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Free Speech, Due Process and Trial by Jury

Making Your Closing Argument – Where Exactly is the Beef?

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Closing arguments are one of the most anticipated parts of any jury trial. They are the last opportunity for both sides to "make their case" before the jury begins its deliberations. Consequently, it's important for the advocate to choose his or her words carefully for maximum impact.

In a recent IP trial we worked on together, the last 60 seconds or so of the closing argument for the defendant (our client) repeated a theme that had been initiated in jury selection a week earlier. This theme drew from the iconic 1984 ad campaign for Wendy's. Oh, we bet you remember it. The three elderly women staring at an enormous hamburger bun containing a tiny sliver of meat, while one of them repeats, over and over, "Where's the beef?"

It is sometimes challenging to articulate a simple but compelling theme in a case involving complex and unfamiliar technology. One familiar approach is to invest the jurors from the beginning in the burden of proof and its importance. It sounds trivial, in one sense. After all, isn't the burden of proof the stuff of the most basic kind of trial advocacy? It is. Yet we've both found that its value as a defense argument is often overlooked as "too basic." There is also a nagging concern that by focusing on the lack of proof, there will be the subtle suggestion created that the approach is more of a "technicality" and not "the truth." Moreover, it's more "exciting" and more dramatic advocacy to point to witnesses caught in inconsistencies or squirming over damaging emails.

And yet we've found that jurors throughout the country are very responsive to an approach that emphasizes the inability of one side to prove its case. Finding a way to couch the argument with broad appeal, such as by reference to a famous advertising campaign, is all the more persuasive. What follows is a transcript of the last minute or so of the closing argument for our side, slightly edited.

> *I've been thinking about how to end this for about a week. And what has come to mind over and over is a famous old line: Where's the beef?*
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> *Some of you may remember that from an old television commercial years ago. Where's the beef? It was a line uttered by someone who said there's nothing there. There's nothing there. It's become kind of a way to ridicule someone that doesn't have the goods.*
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> *So, I say to you and I say to the plaintiff, I say to their lawyers, I say to their client representatives: Where's the beef? You brought this case. You didn't prove it.*
>
> *There's no beef.*

This description of a failure of proof works because it is relatable and memorable. Finding something that most people can relate to — like a famous TV ad — is useful, though we note the reference might not have resonated with a jury made up of mostly people under 45. And ending with the burden of proof is an ideal way to reinforce the point with the jurors who are leaning towards the defense position before deliberations.

So, why is it important to continually reinforce the plaintiff's burden of proof from the opening statement to the closing argument? Because, as confirmed by the hundreds of mock trials we've either run as a consultant or participated in as a trial lawyer over the years, jurors often get the burden wrong. We hear mock participants say things like, "The defense didn't prove it didn't infringe." We watch uncomfortably as those statements go unchallenged by otherwise smart, strong defense-leaning jurors. They fail to understand that one has no obligation to prove his or her innocence. Somehow, they believe that because it's a company on the defense side instead of a person and a civil case instead of a criminal one, the obligation shifts to the corporate entity to prove it is not liable.

Jurors often put themselves in the defendant's shoes and think, "If I had proof that I didn't do it, I would bring that evidence for the jury." However, jurors also appreciate (when we teach and reinforce the burden) that the government or the plaintiff cannot just allege you did something wrong. They have to actually bring evidence and move the scale to tip it in their favor — either some (preponderance) or a lot (beyond a reasonable doubt). But it's all on them. This continual education at trial sets up the "aha" moment for defense-leaning jurors. When

counsel for the plaintiff tries to suggest that a defense expert should have done more work or more tests, strong defense-leaning jurors already know the response: "The expert didn't have to prove anything."

When you put the puzzle together piece by piece and you confirm for jurors that the plaintiff has fallen well short of meeting its burden, you have earned the right to give the kind of closing we gave last month in Waco. Because the jurors knew the plaintiff did not prove its case of infringement, they expected us to get up and say so. The jury accepted, and we believe expected, that we were going to come out swinging. When I reminded the jury that one of the plaintiff experts claimed his two years of experience in the oil and gas industry came from working on this case, I had earned the right to argue, "That's like saying I learned to become a doctor by watching General Hospital." You cannot say lines like that in an opening statement. Jurors will see it as cocky and likely disrespectful. But when you dismantle a case witness by witness and provide credible evidence on your affirmative defense, defense jurors are ready to hear and watch the knockout punch.

As it turns out, all the jurors were ready for this closing. In under three hours, they determined that our client did not infringe the plaintiff's three patents and that two of them were invalid.

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