CLOSING ARGUMENT:
THE DEFENSE PERSPECTIVE

"The Sometimes Neglected Art of Being the Reasonable Person."

By

Thomas N. Kerrick & Brent Brennenstuhl
Kerrick, Stivers, Coyle & Van Zant, PLC

Before considering the issue of how to best present a closing, a preliminary question must be posed: do closing arguments matter? A survey of conventional legal wisdom suggests three possible answers to this question:

Theory 1: Closing argument is of limited value. Modern juries are made up of Baby Boomers and Generation X'ers who want to make up their own minds. They've heard the evidence, listened to the lawyers drone on enough and are ready to get back to the jury room for deliberations. They've watched enough Law & Order to know a good closing argument shouldn't take more than two minutes, anyway.

Theory 2: Closing argument is very important. In a relatively short period of time the jury is expected to come up to speed on issues and proof that the attorneys have been developing over the last couple of years, including understanding the significance of all the exhibits and the testimony of numerous witnesses. They want help figuring out how it all fits together.

Theory 3: Closing argument is a mixed bag. Some jurors have made up their mind against you. Some jurors are still on the fence, and want to weight both sides. They will be looking to your closing argument for an explanation of why your version of the case should be more compelling than the opponent's. Some jurors are already on

your side, and your closing argument can help them sway the fence sitters during deliberations.

While the first theory may sometimes be true in a brief, simple case, and the second theory may be true in an unusually lengthy, complex case, experience tells us that we will most often be faced with a "mixed bag" of juror positions at the conclusion of a trial. Consequently, the closing argument has three objectives: Convert the opposing jurors, sway the neutral jurors and reaffirm the supporting jurors. Fortunately, the same defense theory serves all three purposes: reasonableness.

The Theory of the Case

Many plaintiffs' lawyers are fond of saying (perhaps even bragging) that, right after they draft the complaint, they begin drafting their closing argument. This is rarely a possibility for a defense attorney, who by necessity fights a reactive battle. The defense attorney does not have the opportunity to pick and choose the case – we work with what we have. Often the defense strategy evolves as the case moves through discovery, with adjustments depending on how the evidence shapes up. By the time the case has progressed to trial, however, both sides should have pared the issues down to those few, critical points of dispute. It is around these points of dispute that each side will create characterizations of the theory of the case.

For example, in a case involving a child hit by a motorist when the child chased a ball into the street, the Plaintiff's theory of the case will be "the rushing driver who didn't pay attention to children playing in the yard beside the road." The Defense theory will be "the child who suddenly darted into the road right in front of the driver from between two cars."

A theory of the case, however, is not just a one sentence summation of how a party will characterize the facts – it encapsulates the reason why the jury should find for or against a party. In the previous example, the jury should find for the Plaintiff because the driver was rushing and not exerting the degree of care we expect when driving in a neighborhood full of playing children. In short, the driver was not being reasonable. Conversely, the jury should find for the Defendant because the child's appearance in front of the car was sudden and unexpected and there was nothing the driver could do. It would not be reasonable to expect the driver to have done anything differently.

Weaving The Theory Throughout the Case

The theory of the case shouldn't show up only in the closing argument. It should be woven throughout the trial. To the extent possible it should be foreshadowed in *voir dire*. It should be the centerpiece of your opening statement. It should be reflected in as many witness examinations as possible. By the time you get to closing argument, your objective should be to demonstrate how the evidence presented during the trial supports what you have been telling the jury all along. Reasonableness is a theory that is applicable to any case.

The Theory of Reasonableness

Plaintiffs' lawyers love closing argument. Why? Because that is the point in the trial when they are largely unfettered by all those pesky rules of evidence and procedure. They can summarize, characterize, infer, argue and draw conclusions, so long as they do not blatantly misstate the evidence or appeal purely to the jury's emotions, and even those lines are often tread closely. Plaintiffs' lawyers usually have the juicy side of the case – someone who is hurt or killed - a loss that must be remedied - an injustice that

must be righted. Rare is the opportunity for a defense lawyer to bring the jury to tears, save those of boredom.

