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LAST IMPRESSIONS: THE ROLE OF CLOSING ARGUMENT

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Last Impressions: The Role of Closing Argument

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As the title to this talk suggests, final argument is the last chance to persuade the judge that your case is a winner. While it may be the end of the litigation process, it is something you will have been thinking about since the case began. If you are like most of us, you will have been rehearsing your arguments in your mind throughout the progress of the litigation. As the facts came out in the discovery process, your arguments will have been fleshed out and augmented or, on the other hand, they may have weakened. Whatever the result, the final argument remains the primary preoccupation of the advocate throughout the course of the litigation. There are all sorts of clichés to describe it but it truly is the denouement. It is the point where the case for both sides is laid bare before the judge.

When pleadings are drafted and the claim or defence formulated, the first bones of final argument are created. With documentary and oral discovery, the means of proving the case begin to appear. Witness interviews similarly provide more information that is probative. This evidence gathering stage is, in a very real sense, preparation for final argument. Counsel begins to get a sense of what facts are likely to be capable of proof and which are problematic. Indeed, the gathering of

evidence may demonstrate that the case is sufficiently weak that a settlement results.

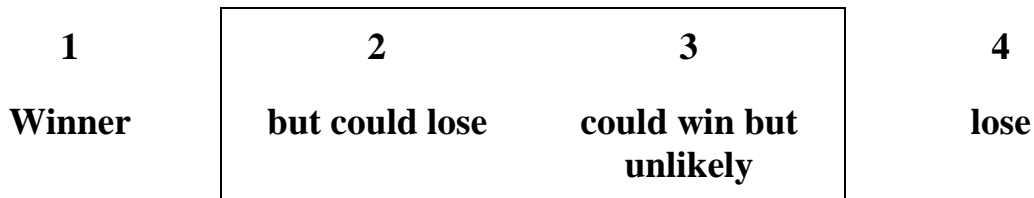
However, on the assumption that the case proceeds, one of the major parts of trial preparation is the opening. The opening statement and final argument are the bookends of the trial. Preparation of an opening is preparation of a final argument. If the trial goes totally as planned, which is seldom, if ever the case, they should be very similar. The difference between them is that with an opening, you are telling the court what the case is about and what you intend to prove. Care must be taken not to promise too much or to overstate.

On the other hand, with final argument, the case is in, and the evidence has been established for better or for worse. The task is to demonstrate how that evidence will ground the findings you want the judge to make so that your client can succeed. These findings will have been featured in the opening as facts that you intended to prove. Having got to the end and having, hopefully, established them, they are the findings that will allow you to succeed.

However, most cases don't go as planned. It seems they rarely go better than plan. Most often, they don't live totally up to the hope and expectation of either side. That is the nature of the trial process. If it had been certain, the case would normally have settled long since. What it means for counsel is that he or she must

constantly re-evaluate the prospects for ultimate success as the evidence comes out. There are two questions that must be asked and answered. “How can I win this case?” is one. The second and equally important question is: “How can I lose this case?” It is these questions that will form the backbone of the final argument (although you obviously will not talk about losing).

By the time the evidence is finished, there will be four possible conclusions you can reach about your case. They can be illustrated by a simple graph:



The two extremes are relatively unusual in that it is seldom the case that counsel can safely conclude that the case cannot be lost. Similarly, it is unlikely that a case that cannot be won will get to final argument, assuming counsel recognize that fact. The great majority of cases will fall into the box and that is where the final argument will focus.

It is difficult to overemphasize the point that an assessment of your prospects going into final argument is a two-sided one. It is easy to look at the positives that auger well for success: it is much more difficult to look rationally at the dark side. How the case could be lost is not an easy analysis at the best of times, and far more difficult in the adrenalin rush period at the end of a trial. Nevertheless, failure to

ask the negative question of yourself, and your colleagues, runs the risk of not being adequately prepared for the opponent's arguments or the judge's questions.

Written Final Argument

Today, there is almost no excuse for failing to file written final argument. As previously stated, it should have been in the course of preparation from the beginning or the early stages of the case. If so, it should be relatively easy to put it into a form that marshals the whole of your client's case for the consideration of the judge before he or she hears oral argument. That is the ideal.

However, in the real world, it may not prove possible to file argument before oral final argument. It may be that there is no adjournment following the end of evidence or there may be some other reason that prevents filing of written argument before oral submissions. Contemporaneous written and oral submissions also have an effect on the oral argument. Having the opportunity to read and consider your opponent's argument before oral submissions is a great advantage for all counsel, as well as the judge. Importantly, it allows you to see more clearly how you might lose and to tailor your submissions accordingly. Thus, if at all possible, try to persuade the court that exchange of written argument beforehand is a worthwhile endeavour. But above all, do not forego the opportunity to file a

written version of your argument, even if it is only in point form. If you don't, you force the court to rely on notes or transcripts.

The form and content of written final submissions is much like any written argument. It needs to be tailored to suit the nature of the case. No one format suits all cases. Its form will also be a function of whether the submissions are filed simultaneously or separately. If written argument is filed beforehand, it need not be the script for the oral submissions. If it is filed at the time of oral argument, it loses a good deal of its effectiveness if it isn't used as the basis of the oral submissions. Finally, written submissions should always contain an explicit list of the findings that you wish the court to make coupled with supporting argument and references to the evidence. In a trial, this will have been the heart of your case and favourable findings will allow you to win.

