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Please send any comments, questions or ideas to editor@tsongas.com

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VOICE OF EXPERIENCE

"Does Closing Really Make a Difference?"

Closing arguments really *do* make a difference, but probably not for the reasons you think.

In our December 2004 issue of *The Advantage*, we explained that despite common wisdom, jurors do not make up their minds after opening statements. However, by closing, jurors usually say they have made an initial decision about who's right and who's wrong—who won and who lost. For those few who have not completely made up their minds, they have either drawn some conclusions about "what happened," or are strongly leaning toward one side or the other. Closings rarely produce opinion change; instead, they are more likely to crystallize an already formulated opinion.

How, then, can your closing make a difference? Closing is your last opportunity to speak to the jury—your last opportunity to make sure that yours is the story (or framework) that sticks. Instead of focusing on trying to "sell" your case, which you should have already done, closing should be used to arm the jurors with evidence and arguments they can use to sway other jurors during deliberations. Essentially, you are both inoculating the jurors who are on your side to any counter arguments they might hear, and you are arming them with the information they need to persuade the undecided jurors. To win, you need strong advocates in the deliberation room who will advance your arguments and themes in the face of opposition. By giving jurors who are already on your side the tools they need to argue on your behalf, you can extend your presence to the jury room and gain a competitive advantage.

Here are a few tips for crafting a successful closing argument.

Keep It Short. One of the most common criticisms we hear from jurors in post-verdict interviews is that closings are too long. By closing arguments, the jurors are anxious to discuss the case with each other, and don't

want their deliberation delayed any longer. Make sure you are clear and organized; avoid tangents, unnecessary redundancies or rambling. Your closing should not go through the minutia of the case. Instead, your closing should be filled with summaries and short, memorable theme-oriented arguments.

Use Theme-Oriented Phrases. As cliché as it has become, Johnny Cochran's infamous tagline, "*If the glove doesn't fit, you must acquit,*" was an effective theme to help solidify a defense verdict. Arm the jurors with your themes by providing them with short, memorable phrases that are repeated several times. You want these themes to become the answer to any jurors' opposing arguments. If you have a room full of jurors parroting back your themes, you have done your job well. For example, Juror A says, "*But there was a warning label on the package!*" Juror B responds "*Yes, but this was an accident that never should have happened*" (your theme). Or, Juror A says, "*But the product was defective!*" Juror B responds, "*Sometimes accidents happen*" (your theme).

Include Summaries of the Evidence. An effective way to condense the closing and arm jurors with your framework is to provide them with concise summaries of the evidence. You can do this verbally, but bullet-point summary charts are even more effective. Jurors like lists, and they are more likely to copy concise

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lists into their notes than general arguments. For example:

- Remind jurors of the three most important reasons why the plaintiffs failed to prove the accident was a proximate cause of harm to the plaintiff;
- Show the jury the eight reasons the defendant is negligent;
- Excerpt the three most important points from your witness testimony; or
- Create a summary of the damages or alternative damages figures.

Tell the Jurors What They Have to Do. Solidify your position by helping the jurors do their job, and motivate them with powerful language. Walk them through the verdict form and tell them how they should answer each question. Use assertive language that ties the evidence to the verdict form questions. Too often we hear attorneys argue, *“If you feel the defendants were negligent, then you should answer this question ‘yes.’”* Instead, phrase your comments more assertively and argue, *“You learned that the defendants failed to warn customers, avoided the simple fix, and put profits over safety. This evidence clearly proves that the defendants were negligent. The answer to this question is ‘yes.’”*

While this list is not exhaustive, utilizing these tips will improve your closing and will help create advocates in the jury room.

A VIEW FROM THE BENCH

A series of informal interviews with the men and women who see the most courtroom action: our state and federal judges



Hon. R.E. Jones

believe all our readers would like to have.

Rulings on motions and objections provide an immediate reading of the judge’s view of very specific issues. Occasionally, a judge will reveal observations about the nature of trial or the conduct of counsel – some of those may not be what you wanted to hear. Seldom, however, do lawyers have the opportunity to listen to judges talk freely about the courtrooms they run and the trials they witness from the most unique perspective of all involved. This series is offered in the spirit of a conversation we

We found it both fortunate and fitting that The Honorable R.E. Jones, Senior Judge of the United State District Court of Oregon, agreed to provide our first interview in this series. Judge Jones’ 42 years on the bench, starting in Multnomah County Circuit Court, moving to the Oregon Supreme Court in 1983, and culminating in his appointment to U.S. District Court in 1990, provides a remarkable basis for his firm understandings and keen insights.

An edited transcript of our interview follows:

Tsongas: What’s the most common mistake you see in attorneys’ approach to jury selection?

Hon. Jones: *“There is so much opportunity lost with closed-ended questions. This is a time for the jurors to do most of the talking and lawyers listening. Instead, it often is just the opposite. Junk the old clichés: ‘Will you be fair?’ ‘Will you keep an open mind?’ ‘Will you follow the court’s instructions?’ What do they expect the answer to be--‘No, I’ll be unfair, jump to conclusions and ignore the judge on the law.’”*

Tsongas: How do you think attorneys should make the most effective use of voir dire?

Hon. Jones: *“The most important question is, ‘How do you feel about this issue?’ Use it as a time to confess some of the bad stuff that is going to come*

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out. Then be quiet and listen to the answers.”

Tsongas: Do you think that attorneys should worry that “confessing some of the bad stuff” is going to contaminate the pool?

