How to win at mud wrestling

Closing argument is the defense's last chance to smear you and your client. Be ready!

By Eustace de Saint Phalle and Andrew Clay

You are likely to be familiar with the following scene: You have just made your closing argument, setting out your case for the jury. You have discussed the key evidence showing how your client was injured and the extent of these injuries. You have put on expert testimony showing your client's injuries, need for treatment, future disability, and the reasonable costs for these. You have characterized the evidence in a reasonable way, used logical inferences to make your points, and guided the jury to conclusions supported by the facts.

Then the defense gets its turn, and logic is drowned by a flood of negative characterizations. The defense unleashes a swirl of innuendo and personal attacks: your client is faking or exaggerating; the treating doctors are foolish or greedy; your experts are frauds paid to bend the truth. The defense invites speculation that the incident happened a completely different way than has been presented by the evidence. The defense may characterize you as a "salesman," "showman," or a liar.

A stream of insults

Our office has experienced a number of trials where the defense closing was little more than a stream of insults. The defense tactics vary, but the general strategy is to attack the credibility of the plaintiff and plaintiff's counsel and witnesses. For example, in one smaller auto accident case, at closing the defense repeatedly referred to the "itty bitty" impact for "itty bitty" damages. Defense counsel might misstate or mischaracterize your expert's opinions. The defense may imply plaintiff's counsel are inflating the damages by some kind of trickery. We have seen defense counsel describe plaintiff's future medical care claim as "Cadillac care," or "comparable to a stay at the Ritz-Carlton." Finally, defense may argue that the time spent in the courtroom was excessive or a waste of time.

In our experience, most trial judges will reign in the more egregious mistakes in closing arguments. However, the law permits many unfair statements in closing. Also, the judge may grant counsel such wide latitude that the closing argument is more like a Jerry Springer show than a courtroom.

Maintain your credibility

In considering your response to false, misleading, or unfair comments by the defense, you should always keep in mind that the most important issue is *credibility*. It is plaintiff's job to *establish credibility with the jury, and build credibility throughout the trial.* Your closing argument should reinforce your credibility as you summarize the evidence and outline the logic compelling a verdict in your favor. Closing argument is also the defense's last chance to weaken plaintiff's credibility and sow the seeds of doubt about your case. This is why we so often see the defense resort to personal attacks in the closing. For that reason, it is vital for plaintiff's counsel to maintain credibility all through your closing, your response during defense closing, and your rebuttal argument.

There are several strategies to deal with improper closing statements. For particularly egregious attacks, you may object to the defense's statements and request admonishment by the trial judge. The judge is empowered to referee the closing statements and prevent them from becoming a barroom brawl or smear contest. However, even if the judge is lenient and lets the defense attack you, there are ways to make the defendant pay for their misleading statements. Every improper attack by the defendant is an over-reach, which makes them open to a counter attack. Particularly, wherever the defense makes a personal attack, you can point out that *the defense is trying to distract the jury from either the facts or the law.* When the defense closes with personal attacks, they are usually revealing a weakness which you can point out to the jury. You can contrast the defense's emotional smear tactics with the solid evidence you have put forward. Thus, you can use the defense's attacks to highlight the weakness in their case and the strength of your case.

Proper closing argument – what you can say

The purpose of closing argument is for each side to provide an overview of the important facts that prove each side's case. The closing argument should restate the key issues in the case, as simply as possible, and provide a logical chain from the key facts to the conclusion. The closing is a critical moment in the case. The attorney's final remarks are the last thing the jury will hear; these remarks should direct them to the most important issues and areas of dispute.

Counsel has wide latitude in making closing argument. It is proper in closing to:

- Cite to facts in evidence.
- Make any reasonable inferences from the evidence, even if the logic is not perfect.
- Give counsel's opinion of disputed facts.
- Cite or paraphrase relevant law, as stated in the jury instructions.

• Reference matters of common knowledge.
• Point out that the opponent failed to explain or deny evidence (CACI 205).
• Point out that the opponent failed to offer available stronger evidence (CACI 203).
• Argue the case vigorously, even asserting that the opponent's claims are ridiculous or incredible.
• Note that opposing experts are paid to help the person hiring them.
• Attack the credibility of opposing witnesses.

