

# These 5 Principles May Help Improve Your Final Arguments

## Business Litigation

By Royal F. Oakes

In the continuum of litigation events, from initial client conference to pleading a case before the Hague Tribunal, what is the most dramatic, storied event of all? Why, the final argument to a jury, of course. And, what does a business litigator do less of than any other activity, with the possible exception of pleading a case before the Hague Tribunal? Why, the final argument to a jury, of course. This doesn't seem to unnerve many lawyers. They probably feel their innate charm and intelligence equip them nicely to sum up a case to 12 folks off the street. In fact, fashioning a good final argument is both difficult and vital to a favorable outcome. Help is available, however, from five basic principles: preparation, organization, rhetorical techniques, the laws of human nature and playing by the rules.

### Preparation

The first principle of giving a final argument is preparation. The preparation process begins when you first receive the case. Immediately create a folder in which you insert ideas for themes, basic principles underlying your case and random thoughts you feel will be relevant if you some day are called upon to talk to a jury about the case.

When trial commences, the contents of your dog-eared folder should be transferred to a final argument folder you supplement each day of the trial. Whether the ordeal lasts three days or three months, it's critical to keep a running log of your thoughts on a daily basis, regarding the standout issues of the case. Trying to slap together an outline of a final argument at the last minute is a lot like doing a month's worth of time sheets at one sitting: Much of what should be in there won't be, and a lot of things that don't belong will crop up.

Development of a theme is a critical aspect of preparation for the final argument. If you have any doubt as to the value of a solid theme, consider the effect of "What is a handshake worth in Texas?" in the Texaco/Pennzoil battle. A good theme has four characteristics: You can prove it, you can win with it, it has the ring of truth to it, and it's simple and direct. Whatever you do, don't try to make it legal (for example, "The defendant is strictly liable").

During trial, an important aspect of preparation is rehearsal. One way to make rehearsal doubly effective is to practice final argument, or an abbreviated version of it, in front of co-workers, and then ask them for their reactions. Give a version of the opposition's final argu-

ment as well, and then adjust your presentation based on the audience's reaction. Naturally, if economically feasible, hiring consultants and/or mock juries will likely result in substantial improvements in your presentation.

The most important way to prepare for final argument, of course, is to try the case in such a way that the jury likes you, and believes you're competent, sincere and fair. With that as background or "preparation," your task in the final argument — persuading the jury to take specific action — is made much easier.

### Organization

There's no shortage of ways to organize a final argument. You can go through events in roughly chronological order, which will probably track your opening statement. One danger in this approach is that the material may seem so familiar that your discussion of the evidence may come across as a "rehash."

Another approach is to start with your strongest argument first, on the assumption you want to grab their attention with your best material. At this point in the trial, in spite of the fact the jury will feel some excitement and anticipation because of the dramatic nature of final arguments, the panel members will also likely be physically drained, and emotionally tired of hearing about the same people, events and evidence.

Tracking the judge's jury instructions (assuming the jury has been pre-instructed) is an approach many lawyers favor, in order to try to identify with the judge's role as authority figure, and to trigger favorable memories of your side's position when the jury mulls over particular words or expressions contained in the jury instructions. Of course, organizing your final argument along the lines of jury instructions isn't the only way to use the instructions in final argument.

Yet another approach to organizing the final argument is to discuss liability first, and then damages. When representing defendants, this allows you to portray liability as the only relevant issue, characterizing damages as something with which the jury need not concern itself.

A final method of organization is to review

the testimony, witness-by-witness. The only time this might be advisable is if you presented exceptionally effective witnesses, or the opposition's witnesses had the appeal of Charles Manson, so that you benefit from conjuring up the sights and sounds of the testimony.

### Rhetorical Techniques

The electronic age has given lawyers their single most important tool in improving rhetorical techniques and delivery. The videotape camera can be of immense value, if the lawyer will simply take the time to record a presentation, review it with an eye toward detecting flaws, and then implement changes that may have been painfully obvious to everyone else for years.

The value of reviewing videotape recordings of yourself is one reason lawyers should ignore the oft-repeated adage about final arguments specifically, and working in front of a jury generally: namely, "be yourself."

Let's face it. A lot of lawyers aren't the kind of folks jurors would like to invite home for Sunday dinner. If you're one of those people who habitually dines alone on Sunday, "being yourself" might not be such a good idea. The way to improve, and give an effective final argument, is not to "be yourself," but to be someone the jury likes, trusts and can understand. Better a few jurors have the nagging suspicion that you're doing a not-very-good job of impersonating television's "Matlock," than all the jurors perceive you as arrogant and obtuse.

In the terms of nuts-and-bolts techniques, the ideas you picked up in college speech classes apply in front of a jury: Start out with an attention grabber, maintain good eye contact, use simple, direct language, be sensitive to your audience's waning interest in the subject, and, as to especially important points, repeat them three times, without being obvious about it.

### Laws of Human Nature

Because you're trying to persuade human beings, it's especially important to follow a few well-known laws of human nature. The law of primacy vs. recency, for example, suggests that you put your best arguments up front. Back in 1925, psychologist F.H. Lund asked subjects to describe a person they were told had six characteristics, three good and three bad. Some subjects were given the list with the good characteristics listed last. This determined whether the subjects described the person in question as a basically good person with

a few minor flaws, or intrinsically bad with a few good points.

Another law of human nature is that unique or novel events are virtually unforgettable. For example, you've attended hundreds of parties, but you'll never forget the one where the hostess spilled spaghetti sauce down your neck. Your goal is to have your arguments, and any supporting analogies or metaphors, remain in jurors' minds as vivid memories of the trial when they deliberate.

Finally, avoid high-pressure techniques in a final argument, such as announcing to the jury that based on the law and the facts, they must return a particular award. Research has confirmed what most people suspect about human nature; namely, when a person's freedom is threatened, they tend to rebel by doing the opposite to insure their freedom.

### Play By the Rules

There are several clearly defined prohibitions when it comes to final argument. Counsel may not assert personal beliefs or opinions; evidence may not be mischaracterized; remarks may not be calculated to inflame the passions or prejudices of the jury; and an argument must be confined to the evidence. When your opposition engages in such improper argument, tread carefully. If you fail to object, the point is waived on appeal. On the other hand, the jury may not understand the appropriateness of the objection, and may resent your interruption of your opposition's moment of glory.

If you wish to digest a larger meal on the subject of final argument, the following sources are excellent: Aron, "Trial Communication Skills" (1986); "Julien on Summation" (1986); Hamlin, "What Makes Juries Listen: A Communication Expert Looks at the Trial" (1985).

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