10. Closing Argument: The Three Necessities

"Closing Argument: The Three Necessities"
WELCOME TO THE REVOLUTION

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As of this writing – July 2008 – the 35 percent of the jury pool poisoned by tort-"reform" continues to grow in number and ferocity. So as consultant Eric Oliver has long taught, no matter how well you do in voir dire, you must count on poisoned jurors being on every jury. That means you must win those poisoned jurors over to your side.

Surprisingly, we now know how to do this. It heavily relies on what you do in closing.

Closings have many goals. In this article I focus on the most important three for winning over the jurors that tort-"reform" continues to poison against you. These three goals also happen to be those that attorneys most often omit or do inadequately. They are:

1. Arming jurors.
2. Making jurors follow the law.
3. Showing jurors how the outcome *personally* affects them.

When you do not successfully do all three, you needlessly endanger your client. And an attorney is never allowed to needlessly endanger the client.

1. ARMING JURORS

Why arm? You do not win cases. Jurors going into deliberations on your side win them for you. They – not you – are the only ones who can sway defense-favoring jurors. You can't charge into the jury room to argue a point any more than a football coach can charge onto the field and recover a fumble. Both you and the coach must teach your players how to win for you. You have to do this throughout the case. And in closing, on every single point which defense-oriented jurors can contest, you must carefully arm favorable jurors for their deliberation battle. You must provide the necessary weapons (the facts and arguments), and you must show how to use them to persuade defense jurors. Failure to do this well is the most common and inexcusable reason for losing.

This means persuasion is never enough. Persuaded jurors often have no idea what to say

to persuade others. You have to teach her. In post-trial interviews, many jurors complain, "I agreed with the plaintiff but I didn't know what to say to persuade the others ." When we hear this, we know counsel's closing was a failure because – no matter what else it achieved – it did not arm the jurors. That includes some otherwise brilliant closings.

Obviously, you must first persuade some jurors to your side. No sense arming an unpersuaded juror. But by closing, you can no longer persuade. Believe it or not, a good closing might *motivate* jurors already on your side to fight and not fold. But even the best closings do not persuade. Closings – even apparently very persuasive ones – persuade fewer than one in 12 jurors. Chances are better than 90% that jurors unpersuaded at the close of evidence will not be swayed by anyone's closing. This (like much lese) flies in the face of what you have been taught, but we know for certain that it is true even of the best closings by the best attorneys.

This does not mean you should quit trying to persuade in closing. But it does mean that arming jurors is far more important and requires more of your attention and skill. And fortunately, the technique of arming jurors also happens to be the best way to persuade any undecided juror, so when you arm, you persuade – accomplishing both at the same time.

How do you arm? Arming is the simplest technique you will ever learn. Arming is as simple as XYZ. Do it like this: "Folks, over the course of deliberations, if a juror says ABC, remind them of XYZ."

ABC is a defense point.

XYZ is your 1) plain-English, 2) boil-down 3) easily-remembered statement of that issue.[1] Example: "Folks, over the course of deliberations, if someone says [here's the ABC:] that the doctor had reason to there was enough oxygen, remind that juror that [here's your XYZ:] *a doctor is never allowed to assume something is harmless until after he scientifically rules out every possibility it might be dangerous.*" Then briefly explain this, and repeat your XYZ.

Your XYZ will probably be the only words most jurors will use, such as in, "... a doctor must never assume something is harmless until after he scientifically rules out every possibility it might be dangerous."

[1]We all owe a National Jury Project founder, Susan Macpherson, a thank you for this essential method.

At this point, do not review all the evidence about this. Do that elsewhere, when you show jurors how to apply the facts to the law, as explained later in this article

Another XYZ example: "In deliberations, if a juror says [ABC:] the baby had brain damage before labor started, remind that juror that [ABC:] no matter what condition the baby was in before labor, the 18-minute lack of oxygen during labor caused almost all the damage." Briefly explain, then repeat the XYZ.

If jurors are taking notes (which you should always try to get the judge to allow), suggest they write down your XYZ to have it in deliberations. If most of them write it down, you're probably in good shape. Jurors don't usually write down anything that helps you unless they're on your side. (The converse – when they don't write down your XYZ – does not necessarily mean they disagree. Jurors rarely write down anything they already know well.)

