

SOUTH CAROLINA CRIMINAL TRIAL TECHNIQUES HANDBOOK

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PUBLISHED BY THE SOUTH CAROLINA BAR
CONTINUING LEGAL EDUCATION DIVISION

SOUTH CAROLINA CRIMINAL TRIAL
TECHNIQUES HANDBOOK



“Closing Arguments”

The Art of Persuasion

Author: Jack Swerling

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CHAPTER XI

CLOSING ARGUMENTS

The Art of Persuasion

Jack B. Swerling, Esquire

I. INTRODUCTION

Closing argument is the highlight of a trial. Court watchers come and go during the direct and cross-examination of witnesses. The quickest way to clear a courtroom is for the judge to announce that he will deliver the charge. But during a closing argument, people watch and listen. The lawyer who recognizes that at that moment people will give their undivided attention have a unique opportunity to advance their case like no other moment in the trial.

The jury has a view of the evidence and an idea of what the law is. Now the jury wants to hear what the lawyers suggest the evidence shows and why their side should obtain a favorable verdict. What a great opportunity -- not only a captive audience, but an audience primed and ready to be persuaded. A lawyer must not only see the opportunity but seize it. Delivering a powerful, forceful, and persuasive argument requires preparation, practice, and passion. It involves both an art and a science, which when successfully brought together, puts in a lawyer's reach the opportunity to persuade the trier of fact of the justness of his cause.

This chapter will focus on some of the techniques that have long been recognized in the art of persuasion. Much of what is suggested may be found in other source material. A great deal of what will be discussed is the product of applying these principles to my experiences and observations. I hope that this chapter will provide a guide to the young trial lawyer, to the lawyer who wants to sharpen his skills, and a refresher to the "old trial horses."

A. PERSUASION - THE PURPOSE OF THE CLOSING ARGUMENT

Before a lawyer can deliver an effective closing argument, he must understand what the ultimate goal is -- what is he striving to accomplish. The answer may seem obvious, but it is not. The purpose of the closing argument is not to state the law or what the lawyer believes the facts show, but to persuade the jury.

In the opening statement, the lawyer captures the attention of the jury with the facts that he believes will be established at trial. During the closing argument, counsel has evidence (or a lack of evidence) and must now show what that evidence means, how the law applies to it, and why the evidence and the law support a particular verdict.

How do lawyers persuade? Jurors expect theatre, so give them theatre -- be animated, forceful, and colorful, but temper that with logic, rational concepts, solid inferences from the evidence or lack of evidence, supportable interpretations of evidence, and most of all with common sense. The key is to align the evidence, reveal appropriate subtleties, and bring all of that together to persuade the jurors to do what you want and to feel good about it afterwards.

B. PRINCIPLES OF PERSUASION

The principles of persuasion are not new. Humans have engaged in the art of persuasion since the beginning of conversation. Every time a minister takes a pulpit, a professor teaches a class, a politician speaks to a group, or a lawyer addresses a jury, each is engaged in the art of persuasion. Every one of these individuals states a proposition, asserts facts in support of the proposition, offers arguments directed at those who may be against the proposition and then states a logical conclusion why the hearer should adopt the proposition. The key to persuasion is learning the techniques which can be utilized to achieve the desired result.

So what are the principles of persuasion? What are the effective forms of rhetoric? The great statesman and philosopher Aristotle wrote a book on persuasion. Aristotle's book was entitled Rhetoric and was the first systematic and scientific treatise on the art of persuasion. According to Aristotle, rhetoric is the force of reason. He defined rhetoric as "the faculty of observing in any given case the available means of persuasion." The aim of rhetoric is to persuade through proof and demonstration, to discover the best possible means of persuasion for any given subject. Aristotle approached rhetoric by seeking to set out the composition of an argument, the categories of argument, the modes of argument and the best style of argument.

Aristotle divided rhetoric into three areas, i.e. ethos, pathos, and logos. As you will see, the old principles still work.

Ethos - ethos deals with the custom, usage or attitude of the speaker in relationship to the audience. The speaker demonstrates that he shares the same attitudes and values as the listener to elicit a positive response, e.g., common social attitudes. ("We deplore violence.")

Pathos - pathos is the part of rhetoric that deals with the passions and emotions of life. To Aristotle this was the center of all logical argument. Pathos is meant to evoke emotions such as pride or embarrassment, pity or indignation, fear or confidence, and love or hate. Pathos is designed to persuade the listener to sympathize with the argument.

Logos - logos deals with the rationality of an argument. Logos deals with the reasoning necessary to establish a truth. This can be accomplished with the use of inductive reasoning (examples and analogy) or deductive reasoning (express or implied premises and conclusions).

In order to develop an effective argument, one that will persuade, Aristotle suggested that all three elements must be blended. Later in this chapter, many of Aristotle's suggestions regarding ethos, pathos and logos will be more fully explored.

II. PREPARATION

A. PRE-TRIAL

The closing argument should start taking form during the initial interview and continue to develop during every step of the case. Take notes with an eye not only toward investigating a case, but toward trying and arguing it. Every interview will yield an idea that can find a place in the closing argument, whether it be to prove a fact, dispute a fact, corroborate a fact, or raise a reasonable doubt.

When reviewing a statement or report, facts will jump out which can be woven into the closing. If what happened on a particular date is in controversy, then every reference to that date or that event should be preserved for integration into the argument.

Look for issues that should be raised with each witness, not just for an effective cross-examination or direct examination, but to have that fact or lack of facts in the record so it can be woven into the argument. As legal research is conducted and ideas are stimulated, record those ideas for reference in the closing.

Depending on the type of case and the volume of discovery and investigation, I organize my files in either a notebook, expandable file folder, or box. No matter how the file is set up, there is a section for the final argument. By the time I get ready to prepare my argument there are dozens of sheets of paper containing many ideas gathered over an extended period of time.

Prepare demonstrative aides for the closing argument. Whether it is a time line or a chart of impeachment evidence against a key witness, the document can be refined over and over again.

During the course of a case, and more particularly in the few weeks before a trial, I bounce ideas off my colleagues and paralegals to find out what they think will and will not work. I almost always come away from such a session with an idea for the trial and the closing argument.

Lawyers are readers by necessity. Everything a lawyer reads can be a source for argument in a case. Whether it is a newspaper, a novel, an article or a reported case, there will be an idea worth preserving. Not only should you keep a folder for each individual case, but keep a general folder of ideas to be used in future cases.

Early in your case preparation, start working on an outline of the closing argument. This will not only operate as a guide for your trial strategy, but it provides a working document that can be continuously refined as new facts and ideas develop. Commit the basic structure of your outline to memory. Familiarity is important. This will make it easier to commit the final product

to memory so that you can deliver a more effective closing argument without notes.

B. TRIAL

As the trial progresses, the closing argument comes nearer to final form. During the trial, record ideas to be used in the final argument. Have a separate legal or memo pad dedicated solely to closing. Put all of the notes into the closing argument folder. Also include any documents or transcripts that contain ideas for the closing or which could be used for demonstrative purposes during the closing.

As each witness leaves the stand, and particularly during any courtroom break, make notes of any memorable ideas. Don't think that those thoughts will stay with you -- they won't. Write them down at the first opportunity. At each stage of the trial you may gain new insights into ideas for the closing argument. During recesses, make notes of ideas that were generated during the day.

As the trial progresses, talk to support staff, the client and his supporters about ideas that may work for the closing. Remember that others may see the case from an entirely different perspective than you and what they see and feel can be invaluable.

Never underestimate the value of opinions from courtroom personnel. I never walk into a courtroom without acknowledging the clerk, court reporter, deputies, bailiffs or other court staff. These are the people who work every day in the forum where you make your living as an advocate. Be kind to them, not only because it's the right thing to do, but if they like you and sense that you like them, they can be an invaluable source of ideas for every aspect of the trial, including your final argument.

The final argument should be delivered without notes or with as few notes as possible. Performers are simply not as effective when reading from a script; neither are lawyers. You will command much more attention if you demonstrate some passion, and you cannot do that effectively when reading from a script. As a practical matter, however, a trial may be so complicated

or long that the mind simply cannot store and then recite all the information needed. You may have to refer to notes. Some lawyers simply do not feel comfortable addressing the jury without notes. If possible, abandon the notes or keep a scarce outline nearby for reference only, so that you can concentrate on persuading rather than reading.

If you are conscientious about taking notes and formulating an outline during the trial, you can commit to memory the framework of the argument. When you speak you may miss a few things, but what you say will be more persuasive.

C. POST-TRIAL

The way to master the closing argument is to keep at it. The more opportunities a lawyer has to get on his feet and perform, the more the lawyer will perfect his trade. Everyone has heard the joke that the reason lawyers call it "practicing law" is that we never have it perfect. Practice does help you approach perfection.

By conducting closing arguments, you learn from experience what works and what does not work. After a closing argument, make notes of ideas for future reference. Over the years you will develop themes and discover quotes, sayings and mannerisms that get better with age. The more an actor performs a part, the more comfortable the performance, and the more effective the delivery.

Order the transcripts of your closing arguments. See how they read. Look at what was said. Sometimes they may appear different from what you recall having said. Don't be shy about asking a court reporter to make a copy of the tape of your argument. Listen to it. Listen to what you said and how you said it.

