what this is all about.
>
> And now that role will change. You will soon retire to your jury room to look at the evidence, the documents. You can talk amongst yourselves and come to a just and fair verdict. That will happen very shortly.
>
> On behalf of the lawyers, it's important to thank you. Because the service that you perform when you sacrifice your own daily schedules to sit as judges of your fellow men and women, as jurors, it is an honor

and it's a privilege; it's also one that is a unique feature of our country. So we thank you for your attention.

It's my purpose during this allotted time for closing argument to highlight for you the evidence that will support the claim of the plaintiffs. I will superimpose on the evidence some of my interpretations of what the evidence brings to bear.

And I think we should begin straightaway.

What is this case about? What were the issues? What are they?

When I came before you in opening statement, I told you that I would prove to you not that Dr. Smedley was a bad person, but that she made a mistake and the mistake cost the life of a dear fellow.

And I suggested to you that the evidence would demonstrate that but for an x-ray Mr. Maffei would be alive today. And I also proved that.

And I will explain how, so that you can be comfortable that the evidence is square.

The plaintiff's counsel here thanks the jurors in a rather somber tone given that the case concerns the death of a patient. The introduction also anticipates an appeal from the defense regarding the doctor's character, her decency, and professionalism. By insisting that the case wasn't about whether she was "a bad person," the plaintiff counsel attempted to strip this appeal of its persuasive force.

Here is how defense counsel began his closing argument:

Mr. Shaw: Thank you.

May it please the Court. Good morning, ladies and gentlemen.

This is my last chance to talk with you. As you've heard, the plaintiffs have the burden of proof in this case, so they go on first in their opening, they go first in presenting their evidence, and they go first and they have a chance to go after me in their closing.

So I want to take this opportunity, as did Mr. Sandler, to thank you very much for your service in this case. All of the attorneys and the parties are very appreciative for your service.

Mr. Sandler mentioned about the significance and the uniqueness of a jury trial in this country.

And I read a statistic somewhere that something like 90 percent of all jury trials in the world are held in the United States of America.

It's a good system. Realize, as Mr. Sandler said, you have common sense and you bring it to bear in your judgment of your peers. So we certainly thank you for your time that you devoted. One of the highest civic duties and responsibilities second to, I guess, enlisting in the military service, is to serve on a jury. So we thank you very much.

As you heard, this case is important to both sides. It's important to Mrs. Maffei but it's also very important to Dr. Smedley. There will be a lot of things that we are going to dispute that you heard from Mr. Sandler about what the evidence showed in this case. I'm not going to revisit every one of those issues, but I'm going to highlight some of which we do dispute and which we believe the judgment should be in favor of Dr. Smedley.

But one thing we don't dispute, one of the things nobody disputes is the tragic death of Mr. Maffei. We certainly recognize the compassion and sympathy that you have for her and that we have and certainly Dr. Smedley has.

You heard Dr. Smedley tell you that by that time, she'd seen hundreds of patients through the years since that time when she saw Mr. Maffei, and his presentation was not at all consistent with one who is going to leave the emergency department and die 17 hours later, that she has a clear recollection of what happened that night.

And certainly she felt sympathy and compassion and she felt the tragedy of Mr. Maffei's death and of what Mrs. Maffei has experienced.

So if your sole duty in this case was to rely on just sympathy and compassion and base your decision, then obviously we wouldn't be here. But as his Honor has instructed you, you have to treat everyone fairly and impartially.

And I'd like to briefly read to you from the jury instructions, one of the jury instructions that Judge Cahill read to you. And it's entitled "Impartiality and Consideration."

You must consider and decide this case fairly and impartially. You can't base your decision or be prejudiced by a person's race, color, religious, political or social views, wealth or poverty. And the same is true as to prejudice for or against and sympathy for any party.

So as hard as it may be, you have to try to put aside your compassion and sympathy for Mrs. Maffei, which we all certainly have. So the critical issue then is: Was there medical malpractice in this case?

"Do you find that the defendant, Angela D. Smedley, M.D., breached the standard of medical care in her care and treatment of Richard Paul Maffei?"

In other words: Did Dr Smedley fail to act as a reasonably competent medical physician in emergency medicine?

And we believe the evidence has shown that Dr. Smedley did act appropriately and she did care properly for Mr. Maffei.

And it's obvious from that definition just because there is a tragic outcome doesn't mean that there's been malpractice. And bad results can occur even with good care.

We've all heard that expression, "Bad things can happen to good people." That's what happened here. Something bad happened, a tragedy happened.

But there was no medical malpractice.

Because the plaintiffs have the burden of proof, if for some reason you can't make up your mind, if the weight is even in your mind, because plaintiff has the burden then you must find for Dr. Smedley.

But we believe that plaintiffs have failed to meet their burden of proof and the evidence is on the side of Dr. Smedley.

Observe that the defense counsel, after thanking the jury, also attempts to defuse his adversary's emotional appeal. The jury, he says, must put aside their sympathy for the widow. This is a critical element in many emotionally charged disputes; one or both sides often need to remind jurors to disregard sympathies for a victim or unfortunate party.

Argument

Here is the time to use the evidence and law to support your theme and request a verdict in your favor. Consider dividing each section of your argument into assertion, presentation, and conclusion. You may repeat this pattern several times within the main body of your argument.

First, assert the issues or themes of your case and then speak to the evidence and exhibits that support them. Build upon the claim, weaving

together testimony and exhibits in a compelling fashion, until you reach a forceful conclusion for each assertion. When you conclude, try to engage the jurors by personally requesting that they act in accordance with the evidence you have presented.

As you make your points, always take time to refute the evidence marshaled against you by your opponent. Explain why the contrary evidence is unpersuasive. When appropriate, pause to read passages of striking testimony. If you have the benefit of daily transcripts, you can go so far as to present testimony to the jury on a PowerPoint slide. Remember to make clear connections between your specific claims and the documents and exhibits you show to the jury. Do not present document after document without a guiding purpose. Also, avoid allowing jurors to read unnecessary text. You want their undivided attention; don't let unhelpful exhibits and visual aids steal the show.

By organizing the main body of your closing argument into repeated patterns of assertion-presentation-conclusion, you can better lead jurors down a clear path to a firm decision in your favor. Remember, the goal of closing argument is to unify disparate information into a cohesive understanding of the facts in play. You cannot do that without a framework on which to build.

> Consider dividing each section of your argument into assertion, presentation, and conclusion.

Like many criminal cases, *U.S. v. Rosen* boiled down to credibility: Whom would the jury believe? The prosecution wanted the jury to believe the testimony of its witnesses but distrust David Rosen. Defense counsel wanted the jury to believe Rosen and doubt the assertions of the government's witnesses. In its closing argument, the prosecution showed great facility in organizing its argument, repeating the pattern of assertion-presentation-conclusion several times. Here is an excerpt, with the elements noted:

The Assertion

There is no doubt that David Rosen knowingly caused those reports to be false in two different ways; first, he flat-out lied to Whitney Burns; second, he, himself was the concealer of numerous items he knew were required to be reported. He either witnessed these items

himself or he incurred these items himself, and he knew that they never were reported.

The Presentation

And ladies and gentlemen, two ways—the direct lies and the concealing—and we'd submit that the evidence on each of these standing alone is sufficient to convict David Rosen of these crimes.

But first David Rosen lied to Whitney Burns at least three different times, each time knowingly and intentionally feeding more and more false information, each time relying on and layering and buttressing the earlier lies.

The first lie David Rosen fed to Whitney Burns is the lie known to you as Exhibit 20. Exhibit 20 is the budget that evidence establishes David Rosen created and David Rosen sent to Whitney Burns.

Of all of that, David Rosen admits discussing this budget and confirming for Whitney Burns that it is accurate, and that's a significant piece of the evidence.

The Conclusion

So just based on that conversation, when he confirmed the numbers, if you believe all the evidence that David Rosen knew the numbers were false, then that conversation alone, we would submit, is enough to find David Rosen guilty.

In response to the prosecution's assertion that the evidence pointed to Rosen's guilt, defense counsel, in its closing argument, had to galvanize the jurors' sentiments against the government's key witnesses. One of these was Reggie, the convicted felon who, before the indictment, had signed a plea bargain with the government and strapped himself with a wire before having dinner with Rosen. But the prosecution had not introduced the taped conversation into evidence, relying instead on Reggie's oral testimony, which was unfavorable to the defendant. Defense counsel's implicit assertion against Reggie, then, was that he could not be believed. The claim relied not only on his criminal past, but on the more dramatic cross-examination testimony:

The Assertion

Let's go to Mr. Ray Reggie, if we could for a minute, another star witness. Now, look, I say that probably Mr. Reggie, based on the

evidence, has to be pitied more than censured. No one enjoys being humiliated and acknowledging that they have done wrong but he did: bank fraud, check kiting, lying under oath to me in front of you about his incident of putting the light on the car—

[Here an objection was entered.]

The Presentation

I recall his testimony thusly, in so many words. Question—why he put a light on top of his car if he were not pretending to be a police officer. I recall him stating to me that he had been given the light because he had some honorary officer position. I then probed a little bit further and pointed out to you that, no, indeed he did not have such a commission, but [the light] was given to him by a police officer or a sheriff because he had to guide dignitaries around. I say about Ray Reggie, beef stew. Just send him back.

And I say it's deplorable, based on the evidence in light of what's going on, that this Ray Reggie, a supposed friend of David Rosen's, calls him and says, "Let's have dinner." And he is so low, based on the evidence, that he could crawl under the belly of a snake wearing a top hat, because what he did—folks, ladies and gentlemen, what he did, if you think about it, was masquerade as a friend, come into his domain of privacy, David Rosen['s], and then he secretly recorded. Tick tock, tick tock, tick tock. Looking and probing, looking and probing. And then—and then AWOL, absent without leave. Where's the tape? Bring it forth, instead of innuendo and hyperbole.

The Conclusion

This man [Rosen], *he* brought it forth. I don't want to be hyperbolic either, but I suggest to you, based on the evidence, if this country looks for leaders and heroes, there is one, with the courage to take the witness stand in a case like this and to tell the truth.

Now, all of this could have been done much more briefly. The defense could have said: "Don't believe this man. He's a low-life crook, and he tricked his friend, as the evidence shows." But dramatizing a point makes it more memorable. The colorful language, the speaker's outrage, the sense of betrayal that Rosen must have felt all come into play in illustrating the witness's character. Notice, too, that the conclusion of this segment reaches beyond the question of whether Reggie

can be believed. With each claim you make and substantiate, you want to advance your argument and bolster foundational themes. For the defense, the key theme was Rosen's clean-cut credibility versus the lack of credibility among the opposing witnesses.