Summary: Arm your favorable jurors to argue every point you need to win. And as the next part of this article explains, you must also arm jurors to successfully battle jurors who either don't understand or won't follow the law.

2. MAKING JURORS FOLLOW THE LAW

The focus of the decades-long campaign against personal injury plaintiffs has been to poison the national jury pool sufficiently that some jurors on almost every jury replace the judge's laws with their own "laws" – those that the insurance and corporate worlds prefer. This is the mechanism by which poisoned jurors make sure we lose or get a small verdict. It is the most successful and widespread jury poisoning in history. Fortunately, it is now unnecessary. You can now prevent it.

During closing, you must explain (as outlined below) the essence of each real law which you want the jury to follow. Usually (but not always) this includes preponderance.[2] It will almost always include negligence, causation, and damages elements. It will be a major section of your closing. It will incorporate arming (see #1, above) and relating the law to the individual jurors, as you will see.

Properly the law is a process of nine irreducibly simple parts:

[2] See "Forgotten Ally: More Likely Right than Wrong," David Ball. *Trial,* March 2008.

Part one: *Choose.* Pick the laws you want the jury to follow. For example: the law the harm need not have been intentional. Choose the phrase of the appropriate jury instruction that most directly makes that point.

Part two: *Display.* Prepare a way to separately show jurors each of those selected phrases. Projected slides – one for each point – will work, as will boards. You can even write each phrase – legibly! – by hand. There is no advantage to making this slick, professionally done, or fancy.

Part three: *Show and read* aloud the first phrase. Explain that it is exactly what the judge will say. More importantly – so do not leave this out – explain that *Mr. Defense Attorney agrees that every juror must accept and follow* it, and not add or substitute anything. "The law," you might want to say, "is an exacting master, and in a courthouse we are all required to be its exacting servants."

Part four: *Explain the law* in plain English. Even if it's already plain English, explain it in different plain English. Understanding is absolutely prerequisite.

Part five: *Explain how the evidence applies* to that particular law. Explicitly show how to apply the facts to the law. Don't use any part of closing to just blabber through a repetition of evidence jurors already know. "Marshaling" of evidence is the sure sign of an amateur. It insults jurors – including those who liked you until you do it. It makes jurors think you find them too stupid to remember what they've just sat through during testimony. Remember that you are not the only person in the room smart enough to know what has been said. So instead of blundering into a marshaling of the evidence, *do* something with it: use the evidence to show jurors how it "wins" each key instruction for you. Result: You will not be an annoyance repeating what they already know. Nor will you be a cloying jerk shoving your evidence down their throats. Rather, you will show jurors what they want: how to apply the evidence to an instruction in order to decide the case and go home.

Part six: *Undermine* all defense arguments which relate to that specific law.

Part seven: *Arm* your jurors to enforce the law. For example, "During deliberations, if another juror is worried that a full verdict might drive up prices of things we all have to buy, remind that juror that the law does not allow you to use anything like that to affect verdict size. Remind that juror that the verdict must be based *only* on the size of the *harms and losses.*

Remind that juror that Mr. Defense Attorney agrees with this. Remind that juror that the judge requires it. The verdict must not go up or down for reason other than the size of the harms and losses. Legally it makes no difference whether it might drive up prices, or whether it might not make the pain go away, or whether John might have some other source of money for medical bills. John's [the plaintiff's] harms and losses only."

Part eight: *Enforce.* Say, for example, "If a juror still wants to factor in any of those illegal factors, you don't have to argue with that juror. No one here or anywhere else has the right to make you be on a jury that decides things outside the law. You just need to tell your foreperson to knock on the door and tell the bailiff to inform the judge there's a juror who is refusing to follow the judge's instructions. If the foreperson won't do tell the judge, it's your job."[3]

Part nine: Repeat steps three through nine for each important instruction. Jurors are likely to misinterpret and misuse everything you omit. That costs us a lot of cases and a lot of money.

Do not leave any steps out. And practice them aloud and in advance. Be prepared with alternate ways to accomplish the same thing, in case you get sustained objections. This approach is almost always objection-proof, but some judges who do think and analyze slowly are prone to sustaining objections to anything they have not seen before.