Hon. Jones: *“They should not be afraid of contaminating the jury. They should welcome the revelation. If someone says something awful about your client, follow-up with the question, ‘Who else feels that way?’ Then ask, ‘Does anyone have a different thought?’ This is the time to ‘unselect’ a juror.”*

Tsongas: What recommendations would you make to attorneys trying to improve their voir dire?

Hon. Jones: *“I think in respect to jury selection, if you have an important case, you should not ignore questionnaires. You can learn more from questionnaires than you can learn from hours of questioning. You can ask very piercing questions, and jurors will tell you things they won’t tell you in open court. You can almost pick a jury on paper when a questionnaire is used.”*

Tsongas: If lawyers could talk to jurors, what do you think they would learn?

Hon. Jones: *“Jurors love to see organized people. They don’t like abrasive lawyers. They love to see a witness impeached with prior inconsistent statements. They are disappointed with those they thought would be the best witnesses, like the police officers who don’t remember their own report, or the experts who can’t find their stuff in their own files. Too often, the ones they expect the most of, they find the least convincing.”*

Tsongas: What do you think jurors expect from a trial?

Hon. Jones: *“They want a straight-forward, ‘don’t try to kid us,’ ‘don’t talk down to us,’ ‘just lay it out,’ presentation of the facts. Don’t be demeaning; don’t get into a fight with the other side. They like to have things laid out so they can do a business-like job. They really*

take their role seriously. To emphasize that, I tell them, ‘You ought to be the ones wearing the black robes because your job is more important than the judge’s.’ That’s why we all stand for the jury. The jury really likes that. So for sure, courtesy to the jury is very important.”

Tsongas: What do you think jurors really dislike about lawyers?

Hon. Jones: *“Unprofessional fighting between the lawyers. Everyone is always uncomfortable if a couple gets into an intramural battle over dinner. Jurors hate to see the same kind of battle with the lawyers. They also hate sidebar conferences. They just hate the whispering. It gives an illusion of collusion. A lot of time it’s stage whispering.”*

Tsongas: What advice would you give lawyers about examining witness?

Hon. Jones: *“Don’t over do it on cross-examination. Often I find myself thinking, ‘Look, you made your point, you impeached the witness, you don’t have to shoot the rabbit, bury it, dig it up, and shoot it again. Make your point and move on.’ Also, on cross-examination, lawyers think you have to start every question with, ‘Isn’t it true,’ or, ‘Isn’t it a fact.’ You don’t have to do that. Just make a declaration, ‘And then you did this, right?’”*

Tsongas: What do you think about jury consultants in the courtroom?

Hon. Jones: *“You should be CIA spies, because I don’t know what you have done. I have no idea of the level of participation, but clearly you’ve made a difference. Our cases are so much better. When cases do go to trial, it’s at a much higher level. The lawyers are so much more prepared. We try less than five percent of our cases, but the cases that are tried are much better prepared. The court system has become so streamlined, that when we actually get to trial, it is very smooth.”*

Tsongas: What other changes have you seen since you’ve been on the bench?

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(Hon. R.E. Jones cont'd)

Hon. Jones: *"It's a whole new world. With what the lawyers did 42 years ago, they couldn't exist today. The capacity for reproduction, the capacity for display is totally different. [In a recent case], the plaintiffs' lawyer used five different mediums of presentation in her opening statement. It was spell-binding. We now pre-receive exhibits so they may be used in opening statement and in trial. Those used are projected to monitors in the jury box. No more of the old routine of asking a witness what an exhibit 'depicts' and then laboriously handing the exhibit to be passed among the jurors."*

Tsongas: Have you personally made any changes?

Hon. Jones: *"I always pre-instruct. It gives the lawyers so much more freedom to talk about the law in their case. So, a smart lawyer will ask for pre-argument instruction and the jurors will have a nicely indexed group of written instructions, which the lawyers can refer to in arguing the facts relevant to the issue of law. And that helps an awful lot."*

Look for the next interview in this series for another up-close and personal view from the bench.



LITIGATION GRAPHICS

Consolidate juror understanding and strengthen recall in the jury room. As most jurors are visual learners, reinforce verbal information with visuals that add persuasive clarity.

- Provide graphic consultation
- Design exhibit that display evidentiary elements; timelines, document and photo blow-ups, graphs charts and illustrations
- Develop two- and 3-dimensional animations that simulate events, put jurors "into the scene" and add the dynamics of motion and depth
- Produce video demonstrations, including "day-in-the-life" videos
- Create multimedia presentations
- Construct settlement brochures

TSONGAS WELCOMES JILL SCHMID, PH.D.



Tsongas Litigation Consulting, Inc. is pleased to announce that Jill D. Schmid, Ph.D., has joined us as an Associate Litigation Consultant. Jill has been working with Tsongas as a contract consultant since 2002, concentrating primarily on pre-trial jury research, jury analysis and litigation strategy.

Prior to joining Tsongas, Schmid was a professor at Willamette University and Linfield College. She focused her teaching on classes in public speaking, media, persuasion, interpersonal, political, and intercultural communication. Schmid's research focused on areas of message framing, narrative, visual messages and attitudes.

Schmid received her masters and doctorate from the University of Washington's School of Communication. There she studied communication theories and practices, information processing with special emphasis on the role of gender and race, attitude formation and change, persuasion, media relations, and advertising/marketing.

She is also a certified mediator in general as well as domestic relations mediation. Her interest in mediation stems from a motivation to uncover why and how parties' resolve conflicts.

She will work out of both our Seattle and Portland offices.

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