



The closing story

The perfect closing argument would have jurors making nooses from their neckties for the defendant....

By Randi McGinn

It is the moment you have been building toward throughout the trial, the moment in which, using all of your very best storytelling skills, you remind the jury of the broken rules and injustice done by the defendants. It is supposed to be the pinnacle of the case, the showcase of a lawyer's skills at oratory and persuasion. And how are you feeling? Exhausted. No matter how long or short the trial, the hours spent in preparation and intense concentration have wrung you out like a wet dishrag. Now is the moment when you must summon your hidden resources and inspire the jury to do the right thing.

The perfect closing argument would have jurors making nooses out of their ties for the defendant and would send them marching into the jury room chanting the old Queen standard: "WE WILL, WE WILL ROCK YOU…" Can you do it?

There is no one right way to do a closing argument, however, there are things you want every jury to know:

- Tell the jurors what you want them to do.
- Tell them how to do it.
- Simplify the jury's task.
- Reinforce and repeat rules/themes/theories.
- Persuade through analogies/similes.
- Ask and answer hard questions to provide ammunition for those who are on your side.
- Visualize your arguments.
- Make damages make sense.

Copyright © 2019 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



Tell the jurors what you want them to do

Put yourself in the juror's place. If you are exhausted, so are they. They have been thrown into a new and unfamiliar environment where they have been asked to sit still for days or weeks, listening to hours of information and testimony presented in a stilted and foreign format. The biggest question burning in their minds when you stand up to do closing is, "What am I supposed to do now?" Early in your closing argument, you must answer that question for them.

What is it you want the jury to do? The key to obtaining your desired result is often in the way you ask for it:

- Now is the time for you to make our community safer.
- Now is the time for you to enforce the rules and set things right.
- The time has come for you to fix what the defendant has refused to fix.
- Hold this corporation/person/business responsible.
- Make the world a safer place.
- Bring sanity to the insane practices of this business.
- Prevent this from happening to anyone else.
- Give Jane Doe (the plaintiff) the freedom to have not just minimum care that she has to beg for from the government, but the best care money can buy.
- Make Jane Doe whole.

Or, following the example of our current president, with a short, pithy, three-word command that starts with an imperative verb:

- Make a change.
- Make a difference.
- Send a message.
- Make them pay.

The idea is to empower the jurors to do what is right and appropriate in your case.

Tell them how to do it

Once empowered, the jury will need some help on how to make a decision. First, you need to think through how you want them to decide this case. Often, the verdict form or the special interrogatories provide a road map for decision making.

You may want to walk the jury through the verdict form or special interrogatories, question by question. Show them a blown-up version of the form and questions they must answer. Take them through how they decide:

Was the defendant negligent?

Yes _____ No _____

Tell the story of how and why the defendant was negligent, finishing with a physical example of what the jury should do at the end of that analysis, i.e., putting an "x" in the box that says "yes."

Was the defendant negligent?

Yes _X_ No. ____

Simplify the jury's task

Based on the language of most state and federal jury instructions, you would think we were trying to confuse the jury rather than help them make a decision. Your job is to translate the abominable massacres on the English language into common concepts that the jury can understand.

In my trials, the jurors themselves have usually come up with far better definitions than the ones provided in the jury instructions. Here are two examples of written questions sent out by jury members when they hit a wall in their deliberations:

- "Is irresponsibility the same thing as negligence?"
- "Does proximate cause mean the approximate cause?"

These are great definitions to use to translate the jury instructions. I now tell jurors that:

- Negligence is simply irresponsibility.
- Proximate cause is the approximate cause of the injury.

Another good explanation for "proximate cause" is the "but for" test we learned back in law school. The jurors understand causation if translated into the concept that the injuries wouldn't have occurred "but for" the act or omission of the defendants. You can visualize the "but for" test through a decision tree that shows how the acts would not have occurred but for the decisions made by the defendant.

The farther away from the actual injury you can move the defendant's ability to avoid the death or injury, the better off you are:

> This drunk driver began driving toward the Chavez family fifteen years ago. During all that time, his employer held the keys to the government car he drove and had the ability to take those keys away from him. The employer was the keeper of the keys through all nine of his DUI arrests and the five times his license was suspended. Despite knowledge of some of these arrests and his driving history, not once did they take the keys away. As a result, the drunk driver kept driving toward the Chavez family until, on January 25, he hit them head on, killing everyone in the car.

Reinforce and repeat the defendant's violation of the rules

The closing argument is a time to reinforce and repeat the themes, theories and rules of the case you have been discussing all along. In addition, make sure the jury knows who the villains are in the case and who the heroes are or may be.