Throughout, remember your goal: To support your favorable jurors by making sure they understand the law and know how to enforce it. Otherwise, expect your favorable jurors to sit mute while defense jurors argue, for example, that "We can't give all this money because it will make our insurance rates go up."

3. "WHAT'S IN IT FOR JUROR #5?"

I am fortunate to be part of a long-term research team with three of the country's most

[3] Here's a new instruction to ask the judge to read as her last instruction (most judges like it): "Ladies and gentlemen, during deliberations if any juror refuses to follow the law as I have just given it, your foreperson *must* tell me right away. If your foreperson refuses, the rest of you *must* make sure some other juror does, or do it yourself. This is because every one of you is sworn to exactly follow the law. So when a juror does not do that, you must make sure I am told – right as it happens, not after trial when it's too late. No exceptions." If the defense objects to this proposed instruction, point out that the only reason anyone would object is in hopes some jurors will violate the law.

formidable plaintiff's personal injury attorneys: Atlanta's Don Keenan, Wyoming's Jim Fitzgerald, and Kentucky's Gary Johnson. If there are better trial lawyers, I have neither seen nor heard of them. Over the long course of a unique series of ongoing jury research sessions across the country, the four of us see that we are approaching the "Holy Grail" of trial advocacy. If you think this is an exaggeration, you will know better once you master and use it.

Our newly developed approach does not merely return the level playing field that was stolen away by tort-"reform" poisoning. It also gives the playing field a significant tilt our way.[4]

An important part of this take place in closing:

While you cannot put jurors into your client's shoes, you can show how the defendant's kinds of violations endanger the community, of which the juror and his family are, to the juror, the singularly most important part. You can show the kinds of harm the community (= juror and family) faces when rules are broken as in this case.[5] Tread carefully, but legal and ethical boundaries allow you ample leeway.

One of the first successful deployments of this method was by Paul Luvera and Joel Cunningham (Luvera Law Firm, Seattle) in a 2008 medical product liability case tried in Oregon. At issue was a medical device that had never hurt anyone in more than a million uses, and that only once had shown malfunction of any kind.

The defendant manufacturer had paid some but not enough attention to a malfunction a decade earlier in Japan which had caused no harm. A favorable verdict is almost impossible when the product has never hurt anyone. So Luvera and Cunningham needed to show that the rule the defendant ignored (that even one malfunction requires a fix or warning) can endanger *anyone* (subtext: each juror and his family, not just some one-in-millions unfortunate plaintiff and his family who in this case were members of a minority group that was not exactly well-accepted in that venue). When you do not show the danger that the defendant's kind of violation

[4]Learn about this at damagesforum.net, the central clearing house for "reptilian" and other important trial advocacy developments. Prerequisite: Read *David Ball on Damages, The Essential Update.* 2005, National Institute for Trial Advocacy.

[5]See *Rules of the Road,* Pat Malone and Rick Friedman – brilliant in every way other than its unfortunate title. The title is unfortunate because the book is not about only highway cases; it applies to every kind of plaintiff's lawsuit. First taught by Diane Wiley in the early 1990s, the rules – as expanded on by Malone and Friedman's book – are applicable to every part of a lawsuit. Damagesforum.net covers an even greater expansion of the rules as part of necessary trial strategy.

poses to the individual juror and his or her family, most jurors detach their own concerns from the case. Result: tort-"reform" poisoning swills into the bloodstream of tort-"reformed" jurors. And the rest of the jurors concern themselves with "justice" instead of *self-protection*.

But self-protection is mightier than justice. Every time.

So instead of letting jurors detach in this way, show them how your case has everything to do with their own safety. That relegates tort-"reform" considerations to a distant second place behind juror self-concerns for their own safety.[6] So "justice" – meaning a full and fair verdict – becomes their chosen tool for keeping themselves safe.

Luvera and Cunningham took advantage of the fact that it is permissible to show jurors the importance and breadth of the violated rule (failure to fix or warn). After all, jurors have to decide how much care constitutes "reasonable" (or "ordinary") care. Jurors cannot legitimately make such a determination without learning how dangerous a failure of care can be. This goes beyond the confines of any single case. So, for example, your expert can say, "It is important for a manufacturer to fix or warn because ....." and then give examples of what happens when the makers of *various kinds* of medical products – or even non-medical products – choose to neither fix nor warn, despite having had notice of a problem.

