Thoughts on Closing Arguments By Robert Lawrence

The importance of an opening statement is often emphasized because it is in opening statement that strong first impressions, if not presumptive conclusions, are formed by the jury as to the validity of the claim. If this is true, then what is the importance of the closing argument? Certainly, if the jurors have begun to make up their minds in the middle of opening statement, how much remains to be done in a one hour summation days to weeks later?

Based upon a multitude of focus groups done by our office over the last ten years in personal injury and medical malpractice cases, I have come to the conclusion that the closing argument really does make a difference in terms of the total sum of money that a jury will be willing to give on any given case. An effective closing argument is an essential tool for the plaintiff’s trial attorney to maximize damages for his injured client regardless of the tort in question.

We have found, by tracking the opinions of members of focus groups at various stages during the presentation, that an effective closing argument will change the juror’s frame of reference on damages. An effective closing argument can alter the juror’s perception of what he or she would consider a “lot of money” by focusing the juror on the total impact of the injury over time.

How then does one give an effective closing argument? The plaintiff’s lawyer probably has more freedom and more control over closing argument than he or she has over any other aspect of the case. For that reason, it should be his or her favorite task; a task that bears the attorney’s own personal stamp, reflective of his or her true inner self. While creativity and individuality are critical, we do need to stay within the legal boundaries that have been drawn over the years.

Although great latitude is given to counsel during closing arguments, the argument “must be confined to matters in issue and to facts shown by competent evidence, with proper inferences to be drawn therefrom.” *H.H. Triplett v. Napier*, 286 S.W.2d 87, 90 (Ky. App. 1955). Where counsel’s statement is highly prejudicial or wholly unsupported by the evidence presented, it is well within the court’s discretion to set aside the verdict. See *Horton v. Herndon*, 70 S.W.2d 975, 977 (Ky. App. 1934).

Since *Louisville & Nashville Railroad Company, Inc. v. Mattingly*, 339 S.W.2d 155, 161 (Ky. App. 1960) it has been held proper for a plaintiff’s attorney to put forth a per diem argument for general damages during each suggested time unit. However, counsel must not argue that damages should be determined in the amount that the jurors would wish themselves to recover if they were injured like the plaintiff.

This argument, or similar arguments, are said to constitute the “golden rule” argument and are prohibited. See *Murphy v. Cordle*, 197 S.W.2d 242, 243 (Ky. App. 1946). When the “golden rule” argument is made, opposing counsel is required to object and ask the court for curative action. As with any improper argument, the failure to raise an objection at trial waives the right to raise the issue on appeal. *McDonald v. Commonwealth*, 554 S.W.2d 84, 86 (Ky. 1977).

While great latitude is afforded counsel in presentation of closing argument, inflammatory appeals to passion in the form of non-factual attacks on the opposing party’s counsel is improper. See *Blair v. Eblen*, 461 S.W.2d 370, 374 (Ky. App. 1970).

Similarly, attacks upon an opposing party are improper and can be the basis for a new trial. In *Boden v. Rogers*, 249 S.W.2d 707, 710 (Ky. App. 1952), the court found it beyond the bounds of legitimate argument in referring to the defendant as a “city slicker’ who had gotten rich selling Cadillacs and Oldsmobiles.”

In *Chesapeake & Ohio Railway Co. v. Shirley’s Administratrix*, 291 S.W. 395, 399 (Ky. App. 1926), it was held improper for an attorney to state; “You killed their Santa Claus (pointing to defendant’s counsel). In the name of God, I ask you to fill their stockings on Christmas Eve night, and I ask it for Jesus’ sake.”

Disciplinary Rule 7-106 places a responsibility on a lawyer not to state or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence. This sort of personal opinion as to the justness of the cause or as to the credibility of the civil litigant is prohibited, but the attorney may argue on the analysis of the evidence for any position or conclusion with respect to the matter stated therein.

Finally, suffice it to say, each of us is limited to a reasonable comment on the evidence introduced at trial and the evidence should never be misquoted or misstated.

With the above limitations in mind, how does one give an effective closing argument which will maximize damages for an injured victim who has been seriously injured? The first rule of an effective closing argument is that it must be reflective of the true state of the evidence, founded in reason and logic, and be delivered in a style which is genuine. Be yourself in closing argument. To be natural, to be genuine, and to be sincere is certainly more important than to be sensational. Having said that, these are the general rules that I personally follow:

1. Do not use notes, if at all possible. Notes are a distraction and keep you from looking at the jury.

2. Have individual eye contact with each member of the jury repeatedly.

3. Be brief, be measured.

4. Use a pound of logic for every ounce of emotion.

5. Tell the jury new things, don’t simply repeat the whole testimony.

6. Emphasize the themes that you have developed in your trial preparation from focus groups.

7. Write your closing argument first before you do anything else in trial preparation and then rewrite it as you conclude.

8. Do not overshadow your client with a performance, but interject the client and the client’s injuries to the forefront.

9. Utter no falsity. Say nothing that you do not believe to the fullest.

10. Always explain, if at all possible, what good the money will do.

11. Do not be shy or timid in asking for the money because it is a legal debt owed to your client.

12. Whenever possible, avoid the pain and suffering terminology. It sounds like lawyer talk.

13. Make the jury understand the total dimensions of the injuries, both now and over time. Underscore the dynamic nature of the injuries.

14. In the profoundly injured, provide, in part, a day-in-the-life type closing in which you go through the daily aspects of living that have been impaired. This is often something that a jury will then apply inwardly to themselves and thereby appreciate the impact of the injury.

15. Make the injury understandable through the use of demonstrative evidence.

16. Before arguing damages first argue liability and causation if they are at issue.

17. Use blowups of medical literature of the defendant and the defendant’s experts when said literature contradicts their sworn testimony and has properly been identified in trial.

18. Use analogies and stories based upon every day experiences the jurors can relate to and will agree to so that they follow you to the conclusion of the large verdict.

19. When the defense lawyer attacks you personally or your litigation or your exhibits, explain why you did what you did, but do not attack the lawyer.

20. Emphasize that the case is not about the lawyers, but about your clients and their permanent injury.

21. Use words that draw images and use words that are understandable. Do not talk down, but talk across to juries.

22. Save some of your best one-liners and most telling points for when the defendant lawyer has sat down and can no longer rebut what you are going to say.

23. At all costs, avoid appearing greedy.

24. Do not underestimate the importance of causation. Explain that the reason that the standards of practice are what they are is to avoid certain injuries, like the one which occurred in this case because the standards weren’t followed. The very reason for the standards is to prevent what happened in this case. Therefore, take the strength of your negligence and intertwine it with your causation.

The points I have listed come from over thirty years of practice. I must emphasize however, that each closing argument for each case must be individually prepared and tailored to be in sync with both the personality of the case and the personality of the lawyer.