Some of these permissible forms of closing argument may allow statements that are somewhat unfair. For example, a closing argument may be illogical as long as it is supported by evidence. (*Miller v. Pacific Constructors* (1945) 68 Cal.App.2d 529, 551.) Also, as long as there is some evidence showing contradiction with a witness's testimony, it is permissible to question the witness's credibility, even calling them a "liar." (*People v. Sandoval* (1992) 4 Cal.4th 155, 180 [permissible to call opposing expert a "liar" where expert had testified differently in another case].)

Improper closing arguments

While there is wide latitude in making closing arguments, there are limits to what is acceptable. Following is a description of some of the more important "don'ts" in closing:

Don't misstate the evidence. Attorneys have a professional duty not to directly mislead the jury. Cal. Rules of Prof. Conduct 5-200(B) states: "A member shall not seek to mislead the . . . jury by . . . [a] *false statement of fact or law*." (Emphasis added; see, *Boyd v. Theetgate* (1947) 78 Cal.App.2d 346, 351.) It is also improper to insinuate the existence of "facts" not proved at trial. (*Kenworthy v. State of Cal.* (1965) 236 Cal.App.2d 378, 398 [in contract case, improper in closing to suggest State officials asked for a bribe, where no evidence supported this accusation].)

For a plaintiff's attorney, it is vital to represent the evidence to the jury with precision at all times, including during closing argument. Any stretching of the evidence will hurt plaintiff's credibility and damage your case. Once you have lost credibility with the jury, a defense verdict becomes much more likely.

Don't misstate the law. While counsel may make accurate statements of law in closing, counsel is not permitted to make inaccurate statements of law, or give law that contradicts the jury instructions. The Court is the arbiter of the law at trial, and counsels' statements on the law must be consistent with the Court's instructions. (See, *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 480 [improper for counsel in closing to imply the court will instruct on suppression of evidence, when such instruction was not requested].) The applicable law should be apparent to all parties before closing arguments, since the Court will have ruled on the jury instructions by that time.

Don't refer to matters outside the record. Courts make rulings about admissible evidence, and some evidence is not admitted. Referring to matters expressly excluded by the Court is "an extreme form of attorney misconduct." (*Hawk v. Sup. Ct.* (*People*) (1974) 42 Cal.App.3d 108, 126-127.) This includes references to statements kept out of court as hearsay. (*Boyd v. Theetgate* (1947) 78 Cal.App.2d 346, 351 [improper in closing to refer to truck drivers' statement that had been excluded as hearsay].)

There are some other matters that are routinely excluded by trial courts, such as settlement offers; statements at mediation; collateral source matters, such as availability of insurance; and other issues excluded in pretrial motions in limine, such as prejudicial evidence. It is improper for counsel to mention these in closing arguments.

Using your closing argument to insert information that the judge has excluded is a quick way to infuriate your judge. This is likely to draw a stern rebuke, which would rapidly erode your credibility with the jury.

Don't comment on a witness's claim of privilege. Where a witness claims privilege not to speak about a given issue, it is error to comment on this or to disparage the witness for not talking about the privileged issue. (Evid. Code § 913.) Again, this is likely to draw a rebuke from the judge.

Don't invite speculation. Your closing argument can make reasonable inferences from the facts, but should not make unsupported leaps or invite the jury to imagine different facts. For example, in a vehicle collision case, defense cannot argue that plaintiff "may have been at fault," for example by falling asleep at the wheel, where no evidence supports this. (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747.) Again, it is the plaintiff's job to build credibility based on facts and reasonable inferences. Plaintiff will lose credibility if plaintiff tries to "reach" for conclusions not well supported by evidence.