Peroration

The peroration of the closing argument should be the logical and emotional climax of your argument. Visual aids, the power of understatement, anecdotes, figurative analogies, and other rhetorical techniques can all enhance your emotional appeal as you speak to the jury one last time. Again, the jury remembers best what it hears first and last, so take full advantage of your last words.

Here is how the government concluded its case in *Rosen*:

> So, finally, let's talk even more briefly about why all this matters, because it doesn't take a lot of explanation.
>
> His Honor gave you an instruction on materiality, and we'd submit to you that the evidence that the defendant's lies were material to the Federal Election Commission is beyond any doubt. The question of benefit is irrelevant as to whether this crime matters or not, because as the first witness told you . . . one of the functions of the Federal Elections Commission is to be the liaison between the campaign and the public, to be the gatekeeper of the public's right to know who is giving how much to their elected officials.
>
> It's clear from the evidence that soft money in the year 2000 had to be reported for joint fundraisers, and as we've discussed and as you've heard from Whitney Burns, it's crucial to know how much soft money is used at a joint fundraising event to know what to do with the hard money.
>
> And this brings up a second reason that these lies matter, because besides just the public's right to know, the evidence shows clearly that it's part of the FEC's function to monitor these reports, to make decisions about who to look more closely at, what events to scrutinize more closely, what audits to do, and who to request additional information from.
>
> In fact, even in this case, even with the numbers it did report, the FEC ended up inquiring further from the campaign about this event, and you can see that for yourself in Exhibit 43.

So it's obvious that the defendant's underreporting had the ability or potential to affect the decisions or activities of the Federal Election Commission, because, in fact, they did.

Now, getting back to the public's right to know; let's talk about one last time the defense's constant pointing out in this trial what bad guys Peter Paul and Aaron Tonken are, and that's the best demonstration why it's so important that these reports be accurate.

Aaron Tonken is giving the first lady's national finance director gifts that equal over two months of his take-home salary, and Aaron Tonken is getting invitations to the White House.

Now, there may be nothing at all wrong with that, but our society has made a deal: People can spend big money on campaigns and thereafter gain influence and access, but the public has a right to know what price they're paying. And how does the public find out? The Federal Election Commission makes the information available.

They summarize some of the information, and they make various studies or reports to enhance the public's knowledge to how money is fed to their elected officials. And they rely on what is known as voluntary compliance; they rely on the campaigns themselves; they rely on Whitney Burns, who relies on David Rosen.

Ladies and gentlemen, the very function of the FEC is to monitor how the money is collected and spent, to be the public's guardian. The very function of the FEC is to publish accurate information to the public.

And, ladies and gentlemen, the very function was willfully and knowingly obstructed by the defendant in this case, David Rosen.

And so now I get to thank you again for your patience because this summation is at an end. The government has proven witness after witness, document after document, that David Rosen knew more, much more, than he ever told Whitney Burns; that David Rosen knew that what he did tell Whitney Burns was a lie; and finally, that David Rosen knew that Whitney Burns would use his information to file at least two specific reports of campaign activity with the Federal Election Commission. And he knew the purpose of those reports was for the FEC's review and scrutiny and more importantly to enable the public's right to know of who pays how much to elected officials.

Ladies and gentlemen, when David Rosen was in Los Angeles in the summer of 2000, he began to sell a pack of lies that is still being sold to this day.

We ask you only to examine all of the real evidence in this case, to apply only your common sense and not your sympathies or your passions, and in the end we ask you not to buy what the defendant is selling.

Ladies and gentlemen, we ask you to find David Rosen guilty beyond a reasonable doubt of the crimes charged. Thank you.

And here is how the defense concluded:

I suggest to you that when you return to the jury room you will use your common sense. You will go through the evidence. You will see for yourselves that the government has not proved its case beyond a reasonable doubt. And you will also see, to the contrary, that David Rosen proved to you by his courageous and truthful testimony that he is innocent and that he did not intend to harm a flea, let alone the FEC.

It would be my request of all of you that when you do go to the jury room, you do one thing that I hope you remember. I cannot come back and speak to you again. I will not have that opportunity. I am prevented. . . . I would ask you to go into the jury room, and if I have missed something here or in the rebuttal the prosecutors say something that I haven't commented on, I ask you to point out to your colleagues in the jury room the evidence that contradicts what the prosecutor said; that I could not do.

Now at this time my burden ends. It goes to you. You, the members of the jury, whose task it is to render a judgment, now receive this case after the rebuttal.

And I conclude by this little tale that I learned long ago about an ancient kingdom where a wise magician was offering great counsel, but there was someone who was jealous and wanted to pull him down. And they went to the king and said, "Look, your magician for so many years has no reason to continue. He is not as smart or wise as you think." So the king said, "What do you mean?" He said, "I am going to devise a test," said the other magician, "and you take a bird in your hand, call him, and you ask him if the bird is living or dead. If

> he says the bird is living, you crush his little neck, open your hands, and we'll have him. If he says, however, the bird is dead, open your hands. The bird will fly and we will have him."
>
> The day comes, the throngs are there. The drums are beating. And, sure enough, the king says to the wise man what the magician said. The magician looks, thinks very quickly, and says, I am in trouble, because if I say the bird is living and the king just presses the neck, that's it. If I say he is dead and he opens his hands, that's it. So the wise magician simply said, when the king said, "Well, tell me, is this bird living or dead?" He simply said the truth: "The answer is in your hands."
>
> David Rosen's life and this case are now going to be in your hands. I proved based on the evidence what I said at the outset: David Rosen is the victim of other peoples' motives; that he did not intend to cheat or violate any law or rule; that he had no personal gain. He had a system. The system worked every time. It didn't work here, because people concealed or did not give him the information; and that the vagaries of what the prosecution produced with the quality of the testimony doesn't meet the burden of proof. And yet—and yet Mr. Rosen testified and told you that he did not do this; that he would never do this. And even if you want to say, "Well, anybody could say that, why wouldn't he?" Why would he testify? Only to meet you and let you meet him and see the cut of his jib.

Notice again the differences in style illustrated by these two passages. The government's peroration is smooth, meticulous, and precise as it draws a clear line between the alleged wrongdoing and the public's well-being, as embodied by the FEC. The approach is befitting of a prosecutor, who advocates for the people, for law and order, and ostensibly serves a higher purpose. The peroration for the defendant is much more emotional. The figurative analogy of the wise man and the king, familiar to many trial lawyers, leaves the jurors with a sense of profound responsibility. It implies the defendant's vulnerability and innocence.

Peroration in the *Maffei* Case

As in *Rosen*, the *Maffei* trial concluded with attorneys tying their case to larger themes about public service. Plaintiff's counsel exhorted the jurors to "send a message" about the importance of taking precautionary x-rays when patients arrive in the hospital with complaints of chest pain.

He also implied that any one of the jurors could find themselves in the position of the deceased one day.

> All you need is courage and common sense. You have it. We can see how courteous you've been and how attentive you are. And use that common sense.
>
> Let it work for you.
>
> And I beseech you, when you return, return with a verdict for Mrs. Maffei. Give her the justice that she deserves.
>
> No amount of money can bring back her husband.
>
> No verdict in her favor can restore her. Life is precious and it flickers. And we never know—I read in the newspaper just the other day, like you did, that poor actress, she was skiing and felt fine and now she's gone. We never know.
>
> But you're here, I'm here. We can do good. We can also send a message to the community—not an evil message, but a message that these x-rays with chest pain are crucial. It can save lives. You can save lives by telegraphing this message.

The defense counsel, on the other hand, sought to humanize the problem his client, Dr. Smedley, faced when treating the late Mr. Maffei. The analogy he offered the jurors in the peroration of closing argument effectively and memorably clarified the physician's task and so called attention away from the plaintiff's call to "send a message" to the public.

> As Dr. Shank explained, there was 800 milliliters of blood found in this pericardial sac. She had the twelve-ounce soda can. It was two and a third of the soda cans of blood that backed up into Mr. Maffei's heart. And Mr. Maffei died very suddenly when that happened.
>
> That was not the presentation that Mr. Maffei had when he was in the emergency department.
>
> I was trying to think of an analogy. It's not a great analogy, but I remember working on snow days with my mother on jigsaw puzzles and putting a puzzle together. And a lot of times with a jigsaw puzzle, you know what you are going to put together because you would see on the front cover what the puzzle looked like. Dr. Smedley didn't have even the cover of the puzzle. She had maybe one piece of the

> puzzle. It was only after Mr. Maffei left the emergency department that a number of the other pieces of the puzzle probably would have come into play and could have been appreciated by an emergency room physician.
>
> It was very early in the dissection, if it was even there, for Dr. Smedley or any reasonably competent physician in the emergency department to make this diagnosis. It was only on the basis of hindsight that the plaintiffs conclude that the case could end otherwise.

These excerpts help illustrate that there is no single proper way to deliver a closing argument. Every attorney is a unique individual. In closing, your persona is on full display. The jurors have closely watched you play your part for hours or days or weeks. They have to come to know your quirks, your mannerisms, the tone of your voice. Closing argument is the end of your brief relationship, and you will want to connect with the jurors one last time. To do so you have to remain true not only to your client, the evidence, and the law, but also to yourself. You should not attempt to affect the style of another or pretend to be someone you are not. It is the most prosaic advice of all, but it is often forgotten at the close of a heated trial: Be yourself.

Rebuttal Argument

The government in a criminal case and the plaintiff in a civil case have the burden of proof. Failure to meet that burden spells defeat. Therefore the moving party has the opportunity to have the last word in argument—rebuttal.

This opportunity is important and must not be misconstrued. Its purpose is to confront the arguments against your case, and persuade the jury that your view of the case is correct. Its purpose is not to reargue your case outside of the context of refuting the opposing case.

The art of effective rebuttal argument is in identifying the offending point by the opposition, explaining based on the evidence why it is incorrect, and then stating why your view of the evidence is the proper interpretation.

You may find in the Appendix the rebuttal arguments in the Rosen and Maffei cases of interest. They are there. For example, see page 316 for the rebuttal argument by the government and page 369 for the rebuttal argument by the plaintiff.

Learning Points For Chapter 9

- *Logos and pathos*: Logic is critical, but don't forget Cicero: "Mankind makes far more determinations by hatred, or love, or desire, or anger, or grief, or joy, or feelings . . . than from regard to truth, or any settled maxim or principle." Strive to engage the jurors' reason and their emotions.
- Winning arguments is about framing them to your advantage. Use figurative analogies to vividly frame the ultimate decision in a way most helpful to your client.
- Consider in advance your nonverbal communication.
- Avoid legalese or hyperbolic language. Your diction should be clear and vivid.
- Remind yourself of all relevant rules.
- Organize your closing so that it has a clear beginning, middle, and end. Remember that you are telling a story, one that should unify disparate facts and acknowledge jurors' doubts or confusions.

