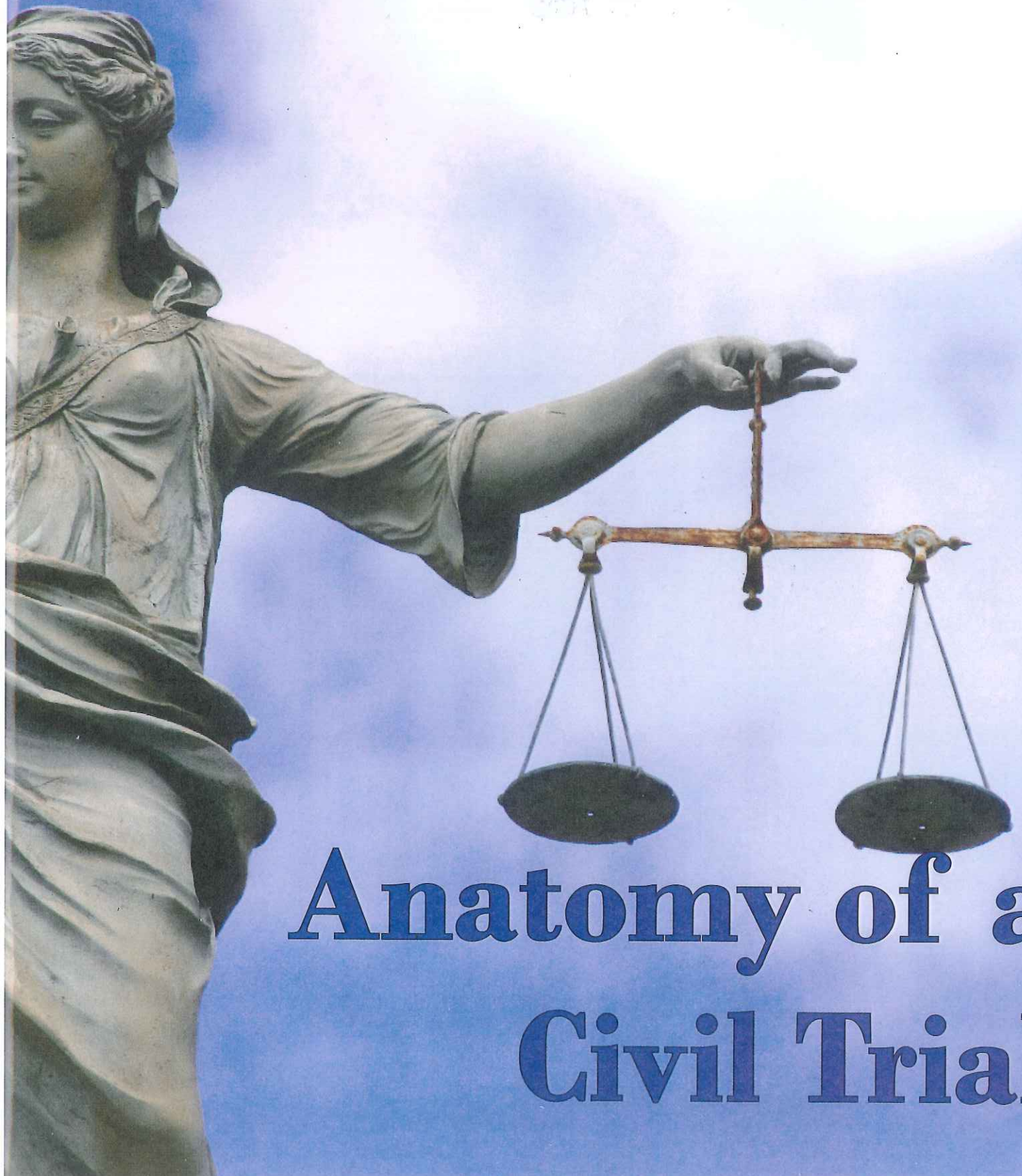


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Anatomy of a Civil Trial

Helpful Hints on Closing Arguments

Bruce M. Bender

The purpose of closing argument is to discuss the evidence persuasively in your client's favor so that they come back with a favorable verdict for your client. Although many studies have concluded that most jurors have made up their minds by the time the closing argument begins, it is still critical to the outcome of the trial. A seasoned trial lawyer knows that a closing argument can make or break a case and is your last chance to connect with the jury and convince them to find in your client's favor. After giving many closing arguments over the years, in cases ranging from medical negligence/ auto negligence, workers compensation and employment cases, this article will present techniques that have been successfully used in closing arguments.

Bring Back the Theme of Your Case

Everyone is taught that you should have a theme of your case in your opening statement that you should try to use throughout the trial. You should bring back this theme in your closing argument at the beginning of your closing as well and weave it into your discussion of the evidence. For example if your theme is that a corporate defendant failed to take responsibility by failing to have a safe workplace and then is blaming someone else, then this should be brought up right from the start and repeated throughout your closing.

