A Dozen Tips for Defense Attorneys Delivering Closing Arguments in Wrongful Death Cases

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For a civil defense attorney, delivering a compelling closing argument in a wrongful death trial can be a precarious proposition. In contested liability cases, it means pointing out that in the last moments of the decedent’s life he or she was negligent and therefore caused or contributed to his or her own death. This argument alone seems to run afoul of the aphorism, “speak no ill of the dead.” Meanwhile, the closing argument on damages usually entails the defense counsel contending that, notwithstanding the decedent’s merits as a human being and the family’s significant loss, the compensation awarded should not be nearly as high as the plaintiff’s counsel suggests. The task is further complicated by the shear emotion and grief that blankets the wrongful death trial and typically favors the plaintiff.

Yet, the fact that the trial is even taking place in a wrongful death case typically indicates that the defendant’s decision maker believes that either the decedent bears all or a significant portion of the comparative fault or the estate is demanding too much, or perhaps both. This then means that the defense counsel should have plenty to discuss with the jury in closing argument. Here are a dozen tips I offer to help develop and deliver an effective defense closing argument in a wrongful death case.

1. **Emphasize the jury’s job is not to value human life**
   For those regularly tasked with wrongful death case valuations, we understand that the goal is not about valuing human life. Rather, it is about valuing specific elements of damages that may be conferred under the given state’s Wrongful Death Act. Yet, it is easy enough for a jury to believe that a life is indeed being valued. Not only is that an incorrect interpretation of the Wrongful Death Act, allowing this concept to be advanced can lead to runaway jury verdicts that are disproportionate to what is right or fair.

2. **Acknowledge the difficulty of the task – both yours and the jury’s**
   Be careful if you are arguing the decedent is at fault. Tell the jury forthrightly that you recognize that it is typically not favored in human thought or discussion to criticize the actions of someone who has since died. Defense counsel’s discussion of the decedent’s comparative fault, employment history, or unfavorable personal habits extend beyond the polite discussions we would have outside the courtroom. However, the courtroom is the place – in fairness to all the parties – where those discussions must take place. That consideration is simply part of the difficult charge of the defense attorney’s job and then the jury’s duty while deliberating.
3. **Make concessions**  
   Be reasonable in your interpretation of the facts, your arguments on the law, and your approach with the jury. Part of being reasonable is making concessions. Acknowledge the strong aspects of the plaintiff’s case. In so doing, it lends fairness and balance to your approach and ultimately adds credibility to your contentions about the strength of the defense case.

4. **Do not use humor or sarcasm**  
   Other than perhaps with an occasional overly ambitious opposing expert, defense counsel should not use sarcasm in the courtroom. Sarcasm is an extension of its cousin, cynicism, and that can be an unbecoming trait in the courtroom, among other places. Occasional spontaneous humor is not always a bad thing in the courtroom, but given the gravity of the subject matters, use humor extremely sparingly. Trying to be too cute in closing argument, telling a joke or attempting to be funny in any way may be viewed as making light of a decedent’s life or death. A jury's disdain for this approach may be reflected in their verdict.

5. **Do not use canned arguments or stories that you try to fit into all of your closing arguments**  
   If you need to make an illustration, make sure you have rarely or ever used it before to ensure that it is most specific to your case. Defense counsel often weave clever metaphors, historical references or anecdotes into their closing arguments. No doubt, such rhetorical devices are clever ways for making a point, but be smart with their use. You have to make sure the rhetorical device fits perfectly in the closing argument. Just because it worked perfectly in your prior wrongful death case, does not mean that it fits here. Also, in thinking about your closing argument before you deliver it, dissect that story or metaphor in a way that opposing counsel will. Make sure that it is not susceptible to being cleverly undone or turned on its head by opposing counsel’s rebuttal. There are not many worse feelings at trial than witnessing your own metaphor or anecdote be unpacked on you and then expertly used against your very argument.

6. **Truly rebut the plaintiff counsel’s closing**  
   This will be your last opportunity to speak to the jury before they speak to you with the verdict. In the first part of the closing argument, perhaps plaintiff’s counsel said something surprising or factually incorrect. Defense counsel needs to guard against having a completely scripted closing argument. This is your last chance to address the jury, so make sure that you have addressed plaintiff’s counsel inaccurate or incomplete arguments as well as their most compelling arguments, even those that were not included in your prepared remarks.

7. **Do not ramble**  
   Get to your point. Even if the court does not impose time limits, impose time limits on yourself. Keep your argument taut. A few concisely crafted arguments are always better than many thinly developed assertions.
8. **Remind the jury if plaintiff’s counsel failed to deliver promises made in opening statement.**
   If plaintiff’s counsel did not prove that which was suggested in opening statement or during *voir dire*, then point out this failing. Do not let the jury consider facts that were merely predicted but never entered into evidence.

9. **Order and recite from transcripts of important testimony.**
   Sometimes, especially in a longer trial, critically important testimony can be forgotten or minimized. Trial counsel might even disagree what witnesses said or the context in which the testimony arose. Therefore, throughout the trial, consider regularly having the court reporter transcribe key testimony. Emphasize to the jury that these are the actual transcribed words that were testified to at trial and not your words. Enlarge the transcribed words or incorporate them into a PowerPoint so the jury can see how the words appear in writing.

10. **Do not read closing arguments and rarely use notes beyond the simplest of outlines.**
    Give solid, continued eye contact. Be persuasive without being glib. Be direct without being harsh. But most of all, be genuine and credible in closing argument. You cannot be any of those things or do them well if you are busy staring at your notepad.

11. **Always give a suggested award amount if liability is conceded or likely, and maybe even when liability is unlikely.**
    If defense counsel does not provide a suggested number, then the only recommended verdict numbers the jury will hear are those from the plaintiff’s counsel. Without your number, there is no anchor or even the beginning of a continuum for the jury to consider between your recommended number and plaintiff’s recommended number. Defense counsel therefore needs to give the jury an earnest recommendation on damages.

12. **Talk specifically about the elements of damage the jury can award and those which it cannot award.**
    Even if your state’s jury verdict forms contemplate line item awards beyond the total sum on the verdict form, you should be specific about the damages that can and cannot be awarded. As to those damages that should be awarded, go through the damage elements on the jury instructions, allocating specific amounts to each element. Be specific to the penny, where you can. Also, point out to the jury those elements of damages that they cannot award, including attorney fees and damages for the survivors’ grief. From observing mock juries deliberate, I have too often seen juries create new elements of damages – chief among them are attorney fees. This is improper under the law, and the jury needs to be cautioned about what damages they cannot award pursuant to the oath they took to follow the law.

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