III. CASE INTEGRATION

An effective closing argument is not simply the product of pre-trial preparation, final preparation and delivery. At every stage of the trial, counsel should be laying the framework for of the closing argument.

A. JURY SELECTION

In many states, counsel conducts, or at least participates in, *voir dire*. In South Carolina, *voir dire* by counsel is mandated only in capital cases. To the extent that a lawyer does participate in *voir dire*, questions should be designed to prepare the jury for what they may hear during the presentation of evidence. This is not always easy to do, not always allowed and not always advisable, but should be considered.

Assume for the moment you are in a capital trial. Assume that the evidence will be fairly graphic about the manner and cause of death. Prepare the jury for the evidence they will hear (evidence you know will be admissible, not merely questionable). Assume that you will argue about the witness' credibility. Inject the idea now. Assume that the defense is self-defense, manslaughter or alibi and you know that you will focus on that during the trial and in the final argument. Plant the seeds now. If you are faced with the knowledge that a conviction is certain but the issue will be between life or death, inject the mitigating factors that you will eventually rely on and argue about. Of course, all of this is contingent upon your trial strategy, but if you know for sure where you are heading with the evidence and the argument, the sooner the theme is injected the better.

At this stage, it is also important to weed out jurors who do not or will not accept your thesis. *Voir dire* on these issues will assist you in deciding who to keep and who to strike.

Use jury selection to seek subtle or express commitments from the jury that they will consider or weigh certain evidence or propositions. During final argument remind them of the commitment they made.

B. OPENING STATEMENTS

The opening statement is a powerful tool that can set the theme for the entire case. There are occasions when, for strategic or evidentiary reasons, counsel will not want to divulge the heart of the case in the opening statement, but if a decision is made to go with a particular theme and stay with it, then the

opening statement is the time to open the door and the closing argument is the time to close it.

The defendant is charged with murder. There is no question the defendant committed the act. The only question is, Did he act in self-defense? There will be a witness who has made a deal to testify and the forensic evidence shows the victim was intoxicated. These are the defense issues now and will be later, so do not wait until the questioning of witnesses or the closing argument to raise them.

Outline the defense or theme to the jury. Tell them the act itself is not in controversy -- the question is why. Let them know that the defendant was in fear of death or serious bodily harm, that the belief was reasonable, and he had no other choice. Tell them the prosecution will rely on "paid for" testimony and they must judge the credibility of the witness. Let them know that the deceased was abusive or had alcohol or drugs in his blood. In a battered woman homicide case, start now with the theme of how bad a person the deceased was.

The opening statement is a good time to begin to challenge the prosecution about evidence and what the prosecution can and cannot show, e.g., explanation of prior acts, location of wounds or the results of forensic tests favorable to the defense. This will get the jury thinking about these issues, give them a preview of what's coming, and lay a bridge to the closing argument.

If the only chance the defense has is a conviction for a lesser offense, then with the consent of the client, concede that issue in opening. This is a dramatic move and should be done only in the most unusual cases. When done, however, it can be very effective and can gain credibility with the jury. You make their job easier by mapping out for them what is important and what is not in issue. In the closing argument you can argue that you have stayed true to the course and not deviated from what was presented to them in the opening. Contrast that with comments made by the prosecution that may not have materialized for one reason or another.

As a defense lawyer, who may or may not ask a question or present a witness for a host of reasons, don't promise too much during the opening. The defense does not have the burden of proof, so you may have to deviate from a plan and react to what has been presented or not presented. I have heard lawyers promise that their client will testify in a trial, and then as a result of some development in trial, and then as a result of some development in trial, the defendant is not called. There is no way to explain that in the closing.

While you should not promise more than can be delivered, note promises that the prosecution makes in the opening. Nothing is more effective in closing than throwing back at the prosecutor an opening statement promise that was not kept. In a murder case you are arguing self-defense. The prosecutor has promised to prove malice aforethought. Now at the closing, the prosecutor starts discussing the elements of voluntary manslaughter. Is he conceding that malice was not shown? Has he failed to deliver? Is he trying to salvage a verdict? During your closing you will probe these issues to raise questions by the jury.

The opening is a map for the trial and an important part of the closing. Remind the jury during the opening that each side will have the opportunity to again address them at the conclusion of the trial. Plant the seeds now and come back in closing and ask who fulfilled commitments and promises and who did not.

C. DIRECT EXAMINATION

As witnesses testify on direct examination, listen carefully to what they say and do not say. Despite the best preparation and plans, witnesses may not deliver what was expected, and in some cases it's because they were not asked. In other situations, a witness testifies to issues you know will be contradicted by the evidence or later testimony. You must make a decision whether to cross-examine and your decision will normally have serious consequences when it is time to make your closing argument.

Assume for the moment that the prosecution's witness could not or did not place the defendant at a drug sale on a certain date. There is no sense in asking the witness "are you sure" on cross-examination, because you may

give him the opportunity to correct the situation. Save it for closing argument.

Assume that a witness states that the victim was shot in a position unfavorable to the defense, but that you possess testimony by other witnesses, an expert, or the physical evidence itself that proves that the witness was wrong. Don't give the witness or the prosecution the opportunity to correct what is wrong. Save it for closing argument.

Assume that a witness testifies to an event that other witnesses have no knowledge of, but would be expected to, if the facts were true. Don't let the witness or the solicitor know, that there is a question about it. Save it for closing argument.

Most cases come down to a question of credibility. If you can destroy the credibility of a key witness through other witnesses or physical evidence and never give that witness a forum to rehabilitate himself, you will have gone a long way to undermining the witness' credibility. Be sure to point out in closing that the jury's assessment of a lack of credibility is based on the evidence the prosecution itself presented.

D. CROSS-EXAMINATION

This is one of the most important stages of the trial in developing issues for closing argument. Nothing is more powerful than testimony from a prosecution's witness that itself either raises a reasonable doubt about guilt or advances the theory of the defense.

Let's assume you are going forward with cross-examination of the witness. Know where you are going with the witness and maintain a vision of how the questioning and the answers will blend into the closing argument. The issue becomes what to ask and how to ask it.

When I speak of how to ask a question, I am referring to the manner in which the questions are asked. Decide whether the questioning will be casual, probing, deliberate, friendly or confrontational. Much of that will depend upon what is being sought from a witness and how the witness responds. If

a witness is forthcoming and is answering questions as you would like, then a confrontational approach would make no sense. A witness in this posture will give you much more information than if you become confrontational or impeaching. You ultimately gain useful information from a witness such as this, whether it in some way contradicts other state's evidence, or advances your theory of defense.

In a murder case I tried, a state's witness who had some good and bad things to say, testified that she was with the deceased for several hours, and that he had nothing to eat during that time. According to her and other witnesses, as he left the bar he was assaulted by my client and others and beaten into unconsciousness. He was put in a truck and carried away and found dead several hours later on the side of a road. Our defense was that no assault took place at the bar, that the victim left the bar without incident, and was apparently killed by others some time later. To some degree the witness was hostile, but in other respects she was forthcoming and informative. Rather than confront her, the cross-examination was designed to casually pin down times and more specifically her testimony about the lack of a meal by the deceased. The state later offered the testimony of the pathologist. In the autopsy, the doctor had noted that the victim's stomach was three-fourths full, that he had a meal within one to two hours of death, because the food had minimally digested, and the time of death was several hours after he left the bar. The doctor was forced to conclude that he had to have eaten after he left the bar. By casually making reference to these issues and not emphasizing the direction of the examination with most of the witnesses, important issues in the case were advanced and brought together in the closing argument which resulted in an acquittal.

A witness who may be experiences in testifying or who may be confrontational, such as an informant or accomplice, may have to be dealt with in a more scathing way. With this kind of witness, consider impeachment by prior inconsistent statement, prior conviction, or by motive, interest or bias. As to this type of witness, it would be beneficial to obtain a favorable admission, but at the very least his credibility can be attacked in closing argument.

What to ask? The key to cross-examination is to ask questions that raise a reasonable doubt or advance your theory. Don't ask questions that help the adversary. Don't ask questions that give the witness or the prosecutor an opportunity to correct an omission or mistake. If the goal is to impeach, then ask questions that will impeach.

If the goal is to contradict this witness or another witness, then ask questions that impliedly or expressly put them against each other. If one witness says that the event took place at 10:00 a.m. and the other witness says the event took place at 4:00 p.m., the questions should be designed to play them off against one another. The argument should emphasize the differences and the implausibility of such a distinct variations to be believed. If the goal is to provide corroboration, then ask questions that join pieces of the puzzle you are trying to build through the witnesses; a puzzle that when completed raises a reasonable doubt or proves your defense. Keep a view on the whole picture.

In a murder case several years ago, my client offered a defense of alibi. A key state's witness said that he and my client had killed a woman within a few minutes after she had left work on her lunch break at around 1:00 p.m. The accomplice gave a number of different statements and was impeached regarding his prior record, prior statements, and expectations in return for the testimony. The testimony about the time was accepted without questioning. Why? The victim's husband had testified that he spoke with his wife a few minutes before she left work -- documented by phone records. Also documented by phone records, without any fanfare, was the fact that the defendant and the victim's husband played "telephone tag" with each other from their respective homes at the very same time the victim was being murdered by the accomplice more than twenty miles away. This became the focal point not of the cross-examination, but of the closing -- our alibi witness was the victim's own husband. The defendant was found not guilty.