CHAPTER 10

CLOSING ARGUMENT—A VIEW FROM THE BENCH

By the Hon. Marvin E. Aspen, United States District Judge, United States District Court for the Northern District of Illinois

In my view a closing argument is not a science: It is an art form, an opportunity for the creative juices of the advocate to flow and shine, which need not be too overly circumscribed by an extensive laundry list of absolute "dos and don'ts." The reasons for this observation are fairly obvious: No two trials are the same. Each fact situation and applicable set of laws varies from case to case. Juries in every trial are different in composition, as are the respective credibilities of the witnesses, and the nuanced degrees of persuasiveness of the evidence. Each lawyer has different and unique strengths and weaknesses of persona and presence. All of these variables must be considered by the skillful lawyer in the planning and preparation of a closing argument.

Keeping this caveat in mind, there are nevertheless certain general approaches to preparing a closing that are useful. Here are a few of these suggestions offered from the perspective of a judicial observer. They have been divided into two parts: those dealing with the organization of the closing and others relating to the lawyer's delivery. I will also

illustrate some of these suggestions with examples from the effective closing arguments of the lawyers in the *Rosen* case.

ORGANIZATION—AN OPPORTUNITY OFTEN LOST

You will never have the opportunity to hold the jury in more rapt attention than during the opening minutes of your closing argument—especially when the argument is planned to be a relatively lengthy one. Too many lawyers squander this golden opportunity with boilerplate ritual, i.e., effusive thank yous, mini-histories of and praise for the jury system, and similar offerings of truncated civics lessons. For example, consider the introductions of the government and defense in the *Rosen* case. The government thanks the judge, opposing counsel, and the jury in two short sentences and then proceeds to the substance of the case. The defense, however, espouses the role of juries in society: "The right to trial by jury is so precious to our society, it's been mentioned no less than four times in the text of the United States Constitution."

It is certainly appropriate to thank the jurors for their service and to let them know how important it is. (Especially when the judge and your opponents may have already done so, as you will not wish to appear ungracious.) But do it quickly and then get on to the substance of your argument.

An Effective Start

If you can find a way to get the jurors interested and invested during the first minutes, you will have a much better chance of retaining their attention during the full course of your closing. Use these opening minutes to whet their appetites with a concise preview of your full argument: the issues you will be discussing, your theory of the case, any key facts, and a short blueprint of how you will be organizing the full argument. The government does this effectively in the *Rosen* case by presenting a general theme of the case, "the public's right to know," and then explaining that the case boils down to three questions: "[F]irst, what did the defendant do? Second, why did he do it? Third, why does it matter?" The defense takes a different but equally useful approach, attempting to grab the jury's attention and minimize the severity of the allegations by injecting some perspective. Counsel asks the jury:

> What is the issue in this case that you, the jury, will decide?
>
> Is David Rosen charged with stealing money that belongs to others? No.
>
> Is he charged with reaping profits to which he is not entitled? No.
>
> Is he charged with inflicting physical harm or violence? No.
>
> Is he charged with causing innocent people to suffer economically or lose their jobs? No.

Not only will the jurors' interest be piqued if they are given an organizational framework, but they will be better prepared to follow your argument—and eventually to review all the evidence in the context of your theory and blueprint of the case.

The Promises

Both your opening statement and that of your opponent should be viewed as promises made at the beginning of the case that the evidence will establish certain facts and inferences favorable to their respective sides. So the preparation of your closing argument should include an assessment of the opening statements to examine whether these promises have been met. Accordingly, a persuasive closing frequently will refer back to one's own opening as a promise shown by the evidence to have been kept. Defense counsel, for example, returns to a theme of its case first presented in its opening statement—Rosen's voluntary choice to testify to allow the jurors to make their own decisions about his conduct and character. Counsel points out that he fulfilled his earlier pledge that:

> David Rosen will testify. . . . He will come to the witness stand. He will tell the judge, he will tell you, the jury, exactly why he did not do this and exactly what did occur. He will tell you that he is innocent and will relate to you in his own words, answering all the questions Mr. Zeidenberg puts to him, under oath.

A compelling argument will also cast the opponent's opening as a promise that has not been fulfilled by the evidence. The government's clever twist on the defense's use of the word "concealer" in its opening illustrates the point nicely ("David Rosen is the true concealer in this

case."). The government further discredits the defense's opening statement by referring to it as part of the "absolutely absurd . . . pitch" that Rosen is trying to sell. In addition, after presenting evidence of Rosen's motive to underreport and the campaign's cost concerns, the government uses a rhetorical question to imply that the evidence does not support the defense's claims in its opening statement that the campaign was complacent regarding costs ("[B]ut do you believe for a second that Harold Ickes, Hillary Clinton, or anyone on the campaign staff was ever as complacent about their funds as the defense tried to suggest in their opening statement?").

A powerful closing can also refer to the jury's implicit promises and duties. Defense counsel in *Rosen* cleverly reminds the jury of its reciprocal promises, stating that because counsel has kept his word, the jury must acquit Rosen. In doing so, counsel encourages the jury to feel good about keeping its promise, pointing out that an acquittal should satisfy the government as well ("I told you in opening statement—I made some promises to you, just like you implicitly made promises to me—I would demonstrate that David Rosen was innocent. If I did that, you would find him not guilty. And I also said to you, if you did that, the government still wins, because the government always wins when justice is done.").

Use Demonstratives Effectively

It is extremely burdensome for any layperson to listen and follow carefully an individual speaking nonstop for a fairly lengthy period of time. This is especially true of a lawyer's closing argument in a case rendered complex by law or fact. The subject matter is new and may be difficult for the juror. The language of the law is foreign. It is tempting and, not surprisingly, easy for ordinary citizens, who are not often required to sit still for an hour or more and listen to one person talk uninterrupted, to eventually tune out completely.

What can you do to make sure this does not happen to you? Of course, refining the style of your delivery, which is addressed later, is important. But organization is of equal importance and you can organize your argument so that you will *not* be talking nonstop. One simple and useful way of accomplishing this is with a healthy dose of relevant demonstratives (whether high- or low-tech) to illustrate your argument and to break up the one-way dialogue. Evidence, blown-up or otherwise enhanced, an excerpt of a transcript of key testimony, an accurate

summary chart (even if not in evidence and prepared especially for closing), or a legal instruction used during the course of argument will enhance the closing, give it a fresh change of pace, and help to retain the jurors' attention to its finish.

Returning to the *Rosen* example, the defense repeatedly relies on an exhibit summarizing the law at issue. Counsel uses this exhibit to refute the government's description of the law, further commenting that "the facts were not interpreted by the prosecutors either." Counsel also incorporates the jury instructions in its argument by detailing the elements of the crime ("As the judge has instructed you . . . [h]e has been charged with willfully, knowingly, and deliberately making false statements and that he had knowledge of these statements and intended to do it"), and then boiling down what these instructions mean in laymen's terms ("In other words, he sat down one day and said, okay, I am 33 years old. I have a very important job. I am afraid that I could get fired and, let's see, I think I'll risk my whole career, my family, and jeopardize everything. I am going to lie. I am intentionally going to deceive people.").

The government also frequently refers back to exhibits during its closing argument to clarify the sequence of the costs listed on the expense reports. For example, the government even uses one of the defense's own exhibits (Exhibit 548) to show how its contents (that the August 12, 2000, gala was hosted by Aaron Tonken and Peter Paul) are inconsistent with Rosen's comments to Whitney Burns (that the $366,000 was coming from Stan Lee Media).

Of course, to avoid any unwanted interruption of your argument by an objection to the use of demonstratives prepared especially for closing, show the material to the other side and get the judge's approval for its use prior to the argument. This is especially important when you intend to use summary charts not in evidence or individual jury instructions. Remember also, when anticipating use of jury instructions during closing, to schedule the jury instruction conference before the closing argument—and you might attempt also to prevail upon the judge to give the final jury instructions before the closings.

Final Words—A Bang, Not a Whimper

End your argument at a high point. Plan on saving one of your best points, analogies, or quotes for your conclusion. And always tell the jury

precisely and succinctly what the verdict should be and why. In *Rosen*, for example, the government's last statements specifically ask the jury to "not buy what the defendant is selling" and for this reason to "find David Rosen guilty beyond a reasonable doubt." Indeed, the government sums up its main argument in one attention-grabbing sentence when it says, "Ladies and gentlemen, when David Rosen was in Los Angeles in the summer of 2000, he began to sell a pack of lies that is still being sold today." Defense counsel, for its part, responds forcefully by suggesting that the jury in fact "buy it lock, stock, and barrel." While defense counsel does not specifically ask the jurors to return a "not guilty" verdict, its finale contends that the government has not met its burden of proof and manages to portray David Rosen as an honest victim by emphasizing his willingness to testify.

> Plan on saving one of your best points, analogies, or quotes for your conclusion. And always tell the jury precisely and succinctly what the verdict should be and why.

Delivery—Be Yourself

It is almost impossible to change your personality for purposes of a closing. It is far easier and more effective to analyze the strong and weak points of your persona and to utilize them in a productive manner.

By the time you are making your closing argument, the jury has carefully observed your demeanor during the course of the trial. The jurors will already have a fairly accurate impression of who you are. So do not attempt at the closing to metamorphose into something you are not. For example, if you cannot successfully pull off recounting a funny story in your day-to-day life, do not make your comedic debut before the jury. On the other hand, if you have the ability to tell a story or an anecdote that will enhance or illustrate your argument, by all means do it. For example, defense counsel's football analogy in *Rosen* in describing the burden of proof was masterful and right to the point:

> There is no question that the government has the burden of proving its case beyond a reasonable doubt. And what does that mean? In most

> civil cases the government has to push the ball, if you can use that, a little bit over the 50-yard line, and that's called more likely than not. But in a criminal case the government has to prove the ball—push the ball all the way up, say, to the 90-yard line, the other side's 10-yard line.

Also, defense counsel's anecdote about the cat and mouse in a box made a great point about the ability to draw inferences and was an excellent segue into discussing the holes in the government's case.

The most important qualities the jury is looking for in a lawyer are sincerity, honesty, and trustworthiness. Play up to your strengths. Do the things that have already made you a successful advocate.