Of course, you need to discuss the actions of the villain(s) *before* you talk about your client's injuries. ATLA research establishes that jurors cannot be sympathetic or focus on damages until they assign blame. If you don't have a villain in the case you have a problem on liability. Highlight the heroes or sheroes in your case. One of the best heroes of all is an empowered jury.

Persuasion through analogies/similes

We all learn through stories, analogies and similes that we utilize to understand

Copyright © 2019 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



our world. Trial lawyers should be students of storytelling, looking for analogies and similes in great literature, the Bible, Aesop's Fables, advertising, and my personal favorite, country western songs. These analogies and similes are a shorthand way for the jurors to understand your theory and theme of the case.

Some examples follow:

For an expert witness:
- He who pays the piper calls the tune.
- Actions speak louder than words.
- Garbage in/garbage out.
- A workman is only as good as his tools.

For a lying witness:
- His wife is like the woman in the old country western song who will "stand by her man" no matter what.
- Throwing someone to the wolves to save your own skin.
- No fury like a woman scorned.
- You can't buy the truth.
- Desperate men do desperate things.

Description of a mistaken police officer/investigator:
- He is someone who believes the end justifies the means.
- Might makes right.
- Wrong place/wrong time.
- The faithful bloodhound.
- The blind leading the blind.

Asking and answering hard questions = ammo for your jurors

By the time you reach closing, hopefully there are some people on the jury who are on your side. Among those people there may also be some who are not yet persuaded. Jury deliberations will be a wrestling match between those who are for you and those who are against you. In order to win that tussle in the jury room, you need to provide the people on your side with the ammunition and arguments to win over the few stragglers.

The best way to do that is to ask and answer the very questions you think the jurors who are against you will ask those who are on your side. For example:

> When you are back in the jury room, someone might suggest, "How about just giving Jane her medical bills and lost wages, because wouldn't that be fair?"
>
> When that happens, your answer should be a resounding "NO." Awarding her just medical expenses and lost wages is not fair. It does not restore her to the way she was before the collision. It does not give her back her kidney. It does not even pull her back to even. Such an approach would be in violation of the jury instructions given by the judge, which require you to consider other kinds of damages, including permanent impairment, pain, and the horrendous suffering she had during her surgery and recovery.

What other kinds of questions might the other side bring up in your case? Here are just a few that you might want to think about answering:
- The plaintiff probably has health insurance, so why should we award medical bills?
- How do we know the patient isn't faking/exaggerating his or her injuries?
- Why should we give the plaintiff any money if this was partially his or her fault?
- Why should these parents get lucky and get a bunch of money just because their child died? [a real question from a juror in voir dire]
- What good will it do for us to award money in this case?
- Won't our insurance rates or health costs go up if we award money?
- Won't this doctor leave town if we find against him in this medical malpractice case?

Scary, the kinds of things they may come up with to defeat your arguments in the jury room. There will be even scarier issues in your own individual cases. You must address these questions in closing argument (or earlier in the trial) or you will find the answer to these questions in a big goose egg on your jury verdict form.

Visualize your arguments

Increasingly, our jurors are becoming people of the screen rather than people of the word or people of the book, as is the case with most lawyers. People of the screen get their information from screens; rather than books, it's television screens, computer screens, movie screens. They are more likely to believe something they see rather than something they hear.

Not only do they want to see things visually, they need almost constant visual stimulation to keep their interest. Before the MTV generation, it was the practice of television and movie editors to change the visual image every seventeen seconds. This is why, even during a conversation between just two people, the angle of the camera will change numerous times during the same conversation. After MTV, the viewer's interest is kept only by cuts of even faster duration (a second or fraction of a second) in which a new image comes on the screen.

Where does that leave lawyers who present arguments by talking and talking and talking? With a jury that's asleep, unless you use PowerPoint or boards or some other kind of visual imagery to support your closing argument.

Make damages make sense

It is not enough to have a doctor describe what it means for your client to have been injured or to have died. In addition to the description of what occurred and the ramifications to the client, the jury can only understand the depth of the injury if you use analogies and the client's own stories to bring home the loss.

Death

Description: The client's son was beaten to death while at school.

Analogy: The decision to have a child is a decision to have your heart go walking around outside of your body.

> *Story*: Since Jason's death his parents have not celebrated Christmas. It was Jason's favorite holiday and the reminder is too painful for them.

Copyright © 2019 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



As a result, they no longer send any Christmas cards, they return all wrapped presents unopened, they do not put up a tree, nor do they gather around the piano to sing Christmas carols.

