

Kenya School of Law

ADVOCATES TRAINING PROGRAM

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Trial Advocacy

CLOSING ARGUMENT

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OUTLINE

Definitions
Statutory basis
Role and Function
Nature
Elements
IRAC
Structure
Content, Delivery and Ethics
Other Aspects of Preparation
Exercise

Statutory basis-Civil

Civil Procedure Act and Rules

Order 18 Rules 2 and 3: *Unless the court otherwise orders—*

- (2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case.
- (3) After the party beginning has produced his evidence ... the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited.
- (4) The court may in its discretion limit the time allowed for addresses by the parties or their advocates.

Statutory basis-Criminal

Criminal Procedure Code, Cap. 75

Part VI-Subordinate Courts

Sec. 213-Order of speeches-to be the same as in Trials before High Court.

Part IX-Procedure of Trial before High Court

Sec. 306. (1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

Statutory basis-Criminal(contd.)

Sec.306 (3) If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person;

307. (1) The accused person or his advocate may examine his witnesses (if any), and after their cross-examination and re-examination (if any) may sum up his case.

311: If the accused person says that he does not intend to give or adduce evidence and the court considers that there is evidence that he committed the offence, the advocate for **the prosecution shall then sum up the case against the accused person**, and the court shall then call on the accused person personally or by his advocate to address the court on his own behalf.

Role and Function

- ❖ To consolidate all the evidence that has been adduced
- ❖ To link together the components of the trial.
- ❖ To argue out the case from the client's perspective
- ❖ To make the prayer of what you are seeking.

Role and Function-Steve Lubet, "Modern Trial Advocacy"

- ❖ Opportunity to tell entire story without interruption and constraining formalities.
- ❖ Its success depends on success of previous stages of trial.
- ❖ It must complement opening statement and reflect and encompass the evidence in the case.

Theory, Theme and Story Arc

THEORY-Should Be

A) Logical-show movement from fact to conclusion

B) Believable-By being based on

- i. Admissions by opposite side
- ii. Undisputed facts
- iii. Common sense and experience
- iv. Credibility of witnesses

C) Legally sufficient –By addressing both the Law and the facts.

Theme in closing Argument

- ❖ Have it constantly present in closing argument.
- ❖ Start with it; use it in each segment.
- ❖ Theme serves role of moral persuasion.
- ❖ Even then , avoid it becoming a monotonous repetition.

Story arc in closing argument

1. Things were fine, everything going on well.
2. Something drastic and disruptive happened.
3. Need to restore client as far as is possible to state before the disruption.

What story arc accomplishes:

- a) Establishes client As the centre of the whole story
- b) Takes advantage of human desire for equilibrium and order.
- c) Engages fact finder as the “hero” to rectify the disruption and save client from further injustice.

Nature

- Is an argument.
- Is post the fact.
- Is based on what has been adduced(evidence, exhibits)

Elements of the Closing Argument(Lubet)

1. Conclusions
2. Inferences
3. Details and circumstantial evidence
4. Analogies, allusions and stories
5. Credibility and motive
6. Weight and evidence
7. Demeanour
8. Refutation
9. Application of the Law
10. Moral appeal.

Conclusions;Inferences;Details

Conclusion -Flows from the evidence.

Inference-A deduction drawn from a known fact.

Detail and circumstantial evidence- that was earlier gathered in examination in chief and in cross examination.

Analogy, allusions, stories

Analogy-Draw from everyday human behaviour. Comparison to widely understood experience or activity.

Caution: Ensure they are “air tight”.

Allusion-A literary reference to add to persuasive force. In past mostly drawn from Shakespeare and the Bible.

Stories-To humanize the client.

Credibility and Motive

Closing argument is the opportunity to comment on and compare motive and credibility of witnesses.

It's here that can refer to what came from impeachment.

Can directly compare the testimony that came from different witnesses.

Motive can be commented upon from either what came out directly as a fact or from a logical inference.

Weight of Evidence

Here will assert:

- ❖ Why one version is preferable to another.
- ❖ Why some facts should be accepted and others rejected.
- ❖ Why one piece of evidence is stronger than the other.

Demeanour

Be based on an observable fact.

Things can point out:

- ❖ Delay or refusal to answer question.
- ❖ Sudden loss of composure (fidgeting).
- ❖ Sudden loss of temper.

Note: Since it's based on perception, need to bear caution that the fact finder may get a different perception.

Refutation; Application of the Law

Refutation:

- ❖ Is opportunity to refute opposing positions.
- ❖ Can point out errors, inconsistencies, implausibilities and contradictions.

Application of the Law:

- ❖ Apply the law to the facts.
- ❖ This is the most extensive part of trial when to talk about the Law.