In most cases, some issue favorable to the defense can be elicited on cross-examination from any witness. The issue may not be readily apparent and that can be a positive thing. The issue may contradict a prosecution's witness, the prosecution's theory of the case or in some way advance your

own case. By viewing the whole case, these matters should be brought together in the closing argument.

E. JURY INSTRUCTIONS

Give careful attention to jury instructions, not only for the purpose of explaining favorable issues of law, but to ensure that the closing argument is more fluid and persuasive. When possible, obtain a copy of the judge's proposed charge. Review the proposed charges that you and the prosecution submit to make sure the language is clear as to the issues you will want to argue. The proposed charges should be simple, speak in lay terms, and avoid "legalese."

Once you know what the charge is, weave it into the closing argument. Every charge delivered to a jury is going to have certain basic legal principles, for example, the presumption of innocence, credibility of witnesses, prior inconsistent statements, proof beyond a reasonable doubt, and a host of others. If during your argument you can tell the jury "that the judge will tell you that the defendant need not testify in a case, that the burden of proof is on the prosecution and this issue cannot be discussed or considered by the jury," you will have more credibility when it is repeated by the judge. Utilize this technique so that it appears the court is ratifying principles of law that you have suggested the jury consider.

Every case will have charges unique to that case. In a self-defense homicide case enhance the judge's charge with factors that the jury can also consider in determining whether or not a defendant acted in self-defense. Weave these principles of law into the argument. When you speak about "appearances," refer to the law that the judge will instruct on "appearances." When you refer to "prior difficulties" between the parties, refer to the legal instructions that the jury will hear. The more you can weave your factual arguments together with legal principles, the more persuasive and effective the argument becomes. For example,

"Ladies and Gentlemen, you have heard uncontradicted testimony that the deceased and John Doe had a stormy relationship and the deceased had a reputation for violence.

You have also heard testimony that the deceased appeared to place his hand in the glove compartment of his automobile, as my client approached him. The Court will instruct you that in considering a claim of self-defense you have a right to consider prior difficulties between the parties in determining who was the aggressor on this particular occasion. The Court will also instruct you that you have a right to consider the reputation of the deceased for violence in determining who was probably the aggressor. And finally, ladies and gentlemen, the Court will instruct you that an individual has the right to rely on appearances and does not have to wait until a person draws a gun and fires a weapon before exercising his right to self-defense.”

IV. GENERAL THOUGHTS ON THE STRUCTURE OF THE CLOSING ARGUMENT

In structuring the closing argument, there are factors to keep in mind that will assist you in preparing an argument that will be thought-provoking and persuasive.

A. IDENTIFYING GOALS AND LIMITATIONS

Know the limitations of the argument. Understand what it is that can and cannot be accomplished. In a death penalty case you may not persuade a jury that the death penalty is morally wrong, but you may succeed in convincing a juror, or at least raise a reasonable doubt, as to whether the death penalty is appropriate in this case. You risk diluting the effectiveness of your argument when you make an argument that you cannot win.

B. ORGANIZE THE FACTS

Once goals are identified, the task is to marshal the facts, align them and organize them into a cogent explanation of what the evidence does and does not show. In order to accomplish this master the facts and know how all of the facts interrelate. Merely mastering the facts, however, will not suffice. You must have common sense and an understanding of human nature so that you can push the right “buttons” to bring the jury over to your side.

C. PRIMACY AND RECENCY

While preparing your closing argument it is important to keep in mind the principles of primacy and recency. It is well-known that an audience most remembers what it heard first and what it heard last. The jury will not remember everything in the opening statements, but they will remember some of it. The task is to stimulate memories that work to your advantage. For example, remind the jury of promises made by the opposition, but not kept. Remind them of promises made by you and how they were kept. The key is to tie the memories together between the opening and the closing argument.

The principle of recency deals with what the jury heard last. If the state ended on a high note, attempt to defuse that evidence. If the defendant ended on a strong note, then remarks to the jury should emphasize those factors. Strong evidence must become a focal point of the argument, and should be highlighted and repeated at strategic points in the argument.

D. ARGUE AFFIRMATIVELY

Try to argue in an affirmative way. An argument is more persuasive if it points to positive factors that support the theory rather than arguing the factors that negate the opposition's theory. People are much more likely to accept that you proved your case (even though not required of the defense) rather than disproved the opposition's case. Of course, this is not always possible. On the other hand, defense lawyers find themselves in a position where the best argument they have is the existence of reasonable doubt. If that's all there is, go for it. Attack the prosecution's theory with specifics from the evidence or lack of evidence. Give your supporters on the jury ideas to debate in the jury room. Attack credibility, inconsistencies on the part of a witness and between witnesses, and the lack of corroboration between testimony and physical evidence.

E. RAISE POSITIVE INFERENCES

Raise inferences and assist the jury in drawing conclusions from those inferences. Tell a story, be entertaining, create a puzzle and give the jury

assistance in solving the puzzle. Tell the jury from the inferences and facts why you are entitled to a verdict. In an involuntary manslaughter case that I tried, a convenience store owner was accused of selling beer to two minors on Sunday. The minors got intoxicated, wrecked, and one was killed. The survivor testified that the defendant sold them a 12-pack of Miller Lite. The defendant denied the sale and we produced evidence through the last witness that the defendant did not even sell Miller Lite in a 12-pack -- a store down the road did. In reply, the state offered the testimony of the other store owner who denied the sale and stated he never sold beer on Sunday. Cross-examination established that store owner had been cited several times for Sunday sales. The jury enjoyed the presentation of a puzzle, our theory of how the case should be decided, and the fact it was left up to them to come to the logical conclusion of who probably sold the beer.

F. USE SOLID REASONING

Use solid reasoning in organizing the closing argument. There are two primary methods for doing this. The first is to take a number of specific instances or facts and have them lead to a favorable conclusion. An example of this would be to enumerate a number of factors that support your position that the defendant did not have the requisite criminal intent to be guilty of an offense. Second, take a conclusion such as the right to act in self-defense and then offer an analysis of the factors that support the claim of self-defense. In either event you have offered a well-reasoned approach as to how the desired result should be reached.

V. STRUCTURING THE CLOSING ARGUMENT

Every practitioner should develop a standard reference outline for closing argument. While each case will have different issues, a standard outline will allow counsel to integrate the issues, the law, and the facts into a comfortable format. The more the outline is used, the more confidence the lawyer has with the delivery of the argument.

In a case where there are multiple legal issues or a complicated set of facts, the defense should require the prosecution to open. Force the prosecution to commit to a theory in the opening so that you can modify your closing to respond to their position or change of position. It is wise to respond, but not to the extent that it

detracts or takes away from your prepared remarks. The argument must be persuasive and it must be fluid. Responding too much can undermine your effort. Any response must be integrated quickly into the prepared format so as not to appear disjointed.

A. OPENING

Approach the jury in a congenial fashion. Say "good morning" or "good afternoon." Most of the jury will respond. It is the only time you will address each other. The remark lends an air of congeniality and deflates tension.

Thank the jury for the attention they have shown and the sacrifice they have made during their period of jury service. The system could not work without them and a citizen accused of a crime would have no protection from an accusation were it not for those willing to perform jury service.

Catch their attention early. Lift their spirits and heighten their interest. Establish the theme. Remember primacy.

"Ladies and gentlemen on Sunday March 12, 1997, someone was going to die. It was either going to be my client, Edna Smith, or her abusive husband John. Edna took his life to preserve her own. This is a case of protecting one's life."

By the time of the closing argument, instinct, knowledge, and skill should give an idea of what the jury wants to hear, needs to hear and expects to hear. Counsel may have some idea of who on the jury needs convincing, who is already convinced, and who might never be convinced. None of us are mind readers, but we may detect what is in the eyes and body language of individual jurors. We may be completely incorrect about our assumptions about a particular juror, but that really does not matter. What makes a lawyer persuasive is knowing what jurors need to hear and knowing how to deliver it.

Look at the case from the jury's perspective. Understand that the jury may be confused, uncomfortable, or even cynical. The jury may be restless,

bored, or agitated. The range of emotions of a jury is endless and in order to persuade, the lawyer must be able to evaluate feelings and manipulate them. We must be listeners, evaluators, and communicators.

Explain to the jury their role. No one in the courtroom is more important. Explain that those chosen to sit on this case were selected and accepted by the court, the prosecution, and the defense. The court excused certain jurors for cause, and both the prosecution and defense exercised peremptory strikes. The members of the jury are the people that all parties found acceptable, all found would be fair and impartial, and all found were the best citizens to resolve the dispute before the court.

Tell the jury that they do not have a side, they have a goal -- justice. The prosecution brings an allegation through an indictment. Explain what an indictment is -- a charging paper. Both the people (the state) and the accused have lawyers to represent their interests. The court has the duty and obligation to apply the rules of law and procedure and to instruct the jury on the applicable law at the end of the trial. The jury hears the facts and applies the law and renders a fair and just verdict. Tell the jury that they are the guardians of liberty, those that sit in judgment as to accusations made by the government against a fellow citizen. In truth, the jury is the protector of all the citizens in a community against accusations made by a powerful government that must at times be held in check if our system of justice is to be preserved.