Respect the Jury's Intelligence

It probably is equally disastrous to argue down to the jury as it is to talk over its head. In my view the effective closing argument is a *conversation* between you and the jury—not a lecture. Do not underestimate the intelligence of your jury. The jurors will know if you have done so and will resent it. Speak to the jurors in the same style and manner as you would with an intelligent friend or acquaintance. For example, the government's tone during the end of its closing argument accomplishes this by appealing to the jurors' "common sense" and asking them, in informal language, "in the end . . . not to buy what the defendant is selling." The defense similarly asks the jurors to wear "the hat of common sense" when assessing Rosen's credibility and in reaching a verdict. Counsel commends the jury and hammers this point home by saying that:

> You have common sense. Sisters, brothers, parents, relatives, children, friends on surfboards, whoever it is, you know when someone is lying. You can tell that because you know how to evaluate people. All of us as adults do. And you saw David Rosen. He looked into your eyes, and you looked into his.

And, of course, remember also that you are not arguing before a judge in a bench trial. So avoid the unnecessary use of legalese and other stilted language. If you are required during argument to use a legal term, take the time to explain it as best you can in lay language. And try not to use unnecessarily formal, multisyllabic words in your argument if you would not do so in normal intelligent conversation.

Likewise, even if comfortable to you, try to avoid complicated or obscure expressions in your argument. For example, defense counsel's statement that the legendary "sword of Damocles" was hanging over Rosen's head may not have been helpful. Not only may the jurors miss what you are trying to say, but you do not want to risk that they might perceive that you are attempting to show off your erudition at their expense.

Tell Your Story

The dullest and least persuasive marshalling of evidence during closing argument too often occurs when the attorney attempts to recap the testimony of each witness—one after another—in an effort to show how the evidence bolsters the argument. A far more useful approach is to simply tell your version of the case in story fashion—chronologically or otherwise—inserting each pertinent piece of relevant testimony or other evidence into the narrative where appropriate. Learn from the novelist and the movie or TV scriptwriter. How often would we read more than a few minutes of a novel or watch a film that tells its story in a format that presents the words of each of its characters *ad seriatim*? The government does this effectively and even begins its recap of the evidence by stating, "[L]et's talk about the story that the evidence told throughout the case." The government then generally incorporates the evidence into a story-like framework, summarizing what the witnesses stated. However, there are times during its closing argument that the government, in my opinion, offers too much detail regarding a witness's testimony that may distract the jury from the flow of its story. One example occurs when the government recaps Rick Madden's testimony. ("[L]et me take you back to Madden's testimony. And if you remember Mr. Madden, he was the general counsel at Stan Lee Media for some time. He came to court from Skadden Arps, a law firm down the street, where he works now.")

The defense exhibits a less straightforward but more colorful style by including anecdotes to help tell Rosen's story. Early into the closing argument, counsel tells the tale of an uncle who was treated to dinner by his nephew at a restaurant featuring his favorite dish: beef stew. When he realizes the meat in his stew is rancid, he has a choice of either eating what he can or sending it all back at the risk of insulting his nephew. Counsel encourages the jury, like this uncle, to entirely reject

the testimony of a government witness. Later, when discussing a different witness, counsel need only say "beef stew" to remind the jury of this story and its moral.

Talk to the Jurors

During argument, maintain eye contact with the jurors. I have seen attorneys so enrapt in their own words that, although looking in the direction of the jury box, there is complete failure to make meaningful eye contact with the individual jurors. Other lawyers have attempted to guess—often not very successfully—who will be the foreperson or who are the stronger personalities among jurors and to direct their arguments toward those individuals. Even if lucky enough to identify correctly the potential leaders, lavishing your total attention on those individuals during closing is a mistake. The other jurors very well may resent being ignored, and you will never be certain whether such resentment played a role during deliberation.

Both sides in the *Rosen* trial developed a good rapport with the jurors, often by using a direct but informal tone when summarizing the evidence. In discussing certain exhibits, for example, the government commented that "in the end even the defendant doesn't dispute these numbers. So don't kill yourselves about that." Defense counsel even more effectively reviewed the evidence in a collaborative fashion. When analyzing the potentially damaging testimony of Bretta Nock, he told the jury: "Let's confront it, you and I, together." This is a fine example of how to move the jury to identify with counsel by defining a mutuality of purpose.

To Object or Not to Object

Some lawyers make objections during closing arguments in a transparent attempt to disrupt the flow of an opponent's argument. This is always a mistake and is usually perceived by jurors for exactly what it is. A more difficult call is whether to object if you perceive that your opponent is misstating the law or evidence or otherwise making an improper argument during closing. The answer in my view is a simple one: If the argument is *clearly* improper and prejudicial to your side, make the objection. The corollary is also correct: Don't object if the argument is borderline problematic. The following excerpt from the *Rosen* closing is illustrative:

Mr. Sandler: Let's go to Mr. Ray Reggie, if we could for a minute, another star witness. Now, look, I say that probably Mr. Reggie, based on the evidence, has to be pitied more than censured. No one enjoys being humiliated and acknowledging that they have done wrong, but he did: bank fraud, check kiting, lying under oath to me in front of you about his incident of putting the light on the car.

Mr. Zeidenberg: Objection.

The Court: Overruled.

Mr. Sandler: I am going to be very specific then, sir. I asked Mr. Ray Reggie in court about an incident of impersonating a police officer and asked if he put this light on the top, and what did he say? He was a commissioner himself of police.

Mr. Schwager: Objection.

The Court: Ladies and gentlemen, the characterization of what the evidence was and what the testimony was, as I instructed you in the jury instructions, if there is a different recollection you have, yours controls. Lawyers are expected to account for the evidence in a fair-minded way and to draw reasonable inferences from that. You will be the judges of just what he said and whether he said what counsel has just referred to.

Now please proceed.

Mr. Sandler: Thank you, your Honor.

The first objection to the evidence as argued was overruled. The judge did not rule on the second objection on the disputed evidence and instead instructed the jury to follow its collective recollection of the evidence. The judge concluded: "Now please proceed."

There was no upside to the objections. The arguments were not really harmful to the objector. The downside to the objections were the dangers that the jury would perceive (1) that the objector was unfairly interrupting his opponent, (2) that the objector was attempting to keep pertinent matters from the jury, and (3) that the judge was becoming impatient with the objector.

A Concluding Thought

I have presented a few suggestions from a judge's perspective for the preparation and delivery of a successful closing argument. The arguments of the talented lawyers in the *Rosen* case have provided excellent examples of how lawyers can, at the same time, utilize the strengths of their respective personalities, be creative, and apply the general rules of organization and style to argue effectively and forcefully before the jury.

This chapter is not meant to be an exhaustive discourse on the subject. The full text of this book and the words of others who have written in this area, of course, are valuable references.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY
CIVIL DIVISION

HILLSBOROUGH COUNTY EXPRESSWAY AUTHORITY, Plaintiff, vs. GAT DEVELOPMENT COMPANY, Defendant.	CASE NO. 92-2592 DIVISION: A

TRANSCRIPT OF PROCEEDINGS

BEFORE:	HONORABLE JAMES D. ARNOLD Circuit Judge
TAKEN AT:	Courtroom No. 2-B Hillsborough County Courthouse Tampa, Florida
DATE:	December 15, 1993
TIME:	Commencing at 9:00 a.m.
REPORTED BY:	Joan Shiralipour Notary Public Deputy Official Court Reporter

VOLUME III

money to be paid to the defendant for the permanent taking. There is of course the two other remaining issues and that is what if any compensation should be had for the defendant for the temporary taking. And what if any compensation should be had by the defendant for any damages for business loss and in that respect it -- to prove up that compensation and those damages, the defense has the burden of establishing those. Therefore, Mr. Buell will present his argument first followed by Mr. Duclos and then Mr. Buell will have an opportunity to make a short rebuttal.

Mr. Buell, you may proceed.

MR. BUELL: Thank you, Your Honor.

CLOSING ARGUMENT

MR. BUELL: May it please the Court, first of all let me say thank you on behalf of my clients, Dorsey Tynes and his daughter, Linda and my partner, Tom Elligett, and I know the petitioner's counsel and representatives join me in saying thanks for your hard work. You have been very attentive this week. You have taken your job seriously and it's clear that the time that you've taken off from your jobs and family has

been well spent and will be well spent here in your deliberations.

Our system of justice is I think -- I think it becomes clear places one thing between the government with all of its power and money, and the people or the individual or a small business. And that one thing is a jury. I think when you sit here for a few days you realize that the founding father sthat wrote the Constitution and the things that we take for granted like that had some idea of what they were doing. They -- they set up a system in which regular folks from the population could come in and make determinations and decide what even the most powerful force in the country can and cannot do. That is what the government can and cannot do. This case involves very old and serious and sacred constitutional rights and those are the rights to property. And in the United States the government doesn't own all of the property like it used to be the case or perhaps is the case in the Soviet Union and in other countries. And I'm -- I'm told that the reason or one of the reasons we have certain of these rights is that in the colonial days the British soldiers that were garrisoned in the

United States would take property from the colonists and they wouldn't compensate them and it made them mad enough that they were willing to fight about it. And when we wrote our Constitution, they wrote into it the Fifth Amendment that no private property shall be taken without just compensation. The Florida Constitution follows that.

At the beginning of this case each of you took an oath to perform your duty and now it's time for us to turn the case over to you to make a decision and to let you perform that duty. This case is really not that complicated although there are some complicated or there were some complicated issues relating to real estate and the like. What it really boils down to is two things. GAT, G-A-T, which was the owner of the land is entitled to damages for the taking of its property caused by the map of reservation. The Court has determined that indeed a taking occurred. The only question is what are the damages caused by the government coming in and filing that map of reservation and freezing that property. The other issue is what damages are due to Enrichment Preschools whose business was

eroded and destroyed as a result of the map of reservation and the action of the government. The evidence is undisputed that Enrichment Preschools was absolutely driven into the ground as a result of the actions of the Expressway Authority.

