

CLOSING ARGUMENT

Myth vs. Reality

By Frank A. Ray

Trial lawyers who work themselves into a lather in an attempt to "win the case on closing argument" probably expend energy and emotion on an unattainable goal. In truth, by the close of evidence, most jurors have definitely determined how they will vote during deliberations.

Jurors, judges, and lawyers understandably view closing argument as an opportunity for a dramatic experience. Yet, lawyers who draw attention to themselves with effusive explosions of electrifying words might achieve awe from their listeners, only to fail in the ultimate goal of closing argument.

Effective closing argument coalesces with a clear, concise, understandable, simple, and convincing summary of evidence admitted during the trial. Advocacy remains the hallmark of competent summation, as long as the jury escapes influence imposed by passion or prejudice.¹ This is why enlightened judges and lawyers prefer reference to the final adversarial chapter in trial as "summation" as opposed to "argument."

In both criminal and civil cases, if any decisive opportunity actually confronts trial counsel during summation, that opportunity is to blow the case. The Ohio Supreme Court has repeatedly instructed that "over-the-top" presentations by trial counsel during summation can constitute reversible error because of prejudice imposed by counsel's conduct. In criminal actions, if a prosecutor has presented a well-tryed case, a prosecutor's unwarranted emotional tirade in closing argument can irrevocably unwind a conviction.² Similarly, in civil cases, counsel who use summation to fan the fires of passion and prejudice can cause a client's case to disintegrate due to self-ignition.³ The Ohio Supreme Court has also cited deplorable conduct of counsel in closing argument as a basis for disciplinary action.⁴

Ohio courts provide trial counsel generous latitude with respect to the form and substance of summation, restricted by the requirement that a trial be so conducted as not to impair the impartial and fair administration of justice.⁵ During closing argument, counsel must confine statements to issues in the case, facts shown by admitted evidence, fair and reasonable deductions from that evidence, and responses to statements made by opposing counsel.⁶ Whether counsel exceeds the bounds of propriety in summation rests in discretionary rulings of the trial judge.⁷

While the trial court will permit counsel to discuss applicable law in the context of admitted evidence, trial counsel can never indulge in comment that would induce the jury to disregard the court's instructions of law.⁸ In closing argument, counsel is forbidden to comment on the court's evidentiary rulings or on excluded evidence, which constitutes misconduct.⁹

In civil cases involving personal injury claims, plaintiff's counsel can properly engage in a so-called per diem argument in which counsel offers a suggested monetary value for non-economic damages based upon time units.¹⁰ Yet, in closing argument in personal injury or wrongful death cases, plaintiff's counsel injects error if arguing that damages should be determined in the amount that jurors would wish to recover if the jurors were the injured plaintiff.¹¹ This is known as the forbidden "golden rule" argument.

In civil cases, it is fair game for counsel to comment on an adversarial party's omission to produce evidence within the control of that adversary.¹² In contrast, in criminal cases, the prosecutor creates reversible error by suggesting that the defense failed to produce certain evidence within the control of



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the criminal defendant. Such a comment intrudes on the Fifth Amendment right against self-incrimination.¹³

In closing argument, counsel should re-employ themes that should already have resonated from voir dire through cross-examination of the last witness. Summation should offer the jury more than a "talking head." Even though proper display of images through technology during opening statements and evidentiary offerings probably plays effectively, a full re-hash of images using the same technology during summation could engender a negative response from jurors. Simple, low-tech displays of images coupled with a logical verbal presentation will supply prompts for jurors to adopt for their repetition during deliberations.

Credible understatement remains the best ally for advocates during the course of a trial. Jurors will reward lawyers' clients if trial counsel delivers summations with even-tempered, controlled, and confident statements about meaningful evidence that the jurors actually heard and considered during trial. Jurors recognize and appreciate a trial lawyer's demonstration of integrity and credibility. In the delivery of summation to conclude a trial, counsel faces that final test of the measure of integrity and credibility under the scrutiny of the ultimate decision makers – the jury panel.

¹ *Cleveland Ry. Co. v. Crooks* (1935), 130 Ohio St. 255.

² *State v. Williams* (1986), 23 Ohio St.3d 16; *State v. Keenan* (1993), 66 Ohio St.3d 402; and *State v. Smith* (1984), 14 Ohio St.3d 13.

³ *Drake v. Caterpillar Tractor Co.* (1984), 15 Ohio St.3d 346; and *Wasserman v. Buckeye Union Casualty Co.* (1972), 32 Ohio St.2d 69.

⁴ *Disciplinary Counsel v. Armengau*, 99 Ohio St.3d 55, 2003-Ohio-2465.

⁵ *Hayes v. Smith* (1900), 62 Ohio St. 161; and *Pang v. Minch* (1990), 53 Ohio St.3d 186.

⁶ *Cusumano v. Pepsi Cola Bottling Co.* (1967), 9 Ohio App.2d 105.

⁷ *Re Appropriation easement for highway purposes* (1962), 118 Ohio App. 207.

⁸ *Driscoll v. Cincinnati Trash & Co.* (1913), 88 Ohio St. 150.

⁹ *Snyder v. Stanford* (1968), 15 Ohio St.2d 31.

¹⁰ *Grossnickle v. Village of Germantown* (1965), 3 Ohio St.2d 96.

¹¹ *McCullough Transfer Co. v. Pazzulo* (1936), 53 Ohio App. 470; and

Yerrick v. East Ohio Gas Co. (1964), 119 Ohio App. 220.

¹² *Sparks v. American Light and Accident Insurance Co.* (1940), 31 Ohio L. Abs. 613.

¹³ *State v. Lynn* (1966), 5 Ohio St.2d, 106; and *Griffin v. California* (1965), 380 U.S. 609.



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