Tell the jury that the oath they took "to well and truly try and true deliverance make" is a time honored oath and it must be applied in every case without exception. The oath requires them to weigh facts, consider the credibility of witnesses and apply the law. The jury must be made to understand that their oath is fulfilled by applying the standard of reasonable doubt to the facts and the law. If convinced beyond a reasonable doubt, the oath requires a guilty verdict, but if there is a reasonable doubt, the oath requires, a verdict in favor of the accused. The jury is the conscience of the community and they are guardians of justice -- whatever verdict they may render. Let them know what you believe the verdict should be.

This is the time of the argument to establish a rapport and a bond with the jury. Your credibility is important. Develop an argument which evokes the values and beliefs that the jury will share with you. Speak of "we" instead of "I" or "you." Once you identify common beliefs and values, then show how your position is consistent with those beliefs and values.

Always be confident in your position, but do not be arrogant. Speak in a tone that will let the jury know that you believe in what you are asking them to accept. Speak simply, but don't be patronizing or condescending. Don't appear dominating - be friendly. Avoid excessive praise, gratitude, apologies or controversial language.

During the early stages of the closing argument avoid negative statements. This is a positive presentation. Explain that a trial is not combat between you and opposing counsel. It is an adversarial proceeding, a proceeding governed by rules. Nothing in a trial is personal, nor should they construe anything said or seen as personal. If the proceeding gets personal, make sure to apologize for whatever contribution you make to it. Never make a personal attack on the other lawyer.

Make the jury feel at ease. Make them laugh. If during the course of the trial you make a mistake, did something funny or silly, or invited a response that was amusing, remind the jury of it. Let them know that you can laugh at yourself and you can laugh with them. Let them see that you are human and recognize that you are fallible.

Humanize the defendant. Refer to the accused as John or Mr. Smith, not the "defendant" or your "client." There is a difference between the prosecution and the defense. The State is an entity -- the defendant is a person. Don't let that issue escape the jury.

For the defense, this part of the closing argument should end with an admonition that the defendant is merely accused. The jury should be told not to equate an arrest with guilt. They must weigh evidence with their heads, not their hearts. The prosecution has the burden of proof -- to eliminate reasonable doubt. Remind the jury that at the end of the case they should

have no questions -- nothing should be left to the imagination and if it is, they must acquit.

B. CLOSING ARGUMENT IN RELATIONSHIP TO THE OPENING STATEMENT

Keep in mind the principles of primacy and recency. Jurors remember what was said first and what was said last.

Remind the jury of promises made by the parties during their openings. If you can point out how you kept your commitments, you will enhance your credibility with the jury. The jury will want to listen to what you have to say in the concluding remarks.

Bring out every commitment made by the opponent that was not kept. A witness may not testify as expected or an evidentiary ruling may have been adverse. The end result is that the opponent has failed to deliver as promised. The opponent may also have shifted theories about the case based on the evidence presented. For example, if the prosecutor began the trial by promising to prove malice to support a murder conviction, but now shifts to trying to salvage a conviction for manslaughter, point that out. Even without specifically saying it, you are communicating to the jury that the other side lacks some credibility in their view of the evidence, especially if their theory of the case has changed.

C. THE LEGAL ARGUMENT

It is important to discuss the applicable legal principles before you review the evidence, and then again while you discuss the evidence. First, give the jury a brief preview of the law and how it applies to the case.

Certain basic issues will be covered in every argument. After years of presenting cases, some lawyers take lightly the fundamental legal principles, but the jury does not. The jury may be hearing or applying them for the first time. Defense attorneys should discuss with conviction reasonable doubt and the meaning of proof beyond a reasonable doubt. The prosecution is not entitled to a conviction if the jury has a reasonable doubt. Conjecture,

speculation, and suspicion are never enough. The burden rests squarely on the prosecution to eliminate reasonable doubt. The defendant has no burden whatsoever under our law. Compare the burden of proof in criminal and civil court. The jury must understand the distinction between the two and how important that distinction is under the law. The phrase "where there is smoke, there is fire" does not apply to the criminal law. They must see the fire.

Embrace the presumption of innocence. The charges against a defendant are presumed to be unfounded. He is presumed not guilty. Explain to the jury that this legal presumption is fundamental to our system of justice. Explain that charges are easily made, and accusations are difficult and sometimes impossible to defend against or disprove. That is why our forefathers cloaked an individual with the presumption of innocence. No person has to prove his innocence for an acquittal. Illustrate the logic and wisdom of this principle. This is no legal fiction, no idle phrase. The jury must understand this is what makes our system unique, what makes us special.

If the defendant does not testify, explain that our system was founded on the principle that the defendant does not have to prove anything and the fact that the defendant did not testify cannot even be taken into consideration during deliberations. Explain that there may be reasons for the defendant not testifying which are of a strategic or tactical nature -- like preserving last argument. I explain to the jury that under our law, if a defendant presents no evidence, this is the only occasion that the defense may argue last, and last argument is important because I want to be able to answer the prosecution's theories. Another reason for the defendant not to testify might be that the prosecution simply has not proven its case; the defendant has already said by his plea that he is not guilty, and it is time to decide the case without further delay.

Discuss with the jury how they are to arrive at their verdict -- by unanimous decision. They will reach a unanimous decision by listening to the evidence and judging the credibility of the witnesses. Jurors must understand that they are the sole judges of the credibility of the witnesses. How do they evaluate credibility? Give them examples. They may look at attitude and demeanor. They may look at the consistency or inconsistency of statements of a witness

or between several witnesses. They can look at the corroboration or lack of corroboration of other evidence. They may consider interest, motive, bias or prejudice. They can consider other evidence that impeaches a witness such as prior convictions. They can consider just about anything they want to assess whether a witness is or is not telling the truth.

Discuss in simple terms the elements of an offense that the prosecution must establish. Highlight elements that have not been proven. Discuss the relevant principles of law that accompany the charge, e.g., constructive or actual possession in a drug case. Where there is no evidence to support an element, say so now and again during the discussion of the facts.

Set out in full the elements of your defenses. Explain self-defense and other legal principles that help define self-defense, e.g., hostile acts, prior difficulties, appearances. Take a firm position on a defense. Do not present inconsistent defenses, e.g., alibi and self-defense. If there is more than one defense, devise a way that each will appear compatible. As an example, in a homicide the defense is self-defense, but if the jury does not find an element of self-defense, then they should consider manslaughter, not murder. In a drug case you argue the defenses of mere association, mere presence or mere knowledge, but if the jury does not accept your client's position, argue there is no showing of anything more than possession, certainly not possession with intent to distribute.

There are some occasions where you will not want to spend a great amount of time on the law. If the facts are so clear that an explanation of the law will not enhance or further your argument, or may even hurt, move on. For example:

"Members of the jury, the Prosecution must prove beyond a reasonable doubt that John Jones possessed the cocaine. They have not. Rather than talk to you about the law, which the judge will do, let me discuss the facts."

D. THE FACTUAL PREVIEW

As you move into this stage of the argument, begin to more clearly state the themes of the case from the view of the prosecution and the defense. Here is the opportunity to touch on everything and develop it more fully later.

Identify as favorably to the defense as possible, the prosecution's theory of the case.

"The state contends that Joan Smith, who was assaulted and beaten over and over again by her husband, John Smith, is guilty of murdering John Smith with malice aforethought."

At this juncture, briefly lay out what the prosecution has relied on to support the charge, again in as favorable a manner as you can. Who were the witnesses? What is the evidence? Briefly discuss the shortcomings and flaws. Discuss the evidence, the lack of evidence, the investigation and the quality of witnesses, such as accomplices or informers. Question the foundation of the prosecution's case based on lack of credibility, reliability, or logic.

What is your case about? Self-defense, alibi, or lack of intent. Discuss the strengths of the case. What are the main issues to support the theory of defense? Is it a flaw in the prosecution's case or a strong witness or item of evidence in your own case? Let the jury know what facts and inferences there are to support the position. You may wish at this time to concede that your case is not perfect like the prosecution is claiming its case to be. No case should be perfect and if it is, it should be suspect. The witnesses are who they are, and the facts are what they are, and they still support the defense theory of the case.

Identify issues which are not in dispute. If the defendant shot the deceased, admit it. If the defendant had the drugs, but did not distribute them, admit possession. Discuss facts which are not in dispute but are clearly favorable to your theory, e.g., the defendant was beaten or the victim was intoxicated. This allows you to explain the central unifying concept of your argument.

“Joan Smith shot and killed John Smith after he went on a drunken rage and beat her, as he had repeatedly beat her in the past. She acted in self-defense.”

Identify the key issues in dispute. Simplify for the jury what you contend will be the main issues for them to resolve. Once the disputed facts are identified, briefly state what proof exists in the record and what you intend to offer in argument to rationally and logically prevail on the disputed facts, e.g., testimony, physical evidence, corroboration or exhibits. Ask the jury to rely on human nature, common sense, and the probability or improbability of the items in dispute.

E. YOUR OPPONENT'S THEORY

Now is the time to begin focusing on persuasion. The emotional level of the argument should be appropriate to the case at hand.

In order to dismantle a theory, the theory must be understood by the audience. Before you outline the reasons that your opponent's theory won't work, set out what that theory is as suggested by your opponent and as brought out- by the evidence. These theories may not always be the same or even consistent with each other.