My clients do not dispute the government's right to build a road or to take property for the good of all, but they insist on fair and just treatment. The Court will instruct you when both the lawyers have had a chance to give closing arguments that you may consider all of the testimony in light of all of the evidence in the case and in light of your own experience and common sense. If you don't throw your common sense out when you walk in the courtroom to become a juror, and I would ask you, I would ask each of you whether the evidence presented by the defendant in this case makes common sense? Does it make sense that the parents would pull their children out of a preschool that is about to be destroyed by a road project? Does it make sense that parents wouldn't put their children in a preschool in the first place that isn't going to be around very long? I would suggest to you that

makes absolutely perfect common sense. We all know how important our children are to us, and we all know how important parents feel about the subject of their children, the educational foundation -- of their education, all the way up and how important that is. And why would a parent place a child in a strangling school soon to be destroyed when there are other alternatives? You heard the testimony of both Dorsey Tynes and Julia Levy regarding damages to the school. And you will have a chance to take all of that -- all of the exhibits that were entered into evidence back with you. We placed into evidence the annual income and expense statements from both the Casey Road and the Gunn Highway preschools and these statements are for '88, '89 and '90 which more than covers it, in other words, overlaps on both sides the period of time that we are concerned with relating to business damages. You heard Mr. Tynes testify regarding the amount of damages that he calculated when he compared the schools. Now, what he did and again I would suggest to you this makes perfect common sense. We are fortunate in this case because we don't just have one business to look at and then wonder,

you know, what can we compare it with or what would have happened had the road not been there and that sort of thing. We have two virtually identical schools. The schools are run by the same management under the same rules and guidelines. They are in the same basic area of Hillsborough County. They were built at the same time. They have been there the same amount of time. Their campuses are virtually identical. The buildings are exactly the same. The only difference is that Gunn is on a much busier highway, and the Gunn Highway school had a swimming pool which Casey Road did not. And it had an extra large playground for the small children. There were no disadvantages related to the Gunn Highway location, and Mr. Tynes calculated the difference in the revenues between those schools for exactly the same period of time. They -- the petitioners made some comments about the schools having come out of a bankruptcy and so on, but they both came out of the same bankruptcy. One of the schools took off and the revenues went up, and the other one went the other -- went the other direction and interestingly during the first year or 18 months after they came out of

this bankruptcy, both schools went up together, and at the end of the 1988 year, Mr. Tynes testified their -- their -- after expense revenues was only $11,000 difference and there wasn't even 10 percent or even five percent difference between these two schools. But once the map was filed the Gunn Highway location turned sour and was ultimately destroyed. Again the evidence -- that's the evidence that is here for you to consider.

Mr. Tynes calculated damages of $99,180, but then in absolute fairness to petitioner, he said well the company would of had lower expenses during that time because we did have fewer teachers and fewer students and the like, and he deducted 30 percent from that to come up with a figure for business damages of $69,426. I hope you can read my handwriting. The -- as I said there are two players here, Enrichment Preschools, the business, and GAT is the owner of the real estate. The damage -- the business damage to the Enrichment Preschools is $69,426 and it's for this limited period of time and this limited period of time is the only period in question, June 10 of '89 to July 28 of 1990. It

doesn't include damages before or after that period of time. Again, you will have the opportunity to take these with you back to the jury room when deliberating and you can evaluate them yourself and see if they make common sense, see if they pass the test of common sense.

You heard the testimony of Lee Pallardy on the issue of the damages caused by the map of reservation. Lee Pallardy is the same expert, the same appraiser that the condemning authority, the Tampa-Hillsborough County Expressway, hired to value six different properties out on where? Gunn Highway, almost exactly where the subject premises, the 5-33 owned by GAT is located. He -- he clearly comes in here with the stamp of credibility. He is someone that the Expressway Authority uses and has confidence in, and he is someone that the defendants have confidence in. You had a chance to observe him, see what he looked like, sounded like and whether what he said made sense. He testified that a map of reservation is very similar to an option agreement. An option agreement is a situation where someone agrees to take his or her property off the market while someone else pays them to take it off the

market, and he gives the buyer a period of time during which he can exercise the option and buy the property. This is a very similar thing to what the Expressway Authority did. They knocked the market off the property -- knocked the property off the market -- easier for me to say. They took this property off the market just as an option except there are some very serious differences. In an option agreement the seller has some opportunity to contract and decide whether or not he wants to give that option. He gets to decide who he gives the option to. He gets to decide what the option price is going to be during the period of time that the option is in force, and also what the purchase price will be at the end of the year or two years and 20 days as in this case. This seller didn't get to decide any of those things, didn't have any opportunity to decide even if it was a good idea or if the seller, GAT, wanted to do it.

Now, Mr. Pallardy testified that the value of the damages, in other words what a buyer would pay for that option to take a $960,000 piece of property in a hot area of Hillsborough County close to the Citrus and -- both of the appraisers

you heard testified to this, Mr. Knight testified too, both of them -- the first thing they said about this area was the Citrus Park Mall, giant mall going in a block away, everything is popping especially back in 1988 and '89. Mr. Pallardy testified that a buyer -- that the value of that option agreement if the buyer had gotten somebody to take the property off the market and give away that opportunity, that is the opportunity that some other purchaser might come in and buy it for a higher price, and we will never know now what might have happened. Mr. Pallardy said that those damages -- the cost of the option would be $91,550. Now that calculates out to a rate of return -- if you take the $960,000, this number, 91,000 figure comes out to a rate of return of 4.75 percent a year. If you want to look at it that way. Some of this again gets a little bit technical although I think the basic issue is simple and that is how much owed because we know a taking occurred. 4.75 percent a year is less than a passbook savings account at a bank in 1988. He testified there was a range -- he looked at a number of options, and interestingly he found one right across the

street from this parcel.

The Expressway Authority suggests that -- that the defendant is trying to double dip, trying -- trying to charge twice, trying to lease the property with one hand and put the property up for sale under an option with the other hand. And you heard Mr. Duclos ask Mr. Pallardy if that wasn't impossible -- you can't do that; can you? And Mr. Pallardy said not only can you do it but there was one option right across the street. The owner of the property was renting buildings on that property, gave an option at the same time and the option price in that instance was $12 a square foot.

THE COURT REPORTER: Excuse me, I just ran out of paper.

(Paper was added to machine.)

MR. BUELL: Mr. Pallardy testified that there was an option -- that there was an option given right across the street under the same circumstances, the owner was renting the property and given an option on the real estate at a price of $12 per square foot. The price of this land across the street on Gunn Highway is $5.55 per square foot that the defendants here have agreed to,

they haven't put up a big fuss about that, but yet property within a few hundred feet was being optioned back in the same area more than twice that price. Again I suggest to you when you look at the totality of the evidence it needs to make common sense and I would suggest to you that that makes perfect common sense. Mr. Pallardy testified that there could be a range. Sometimes options go for -- for more or less, but the 4.5 percent as a -- as a rate of return on this kind of price was at the low end of the range of what people pay for options. In fact he said that he found one that went as high as 57 percent. In other words they put down the option price at 57 percent of what they were going to pay. Now, 57 percent of $960,000 would be more than half a million dollars and that -- and that doesn't meet a reasonable test. That would be crazy if we came in here and said the option price was half a million dollars, but the type of numbers we are talking about, 4.75 percent which is $45,000 a year on a $960,000 piece of property during this period of time, I would suggest that is extremely reasonable. The Expressway Authority has also suggested to you that there is a lease on this land

and it couldn't have been broken so how could you ever sell it. Well, Mr. Pallardy answered that question as well. He said it happens all the time, just buy out the tenant. And in this situation Mr. Tynes is the president of both GAT which owns the property and Enrichment Preschools. There are different owners and different investors and two different entities, but does anyone here really think that Mr. Tynes as the president of both of these companies couldn't have worked something out with the tenant if -- if a buyer came in and wanted to take an option on the property. Again, it just makes common sense.

The -- many of the facts here really are not disputed. The Court has ruled there was a taking and you don't have to -- to consider that. The value of the land is $960,050 and GAT agreed to that, the price that the petitioner offered. The temporary taking occurred between July 7 and -- of '88 and July 28 of 1990. The highest and best use of this land is commercial. There wasn't any dispute about that, but that means a developer would be likely to buy and develop it, and that's very significant in the sense that people are taking

options out in this section of town and paying high prices for land. And again using your common sense and experience if no one could have purchased this property, if it really was already tied up then why didn't he -- why did they need to file a map of reservation in the first place? Why did they need to file these things to freeze the land if what the defendant is saying isn't true? Now, as I said before, and the Judge made light of the fact that you weren't invited here, you were subpoenaed and my client wasn't invited here either. He did not ask for this fight with the Expressway Authority which is obviously a pretty formidable opponent, but they are not going to be trampled or intimidated or bullied. And that's why you are here and that's why we are here.

Now, Mr. Duclos -- let me talk about one other issue. Another smokescreen that may be put up in this trial is the -- is the question about whether Mrs. Levy attempted to chase off the students from her own school. And the only evidence that you will have on that subject is this letter. It's written April 6, 1992 and it was put in by the defendants. In it -- it's the

letter that Mrs. Levy sent to the few students that were left and -- when the school had virtually been destroyed. She said there were 30 or 45 left. So it's a letter she sent and she said the school is about to be plowed under and you can transfer to the Casey Road school which is five miles away and we will give you some incentive and I think it gives a week free or gives some price breaks on that. But that's -- that's the only evidence on that and both Mr. Tynes and Mrs. Levy testified that the point at which they gave notice to the parents that the -- that the taking really was going to occur and that the school was really going to close back in 1992 which is way after the period of time that we are even involved with in this case.

I started to say that the Expressway -- well, let me first tell you this. There are several other instructions that the Court will give you and I'm not going to read them all, but the one about business damages I think is important and I want you to hear it. The Court will instruct you that the lessee is entitled to be paid for the business loss if any to his business located on the remaining land if this loss is caused by the

denial of use of the property taken. In making that determination you should determine the probable damages to the business that the denial of the use of the property taken will reasonably cost. The award for business damages is a separate item from the value of the land taken and -- and damages from the temporary taking. Business damages are not limited to loss of profit but may also include the depreciation effect the taking will have on the business or on its good will or the going concern value of the business.

I will have a moment to speak to you again in a few minutes. I would as I said earlier respectfully suggest to you that the evidence is clear in this case that the business damages are $69,426. The damage caused by the temporary taking are $91,550.

Please give Mr. Duclos the same kind attention that you have given me. Thank you.

THE COURT: Thank you, counsel. Mr. Duclos?

MR. DUCLOS: Thank you, Your Honor.

CLOSING ARGUMENT

MR. DUCLOS: May I have just a moment, Judge, I don't want to block you in.

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA

CIRCUIT CIVIL NO. 91-12059-13

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HELEN MARIE HIGGINS,

Plaintiff,

VS.

J. QUENTIN DAVIDSON, JR., as General Partner of HARDAWAY ASSOCIATES OF LYNN LAKE, a Georgia General Partnership, as General Partner of LYNN LAKE ARMS, a Florida General Partnership, et al.,

Defendants.

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PROCEEDINGS:	Excerpt from Jury Trial
BEFORE:	Honorable Radford Smith Circuit Judge
DATE:	December 7-11, 1992
PLACE:	Judicial Building St. Petersburg, Florida
REPORTED BY:	Elizabeth A. Dixon, RPR Deputy Official Court Reporter

APPEARANCES:

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PROCEEDINGS

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MR. BUELL: May it please the Court.

First let me say thank you on behalf of my client, Bonnie Higgins, and Tom Elligett and Amy Farrior of my office, and myself as well. We've appreciated your attention this week.