Don't make personal attacks on the character or motives of opposing counsel, party, or witnesses. This is an attempt to prejudice the jury and is improper. "Personal attacks on the character or motives of the adverse party, his counsel, or his witnesses are misconduct." (*Stone v. Foster* (1980) 106 Cal.App.3d 334, 355.) It is misconduct for counsel to make "personally insulting or derogatory remarks directed at opposing counsel or counsel's motives or character." (*Cassim v. Allstate Ins. Co*. (2004) 33 Cal.4th 780, 796.) Some examples include:
• Improper to claim opposing party and witnesses will "lie and cheat and steal and thieve." (*Simmons v. S. Pac. Transp. Co.* (1976) 62 Cal.App.3d 341, 351.)
• Improper to refer to opposing counsel as "an idiot" and a "laughing hyena," and accusing counsel of suborning perjury. (*Love v. Wolf* (1964) 226 Cal.App.2d 378, 391.)
• Improper to refer to opposing counsel as "whores" who would lie for their client. (*Las Palmas Associates v. Las Palmas Center Assoc.* (1991) 235 Cal.App.3d 1228, 1247.)

While it is proper to point out that a witness had been inconsistent or illogical, general attacks on witnesses not based on reasonable inferences are improper.

For example: Saying witness is "a damned liar," although no evidence contradicted the witness's testimony, was prejudicial and improper. (*People v. Johnson* (1981) 121 Cal.App.3d 94, 103.)

As plaintiff attorneys, you will confront defense witnesses whose version of events are false or mistaken. In closing argument, you should strive to demonstrate the falsity of their statements by showing factual contradictions or illogical consequences.

Don't claim you have personal knowledge of facts. In closing (as throughout trial), counsel should refer to facts in evidence. What counsel themselves know about any given issue is not relevant. Attesting to counsel's personal knowledge on any point is improper. (*People v. Johnson* (1981) 121 Cal.App.3d 94, 103 [attorney claiming that he had personally investigated an issue stated by the witness, and found it to be false, was improper].)

It is particularly perilous for a plaintiff's attorney to say "I know" or "I believe" about any fact in the case. You are then open to the defense argument that the plaintiff's case is all made up in plaintiff's counsel's mind, or is all a "big show" by counsel. Further, you have made that fact entirely reliant on your own credibility as an attorney.

Particular closing arguments to avoid for plaintiffs and defendants

There are some particular types of closing argument that are "occupational hazards" for attorneys on each side of the aisle.

Golden Rule argument: "What would you want to compensate yourself for these injuries?" This argument improperly asks jurors to become plaintiff advocates, puts jurors on plaintiff's side. (*Horn v. Atcheson Topeka Ry. Co.* (1964) 61 Cal.2d 602, 609.) (However, it is acceptable to argue for pain to be awarded *per diem*, i.e., to ask the jury to award a certain dollar amount per day for pain. (See, *Beagle v. Vasold* (1966) 65 Cal.2d 166, 177.)

"Little guy vs. corporation:" It is improper to refer to the wealth disparity between your client and the defendant, in order to create a bias for your client. (*Seimon v. Southn. Pac. Trans. Co.* (1977) 67 Cal.App.3d 600, 606.)

Appeal to jurors' self-interest: Don't argue that a certain verdict will affect the jurors themselves. The jury is supposed to decide a case impartially, and such arguments undermine their objectivity. This issue often arises as an appeal to a potential tax burden on society if the opponent wins, e.g., "We the taxpayers should not have to pay" by paying for plaintiff's Veterans Hospital treatment if defendant wins. (*Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 847 at 861.) Another improper self-interest argument is to, "Send a message to community with the verdict." (*Nishihama v. City of S.F.* (2001) 93 Cal.App.4th 298, 305.)

Watch out for the following defense arguments:

Speculative inferences, e.g., the incident or injury "may have" occurred differently: Defense counsel may try to defeat your evidence of the defendant's liability, or causation of injury, by coming up with alternative explanations. Such "alternative facts" are objectionable as speculation unless they are supported by objective facts in evidence. (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747 [in auto accident case, improper for defense closing to argue the plaintiff "may have been at fault" in various ways, where no evidence supported this speculation].) Be especially wary if the defense includes "maybe," "might have," or "could have" in its statements; these usually signal improper speculation by defense counsel.

Remember, the defendant *does* bear a burden of proof as to its own affirmative defenses, as well as on counterclaims such as the plaintiff's comparative fault. Do not let the defense present such defenses or counterclaims without admissible evidence and reasonable inferences from evidence.