Clearly identify for the jury what your opponent is asking them to accept, and the witnesses, testimony and physical evidence they have asked the jury to rely on. During your opponent's argument he may mention or fail to mention evidence that was presented, but which was either soundly impeached or just not plausible. Don't let the jury forget what evidence was presented and how your opponent originally asked them to rely on it. Let them know that the issue is being abandoned or pushed to the side for a reason -- hopefully because it undermines your opponent's theory. For example, consider an informant or accomplice that has testified but has been contradicted or failed to corroborate other witnesses. He might quickly be forgotten by the solicitor, but should be remembered by you and the jury.

F. WHY YOUR OPPONENT'S THEORY DOES NOT WORK

Your opponent's case must be dismantled through cogent points, passion and logic.

Testimony - Set out in detail how some testimony does not support other testimony, how it is not supported by the physical evidence, or how it has been shown to be untrue. Show how witnesses have differed about events, times, dates, or places.

The law - Identify the legal issues that do not support or in fact contradict your opponent's theory of the case. Intermingle the law with the facts so the jury can get a visual image of the application of the facts to the law.

Ability to observe - Point out factors which undermine a witness' ability and/or opportunity to observe the event. Discuss factors such as physical impairments, time, lighting conditions, distance, etc.

Ability to recall - Discuss factors which call into question a witness' ability to recall an event, e.g., the length of time between the event and the report, or mental or physical infirmities.

Ability to describe - Was the witness in a position to describe the events in question? Do the witness' descriptions match the physical evidence?

Bias - With every witness, point out factors that establish that the witness has a bias against or a bias in favor of your opponent.

Interest - What interest does a witness have in the outcome of a case which would cause the witness to shade the truth?

Motive - Does the witness have a motive to testify in a certain manner? What hope of reward or actual promise has been made to an accomplice or informer? Is the brother of a victim or a defendant likely to candidly describe an event?

Prejudice - Does the witness have a prejudice?

Demeanor - What was the demeanor of the witnesses? Were answers forthright? Did they look at the jury? Were they comfortable as a witness? What was their attitude?

Prior record - Did the witness have a prior record? What was it for? Would the jury believe someone with that conviction?

Impeachment - Was a witness impeached? Were the witness's prior statements consistent with trial testimony? Was the witness consistent with other witnesses or physical evidence?

Forensics - The defense should point out every flaw in the forensic analysis of evidence. Examine what was done and what was not done. Discuss how the evidence was gathered, how it was stored, the chain of custody and testing techniques. Don't forget to argue about conclusions in the forensic testing that contradict the prosecution's theory or support the defense.

Crime scene - Detail every flaw in the investigation of the crime scene and the gathering of evidence. What was done wrong? How could things have been done better? What was missed? What does not support the prosecution's case? What supports the defense case?

Lack of testimony - Let the jury know what they did not hear and what they should have expected to hear in the case.

Lack of corroboration - What was not corroborated and what should have been corroborated? Jurors expect to see fingerprints or DNA. Make sure they know that they did not.

Promises - Remind the jury of what they were promised and what was not delivered. Make sure they understand change in position by the opposition.

Failure to call a witness - What witnesses were not called by your opponent? Why weren't they called? Would their testimony have been unfavorable?

Failure to introduce documents - Were there exhibits or documents that one would expect to be introduced into evidence? What does the absence of those items suggest?

Improbabilities - Point out to the jury the improbability of what your opponent has contended in the factual scenario.

Set up specific challenges to the state. Request that in their argument they respond to the specific issues you've raised. Ask the jury to listen carefully whether your opponent answers the questions or not.

The central idea in taking on your opponent's case is two-fold. On the one hand offer argument as to why your opponent's theory is not true, or not supported by the evidence. On the other hand, take the evidence or lack of evidence and offer sound, concrete reasons why the jury should adopt your position.

G. THE DEFENSE THEORY

Now move to your case. Step up the emotion and the passion (pathos) in the argument as you move from dismantling your opponent's theory to advancing your own.

The defense should begin by reminding the jury that the defendant has nothing to prove. Even though there is nothing to prove, the defense welcomes the opportunity to explain to the jury what the theory of the defense is and why the defense theory works.

Lay out the defense in a clear and concise manner. Keep it simple. "This is a case of protecting one's life." Advance only one defense if at all possible. If there is an alternative defense, save it for later discussion, although there is a strong preference to not dilute the main argument by asserting more than one defense.

State the main principle of law relied on as you state the defense so that the jury knows exactly what facts and what principles of law are being relied on.

“The right to act in self-defense is ancient. It is a part of the natural law and maintains its vitality today with no exception.”

If there is a weakness in your case face it head on, but only if it is obvious and will be an issue for the opposition. If you wait, and it is brought up by your opponent in closing, there may be no opportunity to respond. By addressing the issue first you can deflate your opponent's argument. By addressing the problems first, you also have the opportunity to offer an explanation in a favorable light. This method also supports the ethos of an argument -- honesty and candor.

If the defendant does not testify, the defense attorney should confront it. Remind the jury of the judge's instructions on the law, but also offer an explanation. It is not enough to simply say the defendant has no burden. If you preserve last argument, let the jury know how important that is and that right or privilege is lost if the defendant testifies. After all, the defendant has pled not guilty -- he denies the charges. He has said what he can say. Offer other explanations such as strategy, tactics, or even the defendant's lack of education or sophistication. Let the jury know it is a decision that you made or helped to make. Take the heat off the defendant, but also remind the jury again they can't consider it or even discuss it.

H. WHY THE DEFENSE WORKS

The argument should now proceed into positive statements about why your client is entitled to a verdict (logos). Up to this point, the argument has primarily been designed to dismantle your opponent's theory and if you represent the defense, raise reasonable doubt. The chances of prevailing on the merits are heightened if the jury can resolve the case on a positive note, i.e., that your version of the facts is the right one. Be positive. Be confident. This is the time that advocacy and persuasion are most important. You are now selling your product, not trying to convince the consumer that the other product is not good. Consider the following:

The defendant - If the defendant has testified and done well, then focus on his testimony. Point out his positive attributes. Discuss family, education, or work history and the lack of a criminal record. Compare him favorably to the prosecution's witnesses. Stress the main factual issues testified to by the defendant so the jury can focus on what you deem important, and what you are asking them to consider. If the defendant has not done well on the stand or does not have a strong background, focus on the strengths he has and deal with the weaknesses in as favorable a light as possible.

"The defendant has a record, but the offense was several years ago and he has paid the price demanded of him."

The witnesses - Discuss each witness's testimony and the positive aspects. Point out the favorable character of the witnesses and how they compare to the opposition witnesses.

Exhibits/physical evidence - Review the favorable exhibits and physical evidence and show how they advance your theory.

Opposition witnesses - What could be more convincing than taking your opponent's witness and turning the testimony so that it supports your case?

Corroboration - Explain how the witnesses corroborate each other as to the material facts. Illustrate how the physical evidence or exhibits corroborate the defendant and the witnesses.

Refutations - Point out exactly where your testimony refutes the testimony, evidence, and theory of the opposition.

The law - Intermingle your arguments on the facts with favorable and positive principles of law. This allows the jury to see the relationship between the law and facts as you want them to view it.

The facts - Another technique is to take the facts, the issues, or the elements of the offense or defense, and review how certain witnesses support or contradict them.

Tell a story - A favorite technique after a review of the evidence, is to actually give the jury a scenario of how you think the incident happened. Tell the jury a story. Let them have a visual image of what you contend the evidence shows actually happened.

Logic - Develop your argument to marshal the facts in a light that appeals to common sense and takes into consideration human nature. No matter what the law or the facts are, nothing will appeal to the jury more than what makes sense.

Probabilities/improbabilities - Use the facts and the law to develop arguments that make your theory of the case more probable and the opposition theory improbable or less probable.

Minor issues - Discard any weak issues that will not advance your theory. Do not dilute the favorable points of your argument.

Opponent's argument - Correct any misstatement by the opponent. Point out every omission of adverse facts by your opponent. Discuss any unsupported or erroneous inferences and conclusions that the opponent has offered. Highlight any inappropriate analogy.

Character witnesses - Discuss how important these witnesses are. Whether the issue is veracity or another relevant character trait, let the jury know that the law allows these issues to raise a reasonable doubt. A person's good character, his history, his position in the community, and what people think about him are important.

Rebuttal - Anticipate the rebuttal argument. Discuss why rebuttal arguments will not work. Challenge the opposition to answer your most favorable facts and their weakest issues.

I. CLOSING REMARKS

An argument must have a strong ending. The ending must be planned and orchestrated. The ending should be smooth and graceful. As you build toward a conclusion ethos (shared values), pathos (passion), and logos (logic) should be intertwined.

This part of an argument rarely changes except with some minor variations driven by the facts of a particular case. It may be repeated again and again over the years. Adopt some catch phrases or stories, so that the more you use and repeat them, the more at ease you become in front of the jury -- hence the more persuasive. Remember, the jury is always different, so there is little danger of "I've heard that before," except possibly by the opposition, the judge or some courtroom personnel.

Let the jury know you are coming to the conclusion. Thank them. Let them know your client thanks them for their sacrifice and for their attention. Acknowledge their hard work. The case will soon be over and you are passing the case to them.

In certain cases, you may save an important principle of law or an important fact for this part of the argument. For example, in a battered wife case, the defense may save until now the Supreme Court's expansion of self-defense. If there were a series of inconsistent statements, explain that those inconsistent statements go right to the heart of a witness' credibility. If the testimony was from an accomplice or informer, remind the jury of the motive, interest and bias of the witness and what he received in return for the testimony.