I think it's obvious at the end of a week of sitting as a juror that the system works in a certain way, that you are the most integral part of the system. It's not the judge; it's not the lawyers; it's not the witnesses who make decisions and who ultimately are the arbiter of the facts in a case like this; it's the jury.

I think each time that I give a closing argument about the founding fathers of our country who set up this system, they set up a jury system that permits regular folks, just like the litigants, to come in and make a decision in cases like this. They set up a system that provides for the same justice for an individual, no matter how significant or insignificant that individual is, and they provided the opportunity for an individual to be on a level playing field with big companies, even big apartment complexes like in this case.

At the beginning of the case, you took an oath. You all stood and raised your hands. You solemnly swore to do your duty as jurors in this case. And it's time now, and I call upon you now to fulfill that oath.

It is the Plaintiff's burden in this case to prove liability and damages, as I mentioned during closing argument. And I would suggest to you that both are absolutely clear in this case, and that the evidence is absolutely overwhelming, one, that the Defendants were negligent, and two, that my client, Bonnie Higgins, suffered terrible damages as a result of that negligence.

The primary issue in this case, when you boil down all the evidence that you've heard, is whether the Defendants were reasonably careful in waiting thirty-five days to warn after the attack on Mrs. Miller on September 5, 1989. There is not a single person who has come in this courtroom who has said to you it was a bad idea to warn after Mrs. Miller was attacked, or that thirty-five days is a reasonable amount of time to wait to warn of a crime-specific event such as this, in such a life threatening situation, where a lady has been burglarized, attacked with an attempted sexual assault, and attacked with a

knife in her own apartment.

I've made some notes to help myself, and I hope they're reasonably helpful to you as well. I know you'll -- I hope you'll excuse my handwriting.

There was a great deal of evidence in this case about warnings, and particularly about crime-specific warnings. And I made a list here of the witnesses who testified on this subject, and I hope I included them all. If I left somebody out, I'm sure you'll remember. But everybody, every witness who testified in this case about warnings testified that a crime-specific warning should have been given as a result of the series of burglaries that were occurring, and particularly as a result of the attack on Mrs. Miller on September the 5th.

Dr. Territo is the security expert that we called as a witness to testify on that subject. And he explained in great detail about a number of problems at the Lynn Lake Arms complex particularly with respect to the warning. He also testified that the lighting was inadequate, and that supplemental window locks should have been put on the windows, all of which would have prevented the attack on Bonnie Higgins.

The Defendants retained Dr. Kirkham, paid him in

excess of $10,000 to come down here from Atlanta. And he agreed with Dr. Territo. He said, that's right. There should have been a crime-specific warning. The reason you give a crime-specific warning is to increase -- and it's really common sense -- to increase the vigilance of the people who are living there so that they will be in a position to choose and can make an educated decision about whether or not they're going to protect themselves. And I would ask you rhetorically, is there anybody -- is there anybody in this courtroom who would say that had Bonnie Higgins been advised that there had been a series of burglaries, and that there had been an attack by a sexual assailant with a knife, is there anybody in this courtroom who does not believe she would have closed and locked her windows?

Bonnie Higgins was being safe. She was exercising more than ordinary care on the night of September 28th and 29th. She locked -- double locked her front door. She locked the sliding glass door. She closed the drapes and turned on the light. This isn't a situation where all the doors were open and no lights were on and that sort of thing. She did everything that a person would be expected to do, particularly a person living in an apartment complex

with a wall around the outside, with guards patrolling at night, with the guard gate with a single entrance, and all the other things that the Defendants proved to you that created an illusion -- and that's what it was -- an illusion of security.

Let me get back to my list there. The police said it was important to issue crime-specific warnings. In fact, the police put out bulletins about these very crimes in this case at the end of September. And notwithstanding police bulletins coming out on September the 29th outlining everything that was going on, it wasn't until eleven days later that Lynn Lake Arms finally got around to giving a warning.

Mr. Wolfson testified that it was important -- important to warn as soon as possible, I think were his words, about serious incidents like this. Mr. Wolfson testified about how quickly Lynn Lake Arms was able to get out a warning; how they -- after the first three burglaries they were able to turn around within twenty-four hours and get their newsletter changed in such a way that they could put some information in it. But after the attack on Mrs. Miller, it took thirty-five days, and during that thirty-five days Bonnie Higgins was brutally raped and beaten.

Finally, there can be no question that everyone in this courtroom agrees that a crime-specific warning should have been given as a result of the attack and the attempted sexual attack on Mrs. Miller, because they did give a warning. They gave a warning on October 10, 1989. And that exhibit -- I think it's Number 40, yeah, Number 40 -- is in evidence. You'll have the opportunity to take that back. But it is the crime-specific warning that should have been given that would have prevented this attack on Bonnie Higgins. The problem is it's dated October the 10th, instead of September the 5th or September the 6th as it should have been.

One of the -- one of the issues in this case is foreseeability, that is, was it reasonably foreseeable that another attack, or attacks in general, might occur. Can there be any doubt that once this burglar began, whether he was inside or outside the complex, or whoever he was, can there be any doubt that they were going to continue? And can there be any doubt that having burglarized and attacked somebody with a knife, and having perpetrated an attempted sexual attack, can there be any doubt that it might happen again? Can anybody suggest that's not reasonably foreseeable?

Additionally, we have put the crime statistics from that area of town into evidence. This is 1987, '88 and '89 up through September. And we also have Mr. Hart, who is the first witness who testified. He has summarized these statistics and has pulled out those that relate to Lynn Lake Arms apartments. And the fact is, they are all uncontroverted facts that during the first nine months of 1989, there were fifty percent more burglaries than there had been during all of 1988. Everybody agrees this is -- this was a high crime area, at least everybody but the management of Lynn Lake Arms.

Mr. Wolfson and Miss Gray, I believe, indicated they didn't know whether it was a high crime area or not. But the guard certainly said it was a high crime area, and the two experts, the one the Plaintiffs called as a witness, and the one the Defendants called as a witness, they both said it was a high crime area. And it's sort of interesting in this case, most of the evidence was uncontroverted. I mean, there is really very little conflict in the evidence that's been presented both as to negligence and as to damages.

Now, the Court's going to instruct you that negligence is a failure to use reasonable care. The evidence in this case clearly establishes that waiting

thirty-five days to issue a crime-specific warning, that everybody agrees should have been given, thirty-five days is the failure to use reasonable care. The Court will also instruct you that the Defendants had a duty to warn the Plaintiff of dangerous conditions concerning which the Defendants had, or should have had, knowledge greater than that of the Plaintiff. This is clearly a situation of a dangerous condition. It is not unlike a vicious animal, you know, a snake or a dog, that the apartment complex was aware of. There's no doubt they were aware of it. Their own guards -- and the incident reports are in evidence. Their own guards filled out incident reports every time there was one of these burglaries.

You heard Officer Begerow testify that the night he -- when he investigated both the Miller incident and the Higgins rape, the night he came in regarding Mrs. Miller, there were six other emergency vehicles. This is in the middle of the night. This isn't a place where a thousand vehicles come by every hour. His vehicle was there for Miss Miller. He was the backup. The primary investigating officer's police car was there. The technician's police car was there. He's the guy taking the fingerprints and stuff. They

brought in the K-9 unit. He was in a different vehicle carrying the dog and so on. The emergency medical people came in. They were in a fifth vehicle. And I believe he testified there was another officer as well. There's no question that they were aware of what's going on.

The apartment complex attempts to rely upon a notice in the penguin newsletter, something that they had to blow up to make it large enough for you to see, and that is just the problem. You heard Dr. Territo, and really Dr. Kirkham, both of them said this was inadequate. Dr. Territo did it in a little more detail. He said that you don't -- first of all Important Notice, this isn't enough. You don't see a skull and crossbones or whatever. Dr. Territo said it should have been on a separate sheet of paper. And Lynn Lake Arms agrees, because that's what they did on October 10th. Nowhere here do you see any mention of any specific crimes. There was a burglary. There was a knife. There was an attempted sexual assault, and that it plainly was inadequate.

Lynn Lake Arms has indicated that financial reasons really were not important in this case. And there's no way for any of us to get into the minds of the management at Lynn Lake Arms and figure out why

they didn't give the warning in a timely manner.

There is evidence that when Mrs. Miller moved out as a result of the attack on her, and when Bonnie Higgins moved out as a result of the attack on her, they did forfeit their security deposits. There's evidence that had they discovered at the apartment complex that Bonnie Higgins had a second kittycat and that she got a warning the next day, hand delivered to her apartment saying you owe us another $10 a month and come in and sign a new agreement.

The evidence before you will permit you to infer from that what their interest was really. And were they more interested in $10 a month for a second kittycat or were they more interested in the security of the tenants who lived at the Lynn Lake Arms?

Another seeming coincidence in the case -- you know, again, the evidence is in the record. You'll have a chance to examine it. This is in the form of a newspaper article from the St. Petersburg Times. The St. Petersburg Times printed the story about these attacks at Lynn Lake Arms on October 10, 1989. Now, isn't it a coincidence that on October 10, 1989, that that's when the warning finally came out? At that point, everyone knew. Everybody who reviews the St. Petersburg Times in St. Petersburg knew about it. If

you would like to compare the language in this October 10th letter with the language in the newspaper article, you will see amazing similarities in the description of the events that had occurred.

What was the normal procedure at Lynn Lake Arms? The evidence is that there weren't any written procedures to control the situation in this kind of an event when there was a serious criminal attack. There was no -- there were no criteria that says if there's a knife, if there's an assault, a serious crime, then a warning must go out.

But you can judge from what happened previously what their policy was. In 1987, there was another rape at the Lynn Lake Arms apartments. Did they warn immediately? Did the warning go out the next day, or week, or a few days later? No, the warning went out about two months later in 1987. The rape occurred on July 25th, and the letter that finally went out is dated September 18th, almost two months later. And that was exactly -- exactly the type of procedure that was followed in this case. Except in the Higgins situation, the St. Pete Times came out on October 10th and told everybody about it, so they could no longer keep it quiet for whatever reason.

It is probably understandable that an apartment

complex is not proud or happy about the fact that it's having assaults or burglaries or rapes within the complex. Nevertheless, that doesn't excuse the failure to warn the tenants in order to permit them to be vigilant and to protect themselves.

You will probably hear argument from Mr. Dore -- who is an outstanding lawyer. I don't need to tell you that -- that it's up to people to protect themselves. But it is difficult for people to protect themselves if they don't have all the information. You heard Dr. Territo talk about warnings. He said you can tell people not to pet stray animals, or you can tell them that there's a rabid dog who has bitten several people at large in the premises. Which do you think is going to get people's attention and which do you think is going to get people to avoid petting stray animals? I would suggest it is the specific warning regarding rabid dogs.

