

FUNDAMENTAL TRIAL ADVOCACY

Second Edition

■ ■ ■

By

Charles H. Rose III

*Professor of Excellence in Trial Advocacy
Director, Center for Excellence in Advocacy
Stetson University College of Law*

AMERICAN CASEBOOK SERIES®

WEST®

A Thomson Reuters business

From the Library of
Joseph Cameron Bodiford

Mat #40794566

Moussaoui acted by lying, and 2,972 people died. They were brutally murdered. He lied so his al Qaeda brothers could commit those murders and those people were killed. They were because of Moussaoui's actions.

Hold him accountable for causing those horrible deaths. Thank you.

E. Opening Statement Checklist

The following checklist summarizes the chapter on opening statements. You should use it as a starting point in developing your own opening skills. This checklist is not "Holy Writ" and is merely the soil in which you should plant the seeds of your own creativity.

- I. Effective Opening Statements:
 - a. Thematic Statement
 - i. Grabber
 - ii. One-Liner
 - iii. Hook
 - b. Primacy and Recency
 - i. Bookend the theme front and back
 - ii. Most important information up front
 - iii. Weaknesses fronted during the middle
 - c. Tell the Story
 - i. Use structure
 - ii. Present tense verbs
 - iii. Appropriate language
 - d. Preview the Law
 - i. Give them a taste
 - ii. Identify how the law is important for this case
 - iii. Use the instructions you know will be coming
 - e. Set the Hook for Closing Argument
- II. Basic Legal Principles of Opening Statements
 - a. Judge is in charge

- b. Do not waste time arguing, tell the story!
 - c. Do not vouch for witness credibility
 - d. No personal opinions
 - e. If evidence is excluded do not mention it
 - f. Do not mention evidence if you have no good faith basis to believe it will be admitted
 - g. Do not violate the “Golden Rule” argument
- III. The Art of Opening Statements
- a. Structuring
 - i. Cohesive and complementary legal and factual themes
 - ii. Powerful moral theme
 - iii. Thematic statement
 - iv. Bookending
 - v. Focus on the story
 - vi. Preview the Law
 - vii. End on a reminder of what is coming in Closing (thematic bookending)
 - b. Delivering
 - i. First impression
 - ii. Beginning the Opening
 - 1. Acknowledge the court
 - 2. Assume the position
 - 3. Breathe
 - 4. Eye contact
 - 5. Jury gives you permission to begin
 - 6. Start strong!
 - iii. Body Language
 - 1. Fill the space quietly
 - 2. Command the room

3. Start from a still position
 4. Movement follows the words
 5. Podium – BAD
 6. Eye contact – GOOD
- iv. Verbal Keys
1. Present tense verbs
 2. Clear language
 3. Concise
 4. Dynamic language
 5. Positive approach
 6. Tone
 7. Modulation
- v. Dangers of Improper Argument
1. Do not stretch the envelope
 2. Persuasion comes from structure, not argument
 3. Civics lesson waste time
 4. No throat clearing
 5. Do not spend time on your weaknesses

F. Conclusion

Now that we have developed the core set of skills necessary to make effective and persuasive promises to the jury during opening statement we will move on to a discussion of how to keep that promise through the testimony of witnesses during direct examination. If you cannot fulfill the promise made in opening then all of your words are hot air, signifying nothing.

G. Closing Argument Checklist

The following checklist summarizes the information presented throughout this chapter on closing arguments. You should use it as a starting point in developing your own questioning skills. This checklist is not “Holy Writ” and is merely the soil in which you should plant the seeds of your own creativity.

- I. Use the Rule of Threes
 - a. Tell them what you are going to tell them.
 - b. Tell them.
 - c. Tell them what you told them and why it means you win.
- II. Remember the Three Primary Steps of Case Analysis:
 - a. Identify and analyze the legal issues.
 - b. Identify and analyze the factual issues.
 - c. Develop a moral theme and legal theory.
- III. Use the Seven Steps to Superior Closing Arguments:
 - a. Case Analysis, first, last, always (opening).
 - b. Grabber, one-liner, hook (moral).
 - c. Argue! Use the law and evidence to create inferences supporting your theme and theory.
 - i. Answer the questions in the jury’s mind.
 - ii. Beware the burden of boredom.
 - d. Uses appropriate rhetorical devices.
 - i. Primacy & recency.
 - ii. Rule of threes.
 - iii. Parallelism.
 - iv. Analogies & inferences.
 - v. Engage multiple senses.
 - e. Meet the burden of common sense (facts).
 - f. Instructions are your friend (law).

- g. Tell the jury what you want them to do (what the evidence demands).
- IV. The Do's of Closing Argument:
- a. Be confident in arguing your position.
 - b. Maintain eye contact, but not so much to make jurors uncomfortable.
 - c. Structure your argument - don't simply re-hash the facts.
 - d. Draw on the jury's common sense.
 - e. Use visual aids or physical evidence from the trial.
 - f. Address the standard of proof.
 - g. (Prosecution) Use rebuttal argument to hammer home your strongest points, how you refuted the defense's contentions, and remain positive in your case!
- V. The Do Nots of Closing Argument:
- a. Misstate the evidence or the law.
 - b. Argue facts not in evidence.
 - c. State your personal belief in the justice of your cause.
 - d. Personally vouch for the credibility of a witness.
 - e. Comment on the accused's exercise of a fundamental right (prosecution).
 - f. Make personal attacks on opposing counsel.
- VI. Legal Principles for a Proper Closing Argument:
- a. You are confined to the record. If evidence is not admitted you cannot argue it.
 - b. The trial court has supervisory authority over the scope and direction of closing argument, but should give deference to counsel unless the law is misstated.
 - c. Prosecutors cannot argue merely to inflame or arouse passions. The courts will consider whether a substantial right of the accused was violated when reviewing this issue.
 - d. Advocates cannot intentionally misstate evidence or attempt to lead the jury to draw improper inferences from admitted evidence.

- e. Personal beliefs and opinions of counsel are forbidden.
- f. Reasonable inferences are permissible and expected.
- g. It is improper to refer to evidence which was either successfully objected to as to admissibility, stricken from the record, or otherwise excluded.

H. Conclusion

Applying the lessons of this chapter will assist you greatly persuading the jury to follow your line of reasoning at the close of the trial. If you properly identify your closing arguments' legal theories, factual theories and moral themes during case analysis you will be able to answer the why question that is always present in the minds of the jury. Remember, you must not allow the opposing side to determine your destination during closing argument.

If you do not take the time to sort it out using the tools provided in this chapter you are at the mercy of the opposing counsel who does. That is not a place that anyone wants to be. Let us turn our attention now to jury selection. Once we have identified how we expect the case to proceed from opening through closing we must identify those jurors who cannot serve in a fair and impartial manner. Jury selection is the vehicle for this process.