The jurors' self-interest: As with plaintiff's closing, it is improper for the defense to refer to the jurors' self-interest, either as taxpayers, or as payers of insurance premiums. For example, it is improper to refer to "begging to . . . the government taxpayer." (*DuJardin v. City of Oxnard* (1995) 38 Cal.App.4th 174, 177.)

Also, as with plaintiff, it is improper for the defense to ask the jurors to "send a message" with its verdict. For example, it is improper for defense to argue, "A defense verdict will send a message . . . that plaintiff [should] learn to help himself." (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 155-157.)

The defendant's financial status: It is improper to suggest that defendant's wealth was the target of the litigation, for example, "[The] defendant was sued because of [its] deep pockets." This creates bias for the defendant. (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 155-157.) Conversely, it is improper to invoke sympathy by referencing defendant's lack of wealth. (*Hoffman v. Brandt* (1966) 65 Cal.2d 550, 552-553.)

How to object to improper defense closing arguments

If you encounter improper closing argument from defense counsel, you should be prepared to react quickly. You must immediately decide whether to object. Waiting until the end of argument waives any objection, and these objections cannot be raised for the first time on appeal. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 797-798.)

It is within the court's power to intercede *sua sponte* to admonish counsel when the court believes an attorney has made improper argument.

Unfortunately, there are judges who will permit improper argument unless objected to (and some will overrule your valid objections).

While there is a "gray zone" for acceptable statements in closing, in my opinion there are some kinds of closing statements that should always be objected to:

- Misstatements of law

- Facts the court has ruled are excluded
- Gross misstatements of evidence
- Pure speculation without evidentiary support
- Demeaning personal attacks on you, your client, or a witness

On objecting, it is important to also request an admonition that the jury disregard the offending comment. (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 892.) Also, if there is any argument about the defendant's comment, it would be better to request that this take place outside the jury's presence.

Using defendant's improper closing against them

While you are "in the moment" at trial, it is possible that some of the defense's questionable closing comments will slip through. There may be a downside to objecting too often, even where justified. Some judges consider it to be "bad form" to interrupt counsel during closing to object to minor misstatements of fact. Also, the jury may not understand the basis for the objections and decide that you are not allowing your opponent to have their say. Because of the wide latitude given, some highly unfair comments may not be strictly objectionable. Finally, you may encounter a trial judge that believes "wide latitude" in closing permits a free-for-all for innuendo and speculation.

In such instances, you should remember that every over-reaching attack by your opponent opens them to a counter attack. Your ace in the hole is your final rebuttal statement. If defense counsel has made unreasonable statements, you can point these out in your rebuttal.

In fact, the more egregious the statement by the defense in closing, the more this can help your case. Again, the main issue here is credibility. Where the defense has resorted to personal attacks on your client or your witnesses, the defense demonstrates that they *cannot cope with the facts these witnesses present.* This is a major weakness that should be pointed out to the jury. You can show, with reference to the supporting facts, that your witness is truthful and the facts support your case. Then you can put the defense's personal attacks in context: the defense can't deal with the truth, and so seeks to "kill the messenger" with false statements. Once the defense's personal attacks are shown to be without merit and motivated by a desire to obscure the truth, the jury is likely to dislike the defense and reach a plaintiff's verdict.

In rebuttal, it is always important to *empower the jury to discover the truth and do the right thing.* Let the jury know that they are the ones who decide what is true, and that you trust them to see through defendant's deceptions to find the truth. Remind them that they should base their decision on the evidence and not the argument of counsel.

We have found it powerful to argue along these lines: "If you don't believe our witnesses, and you find the facts are against the plaintiff, *you have every right to give our clients nothing*. However, if the facts and evidence show defendant caused injury, you should determine the reasonable compensation for plaintiff based on the evidence." This establishes plaintiff's credibility, and re-focuses the jury on the task of determining the truth of the matter.

If you behave openly with the jury, and let the jury know that you want to cooperate with them in finding the truth, the jury is likely to see through the defense's diversions and smear tactics, and return a verdict for the plaintiff.


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