

Closing Argument: Prospective, Not Retrospective -or- The Closing Argument: Telling the Future, Not the Past

By *Bob Gerchen*

Tell 'em what you're going to tell 'em;
Tell 'em;
Tell 'em what you told 'em;
Sit down.

--an old trial truism that isn't very true.

Let me tell you a story: One fine day, The Three Bears sat down to eat breakfast. But their porridge was too hot, so they decided to go for a walk while their breakfast cooled down. Not long after The Three Bears sidled down the path, a lost, hungry girl named Goldilocks came upon the Bear cabin. When no one answered her knock, she entered...

You know the rest of the story: girl eats porridge, breaks chair, passes out in Baby Bear's bed.

What happened next? If the rest of the story was told in closing argument it would probably go like this:

Well, when Goldilocks came upon that cabin – locked or not – she had an obligation to remain outside unless she had permission to enter. But she was too hungry to abide by the accepted rules of our society. She simply burst right in. And she fouled not one, not two, but all three bowls of Bear porridge, not one, not two, but all three Bear chairs and messed up not one, not two, but all three Bear beds...

But, what happened next?

And so you can now see that the evidence has indeed shown that Goldilocks is a miscreant, a threat to civilized society and a young lady who just doesn't learn from her mistakes. Tell her it is time to own up to her behavior. Punish her accordingly.

Wait, how does the story end?

Traditional narrative has a beginning, a middle and an end. The end of the story is so very important; we all want to know how the story ends. Does our hero get the girl? Does our heroine survive the killer storm? Do they live happily ever after?

So why, after telling most of the case story at trial, and the opportunity to help jurors end the story in a fitting manner arrives, do so many lawyers go back to the beginning?

Where Does the Story End?

The story ends in the jury room. And several things happen in that jury room:

- 1) Jurors look at the instructions, and the verdict form, and as we've seen countless times in mock deliberations, exclaim, "This [instructions/verdict form] has nothing to do with what they were talking about out there [in the courtroom]."
- 2) The true work of persuasion takes place.

Let's Talk About Persuasion

There are several internal issues at play for jurors by the time you get up to deliver your closing arguments:

- Most of them believe they know how they feel about the case;
- Most of them are eager to talk about the case;
- Many of them are experiencing some level of anxiety and/or confusion over what they are being asked to do by the parties.

But it is not during closing arguments that those internal issues get resolved. It is during deliberations.

A meta-analysis of 1,631 jurors who participated in mock trials between January 1, 2011 and June 22, 2012 showed that 53.6% of jurors changed their leaning toward plaintiff or defense during deliberations. A full 85% of undecided jurors waited until deliberations – not closings – to finally make up their minds.

The true work of persuasion takes place in the jury room. If the first vote in the room is 7-5, and a couple of hours later, the final vote is 10-2 (in a civil case), who persuaded the three converts? It wasn't you; you weren't there.

So, if the persuasion is happening in the jury room, and not during closing, what is the purpose of closing argument?

The True Purpose of Closing

It's simple: Help them put the fitting end to the story. More specifically:

- 1) Help them understand the job that is before them;
- 2) Arm jurors who are sympathetic to your case with the words and ideas they need to counter the objections of jurors who are sympathetic to your opponent's case.

So in preparing your closing:

- Think prospective, not retrospective;
- Give them a reason to listen;
- Use the instructions/verdict form as a framework, not an afterthought;
- Make it about them.

Think Prospective

When you begin to put your closing together, think in terms of “What is going to happen next?” Well, what is going to happen is, twelve relative strangers are going to go into a small room and discuss, argue, barter and compromise. And they need help.

Give Them a Reason to Listen

By the time you get up to close, they’ve heard enough. They’ve listened to attorney rhetoric and to witness upon witness. And they’ve made some judgments along the way. They want to talk about the case, already. And your oratory is an obstacle to their getting to do that. So before you can accomplish anything in closing, you first have to give them a reason to listen to you. One way to do that is to predict the future: “When you go back into that jury room, you are going to have two jobs,” you can begin. Wait a minute, they’re thinking, I thought I only had one job – answer the questions. “Your first job is going to be to answer the questions that the Court wants you to answer. Yup, knew that one. “Your second job will be to explain to your fellow jurors why you feel the way you do about each of the issues these questions raise.” So, how do I do that?

Now they have a reason to listen.

Use the Instructions/Verdict Form As a Framework, Not an Afterthought

All too often, attorneys are so wrapped up in trotting out their best imitation of Cicero, the true job of the jurors – answering the verdict form – gets relegated to a few minutes at the end of closing (“Now let me tell you how what I’ve just expounded upon for 30 minutes relates to the verdict form”).

It is so very critical to help the jurors understand how to deliberate. If you practice in a venue that allows you to do so, start with the instructions. Pedestrian? Perhaps. More useful to the jurors than a retelling of what they’ve just heard for the last two weeks? Certainly. If there are terms in there that routinely confuse laypeople, e.g., “recover,” “injury,” explain them in laymen’s terms. What does an instruction on “Agency,” or “Scope of Employment” mean?

Walk through the verdict form; if one question is predicated on another, make sure jurors are clear on that. If you are the defendant, you don’t particularly want a “No” answer on Negligence, but a “Yes” answer on Gross Negligence, do you? Take the time now to refer back to the evidence in the case and apply it not rhetorically, but concretely – to the very questions they are being called upon to answer. And make sure they understand which instructions apply to which questions on the verdict form. Attorneys make the mistake of assuming that legal constructs that seem logical to someone who spent three years in law school will seem equally logical to laypeople. Assume nothing.

Arm your jurors for argument by predicting the future: “When you are talking about this question, someone may very well say [opponent’s theme or argument]. If they say that, you remind them, [your theme or argument, in one succinct line].” Ultimately, what you are doing is walking them through the strange process that they are about to embark upon, and easing their anxiety about it.

Make It About Them

If, in closing, you take on the role of facilitator – the one who understands the difficulty and the emotion of the job that jurors are about to be called upon to do – you increase your credibility as you provide clarity for your triers of fact. And clarity is what they need more than anything as the story draws to a close. Not rhetoric. Not convention. Not self-indulgence. Clarity. It is no longer about you, or about your client. It is now about the jurors and the job they are about to do. Ask yourself, “How can I make this upcoming process as clear as possible for them?” Clear thoughts produce clear results.

By the way, for those who have forgotten: the ending to the story is Goldilocks, upon being discovered by The Three Bears in Baby Bear’s Bed, jumps up and runs out of the cabin, never to be seen again (and The Bear family installs an alarm the next day).

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