

Strategies for Presenting Closing Arguments: Plaintiff's Case

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I. INTRODUCTION

As you make your closing argument you are, hopefully, confirming for the jury that the decision they have already made is the correct one. Closing argument is your opportunity to convince the jury that a significant award is appropriate in your nursing home case because of the bad conduct of the nursing home and because the life of an elderly person is no less valuable than that of any other human being. The jury should understand that all life is precious and should end naturally, not because of a corporation's greed and indifference. Closing is your opportunity to convince the jury of the righteousness of your case and the opportunity they have before them. It is an opportunity to protect those that cannot protect themselves and to make a difference in the quality of care nursing home residents receive.

II. WHAT ARE YOU TRYING TO ACCOMPLISH?

After years of work, meetings with the client, depositions, hearings, countless hours spent reviewing and analyzing the chart, consultation with experts, preparation and presentation of witnesses, you now stand before the jury for the last time in your nursing home case. You have a great responsibility to the resident and/or their family. You also have a responsibility to the nursing home population at large. The jury's decision in your nursing home case will have an effect on the care that nursing home residents receive. If you win, the defendant nursing home and others will pay attention to the verdict and, hopefully, make changes in the quantity and quality of care they provide to their residents. If you lose, the nursing home will be tempted to sit back and tell themselves "its business as usual." The jury's verdict in your case will be important on many levels.

What are you trying to accomplish in closing? First, you must reemphasize the theme you have developed during voir dire and throughout the trial. Effective themes in nursing home cases will be discussed later in this paper. Your theme should be the foundation of your closing.

All of the specific points, references and inferences alluded to throughout the trial should be tied together to reinforce Plaintiff's theme and Plaintiff's theory of liability. Equally important, your closing argument must counter the defense theories advanced during trial and closing argument.

III. BE YOURSELF

I have met Johnny Cochran. You and I are not Johnny Cochran. Do not, I repeat, do not try to imitate another attorney during your arguments to the jury. Or, as my grandfather used to tell me "don't try to be something you ain't." The beautiful thing is you don't have to. Juries respond to lawyers who know their case, who are passionate and honest about their case, and who have thoughtfully crafted the facts of their case into an argument that counters those of the defense. All of us can do that. (I left out the important point that the case must be meritorious). You and I have both seen lawyers win cases who in no way could be referred to as "silver tongued". I am a prime example.

Do not read your closing argument or constantly refer to notes. At most, have an outline to keep you on track. The jury wants to hear what is in your heart, not a speech you carefully composed the previous night. If the court will allow it, stay away from the podium; your presentation will be much more natural.

IV. DRIVE HOME YOUR THEME

I cannot over- emphasize the importance of a well-crafted theme. A good theme, based on the facts, pulls the evidence together in the minds of the jurors. It validates the evidence and gives the jury a real-life frame of reference for their verdict.

There are an endless number of themes that are effective in nursing home cases. Consider the facts of your case in their entirety and state what your case is about in one sentence. Mock trials and focus groups are a great way to find out what your jury will think about your case. Ask your mock jurors how they would describe the case. Whatever the theme, you must emphasize it throughout the trial.

Some themes that have been persuasive and have produced significant seven figure verdicts in nursing home cases are outlined below:

A. ACCOUNTABILITY

Accountability is the notion that we are all held to certain standards in our lives and in our jobs. Nursing homes are no different and must also be accountable. What would our lives be like if our society had no benchmarks by which we judge performance and rules to which our conduct must conform. The premise that actions have consequences and that we must all be responsible for our actions will strike a common chord with the jury. Nursing homes must be held to the same standard. This theme rings especially true in the minds of conservative jurors.

B. THERE WAS NO CAPTAIN OF THE SHIP

The facts in many nursing home cases will allow you to argue to the jury that, in terms of the overall care given to the resident, the right hand did not know what the left hand was doing. Perhaps an appropriate care plan was prepared for the resident, but the staff was not familiar with it and did not implement the recommended approaches. There was no comprehensive coordination of the care, no continuity of care, no overall supervision.

C. SANCTITY OF LIFE

This is another theme that resonates with conservative jurors. The basis of this theme is that all life is precious, even if you are old and feeble and your mind and body do not work as well as when you were young. The right of a human being to live free of neglect and abuse and to receive good care deserves no less protection just because that human being has become old and infirm. Children and the elderly are the most vulnerable human beings in our society. If children were treated the way some nursing home residents are, the public hue and cry would be overwhelming. There should be no different standard for the elderly.

D. THEY GAVE UP ON THEM

Analysis of the chart in some nursing home cases, and perhaps the testimony, may reflect an attitude on the part of the staff that “they were going to die anyway.” Unfortunately, I have seen several cases where this seemed apparent after a resident’s condition became terminal. Emphasize with the jury that the job of the nursing home is not to give up, but to keep trying regardless of how long the resident had to live.