So during the Luvera/Cunningham trial, jurors learned from an expert that whenever *anyone* (i.e. a juror) walks into any clinic or hospital, every medical device or machine they see that can be used on an adult patient or a child patient or a baby patient or an elderly patient or a female or male patient is fully as deadly as the one in this case if the manufacturer has violated the rule of care (fix or warn) as the defendant in this case violated it. Result: Every juror had food for thought (and they always think it) of how this case was directly relevant to community (i.e. their own) safety.

Genes trump tort-"reform." So jurors choose justice when justice makes them and their families (their genes) safer.[7]

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[6]You can accomplish this even when the defense stipulates to liability, though this is beyond the scope of this article. Please see damagesforum.net for help.

[7]See *The Selfish Gene.* Richard Dawkins.

So the brilliantly prescient words of Moe Levine ("You [the juror] are the conscience of the community") are now changed to "As a juror, you are the *caretaker* of your community" – because "Our legislature has established juries to ensure that anyone who violates safety rules and harms a member of our community is required to meet their responsibility. As jurors, you alone decide when a defendant's violation of safety rules is bad enough for that defendant to be forced to pay full and fair compensation."

And, "When juries do not pay full and fair compensation, careless doctors [or whatever] are encouraged to come here and slacken on the safety rules that protect this community. You know this happens because the defendant in this very case has told you under oath that what he did was plenty safe enough. So you can rest assured that without a full and fair verdict, he will continue violating the safety rules the community needs."

And, "The reason the defense thinks the verdict should be low is that they seriously undervalue *human safety and well-being.* If they placed enough value on human safety and well-being, the defense would not have done what they did in the first place. That's why the legislature creates juries: to establish the real value of human safety and well-being instead of letting people set it who severely undervalue it, as the defense has revealed by telling you how low they think the verdict should be. That's why trials are almost always held in the community itself – so jurors can see when human well-being and safety are actually more valuable than this hospital obviously thinks."

In arguing this way, don't step over the ethical or legal lines separating a compensation argument from a punitives argument. This varies venue to venue, but is usually readily ascertainable. Damagesforum.net is gathering this kind of information from trial lawyers nationwide so that no one need re-invent the wheel for every trial.

Your job in trial – including in closing — is to give jurors a "danger appreciation" course about all the various kinds of harm that can result from the kind of safety-rule violation(s) the defendants committed. This danger-appreciation course shows jurors the personal safety stakes of the case: the juror's personal safety and that of their families. The result will not be anything so impotent and abstract as "justice" for some stranger-victim of an act the juror never expects to experience. Instead, the juror sees what is really at stake for him, know what to do about it, and be deeply and primally motivated to do it. The juror will see that by means of justice – by means

of the legally-encouraged means of making a safety-rules-breaking defendant meet his responsibility – the juror will make the world safer for himself and his family. This blows tor-"reform" considerations out of the water.

Years ago, Rhode Island attorney Mark Mandell, as always ahead of the curve, proposed that our motto be "Safety for your family." Now that time has come to pass. And now you know how to do it in closing.

CONCLUSION

Whatever else you do in closing, master and use the three steps you have just read about. Do not try them without careful preparation and practice. They are easy – but not easy enough to do without careful preparation and practice.

The intent of this article has been to arm you to do the best possible closings, no matter which style of closing you prefer. By means of this book,[8] Don Keenan, who is my dear friend and personal hero, has performed an outstanding service – one that few others, if any, would have had the judgment or access to accomplish so well – in selecting and bringing together this incomparable assemblage of closings. And with this book, Trial Guides – our premier plaintiff's publisher – again shows itself to be America's most concerned and involved publisher. So don't waste the precious resource that this book is. By studying its closings in detail, you'll learn a wide range of the masters' best closing styles and approaches. Diligently combine that with the three steps in this article. Then go do well in trial, and let us know how you do. We look forward to the good news.

[8]If you are reading this as a reprinted article: The book is *Closing Arguments: Child Injury Wrongful Death Volume II,* ed. Don C. Keenan. 2008, Balloon Press.