If a word or definition of a word is a main issue, argue that now, e.g., "willfully" or "knowingly" rather than burying it in the general argument.

As you move into the final phases discuss issues of ethos (shared values and experience) and logos (logic). Tell the jury what you want and give them reasons why that would be fair. Guide them, but let them believe that what is fair and just is their discovery. Ask the jury to use their common sense and life experiences in evaluating the evidence. Ask them to consider the issues

in the light of reason. Implore them to use logic, for logic may be the key to a favorable verdict -- logic about life, people, and circumstances. Jurors are serious people and logic should prevail over emotion. If you are successful in delivering this message, the jury should reach the conclusion you want them to reach.

The jury should again be reminded of pledges or promises made during *voir dire*. They can be reminded of implied agreements made during the opening statement, e.g., "At the beginning of this trial, I asked you to consider. . . ." Lastly, remind them of their oath -- "to well and truly try and true deliverance make." That means if the prosecution has proven guilt beyond a reasonable doubt, say so. But if the prosecution has not proven the defendant's guilt beyond a reasonable doubt, the jury has a moral, legal and ethical obligation to say so.

Finish your argument on high moral ground. All you seek is justice. The jury should be able to look back and be proud of their verdict. Tell them that everyone wins when justice is done, and justice is a verdict of not guilty.

VI. TECHNIQUES OF SPEECH

An effective closing argument involves more than just a statement of the law and an analysis of the facts. The argument will be enhanced if the lawyer creates visual images or employs techniques that will cause a juror to remember a point. These little persuasion jewels may come from newspapers, literature, life experiences or even other lawyers.

A. KEY WORDS

Practitioners should carefully choose the words they use in closing argument. It is not only the story you tell that carries the message, it's the words used that drive the message into the hearts and minds of the jurors.

Words are central to what Aristotle spoke of as the ethos, pathos, and logos of an argument. Words convey the psychological aspects of the issues before the jury. Words evoke emotion. Words create visual images which will be remembered.

What is the case about? Consider the following words in describing your case to the jury.

Jealousy	Truth
Rage	Revenge
Greed	Thievery
Deceit	Treachery
Honesty	Trust

What are the emotions that you would like the jury to adopt in order to identify with your position? Identify them and integrate the appropriate level of pathos (emotion) into the argument with those words. As an example¹:

Affection	Disgust	Inferiority	Self-aggrandizement
Aggression	Dislike	Jealousy	Shame
Anger	Embarrassment	Joy	Shyness
Annoyance	Enthusiasm	Love	Superiority
Anxiety	Envy	Nervousness	Surprise
Combativeness	Excitement	Pain	Suspicion
Comfort	Fear	Prejudice	Tension
Confidence	Frustration	Pride	Timidity
Conflict	Grief	Rage	Vindictiveness
Defensiveness	Guilt	Remorse	Worry
Dejectedness	Horror	Resentment	
Discontent	Impatience	Satisfaction	

¹Edward Friedman, *The Speechmakers Complete Handbook*, pg. 373-374 (Harper & Brothers, NY 1955) Other traits/characteristics/virtues

Also identify the human characteristics of the witnesses that you believe the jury will find important to a resolution of the case. For example:

Ambition	Conceit	Initiative	Politeness
Courage	Confidence	Laziness	Reliability
Prudence	Courtesy	Methodicalness	Respectability
Temperance	Determination	Modesty	Slowness
Charity	Generosity	Nobility	Strength
Faith	Honesty	Patience	Truthfulness
Hope	Industriousness	Persistence	Tyranny

B. BOILER PLATE PHRASES

Every lawyer has phrases that have been accumulated over the years and employed during trials. These phrases help illustrate a point. They become a part of our dialogue and can enhance an argument.

C. ANALOGIES

People love an analogy. Often a good analogy can offer a concrete example of common sense, knowledge and understanding. An analogy can simplify an otherwise complicated issue. Analogies heighten awareness. They lead the jury to a conclusion -- the important thing is for the jury to see the conclusion on their own. That will make a more lasting impression.

An analogy should leave the jury with a vivid mental picture so that the point is lasting. Circumstantial evidence has often been referred to as not actually seeing it rain outside, but observing everyone entering the building with a wet umbrella.

D. RHETORICAL QUESTIONS

Rhetorical questions are a wonderful way to lead jurors to the conclusion that you desire. Anticipate the jury's questions, then formulate a question that does not contain an answer, but from which the answer is obvious.

Rhetorical questions can be asked of the jury or to opposing counsel as a challenge, e.g.:

Where is the motive?
Why didn't he leave?
Where are the fingerprints?
Why didn't the prosecution call Jane Doe? Where is she?
Why didn't the prosecution introduce an item of evidence?

E. TELL A STORY OR AN ANECDOTE

Everyone loves a story. Stories are descriptive. They also create a visual image and carry a message from life experiences. They help the jury live through or picture the event.

F. PROSE/LITERATURE

There is much wonderful prose and literature to draw from for closing arguments. So many emotions and insights have been reduced to writing. Work familiar and effective prose into your argument to help illustrate and illuminate your thoughts, e.g.,

“Unto thine own self be true and it must follow as night to day, thou canst not then be false to any man” - Hamlet Quotations

“The United States wins whenever justice is done to its citizens in the Courts.” Quotation from the Rotunda of the United States Justice Department.

“It is more important to the community that innocence be protected than guilt be punished.” John Adams.

G. REPETITION

The experts tell us that repetition is important for retention. Repetition is also important for persuasion. Repeat ideas using different forms, words, phrases, or thoughts.

H. DEMONSTRATIVE EVIDENCE

It is often said that a picture is worth a thousand words. People learn and remember by demonstration, by an image, e.g., a chart, a blow-up of a statement, a picture or a list. Demonstrative evidence appeals to the senses and helps the jury understand and retain.

I. DELIVERY/STYLE/VERBAL SKILLS

When you argue to a jury, you must reach the heights of salesmanship and communication. The object is to persuade. In order to be persuasive you must exude confidence in your product. Not only must you convey your belief in the case, but you must convey sincerity in that belief. Be controlled, but display emotion. Talk with the jury, not to them. Be personable, be rational, and be stimulating.

Great communicators keep it simple. While the message may be important, the thoughts and words need not be complicated. Use plain English. Say what you mean and mean what you say. Even with legal terms, its best to avoid "legalese," e.g., instead of "apprehension," use "fear;" it's a "deal," not a "plea bargain."

Communicate your sincerity and your relaxed attitude, but also your concern about the issues. As you move forward, change the pitch of your voice up or down depending on the emotion you wish to achieve or the point you want to make. Shift the pace of the voice from slow and deliberate to an increased rhythm. Pause to make a strong point or to let a message sink in. Go from relaxed to intense to drained as you convey the desirable emotions. The inflection and pace of your voice tell a story. This is drama -- capture your audience.

J. NOTES

Wean yourself from relying on notes. If you have prepared well and know your case, you can deliver a closing argument with little or no use of notes. Persuasion can be more effectively achieved if you concentrate on the jury and not the notes. If you must use notes, put them in a comfortable location where you can refer to them only as a prompt.

K. TIME/EFFICIENCY

The mind can only absorb what the seat can endure. An argument that goes too long will lose the audience. Make the argument efficient. Strip away the peripheral issues and concentrate on what really is going to be important to resolve the case. If the case was complicated or long and the argument must run into some length, be resourceful with pauses, language, emotion, demonstrative evidence or even a story.

L. MOVEMENT

The courtroom is your workshop so make the most of it. Stand close to the jury, but not so close that they feel uncomfortable. Center yourself before the jury, but don't be rigid. Use the space in front of the jury box to move around. Move up and down the row of jurors to establish a comfort level between you, but don't wander aimlessly. Make your movements deliberate and calculated to make the desired points.

Move to and from the opposition as you offer challenges or ask rhetorical questions. Stand near the opposition and posture the question "Where is Jane Doe?" They can't answer.

Avoid using a lectern or a podium unless you must use notes and you wish to conceal them. The lectern appears too academic, too much like a speech and too authoritative. The jury will not be relaxed and comfortable with you unless you come out from behind it.

M. THE BODY

Be expressive with your body and face. Gestures serve to enhance your verbal message and vocal skills. They demonstrate the full range of emotions from trust to utter disbelief. The hands and arms are important props. They animate and help in telling a story and in measuring emotion. Don't fold them or put them in your pocket. Avoid annoying or wild gestures.

N. THE EYES

The eyes not only see but they communicate. Look at the jury's eyes and let them see yours. People trust people who look at them when they talk. Maintain periodic eye contact with each juror. It forces them to look at you, but it may also flatter them that you are actually talking to them individually. Talk to each juror and then move on. Fixed eye contact may make the juror feel uncomfortable.

O. DRESS

Dress to make an impression. Your appearance conveys an attitude, and you want that attitude to be positive. Most jurors expect lawyers to be professional and polished.

P. SOME DON'TS

There are some things that lawyers should avoid in the courtroom.

