FROM MY SIDE OF THE BENCH

The Closing

BY HON. RANDY WILSON

ONE OF THE TRUE PLEASURES OF BEING A DISTRICT JUDGE is that I get to get to watch closing arguments. This is advocacy at its best; lawyers displaying their skills and fighting for their clients. The closing argument is both emotional and logical. Yet, some of the most eloquent and gut wrenching closing arguments fail to achieve the desired goal—arming the jury with the tools they need to answer the questions your way.

Let's set the stage. By closing argument, the jury has heard all the evidence and many have made up their minds. They are sitting there with a copy of the charge in their hands.[1] They probably have a pen and paper since they may have been taking notes during the trial. Indeed, pursuant to a rules amendment effective April 1, 2011, jurors are allowed to take their notes back to the jury room.[2] Bottom line—they're sitting there poised to write what you say. Unfortunately, many lawyers squander that golden opportunity. Here are my suggestions.

First, always argue from the charge. While it would seem that this suggestion would be unnecessary, I see far too many closings where the lawyers give a long speech and either never get to the charge or hurriedly rush through the charge almost as an afterthought. The charge should not be a mere add-on to be discussed at the end of the closing. Rather, the charge should be the core of your argument and the outline for your presentation. The charge enables you to focus your argument on the specific causes of action and the elements for each.

Second, never hesitate to suggest and write proposed answers to each question. While I would like to think that the questions in the jury charge are well drafted, I have to confess that sometimes even the pattern jury charge questions are sometimes less than perfect and could be confusing. Don't assume that the jury knows what answer favors your client. Write it down. My experience is that about half the jurors will write down the answers that are suggested by the lawyer that a juror may be favoring. Jurors want to make sure they get the answers right.

Third, tell the jurors what will and will not go back to the jury room. For example, tell them that the exhibits will be sent to the jury room and that they will be able to take their notes back but that certain demonstratives were not admitted in evidence and they won't have them in the jury room. If there is a particular demonstrative that lists a lot of dates or numbers or other data that was referred to frequently during the trial, invite the jury to jot down on their notes things that they want to remember.

Simply put, one of the most effective things you can do during closing is to carefully and specifically identify the exhibits and evidence that supports your conclusion to a particular question.

Fourth, and most important, you should use the closing argument to arm your favorable jurors with the ammunition they will need during deliberations. While you might be tempted to give a bombastic and emotional closing, such an argument may sound good at the time but by the time deliberations begin, those emotional points will be a distant memory. Rather, you need to provide not just the specific evidence, but also the reasons why a vote should be a certain way. The jury may have already made logical conclusions, but some may need reasoning in addition to the specific evidence. Tell them, for example that there are five reasons why a particular question should be answered a certain way. Then, list the reasons and the evidence that supports each reason. A lawyer once said during closing, "When you get to this question during your deliberations, you should focus on Exhibits 3, 12 and 24. You might even want to make a note of those exhibit numbers so that when you get to that question, you can go right to the key exhibits."

Simply put, one of the most effective things you can do during closing is to carefully and specifically identify the exhibits and evidence that supports your conclusion to a particular question. Jury deliberations usually last many hours or even

days. As deliberations wear on, the jury will long forget some of the emotional appeal in your closing. However, their notes, with your specific listing of favorable facts will be with them throughout deliberations. This will provide the roadmap for your favorable jurors to persuade the others to your side.

Of course, a plaintiff gets a rebuttal. The opening argument should be based on the charge and a listing of the favorable evidence. The rebuttal argument, however, is the time to let loose and give your emotional arguments.

Finally, don't get bogged down in minutia. Don't feel compelled to respond to each and every point the other side makes. This is not a collegiate debate where you are judged on whether you have answered each and every opposing point. Rather, this is persuasion at the highest level. Pick your key points and don't get distracted by each and every opposing argument. Far too often, I see lawyers get derailed by rising to the bait of their opponents by trying to answer each and every point.

Am I suggesting that a closing argument should be devoid of emotional appeal? Of course not. You have to make the jury want to vote for you. But you can't or shouldn't stop there. In addition to emotional appeal, you must give them the tools they will need to persuade other jurors during deliberations.

Judge Randy Wilson is judge of the 157th District Court in Harris County, Texas. Judge Wilson tried cases at Susman Godfrey for 27 years and taught young lawyers at that firm before joining the bench. He now offers his suggestions of how lawyers can improve now that he has moved to a different perspective. ★

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[1] Tex.R.Civ.P. 226a now requires that "[b]efore closing arguments begin, the court must give to each member of the jury a copy of the charge."

[2] Tex.R.Civ.P. 281.