There should have been a crime-specific warning saying there were four home invasions that had occurred in the last week, and that in the last one there was a stabbing and a sexual assault. That would have brought virtually every window down and locked in that entire complex.

You've heard some talk about the tenant handbook,

this is Exhibit 7, that was given to all the tenants when they moved in at Lynn Lake Arms apartments. And if you look at Page 7, Paragraph 16 is entitled Security. And it mentioned a number of things. And it's somewhat generic, like the newsletter and like the March letter that went out, but it doesn't mention locking windows. I mean, Lynn Lake Arms apartments, although it wants to make a big deal about it now that some tenant didn't lock its windows, Lynn Lake Arms, when that tenant moved in and was given a residence guide, didn't think it was important enough to put it under security in their residence guide.

You heard some testimony about lighting. The significance of lighting at an apartment complex is that criminals can operate easily in the dark, and that if you have patrols and the place isn't lighted, the patrols don't do any good because they can't see people that are moving around. The whole reason for having a patrol is to be able to see what's going on. It's common sense really that when it's dark, the patrol can't see. Again, there really wasn't any controversy. Dr. Territo and Dr. Kirkham agree that the Lynn Lake Arms, in September of 1989, was not well lit and that provided the dark spots, provided opportunities for criminals.

I would respectfully suggest that the evidence in this case as to liability, that is, as to negligence is absolutely overwhelming, absolutely uncontroverted. And that the negligence issue must be decided in favor of the Plaintiff, that is, that the Defendants were negligent in this case which was a legal cause of injury to Bonnie Higgins. The issue really is whether thirty-five days is a reasonable time to wait to warn after a vicious attack. The evidence clearly says no.

The more complicated issue is damages in this case. And you heard a number of witnesses testify about damages. The Court will instruct you on damages. You may award damages for pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience, a loss of capacity for the enjoyment of life in the past and in the future, and that the amount should be fair and just in light of the evidence. The Court will also instruct you that if you find there was an aggravation of any preexisting condition, and in this case, there was testimony that Bonnie Higgins' neck may have had some early arthritic changes, if you find that the attack aggravated that or caused that to become painful when it wasn't painful before, you may consider that and award damages for that aggravation.

If it were possible, Bonnie Higgins would prefer to have this horrible tragedy that she's lived through reversed. Unfortunately, it is not within anybody's power to do that. So our legal system provides a remedy. You know, I understand that five hundred or a thousand years ago they would send out somebody to whip up on the person that caused the injury, whatever. But obviously we don't do that anymore. Our legal system only provides for a monetary award as compensation in a case like this. The Court will instruct you that that is the compensation that you must give to the Plaintiff which must be fair and just if you find that the Plaintiff has borne that burden by the greater weight of the evidence.

This is Bonnie Higgins' only day in court. Your decision in this case will bind her for the rest of her life.

The mortality tables -- now, this was probably a little confusing when my partner did what we call publishing this. But we introduced the mortality tables in evidence. And the significance of these -- you'll take these back. It still won't make any sense to you. The significance is a thirty-six year old female, which is what Bonnie Higgins is, has a life expectancy of between forty-two and forty-eight

point nine -- and you can round that out to forty-nine years from this point on. She has suffered permanent injuries as a result of this attack. Permanent, for purposes of this case, means the rest of her life, which is the time period I just described, forty-two to forty-nine years.

As I was saying, Bonnie Higgins cannot come back if a mistake is made by the jury in this case. If Bonnie Higgins is awarded sixty percent of what's just, then she's been given forty percent of injustice.

You heard the evidence of what Bonnie Higgins went through in this case. She was awakened in the middle of the night on September 29th by someone in her bed, with his hands around her throat. He brutally beat her, tore her clothes off her bed, her clothes off, and he raped her. After this terrifying attack, she was taken to the hospital. She went through a humiliating examination where they withdrew all types of fluids and blood and took hair samples from all over her body and so on. And the report, called the SAVE Exam, S-A-V-E, is in evidence, and you'll have the opportunity to take that back with you and see what the doctor did and what his diagnosis and so on was.

You heard Bonnie Higgins testify that the first thing she feared after her very life was that she might get AIDS, and that the death that she had narrowly averted might take her in a different form. She feared pregnancy. She feared VD. Bonnie Higgins will never be able to escape what happened to her. But she fought the attacker that night, and she continues to fight the problems that it's caused. She's lived with fear and terror, had nightmares. When Bonnie Higgins wakes up at night, like everyone does from time to time, her first thought is has he come back. She's under pressure, anxiousness, nervousness. She was a person that always worked in jobs with people. She has withdrawn. She works alone now. She stays alone.

Dr. Carra, Dr. Sylvia Carra testified. You heard her late one evening. And she testified that Bonnie Higgins suffers from Rape Trauma Syndrome and that she has suffered a twenty to twenty-five percent permanent disability as a result of that. The Defendants didn't bring in a psychologist. They could have had her examined by a psychologist. They could have brought somebody in. But obviously they concluded they couldn't find someone who would disagree with that analysis. Dr. Carra testified that these problems

were permanent, that she was hypervigilant, nervous, depressed, afraid, and so on. She said that the best case that could happen, and that it was unlikely, but the best case that could happen is that Bonnie Higgins could go through another one hundred to three hundred hours at $120 an hour, and that would be about $36,000. That it would be horribly painful for her to have to relive all these events, and even then it might not help. The more likely case is that she's going to have to live with this for the rest of her life.

She also, interestingly, described to you that in most litigation, most people that are involved in lawsuits tend to exaggerate their complaints. They say their complaints are a lot worse than they really are. Bonnie Higgins understates. Dr. Carra described to you that that's how Bonnie Higgins deals with these kinds of problems. She denies. She tries to make believe that everything is okay. She tries to smile, when inside she really isn't. That was borne out by the testimony you heard from Bonnie Higgins. She said she's going to fight this thing the rest her life. She didn't try to invoke your sympathy. She didn't pander or exaggerate.

Hilda Kilgore's testimony was to the same effect

as Dr. Carra's. Hilda Kilgore counseled with Bonnie. She is an experienced counselor. She counseled many rape victims. She agreed with Dr. Carra that Bonnie suffered Rape Trauma Syndrome. She testified that the psychological effect of rape is worse and longer lasting than the death of a close loved one. She testified that she deals with AIDS patients now. She quit on a voluntary basis. So she's in a position to make that analysis.

The testimony by deposition from Dr. Hawkins, he's a chiropractor that Bonnie had gone to a number of times. He testified about the pain in her neck and her back. He stated that she would need ongoing palliative treatment, treatment to relieve symptoms but not to cure her, for the rest of her life, and that it would cost 300 to $800 per year, times forty-nine years, that's about $39,000.

You also heard the testimony of Dr. Slomka, who is another expensive expert called by the Defendants in this case. And he came in here and said, indeed, Bonnie Higgins has a permanent injury to her neck, exactly what Dr. Hawkins said, the only difference being that they disagreed as to the percentage of disability. Dr. Hawkins said twenty percent disabled as a result of this attack and of the squeezing of

Bonnie Higgins' neck by the attacker.

You will have to consider damages if you find that the Defendant was negligent in this case. They include the things that I mentioned a minute ago, pain and suffering, disability, disfigurement, mental anguish, inconvenience, loss of capacity for the enjoyment of life, medical expenses, aggravation of preexisting defect.

The numbers I mentioned previously, Dr. Carra's counseling numbers, Dr. Hawkins' treatment numbers, add up to about $75,000. The past medical bills in this case are in evidence, and they are about thirty -- they're $3329. And the medical bills are attached. Again, there's no -- there's no dispute with respect to any of this.

Another consideration you should give is inflation. Will things cost the same for the rest of Bonnie Higgins' life that they cost today? And what is just compensation for terror?

Based on the evidence in this case -- based on the evidence in this case, I would suggest to you that a verdict in the range of one to two million dollars would be appropriate. I would suggest to you that an absolute bottom line figure for damages for the terror that Bonnie Higgins has livid with and will live with

for life is $750,000.

Mr. Dore will have a chance to speak to you now, and then I'll have a few minutes to speak to you after he finishes. I know you'll give him the same kind attention that you've given me, and given us all this week. Thank you.

* * * * * * * *

MR. BUELL: Ladies and gentlemen, why didn't they warn within thirty-five days? That's the issue in this case. And counsel in this case, opposing counsel is trying to convince you that a dog is a cat. He went on for forty-seven minutes and never once mentioned the fact that they did warn, they did issue a crime-specific warning, so they therefore agree that a crime-specific warning was needed. If a crime-specific warning wasn't needed, why did they send one? And why did it take them thirty-five days?

The Defense has completely ignored the fact that they took an absolutely utterly unreasonable length of time to issue that warning. Mr. Dore made, I think, a very significant point. People think that it won't happen to me. That's why the warning is necessary, because everybody thinks it won't happen to me.

You heard the testimony of the guards. They testified that over half the people at Lynn Lake Arms

slept with their windows open, all thinking it won't happen to me. That's why a warning was necessary. They issued a warning in '87, of course, about sixty days late. They issued a warning in this case. There's no question that a warning should have been given. They agree, all the experts agree.

And let me tell you, notwithstanding what was said about what happened in the Miller incident and what people knew, here's what the guard at Lynn Lake Arms apartments wrote the morning Miss Miller was attacked; police came in, going to 5510, that's Miss Miller's apartment. It says Miller at the top of this. There was a break-in and the elderly woman was stabbed. They brought the K-9 patrol in but was unable to track very far. Then they give a description of the suspect. The suggestion here that they didn't know anything about Miss Miller is absolutely preposterous.

Additionally, we know that they knew enough about Miss Miller to issue a warning on October 10th. How can they possibly come in here and say no warning was necessary when they sent a warning? The problem is it wasn't sent in a timely manner and in a manner that would have caused Bonnie Higgins to lock that window.

Now, Mr. Dore read some from the deposition that

was read into evidence, and I'm going to read a little bit from the deposition that we read into evidence of their expert, because Dr. Kirkham agrees precisely with this crazy theory that it is suggested that Plaintiffs are asserting in this case. Dr. Kirkham, the expert they hired, they paid him $10,000 and flew him down from Atlanta, in answer to my question about what should have been done from the standpoint of a crime-specific memo, and this was read into evidence, Dr. Kirkham said, I think that a crime-specific memo would have entailed saying something to the effect of, quote, Lynn Lake is experiencing a rash. Isn't that an interesting word? Mr. Dore stood up here and said they weren't experiencing any kind of a rash of crime. That's not what his expert, the one he paid over $10,000 to fly down from Atlanta had to say. He called it a rash, the very same word.