1. Don't yell, bang on the rail or shout. That does not mean your voice can't show anger or be loud -- just don't shout. Too much aggression may be a turn-off to the jury. Jurors expect civility between the parties but even more so, they expect lawyers to respect them. Antics such as yelling, shouting or banging show little respect.
2. While you may want to appear at ease and a little bit "homey" and personable, don't be too informal. Too

much informality may cause the jury to feel that you don't take the case or them seriously.

3. Don't show disrespect for the system, the court or opposing counsel. You are a professional and an officer of the court. If you don't show respect for the system, how will the jury?
4. Don't refer to jurors by name.
5. Don't be mechanical or read your closing argument. Stimulate the jury with emotion and use notes sparingly, if at all.
6. Don't be lazy, slouch, or lounge before the jury. Don't turn your back or play with change in your pocket. This is not a discussion among friends, it's a closing argument.
7. Don't state your opinion -- you're not entitled to one. You are an advocate. Suggest what the evidence shows or what inferences should be drawn.
8. Don't add to or misstate the facts. This is a sure way to lose credibility with the jury about the issues that really matter. Explain that there may be different recollections of the evidence, but that any incorrect recollection of the evidence is unintentional. Invite the jury to use their memories.
9. Don't go outside the record. This will quickly draw an objection and cause you to lose momentum and credibility if the objection is sustained.
10. Don't attack opposing counsel unless opposing counsel has gone out of his way to earn it and it is obvious that the jury finds the lawyer or his tactics

distasteful. Even then take the high moral ground and show disapproval instead of making a character assault on the lawyer.

VII. PROCEDURAL ISSUES

1. Prosecution's closing - In all but the simplest of cases, the defense should require the prosecution to open. Not only does it suggest that the prosecution has an advantage with two arguments, it also makes the prosecution commit to a position on the law and facts which you can then refute.
2. Last argument - If the defense attorney offers no testimony and no exhibits, he has last argument in state court. (Not federal.) In some situations the prosecution's evidence may be weak and by presenting a case, the defendant may add evidence to the prosecution's case. In other cases, the cross-examination may bring out areas of reasonable doubt. Retaining last argument may be the best defense you have.
3. Multi-Defendant Cases - The lawyers must have a clear plan on who will argue what issues. Everyone needs to address his own defense issues, but repetition of boiler plate arguments on reasonable doubt, presumption of innocence and other similar type issues will undoubtedly dilute other issues. See if the judge will allow the lawyers to select the order of argument and then agree on who would be best to discuss the legal principles and common facts.
4. Objections - Make timely, well-supported objections during the argument. If necessary, approach the bench to elaborate on objections and request that you be allowed to supplement the record with an extended argument at a break. If the issue is serious or even warrants a mistrial, request that the jury be excused for the argument. If an objection is made against you, don't get unnerved. Never allow the opposition to see you get rattled.
5. Charge - Always ask for a charge conference and make sure you understand the law that can be argued by both sides.

VIII. LAW OF CLOSING ARGUMENT

A. CLOSING ARGUMENTS - GENERAL

It is error for the government to bolster or vouch for its own witnesses. Prosecutors must not make explicit personal assurances that the witness is trustworthy or imply that information not presented to the jury supports the testimony of the witness. *U.S. v. Lewis*, 10 F.3d 1086 (4th Cir. 1993).

The trial judge has discretion to limit the time of oral argument. *State v. El*, 286 S.C. 560, 335 S.E.2d 544 (1985).

Closing argument serves to sharpen and clarify issues for resolution by the trier of fact in a criminal case. Only after all the evidence is in are counsel for the parties in a position to present their respective versions of the case as a whole, and only then can they argue inferences to be drawn from all testimony and point out weaknesses of their adversaries' positions. For the defense, the closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the accused's guilt, and thus serves an important role in ensuring the basic and fundamental right of an accused to make his defense. *State v. Mouzon*, 321 S.C. 27, 467 S.E.2d 122 (Ct. App. 1995), *aff'd* ___ S.C. ___, 485 S.E.2d 918 (1997).

The solicitor may give his version of the testimony and comment on the weight to be given to the testimony of the witnesses for the defense. *State v. Raffaldt*, 318 S.C. 110, 456 S.E.2d 390 (1995); *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990).

The solicitor must confine his closing arguments to the evidence in the record and its reasonable inferences. *State v. Huggins*, ___ S.C. ___, 481 S.E.2d 114 (1997); *State v. Tucker*, ___ S.C. ___, 478 S.E.2d 260 (1996); *State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996). However, the solicitor's failure to confine his remarks to the record will not automatically result in reversal. A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *State v. Coleman*, 301 S.C. 57, 389 S.E.2d 659 (1990); *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990).

The burden of proof is on the appellant to show prejudice resulting from improper argument. *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975). The decision of whether or not to grant a mistrial on the basis of a solicitor's improper jury argument is in the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion. *State v. Tucker, supra*. A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for only very plain and obvious reasons. *State v. Watts*, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996);

The test of granting a new trial for alleged improper closing argument of counsel is whether the defendant was prejudiced to the extent that he was denied a fair trial *State v. Brisbon*, ___ S.C. ___, 474 S.E.2d 433(1996). In order to determine whether fundamental fairness was implicated by closing argument, the solicitor's comments must be viewed in context of the entire proceedings. *Arnold v. Evatt*, 113 F.3d 1352 (4th Cir. 1997).

B. PRESERVING THE ISSUE FOR REVIEW

A contemporaneous objection to an improper closing is required to preserve the issue for appeal. *State v. Peay*, 321 S.C. 405, 468 S.E.2d 669 (Ct. App.1996). The proper course to be pursued when counsel makes improper argument is for opposing counsel to immediately object, have a record made of statements complained of, and ask the court for a distinct ruling on his objection. *State v. Black* 319 S.C. 515, 462 S.E.2d 311 (Ct. App. 1995).

In *Toyota of Florence v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994), the Supreme Court held that a new trial was necessary even in the absence of a contemporaneous objection where vicious and inflammatory argument resulted in clear prejudice. The Court stated that it did not condone the failure to make a contemporaneous objection, but described the *Toyota* case as "extraordinary."

In *Dial v. Niggel Associates, Inc.*, ___ S.C. ___, 476 S.E.2d 700 (Ct.App. 1996), counsel made arguments concerning race, statements concerning the "deceit, deception and lies" purportedly practiced by Dial's counsel, and made assertions that his client was railroaded. The Court of Appeals held that the comments of counsel were so egregious as to require reversal even

in the absence of an objection. In *Dial*, the Court of Appeals held that the comments were "clearly prejudicial." The court commented, "Our ruling in this case should not be interpreted as lessening the obligation of counsel to object to improper arguments made by an adversary. It would have been preferable for Dial's attorney to have objected to these comments. However, even in the absence of an objection, this court will not countenance the content and tenor of the remarks." The Court noted, "Our view of the rule enunciated in *Toyota*, is that the appellate court must decide, on a case by case basis, whether the conduct is sufficiently egregious to warrant reversal in the absence of a contemporaneous objection."

In *State v. Harry*, 321 S.C. 273, 468 S.E.2d 76 (1996), the solicitor commented on the defendant's failure to call alibi witnesses. Defense counsel objected and asked to approach the bench. After the bench conference, counsel requested neither a curative instruction nor a mistrial. The Court of Appeals held that because counsel failed to make further objection, the issue was not preserved for appeal. The Court quoted the following statement from *McElveen v. Ferre*, 299 S.C. 377, 385 S.E.2d 39 (Ct. App. 1989), "When objection is timely made to improper remarks of counsel, the judge should rule on the objection, give a curative charge to the jury, and instruct offending counsel to desist from improper remarks. If the judge takes these steps, and the initial objecting party is not satisfied with the instruction, a further objection and a request for further instruction should be made at that time. If the objecting party fails to make this additional objection, the asserted misconduct of counsel is not preserved for review on appeal."

A defendant waives the issue if a curative instruction is refused. *State v. Tucker, supra*; *State v. Watts*, 321 S.C. 158, 467 S.E.2d 272 (Ct.App. 1996).

C. COMMENT ON DEFENDANT'S SILENCE OR FAILURE TO PRESENT EVIDENCE

The prosecution cannot comment on the accused's exercise of his right to remain silent. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). The prosecution may not comment directly or indirectly on a defendant's failure to testify. *Griffin v. California*, 380 U.S. 609, 85 S.Ct.

1229, 14 L.Ed.2d 106 (1965). As a corollary of the right to remain silent, a prosecutor's comment upon the defendant's failure to testify at trial is constitutionally impermissible. *State v. Hawkins*, 292 S.C. 418, 357 S.E.2d 10 (1987). Even a solicitor's indirect reference to the defendant's silence and indirect comments on the defendant's exercise of his right to counsel and jury trial violated defendant's due process rights and were reversible error. *State v. Cockerham*, 294 S.C. 380, 365 S.E.2d 13 (1987).

In *State v. Posey*, 269 S.C. 500, 238 S.E.2d 176 (1977), the court held that the State may not comment on the failure of the defendant to call a witness when he has not presented any evidence.

In *State v. Truesdale*, 285 S.C. 13, 328 S.E.2d 52 (1984), the court applied a harmless error analysis to a *Doyle* violation. The court held that where a review of the entire record establishes that the error is harmless beyond a reasonable doubt, the conviction should not be reversed. To be harmless, the record must establish that the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to. The solicitor did not tie the defendant's silence directly to his exculpatory story, the exculpatory story was totally implausible, and the evidence of guilt was overwhelming.