Rather than view the Defense agenda as emotionless, however, we should characterize it as "considered." The message delivered by the Defense theory of any case is that an appeal to emotion is simply an effort at manipulating the jury. Throughout the case the Defense attorney must demonstrate to the jury that, in the words of trial technique author James McElhaney, he or she is "the guide they can trust." The key objective is to foster in the jury a belief that they are engaged in collaboration with the Defense to find the truth. In order to recruit the jurors as part of the defense team, the following guidelines are helpful:

Contemplate your closing argument from the perspective of the jury box. By the time a case progresses to trial, often the attorneys have lived with the case for years. They have spent countless hours pouring over the evidence and formulating their plan for presenting it. It is all too easy to forget that, even though the jury will have heard the fruits of all this preparation, they won't view the case in the same context as the lawyers. Our legal education teaches us to "think like a lawyer." In preparing the closing argument, however, we must "think like a juror." In preparing your closing argument, ask yourself "if I was a juror in this case, having heard the evidence presented during trial and knowing nothing more than what had been presented, what would I be thinking? What would I think is important?" Your closing argument should be composed *from* the jury box.

Enlist the jury. The Defense must encourage the jury's perception that there are three participants in the trial: the Plaintiff, the Defendant and the jury, and that, of those three, only the Defense and the jury are reasonable, putting them on the same team. A common method of enlisting the jury is to begin the closing argument as follows:

"Ladies and Gentlemen, [Defendant] and I appreciate your assistance in helping us resolve this dispute. You've heard the testimony in the case, and you now see why we need your help. Mr. [Plaintiff] wants to blame us for this accident, but you've heard the evidence that the accident was his fault for not paying attention. You've heard the evidence that the injuries he claims aren't valid. We've been unable to convince him of that, so he needs to hear it from you. Of course, if we're the ones who are wrong, then we want to know, *[again, showing the jury what reasonable people are on the defense side]* but we are here because we need your help. I'd like to talk with you for a few moments about the evidence that you've heard . . . "

Don't sell what you wouldn't buy. To be the reasonable person, you must never advance an argument that, although makes sense to a lawyer, strikes a chord of insincerity with the layperson. As lawyers, we embrace the concept of "arguing in the alternative" as a valid legal principle. This is demonstrated by the classic "Your Goat Ate My Cabbages" argument: "You say my goat ate your cabbages. You had no cabbages. And if you did, they were not eaten. And if they were eaten, it was not by a goat. And if they were eaten by a goat, it was not my goat. And if they were eaten by my goat, he was insane at the time."

This argument makes no more sense to a layperson than a closing argument which says, in essence "the accident was not the Defendant's fault. And if it was his fault, it was not all his fault. The Plaintiff was not hurt, regardless. And if he was hurt, he was not hurt as badly as he claims." This gives rise to the dilemma which faces a defense attorney in any case in which both liability and damages are contested: how to address damages without appearing to be "arguing in the alternative." More than one Plaintiff's attorney has asked the jury during closing argument "Mr. [Defendant's lawyer] tried to convince you that this accident wasn't his client's fault. But then he spent an awful lot of time talking about how the Plaintiff wasn't hurt. If the accident wasn't their fault, why are they so worried about how much money is fair compensation?" One option for the Defendant is to simply ignore the issue of damages and focus on liability. This is a risky decision, because if the jury does not find in favor of the Defendant, then they only have the Plaintiff's comments to consider.

By making reasonableness the theme of the Defendant's closing argument, the issue of damages can be addressed without appearing to argue in the alternative:

"Ladies and Gentlemen, we've been talking about the evidence you've heard about the accident, and who was at fault. As part of his case, the Plaintiff has made a claim for money against [defendant]. I want to take a few minutes to address the arguments he is making about money, not because he is right, but because my job is to provide you with as much information as I can to help you do your job, which is to find the truth. When we all walk out of the courtroom at the end of the day, I want to be confident that I provided you with all the information I could. For that reason, I want to talk about their argument on their claim for money."

Attack the case, not the people. You may think the opposing party is a low-life and his attorney a disgrace to the Bar. None of that should come out in your closing argument. The jury may not share your perception of either, and an attack will make you the bad person in their eyes. The reasonable person focuses on the facts and issues, not the personalities. If the other side has shown their true colors, then the jury will have already picked up on this. You don't have to call the Plaintiff a liar – you can simply point out how he "misremembered" or "was mistaken." By taking the high ground, you gain credibility.