We've had five burglaries in downstairs units, in every one of which case the window was left unlocked. And a reiteration of what was said in the earlier memos from that point on; that be sure -- it's imperative that you lock doors and windows at all times, most importantly when retiring in the evening. And such a memo would also contain a description of the -- what was known about the perpetrator. It would

have also said, quote, we've had a rash of burglaries in the downstairs apartments, some of which involve a suspect who is described as such and such. That would be the content of that; to try to notch up -- even though you've got vigilance on the part of people from the earlier generic memoranda and newsletter -- that's what he called them, generic -- try to, you know, really draw their attention to what was going on, to enlist their perception and help.

Question: And it's your -- it is your opinion that that should have been done in this case?

Again, Dr. Kirkham: I think that would be indicated as a supplementary measure, given the fact that you do have a pattern of this kind of breaking and entering, or entry into people's apartments at night, yes. That's what their expert says. That's what Dr. Territo says. That's what everybody has said in this case.

I put a list up there of all the people that said there wasn't any need for a warning or it shouldn't have been sent, or it was sent in a timely manner, there's nobody there, because nobody has come in the courtroom, even the expert they paid all this money to and flew all the way down from Atlanta was unwilling to make such a statement.

There was also a suggestion that perhaps Mrs. Miller had her window locked. And I'm not sure that was what was being said, but the police report is in evidence. It's dated September 5, 1989. And I'll read you the very short synopsis of what that said. The police report, now this came out September 5th. This was available. You heard Dr. Territo testify that you go down and get the police reports. Miss Gray testified that one of the things Mr. Wolfson is supposed to do after a serious incident is talk to the resident, get the police report. Here's what it said. Here's what it would have said if they had bothered to go down and get it. Of course, this is what it would have been -- what Mrs. Miller could have told them if they had bothered to walk down and question her about it. This is an armed burglary, aggravated battery, attempted sexual battery where an unknown black male suspect entered the victim's apartment through the dining room window -- same window as in every other case -- by removing the screen from the window, then opening the window, then coming through the window. Once the suspect was inside the apartment, he went through the victim's purse, which was in the living room, threw the purse and contents to the floor. The suspect then went to the bedroom, then attempted to

climb on top of the victim, who was asleep in her bed. The suspect placed his left hand on the victim's chest while holding a jagged edged knife in the right hand. The suspect then told the victim, quote, open your legs, unquote. That's the information that was available. The suggestion that this was either unknown or unknowable is absolutely preposterous.

As I read to you earlier, their own guards not only saw the vehicles come streaming in, but they wrote it up as a stabbing. But a stabbing, according to Lynn Lake Arms apartments, giving them the benefit of the doubt, giving them the benefit of the doubt that that they didn't know about the attempted sexual battery, the stabbing wasn't sufficiently important for them to give a warning. That's not what the experts say. That's not what anybody says should have been done. And there's no one here, I might add, who says thirty-five days is a reasonable period of time, and I don't know how anyone could.

The Court will instruct you with respect to foreseeability. And you will be instructed that foreseeability is determined in light of all the circumstances, although the precise nature and manner of the occurrence need not be foreseeable. Although, in this case, the precise nature and manner of the

occurrence was exactly the same. Every one had a dining room window that was unlocked that the perpetrator was coming through.

The Court will also instruct you, it's not necessary that the exact nature and the extent of the injury, or the precise manner of its occurrence be foreseen. It's essentially only that some injury occur in a generally foreseeable manner as a likely result of a negligent conduct. It was certainly obvious if a warning didn't go out, there were going to be more burglaries. They already had a whole bunch. A lady already had been attacked with a knife. It was certainly foreseeable that something was going to happen.

Finally, that you also will be instructed that the Defendant had a duty to warn the Plaintiff of dangerous conditions concerning which the Defendant had or should have had knowledge greater than the Plaintiff. Who had knowledge greater about the attack on Miss Miller? Was it the apartment complex, whose guards wrote down that there was a stabbing, or was it Bonnie Higgins? I leave that for your determination. I think the answer is obvious.

You know, it's interesting, as Mr. Dore pointed out, that two days after the warning they caught this

fellow. They finally warned on October 10th, and October 12th he was caught. What if they had warned on September 6th? Maybe he would have been caught September 8th and none of this would have happened.

Bonnie Higgins has lived through what is probably a woman's worst nightmare, the absolute worst nightmare that a woman can ever, ever experience. It's one that she will live with for the rest of her life. Everyone is tested at sometime during their lives. Lynn Lake Arms was tested in September of 1989, and it failed that test when it should have warned its residents of terror that was rampant within the lovely walls that had been described to you about a hundred times this week.

Bonnie Higgins was tested on September 29th when she fought for her life. And she's going to be tested every day for the rest of her life. And she's been passing those tests so far.

You're about to be tested. You can't say no. You can't decide not to get involved. You must decide right and wrong in this case. You must decide who was negligent, and who failed to exercise due care.

The Defendants have the burden of proving to you that Bonnie Higgins failed to exercise due care. That is not the burden of Bonnie Higgins. They have

asserted this as a defense and they must bear the burden of proof of proving to you by the greater weight of the evidence that Bonnie Higgins was negligent in this case. And I submit to you they have failed to meet that burden.

Bonnie Higgins isn't here for sympathy. Bonnie Higgins has had about as much sympathy as she needs. Bonnie Higgins is here for justice. And that's why you're here. You will have to live with the verdict you render, just like Bonnie Higgins will have to live with the verdict you render. And so I ask you to do justice, to bring back a verdict of which you can be proud. I ask you to return a substantial verdict in favor of Bonnie Higgins.

You heard no number from the Defendant. I would suggest to you the Defendant agrees that the numbers I have suggested to you are more than reasonable or you would have heard numbers from him. I ask that you return a substantial verdict that does not trivialize or minimize the injury, the terror, the pain and the humiliation that Bonnie has suffered and will suffer for the rest of her life. Thank you.

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STATE OF FLORIDA)

COUNTY OF PINELLAS)

I, Elizabeth A. Dixon, RPR, Deputy Official Court Reporter, do hereby certify that proceedings were held in the above-entitled case at the time and place set forth in the caption hereof; that I was authorized to, and did, report in shorthand the testimony and proceedings had in said proceedings, and that the foregoing pages, numbered 1 to 30, inclusive, constitute a true and correct transcription of my said shorthand report.

WITNESS MY HAND THIS 17th day of December, 1992, at St. Petersburg, Pinellas County, Florida.

Elizabeth A. Dixon

ELIZABETH A. DIXON, RPR
Deputy Official Court Reporter

FLORIDA APPELLATE PRACTICE AND ADVOCACY

Sixth Edition

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Court of Appeal (1974-92)

3.12 Closing Arguments and Mistrial Motions

As with other alleged errors, objections to closing arguments and motions for mistrial based on allegedly improper arguments must be made timely. In *Ed Ricke and Sons, Inc. v. Green*, 468 So. 2d 908 (Fla. 1985), the Court stated:

> We refuse to change the general procedure that must be followed in order for a party to preserve a motion for a mistrial for appellate review. Unless the improper argument constitutes a fundamental error, a motion for a mistrial must be made "at the time the improper comment was made." * * * However to avoid interruption in the continuity of the closing argument and more plainly to afford defendant [or plaintiff] an opportunity to evaluate the prejudicial nature of the objectionable comments in the context of the total closing argument, we do not impose a strict rule requiring that a motion for mistrial be made in the next breath following the objection to the remark. [cites omitted]

The Court went on to hold a party could ask the trial court to wait to rule on a motion for mistrial without waiving it: "a motion for a mistrial coupled with a request that the court reserve ruling until the jury completes their deliberations is merely a motion for a mistrial. Any ruling on such a motion is preserved for appellate review. The judge may, at his discretion, order a new trial immediately following the motion for a mistrial or reserve ruling on the motion until after the jury deliberates."

Ricks v. Loyola, 822 So. 2d 502 (Fla. 2002), extends *Ed Ricke* temporally, holding the trial court did not abuse its discretion in granting a new trial when it had reserved ruling on a mistrial motion made during opening statements.

Keene Brothers Trucking, Inc. v. Pennell, 614 So. 2d 1083 (Fla. 1993), holds if the trial court grants a motion for mistrial before the jury is discharged, motions for new trial and JNOV are nullities.

Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010 (Fla. 2000), resolved a conflict over improper but unobjected-to closing arguments. The supreme court held:

> (A) the party seeking relief must have at least moved for a new trial based on the argument, even if the party did not object during trial (namely, the issue cannot be raised for the first time on appeal);
>
> (B) for the trial court to grant a new trial:
>
> (1) the argument must be improper;
>
> (2) the argument must be harmful (noting not every violation of Fla. R. Prof Conduct 4-3.4 is harmful);

(3) the argument must be incurable (namely, if the party had objected, the harm could not have been cured by an instruction to the jury);

(4) the argument must have so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial (noting such arguments would include appeals to racial, ethnic or religious prejudices);

(C) the trial court granting a new trial must identify the improper arguments and the actions of the jury resulting from those arguments;

(D) on appeal the appellate court applies an abuse of discretion standard to review the grant or denial of a new trial motion based on unobjected-to closing arguments.

The Court observed that while it had "not absolutely 'closed the door' on appellate review of unpreserved challenges to closing argument," it had come as close to doing so as it believed was consistent with notions of due process that deserve public trust in the judicial system.

Telemundo Network, Inc. v. Spanish Television Services, Inc., 812 So. 2d 461 (Fla. 3d DCA 2002), certified the question of whether unobjected to closing argument comments appealing to the jury's racial, ethnic, religious, or xenophobic prejudices would justify a finding of fundamental error.

Walt Disney World Co. v. Blalock, 640 So. 2d 1156 (Fla. 5th DCA 1994), had agreed that the salutary effect of giving curative instructions to disregard such offensive arguments was "aptly summed up by the trial judge in the case of *O'Rear v. Fruehauf Corp*., 554 F.2d 1304, 1309 (5th Cir. 1977): '[Y]ou can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good.'"

When a party objects to instances of attorney misconduct during trial, and the objection is sustained, the party must also timely move for a mistrial to preserve the issue for a trial court's review of a motion for a new trial (absent fundamental error). *Companioni v. City of Tampa*, 51 So. 3d 452 (Fla. 2010).

McElhaney v. Uebrich, 699 So. 2d 1033 (Fla. 4th DCA 1997), suggests an objection by one defendant will not preserve the point for a co-defendant who does not join in the objection.

"To preserve an allegation of improper argument on appeal, timely objection must be made to bring the trial court's attention to the alleged error. . . . This rule applies even when an argument is inflammatory, prejudicial or improper." *Dempsey v. Mac Towing, Inc.*, 876 F.2d 1538 (11th Cir. 1989).