Jason's father is a stoic cowboy, the kind of man that Jason wanted to grow up to be. For two years following his son's death, he never cried. Instead, he was the strong one, letting his wife lean on him and weep until there were no more tears, only dry, racking sobs coming from her chest. Then, one day, he was driving down the freeway when he saw a bumper sticker on a car. "Ask me about my grandchildren," it said. And suddenly, for the first time, Jason's dad realized that, with the death of his only son, his only child, he would never have any grandchildren. Jason's dad pulled to the side of the road and there, alone in his pickup truck, cried for an hour.

Brain injury

Description: Our client was assaulted while working alone at a late night convenience store. The man kicked him over and over in the face, fracturing the bones around his eye socket and pushing them up into his brain, causing brain injury and loss of his short term memory.

Analogy: If someone asked you to pick a body part to lose or injure, the last organ you would choose is your brain. That's because it controls everything about us – who we are, how we feel, memory, language, movement.

Story: When, occasionally, I have a bad day, I think it might be a good idea not to have a short term memory. Wouldn't it be wonderful to be able to push the erase button and have all of the bad things that occurred to you during the day gone. That is what it is like for Ken, except that he does not get to choose what days or what memories he forgets. Yes, the occasional bad days are gone, but so are the majority of wonderful days and wonderful memories. When he holds his newborn grandson and smells that wonderful smell that babies have, within an hour, the memory of that smell, of that touch is gone, erased forever by the beating he took in the store that night.

Back injury

Description: A woman truck driver slipped and fell while taking her CB to be repaired at a repair shop with a sidewalk covered with ice. The injury herniated a disc in her back and prevented her from driving her truck.

Analogy: Some women are beautiful, some women are smart and some women are strong.

Story: Billie was never in the running to win prom queen in high school, nor was she ever a challenger for valedictorian. However, she had something that set her apart from all other women and made her unique. She was the strongest girl in her school, an Amazon who could out-lift, out-pull, out-muscle nearly every boy in the school. That unique ability helped her get one of the highest paying careers of most of the kids she went to school with, that of a truck driver. As a truck driver, she did everything the men could do, including changing her own tires on those eighteen-wheel semis. The ice on that sidewalk took away the one thing that made her unique among women and gave her something she could be proud of. She is not the kind of woman who could be hired to put on a mini skirt and sell cocktails, nor would she ever be happy sitting behind a desk at a typewriter. The carelessness of that shop keeper robbed her of her ability to be on the open road.

What will the damages accomplish? What difference will it make?

In this day and age of jurors being worried about "frivolous lawsuits," "runaway juries," and "lottery litigation," you better have an answer for your jurors about why they should give damages. They will want to know how the damages may make a difference in the life of your client and what difference it will make.

Compensatory

In awarding compensatory damages, make sure you point out that any future medical bills that you have asked for are for the "minimal" life care or services for your client. Since the jury cannot give your client what they really want – no longer being a quadriplegic, no longer having a back injury, the life of their deceased relative – the jury should at least give them medical benefits that will provide the maximum kinds of services they need, rather than the minimum services. If there is some kind of experimental treatment that can give your client hope of walking again, then they should have that amount of money to be able to seek those kinds of treatments.

The most difficult kinds of questions on compensatory damages often come up in a death case, especially for the death of children or elderly persons. The jury will want to know and want you to answer what good it will accomplish to give money for the death of this person. It is best to acknowledge that, if the jury had the power to bring the person back to life and could make them walk through the courtroom door, your client would gladly give up any claim they had, including the claim to all the tears they had shed over the loss of their loved one. Since the jury doesn't have the power to give them what they want, it can give them the next best thing, that is an award that reflects the value of the life of their loved one. A low award means that the defendant's misconduct did not matter. A low award for an elderly person sends the message that it's okay to kill people in nursing homes, because their lives are not worth much. A low award for a child, in an amount less than that for an adult, means that people should try to run over children, rather than adults because their lives are worth less.

Punitive damages

Unless you have a real villain on the other side, it is unlikely that you will get

Copyright © 2019 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



punitive damages. If you are unable to convey to the jury the depth of the villainy of the corporation, business or defendant, then don't count on a big punitives award. However, if you have the right kind of villain, the jury will be anxious to "send a message" and "make a difference" with a large verdict.


McGinn

Randi McGinn is the author of "Changing Laws, Saving Lives: How to Take on Corporate Giants and Win," *available through Trial Guides. She is one of the country's leading trial lawyers, having tried over 130 cases. www.mcginnlaw.com.*

Her book can be purchased at: https://www.trialguides.com/products/changing-laws-saving-lives $10 off book with code: LAWSLIVES10

Copyright © 2019 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**