Argue your case, not your opponent's. Often we fail to consider that our function in closing argument is to be a storyteller. Not a storyteller in the sense of a fiction, but a storyteller in the sense of an oral historian. Our task is to put the evidence which the jury has heard into the context of our trial theme and help them understand and visualize how things happened in accordance with the version we have presented. The reactive nature of the Defense case can lull the defense attorney into focusing on the closing argument as a rebuttal of the plaintiff's allegations. Because the Defense presents the first closing argument, the Defendant should capitalize on being first in the spotlight to tell the Defendant's story. In the course of discussing the evidence, the Defense can compare and contrast the Plaintiff's arguments and evidence, but always in the context of how it does not fit with the Defendant's story which, of course, is the truth.

Allow the jury ownership of the decision. As the saying goes, you can lead a horse to water . . . . Regardless of how much rapport we are able to develop with the jury, in the end they will always retain a bit of skepticism about what we have to say because they know we are advocates and are trying to convince them to side with us. For

this reason, and because as Defendants we have, hopefully, enlisted them in our task to unmask the Plaintiff's dishonesty or correct the Plaintiff's mistaken belief, the Defendant should endeavor to put the puzzle pieces before the jury, but leave a few pieces for them to complete. In so doing, the jury will take ownership of the decision, which is much more persuasive than being told what to do. For example, a Defense attorney might point out how the Plaintiff's testimony at trial is inconsistent with his deposition testimony and answers to interrogatories. It may be clear that he is being dishonest, but there is no need for the Defense attorney to take the harsh step of calling him a liar outright. Let the jury form that conclusion for themselves.

Defeat anger. Jury awards are the result of the jury's empathy with the Plaintiff and desire to compensate a loss. Big jury awards are the result of the jury's dislike for the Defendant and a desire to inflict punishment. While it may not always be possible to overcome bad facts in a case, a Defense attorney should always strive to defuse any anger which might be directed toward the Defendant. A reasonable Defendant is not uncaring – a reasonable Defendant has sympathy for the Plaintiff as well. Arguing that an injury is not the Defendant's fault does not require ignoring the fact that the Plaintiff is nonetheless injured. Sometimes the Defendant should not even blame the Plaintiff for his or her own plight – as the reasonable position may be to argue that "accidents happen," and sometimes are not the fault of either side. The Defense lawyer must strive to make the Defendant as "likeable" as the Plaintiff. Juries don't want to punish people they like.

Forget the "Lawyer-ese." We spend three years in law school learning to "sound like a lawyer." We then spend the remainder of our careers as trial attorneys trying to remember how to sound like a real person. This does not mean "talking-down" to the

jury by any means – jurors are intelligent people. This means abandoning legal terms and the formal manner of presentation which says to the jury "I am a lawyer, you are the jury, and I am making a speech to you." Closing argument should be a conversation, not a sermon or lecture. As the reasonable person the jury can trust, you must be someone with whom the jury can identify.

Argue for fairness. Justice is an esoteric concept. It is the statue of the lady wearing a blindfold and holding a set of scales. Fairness, on the other hand, is a concept we have all grasped since childhood. It is breaking the cookie into two equal pieces. Consequently, the Defendant should argue for fairness. Even if the Plaintiff really is hurt and even if the Plaintiff really does believe the accident is someone else's fault, to place the blame on the Defendant is not fair. The reasonable Defendant can argue that, notwithstanding the genuineness of the Plaintiff's belief or injury, the facts of the case do not establish the Defendant's liability, and to make the Defendant pay the Plaintiff for something that was not his or her fault is not fair. Harkening back to the Defense objective of enlisting the jury, the jury is asked to protect the Defendant from Plaintiff's unfair claim. By posturing the closing argument in this way, the focus is shifted from the Plaintiff's request for "justice" to the Defendant's plea to the jury for protection from unfairness. No one wants to be a party to an act of unfairness.

Conclusion

A closing argument centered on reasonableness need not be dry or boring. In fact, a defense closing argument can be as moving to the jury as any tearful Plaintiff's case delivered on bended-knee. The key to an effective Defense closing argument is to nurture the jury's innate skepticism and recruit them as part of the Defense team to turn a

critical eye on the Plaintiff's case as seen from the Defense perspective. The end goal of the Defense closing argument is to cast the case not in terms of Plaintiff vs. Defendant, but "us vs. them" in the quest to uncover the truth, with the "us" including both the Defense and the jury. The jury will only be inclined to join the Defense team if the jury perceives an absolute sense of reasonableness on that side.