In *State v. Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996), Pickens and a co-defendant, Douglas, were charged with murder resulting from a shooting in a crowded Waffle House parking lot. Douglas presented several witnesses, but Pickens put up no evidence. In closing, the solicitor commented, "One thing they short me up on is I didn't put these officers up. Well, I tell you one thing, they can call witnesses just like I can. And Douglas did call witnesses." In response to the defendants' objection, the judge ruled that Pickens was entitled to protection under *Doyle v. Ohio*, *supra*. However, the trial judge, not wanting to exacerbate the situation, refused to give a curative instruction. The Supreme Court held that the judge erred in failing to give a curative instruction and further that his general charge did not cure the error. The Court held that although this was a single reference, appellant's story of self-defense was not totally implausible and the evidence of guilt was not overwhelming. Therefore, the judge's failure to give a curative instruction was error requiring reversal.

In *Johnson v. State*, ___ S.C. ___, 480 S.E.2d 733 (1997), the solicitor made the following statement: "...you have seen that the defendant has not put up a defense, he's not testified, and you will hear shortly...you cannot even consider the fact that this man has not testified in this trial, so what you have before you to consider is the testimony of all the witnesses that were presented by the State and the physical evidence." There was no objection to this comment. The PCR judge found defense counsel ineffective in failing to object to the solicitor's comment.

The Supreme Court reversed. The court held, "In context, the solicitor's comment was simply a statement of the evidence which was before the jury, rather than a comment on Johnson's failure to testify. As such, it is distinguishable from the typical 'comment' in which the clear implication is that the defendant has failed to explain the circumstances of the crime or has shown no remorse." The court further held that, even assuming the comment was improper, the trial court's instruction to the jury that it could not consider the failure to testify in any way was sufficient to cure any error.

D. APPEAL TO THE PASSIONS AND PREJUDICES OF THE JURY

A solicitor's closing argument must be carefully tailored so that it does not appeal to the personal biases of jurors, is not calculated to arouse jurors' passions or prejudice, and stays within the record and its reasonable inferences. *State v. McFadden*, 318 S.C. 404, 458 S.E.2d 61 (1995). The courts have found closing arguments improper when they appealed to personal bias or when they were calculated to arouse passion and prejudice. *State v. Cockerham*, 294 S.C. 380, 365 S.E.2d 22 (1988); *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987).

"Reference to the victim's family is uncalled for and is not to be tolerated." *State v. Allen*, 266 S.C. 468, 224 S.E.2d 881 (1976). In *Allen*, the court found that the reference to the family was clearly an attempt to inflame the passion of the jury; however, the court found that the solicitor's improper argument was made in response to the argument of defense counsel.

A solicitor's argument in the sentencing phase of a capital murder prosecution stating that the victim's family could not go to see him, but could only visit his grave, was relevant argument of the impact of crime on the victim's family. *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991).

In *State v. McDaniel*, 320 S.C. 33, 462 S.E.2d 882 (1995), the Court of Appeals held that the solicitor's use of "you" some 45 times in an argument where she asked the jury to put themselves in the place of the rape victim constituted reversible error.

A prosecutor should not comment on a defendant's lack of remorse, as such comments are violative of defendant's Fifth, Eighth, and Fourteenth Amendment rights. *State v. Reid*, ___ S.C. ___, 476 S.E.2d 695 (1996); *Fossick v. State*, 371 S.C. 375, 453 S.E.2d 899 (1995); *State v. Diddlemeyer*, 296 S.C. 235, 371 S.E.2d 293 (1988).

In *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991), the Solicitor argued in the sentencing phase of a capital murder case, that while he was a religious man, he wondered if there was a God, because if there was, he would have let the defendant die when he tried to commit suicide rather than take the victim's life. The Solicitor told the jury to "do what's right." The Supreme Court held that the reference to God was not improper and that this was not an improper injection of personal opinion about the death sentence.

Argument concerning the deterrent effect of capital punishment was proper in the solicitor's closing argument in a capital murder prosecution. *State v. Truesdale, supra*.

So long as a prosecutor stays within the record and reasonable inferences from it, he may legitimately appeal to the jury to do their full duty. *State v. Caldwell, supra*.

E. LESSENING THE JURY'S SENSE OF RESPONSIBILITY

In *State v. Thomas*, 287 S.C. 411, 339 S.E.2d 129 (1986) the solicitor told the jury that the case had already been examined by a magistrate and a grand jury, that a preliminary hearing had been held, and that the jury's decision

would be reviewed on appeal by a higher court. The Supreme Court held that this was reversible error. The court noted that closing arguments that lessen the jury's sense of responsibility are improper and are rarely harmless error.

F. LAST ARGUMENT

In a criminal prosecution, where a defendant introduces no testimony, he is entitled to the final closing argument to the jury. *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972); *State v. Mouzon*, ___ S.C. ___, 485 S.E.2d 918 (1997). In *Mouzon*, the jury was taken to view the crime scene at the request of the defendant. The defendant submitted no evidence and argued that he was entitled to last argument. The trial judge found that the jury view was an admission of evidence and therefore, declined to allow the defendant to present the final closing argument. The Supreme Court held that a jury view is not regarded as evidence and therefore, the judge erred in denying the defendant the right to final closing. The Court rejected the State's argument that this was harmless error. The Court noted, "although the right to open and close the argument to the jury has been described as a 'substantial right, the denial of which is reversible error,'...such an error is still subject to harmless error analysis." However, the Court found that, here, the State devoted a significant amount of attention in its closing to the issues of drug dealing and conspiracy. *Mouzon* was convicted of conspiracy to distribute crack cocaine. The Court reasoned, "If *Mouzon* had been allowed to argue last, then he could have more adequately addressed the issue of conspiracy to distribute."

G. RECENT CASES

In *State v. Huggins, supra*, defendant was charged with murder and criminal conspiracy. In his closing, the prosecutor referred to an alleged statement by the defendant to the effect that she wanted to hire someone to kill her husband. No such statement was ever put in evidence and the defendant denied the statement. The Supreme Court found that the argument was fundamental error requiring reversal. The Court noted that evidence of guilt was based on circumstantial evidence and far from overwhelming. Under these circumstances, the prosecutor's reference to a statement which was not in evidence was highly prejudicial to the defense.

In *State v. Tucker, supra*, the Solicitor argued to the jury that the defendant “may have had the intent to rape [the victim] before he killed her and left,” but that he did not have time. It was uncontested that there was no evidence in the record to support the idea that the defendant raped or attempted to rape the victim. The Supreme Court held the remarks, though improper, did not deprive Tucker of a fair trial. The Court reasoned that (1) the defendant had waived the issue by refusing a curative instruction; (2) the comment was only one isolated event in the entire argument and the jury was charged that the argument had no evidentiary value; and (3) there was overwhelming evidence of guilt so that no prejudice could possibly have resulted.

In *State v. Jones*, 320 S.C. 555, 466 S.E.2d 733 (1996), the State made a reference to the O.J. Simpson case during its closing. The defendant’s objection was overruled. The Solicitor continued, “O.J.’s case, they don’t have eye witnesses so they rely on circumstantial evidence. We’ve got eye witnesses and we put them up before you and they said this defendant right here, ladies and gentlemen, did it.” The Court of Appeals noted that in making closing argument the attorneys should stay within the record. “Therefore, a comparison by the state of this case to a totally unrelated case was improper.” However, the court found that the appellant failed to show any prejudice from the improper comment.

In *City of Columbia v. Wilson*, ___ S.C. ___, 478 S.E.2d 88 (Ct. App. 1996), the solicitor stated during his closing, “the judge is going to charge you on the presumption of impairment under our law.” The Circuit Court reversed holding that the use of the word presumption relating to a breathalyzer result impermissibly shifted the burden of proof to the defendant. The Court of Appeals reversed and reinstated the conviction, holding, that while it did not condone the use of the word “presumption,” there was no prejudice in light of the overwhelming evidence of guilt and any error was harmless.

In *State v. Brisbon, supra*, the solicitor carried out what the defense called a “prejudicial demonstration” using the axe that was the alleged murder weapon. The trial judge denied Brisbon’s motion for mistrial. The Supreme Court found no abuse of discretion and held that the defendant was not prejudiced to the extent that he was denied a fair trial.

In *State v. Copeland, supra*, the solicitor first referred to conversations which were not in evidence. The trial judge sustained the defense objection. The Solicitor next speculated that the defendant was part of an extortion scheme whereby she demanded money from men whom she told were the father of her children. The trial judge sustained the defense objection, stating, "There is no evidence that that's what she was doing....stay away from it." The solicitor then told the jury that the defendant met with another to divide money taken from the victim. The trial court sustained the objection, ruling that the argument was not supported by the evidence. The judge instructed the jury that the argument was not evidence. Finally, the solicitor argued that defendant was the mastermind of the plan. The judge told the solicitor that he was "skating on thin ice."

Copeland argued that the solicitor's argument was so prejudicial that it denied her a fair trial and, therefore, the trial judge erred in refusing to grant a mistrial. The Supreme Court held that any objectionable portions of the argument were corrected by a curative instruction. The Court found that the comments did not so infect the trial with unfairness that her conviction was a denial of due process. However, the Court noted, "We take this opportunity to caution counsel to confine their comments to the facts presented and reasonable inferences from such facts."

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