Oral Argument

Let me start with a negative: don't be tempted by the offer to give up oral argument for written submissions alone. The ability to explain and persuade is far more effective when done in person. The interaction between the judge and counsel, as they together work through the judge's problems or misunderstandings concerning the case, should never be surrendered. Don't give up the chance to make a final favourable impression. Secondly, oral submissions have a different

dynamic than the written word. Don't simply repeat your written argument, but rather take advantage of the features of person-to-person communication.

(i) The Theme

Geoffrey Adair, in his book "On Trial" wrote, "Every trial judge is a juror at heart." No doubt most judges wouldn't thank you if you told them that, but they are just as susceptible to notions of fairness, equity and common sense as are ordinary mortals. A good theme, developed to run through the oral submissions and to demonstrate that right, and justice is on your side should be the chassis of an oral argument. Such a logical, persuasive theme should compel a favourable result if your view of the evidence is accepted.

The theme is best established in the opening sentence. "This was a partnership that was destroyed by the defendant's systematic breach of his obligations" or "The federal government couldn't persuade parliament to end the Canadian Wheat Board's monopoly, so it tried to do it through the back door by regulation." These are sentences which are intended both to capture the judge's attention and to indicate where you are headed.

(ii) The Form of the Argument

Having started with an attention grabber, you now need to tell the judge where your argument is going. Tell the judge what your points of argument will be and do it in a way that he or she will write them down. There is nothing wrong with suggesting that the judge may wish to do so and then going slowly through each point so the judge can note them.

There is no rule that says that the facts and law portions of the argument have to be separate sections, but it often turns out that it is the most convenient format. Whatever ordering of the argument that will allow you to be at your most lucid and persuasive is the one to choose.

In a trial, the process has been directed toward establishing the facts. The important ones will have been in contention or at least some of them were. You will want to go through the significant facts by reviewing the relevant evidence. When you do, you must state that evidence clearly and fairly. Do not take it out of context or neglect to refer to contrary evidence. If there is contradictory evidence you have to deal with it. Do not leave it to your opponent. Your credibility is your most important persuasive tool but it is a fragile thing and once lost, it cannot be recovered. For similar reasons, do not overstate the effect of the evidence as it weakens the force of your submissions.

Don't be afraid to invoke policy or equity considerations when making your arguments. If there are policy grounds that could affect the outcome favourably, be sure that the judge is made aware of them and how they are applicable. Citing the Wheat Board case again, it was crucial to success that the court understand the policy that underlay the legislation. It could have been ignored and the case could have been argued on the plain meaning of the statute and it was supposedly decided on that basis alone. But don't you believe it: public policy is not easily ignored, nor is essential unfairness.

How long should your argument be? The answer is as long as necessary to present your arguments in a persuasive manner. I do not believe that in most cases you can continue to be persuasive after more than two or three hours. In most cases, argument should not exceed an hour and a half. The judge has heard all the evidence and at this point should know the case almost as well as counsel. He or she will not thank you for reviewing the evidence unnecessarily or repeating submissions. Not only that, it is unpersuasive to do so.

(iii) Presentation

When a judge comes to prepare his or her reasons for judgment and is reviewing your written argument or notes of oral argument, you will be the image he or she has in mind. The memory of your presentation will directly affect the

persuasiveness of your argument long after you sit down. You should do everything you can to make that image favourable.

We are increasingly learning that non-verbal communication, body language if you will, plays an important role in communication and, consequently, in persuasion. Things such as organization of material so that the perception of uncertainty is minimized, continued eye contact between counsel and judge and quietness of body are important communicators. Equally important is voice; don't drone, don't shout, address the points in the way you would communicate normally. Some points need vocal emphasis, but certainly not all. Timing is also important. Speaking at the speed of light is not helpful to your cause and is frustrating for the trial judge. Bad points can't be avoided by speaking quickly.

None of us is too old or experienced that we don't need to rehearse. It is surprising how much an argument will change after you have spoken it out loud, even to yourself. Rehearse your argument all you can and try the whole or parts on friends or colleagues if they will let you. I used to use my wife as a sounding board but gave it up because I always lost when she heard my argument. My colleagues are more sympathetic.

Finally, there is the subject of questions from the bench. I am concerned here with true questions which originate from a sincere desire to be educated on a point.

Questions which are asked to communicate something, usually that your point is rejected, or worse that you are going to lose, must be answered but it won't help. Real questions however are a true opportunity and should be seized upon as the means of persuasion they are. Don't defer answering because it is inconvenient or out of order. Answer at once and fully, explaining that you will come to the point again later in your argument. Make sure the judge has your answer and that it was fully responsive to the question. If you are in any doubt, ask, and you will be told if there are remaining concerns, as there often are.

(iv) Conclusion

A trial is the best part of a litigator's practice and final argument is the best part of a trial. It is the chance to employ all your forensic and persuasion skills in order to obtain a favourable outcome for your client. Relish the opportunity and take advantage of it.