Moral Appeal

It is explaining how and why your client's position makes sense.

It is when you elaborate on the Moral theme of the case.

It expounds of the shared values, civic virtues and common motivations.

Steps(Mwaniki-KSL)

IRAC

- ❖ Issue
- ❖ Rule(Law)
- ❖ Application
- ❖ Conclusion

STRUCTURE-Steve Lubet

1. Topical organisation.
2. Other organising tools

Topical Organisation

1. Issues-Factual and Legal.
2. Elements-If Criminal, elements of charge. If Civil, the elements of Negligence.
3. If applicable, what instructions Judge gave to Jury or to the assessors.
4. What is the turning point of the case?
5. Alternative structure-
 - a) Chronological.
 - b) Witness listing.

Other Organisation tools

1. Start strong, end strong- Principle of Primacy and Recency
2. Affirmative case first-Build your own case first.
3. Cluster circumstantial evidence; accumulate details.
4. “Bury” (minimize) your concessions in the middle of the argument.
5. Weave witness credibility in the story.
6. Address the damages due to client if is a claim for damages case

CONTENT

a. Tell a persuasive story-

- i. Known facts-what happened
- ii. Reasons-Why did it happen?
- iii. Credible witnesses-who should be believed?
- iv. Supportive details-How can we be sure? Common sense-
Is it plausible?

b. Tie up cross examination

c. Comment on promises -made during opening statement.

d. Resolve problems and weaknesses.

e. Discuss damages.

Delivery and Technique

- a) Do not read or memorise. Use an outline as prompts.
- b) Use body and hand movements-To make emphasis. Avoid aimless pacing or distractive movement.
- c) Verbal-Change speed, tone, inflection, volume. Do not be too quick or too loud.
- d) Emotion-(debatable):If use it, let it not be false .Do not be insincere. Use it at moral dimensions of the case.
- e) Use visual aids-Physical evidence presented in trail, e.g.. Weapons, models, photographs, maps, charts, maps, samples.
- f) Use headlines-Negligence, Damages,
- g) Use simple, active language-

Ethics in Closing Argument

Avoid while doing it:

1. Asserting personal beliefs
2. Appealing to prejudice or bigotry-racial, religious, ethnic, gender
3. Misstating the evidence.
4. Misstating the Law.
5. Misusing evidence.
6. Appealing to Jury/Fact finder's personal interest.
7. Appealing to emotion, sympathy, passion-basing on stereotypes, physical appearance.

Areas(From NITA training)

Theme

- Use your theme.
- Persuasively articulate your theory of the case.

The Law

Show knowledge of the law

- Argue the law effectively.
- Appropriately cite to persuasive authority
- Acknowledge opposing authority
 - Distinguish it
 - Or argue for change in the law

Prayer

Tell the Court what you want.

- The “prayer.”
- But don’t beg.
 - You are asking for justice
 - Not sympathy

Witnesses

- ❖ Argue the credibility of witnesses.
- ❖ If they are many, put them in clusters.
- ❖ Link the cross examination, impeachment.

Show why you should win

- ❖ Be based on the evidence.
- ❖ Connect the facts in a helpful way to complete the story
- ❖ Use analogy, comparisons, rhetorical questions and repetitive techniques such as triads to persuade the judge.
- ❖ Relate the facts to the law.

How to prepare(Palmer and McQuoid)

Write out:

1. Issues-What is the issue; onus on it; legal test applicable.
2. Agreed facts- Pretrial; admissions at trial; identical evidence.
3. Summary of evidence-Witnesses of either side; consented evidence; circumstantial., other evidence.
4. Evaluate summarised evidence-Contradiction, corroboration, exaggerations, demeanour, weight of exhibits.
5. Factual conclusion
6. Applying Law to the conclusion on facts, overall burden of proof.

Presentation (Palmer and McQuoid)

Use “PRES” formula.

P-Point of view

R-Reason(why you hold that point of view)

E-Evidence

S-Summary

Organising you case file(Palmer and Mc Quoid)

- ❖ Label each witness' evidence in order in which was given.
- ❖ Exhibits-In separate order , alphabetic or numbered.
- ❖ Authorities (*If part of a law report, put marker at relevant page*)
- ❖ Visual aids will use-diagrams, charts, slides.

Other Important points- Presentation

(Prof. Goodno)

- Be organised
- Focus on relevant matters.
- Good delivery.
- Passion for the case

Communication techniques

(Adopted from NITA method).

Use appropriate communication techniques of

- language and vocabulary,
- demeanor,
- eye-contact,
- voice projection,
- pace, cadence and silence,
- facial expressions,
- posture and
- avoidance of distracting gestures and verbal habits.

Q and A

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