V. PERSONALIZE THE RESIDENT

During a nursing home trial, believe it or not, it is easy to overlook a most important person- the resident. You can spend a week talking about the resident’s chart, their medical condition, their abilities and limitations, the care they did or did not receive, and the jury will still not know who this person really was. It is imperative you spend time in trial personalizing the resident. The jury needs to know who they were as a person.

Hopefully, you will have caring family members who were actively involved in the life of the resident, and visited frequently at the nursing home, to describe this person to the jury. Present a capsulized picture of their life during closing. Locate pictures of the resident before they went into the nursing home and perhaps while they were there. If caring family members are also in the pictures, that is even better. It may be appropriate to put a picture of the resident where the jury can see it during your entire closing.

To effectively personalize the resident I believe you have to spend significant time with the family. Go to their house, see what mementos they have from the resident's life and take your time in talking with them about this person. Put yourself in the shoes of the resident. See the nursing home as they saw it. By doing so, you will be able to present a picture to the jury of the life and experiences of this human being.

VI. COMMON DEFENSE THEMES

Defense counsel in a nursing home case typically will try and establish certain facts that take the focus off the bad care at the nursing home and places elsewhere. These arguments must be countered during closing.

A. THEY WERE SICK WHEN WE GOT THEM

Of course they were sick that is why they needed a nursing home. Healthy people do not go to nursing homes to live. Embrace this argument and use it to your benefit. You can show that the resident's pre-existing condition put the nursing home on notice of the need for a high level of individualized care.

B. WE DID THE BEST WE COULD CONSIDERING....

Giving the best care you can in a nursing home means never giving up. It also means giving the care you told the family you would and giving care that was appropriate. Do not let the defense argue that the bad outcome of your resident was unavoidable unless and until they prove adequate and appropriate care was given. For instance, if appropriate skin care was not provided to the resident and documented, the facility cannot argue with a straight face that the resulting pressure sore was unavoidable. Good care must have been provided and documented, or the argument that "we did all we could" will be hollow in the eyes of the jury.

C. THEY WERE GOING TO DIE ANYWAY

This defense will be presented in a very subtle manner during trial. The defense will make a point of blowing up records that just so happen to say "prognosis poor", "condition terminal", "life expectancy nil". This is an attempt to create the picture that death was a welcome relief. No one on earth has the right to cut a life short by neglect. Whatever quality of life a nursing home resident has, it is their's and no one has the right to take it away prematurely.

If you hear this subtle argument during trial, expose it for what it is during closing. Hold it up to the light so that all the jury can see the callousness associated with it.

VII. DAMAGES

Arguing damages to the jury in a nursing home case is different than most other cases because the economic damages are typically low or non-existent. There is no lost wage claim and many times the medical bills are not high unless you have an amputation, significant flap surgery for pressure sores, etc. The primary elements you are talking about are pain and suffering and, if the facts warrant it, punitive damages.

When arguing pain and suffering, pay close attention to the chart and any references concerning pain. These will be typically located in the nurses notes and should be emphasized during trial and closing. If pain medication was subscribed but not given, blow up those records and show them to the jury. If you have a pressure sore case and pictures of the pressure sores are available, you must show them to the jury. (Resist the temptation to over-do it). Have your experts testify about the pain associated with pressure sores and the treatments and dressing changes. If your experts are so qualified, have them testify to the fact that just because a person has dementia does not mean they cannot feel pain. Focus on the chart. Show the jury how the chart supports the fact that your resident suffered greatly. If witnesses testified to the resident's pain and suffering obviously that must be emphasized as well.

Punitive damages is another difficult issue. In most states, one of the primary factors to be considered by the jury in determining punitive damages is the egregiousness of the conduct. How bad was it? If you can get your surveys into evidence, present the argument that the facility was on notice of their problems such as short staffing, inadequate administration of the facility, poor wound care treatment, etc. This will show the jury that they knew when your resident was admitted to the facility that they could not provide the care the resident needed. This will establish conscious indifference.

The bottom line concerning damages is that you must ask for them. Don't assume that the jury knows what is an appropriate verdict amount. Give them some frame of reference to show that a significant damage award is warranted and ask for it.

VIII. CONCLUSION

It is critically important that the jury be left with the clear message that human lives cannot be devalued simply because of old age, poor health and feebleness. They must realize, and you must convince them, that they have an opportunity to set the bar a notch higher on the quality of care that is given to nursing home residents. They should see their verdict as an opportunity that few people have to do good. Science has allowed us to live longer and, as a result, the nursing home population will grow by leaps and bounds in the years ahead. Good care in nursing homes must become the norm and not the exception. Your jury's verdict can help make it so.