Always Discuss the Burden of Proof

It is critical that the jury understand the burden of proof in civil cases is only a preponderance of the evidence and not as in a criminal case, beyond a reasonable doubt. Again, this key point should be discussed at the beginning of your case in the opening and emphasized again in your closing argument when discussing the evidence. Many skilled trial lawyers including former presidents of this organization have emphasized that the best way to present the burden of



proof in civil cases is to use the feather weight example. If you put the evidence from both sides on the scales of justice, if the evidence tips in the plaintiff's favor by just the weight of a feather, then the Plaintiff must prevail. This makes it clear to the jury that the evidence just has to tip so ever slightly in the plaintiff's favor for the jury to find in your client's favor. Juries have always understood this example over the years and it effectively conveys the concept of burden of proof to the jury.

Use the Verdict Sheet As an Outline

We always try to use the verdict sheet as an outline for a closing argument because ultimately, the jury is going to have to answer questions on the verdict sheet. A good technique is to take the verdict sheet up with you when doing the closing. It is important to go through the evidence involving each question, one by one and discuss it forcefully and persuasively and suggest to the jury why they should answer the question in the client's favor. This should be done because the jury needs to understand what they will ultimately have to do when they go back in the jury room to find in your client's favor.

Tell the Jury to Go Back and Discuss Important Points About the Evidence When They Deliberate

This tactic is important when giving a closing argument. When there are important pieces of evidence in the case on both sides always discuss the evidence on both sides, tell the jury why the client's position is the one they should adopt and tell them to go back and discuss this point amongst themselves when they deliberate. I feel this highlights important points and gets them to take notes about the important points in the case and what you are trying to convey to them so that they can repeat your side when they

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deliberate. Hopefully, if you have highlighted your position this way and they understand it, the most vocal jurors can argue your case for you by repeating what you have said to the other jurors in the deliberation. This has always been an effective technique for me over the years.

Use Jury Instructions in Your Argument

Although the closing argument is mostly spent discussing the facts and why the facts must cause the jury to find in your client's favor, the law must be discussed. One useful technique is to try to discuss the several most important jury instructions and even put them on blow ups so that they can be highlighted to the jury. For example in a recent trial that involved a workplace safety issue and violation of OSHA regulations, the judge ultimately read the OSHA regulations to the jury as instructions. The regulations can be read to the jury and explained to them how the facts showed the Defendant failed to comply with the regulations and was negligent. This is also critical when talking about damages. The standard instruction on damages should be blown up as well as so that the jury can follow along as to each element of damages and what they can consider.

Connecting with the Jury

One of the most important concepts of the closing is to connect with the jury so they can connect with your client. How do you do this? First, many trial lawyers speak to the jury not from a podium but rather in the well of the courtroom. Most judges allow you to do this but make sure you ask the court clerk that the particular judge will allow this. It is important to use notes as sparingly as possible. A useful guide is to write out the closing and then boil it down to a brief outline. You should speak directly to the jurors and usually go around the jury box and speak to as many of them as possible and have as much eye contact as possible. This gives you a real connection with individual jurors and will help when you tell them to discuss certain pieces of evidence when they go back and deliberate.

The Use of Demonstrative Aids

Some studies suggest that jurors retain 85% of the information they retain from what they see and less than 15% from what they hear. Good closing argument emphasize use of blow ups of the exhibits when discussing the evidence but sometimes interchange the blow ups with power point slides of particular documents, summaries of important points in your argument and jury instructions. You should use one or the other or both because the jury will follow your argument much easier by seeing the arguments, jury instructions and documents in front of them instead of just by hearing them.

Make Sure You Talk About Credibility

Most trials will come down to which witness or expert the jury ultimately believes. It is your job to persuade the jurors that your witnesses are more credible and you must do this by pointing out inconsistencies in lay witness testimony that causes the witness to not be believed or bias in expert witness testimony that also causes the expert testimony to be rejected. It is usually quite effective to impeach expert's credibility with the amount of time and money they make in testifying for the defense.

Make Sure the Jury Understands the Purpose of Damages

The jury must understand that the overall purpose of money damages is to make the victim whole, or to put the victim in the same position they were in immediately before the injury.

Explain the Different Types of Damages

David Ball's important work on Damages has outlined that the three basic types of damages should focus on the jury's role to fix, help and make up for losses. These include:

1. **Fix what can be fixed.** Some losses can be 100 percent fixed, such as repayment of medical bills or lost wages.
2. **Help what can be helped.** Such as by paying for care that will help but not cure.
3. **Make up for (balance) what cannot be fixed or helped.** Such as past pain or untreatable disabilities that won't get better.

This is where you have to use your powers of persuasion the most to talk about the non-economic damages that your client is entitled to. You should use the jury verdict sheet and go through the elements of damage on the verdict sheet.

Although this is not an exhaustive list of helpful hints, these have worked effectively for me over the years in persuading juries to provide justice to my clients. ■

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Biography

Bruce M. Bender is a partner with the law firm of Axelson, Williamowsky, Bender & Fishman, P.C in Rockville, Maryland and has been associated with this firm since 1984. He has been a member of the Board of Governors at MAJ for the past five years and has been honored as a Super Lawyer from 2007 to the present. He has tried over 50 jury trials in state and federal courts including a recent trial in the Superior Court of the District of Columbia whereby his client was awarded \$1,050,000 in damages after a two and one half week trial.

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