

## Trial Diary: "And the crowd cheered . . ."

A chair's year goes too quickly. In this, the last of my chair's columns, I finish with excerpts from my trial diary about the end of the government's case and closing arguments.

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Magic words in long trials—"the government rests." Some jurors seemed surprised. I chose to take that as a good sign. We then spent all afternoon arguing motions for judgment of acquittal. I went last. I urged that the case was about civil issues and not criminal issues. I cleverly distinguished bad testimony. I grew more forceful in the face of angry and dismissive questions from the court. I quoted Shakespeare's *Macbeth* about sound and fury signifying nothing. The judge asked, "Are you saying it does not matter if the marketing materials are misleading?" I responded this was the wrong focus. The judge frowned. I said a better question was what evidence existed that my client had anything to do with the marketing materials or believed anything in them was false. The judge sneered. I got on a roll. I said everything about the government's case was built on speculation and was the product of hindsight analysis. The judge barked, "Isn't circumstantial evidence good enough?" I pretended not to hear. I carried on about the contracts investors signed, and that the money the investors paid became company money and that this money was my client's to take and use

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as he pleased. It sounded so good, I was starting to believe me. I finished with a flourish—"Amazingly, your honor, and despite the fact all 80 witnesses the government called were aimed at my client, there are huge gaps in the government's proofs and judgment should enter for my client." Right. Ignore

those pesky 80 witnesses. Unring that big bell the government clanged every day. Toss away that crazy notion the evidence has to be viewed favorably to the government. Who are you going to believe—me or your lying eyes and ears? And when the prosecutor got up, he shook his head and told

The  
"glamour moment"  
in trial is closing  
argument.

the court, "Just when he thought I couldn't amaze him any more. . . ." I took that as a compliment. Oh, yeah—the motions were denied.

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The "glamour moment" in most criminal trials comes with closing arguments. Today the prosecutor gave his initial closing and I gave mine. I maneuvered a bit to make this happen. We might have had time for some closings yesterday, which was Thursday. But I wanted the jury to go home for the weekend with my closing ringing in their ears. So I shaked-and-baked a bit and the judge went along.

The prosecutor asked for three to four hours for his initial closing. I asked for two-and-a-half hours, telling the court I might go a few minutes long. There is a big challenge in structuring a closing in a long and document-intensive trial. Here we had 80 government witnesses and 12 boxes of exhibits. The events in the case spanned five to six years. The trick was to decide how to cover everything and not lose the jury in the process. I figured I wanted to

avoid too much of a break in my argument. And juries will stop listening to lawyers talking at them after an hour or so. So I urged the judge to let the jury have an early lunch and to allow me to start in the early afternoon, if the prosecutor went deep into the morning. He did and it worked out perfectly. I had also organized my closing so that about 90 minutes into it I would ask for the midday recess. That way, the jury gets to stretch for a few minutes and I have them alert for my last hour. This worked great, too. Except the trial judge decided to change the rules. I went 90 minutes. I asked the court to break. She sent the jury out. Then she snapped that I had 30 minutes left. I responded softly that she allowed me two-and-a-half hours. She glared and said she gave me two hours. I looked at my cocounsel. They hid behind briefcases. I looked at the court staff. Staff ducked behind exhibits. I turned to the court security. They seemed to be reaching for their weapons. I turned back to the judge and asked if I could be allowed 45 to 50 more minutes. She sighed. She acted like this was a very big deal. I said “please.” She said “OK, just don’t go past.” Really.

I believe in defense closings that flow. I always have some kind of introduction. Here I decided to talk about truth. My idea was that the government case primarily depended on four witnesses who I say were liars—caught on cross-examination in numerous lies. The government case also was heavy on prosecutor bombast, making neutral facts sound bad. So I did the “verdict means speak the truth” thing, said how the truth was easy and didn’t need a spin, and argued the government case was built on lies and half-truths. I gave a couple examples from the testimony and wrote on my board that prosecutor questions are not evidence. I then harkened to a line I’d used to good effect during a key cross and accused the government case of being like *Alice in Wonderland* where black is white and white is black. I ran off a litany of statements my client had made denying wrongdoing and how the prosecutor was trying to make them sound like admissions of guilt. I played with some syllogisms and made that the point the government case depended on bad and faulty logic. I usually go early to the court instructions and cherry-pick the ones I like. I did that here, pounding good faith and willfulness. I usually finish this part with reasonable doubt. And I did, playing the hesitation card and asking the jurors if they would hesitate to trust their children to the government star witnesses. Of course they would hesitate. From there I typically use a chart of “rea-

sons to doubt” the defendant’s guilt. In this case, I put together 25 reasons to doubt. I started by pointing out that the jury just needs one reason to doubt and the verdict is “not guilty.” I then went to my 25 reasons. First two are almost always swipes at the government exhibits and the government witnesses. I went hard here. I then flew through all sorts of things that are badges of good faith or things that are inconsistent with the government theory of prosecution. I ridiculed the lack of real evidence. I kept looping back to my prosecutor-questions-are-not-evidence chart. I used lots of exhibits to show my client’s good faith. I highlighted favorable testimony. I danced. I danced around and through every aspect of the case. I wrapped with a chart I love using. It’s a color version of how high a burden the reasonable doubt standard is. I pointed. I waved it around. I made it sound like the government had to climb to the top of Mount Everest before it could earn a guilty verdict. Then I moved to my finish. I always look for an emotional ending. Here I merged two. I put down all my props. I stood in front of the jury alongside the podium. I told them I was going to surprise them. I told them the United States was going to win the case (and yes, like all good closings, mine was pure thievery—here I stole from Edward Bennett Williams). The jurors looked startled. The judge looked startled. I smiled and repeated it: The United States will win the case. I then explained, making reference to the words carved on the entrance to a famous English courthouse that, when the reputation and liberty of a citizen are preserved against false testimony, the government wins. I tied this to the jury’s job. Return the right verdict and we all win. Then I went for their hearts. I told them there are many things in this world you can bargain for and buy. I made it a long list. And I finished by saying there’s one thing you can’t bargain for and buy. The truth. Because when you do, you don’t get the truth. You get half-truths and lies, which, I say, is what happened to the government case here. I told them the only fair and correct verdict was a verdict of not guilty. Not guilty, dammit. I may have left off the “dammit.”

The crowd cheered. The government slunk out and away. My fellow counsel mobbed me with congratulations. My client actually said thank you. Well . . . most of this happened. Even the “thank you” part. And like the Bob Seger song—“every ounce of energy I tried to give away, as the sweat poured out my body like the music that I played”—I was spent. But it was a very good day.