The Art of Trial Advocacy

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Preparation of Effective Rebuttal Arguments

Introduction

Most people agree with Thomas Edison's dictum that "genius is one percent inspiration and ninety-nine percent perspiration." Yet, many trial counsel pretend that Edison's observation does not apply to the practice of making rebuttal arguments. Counsel routinely neglect pretrial analysis and preparation of the rebuttal argument and rely instead on the tenuous hope for divine inspiration at the moment of engagement. Often, rebuttal arguments are impromptu reactions to defense arguments that are made in the heat of the courtroom struggle. Lacking an integrated plan of attack, the rebuttal often becomes a series of insipid postscripts instead of a cohesive and forceful *coup de grace*.

The rebuttal argument gives the government an opportunity to regain the momentum, to reestablish focus on the key issues in the case, and to refute the defense's arguments on key issues. A purely reactive point-by-point response to defense arguments cannot accomplish this mission. The rebuttal must refute the defense arguments on key issues and forcefully reassert the government's theory of guilt. The leading causes of weak and ineffective rebuttal arguments are inadequate preparation and ineffective organization of the argument. This note proposes a method for constructing rebuttal arguments that are consistently on target.

Prepare the Rebuttal as an Integral Part of Your Closing Argument

It is often said that the preparation of a case should begin with an outline of the closing argument. If that is so, preparation must also begin with an outline of the rebuttal argument. The government gets to argue first and last.[1] The benefits of primacy and recency should be fully exploited by careful planning. The first closing and the rebuttal must work together to maximize the persuasive presentation of the government's case.

The mission of the first closing is to marshal the evidence that supports the government's theory of guilt. The government must carry the burden of proof on every element of the offenses charged and must disprove any defenses that are raised by the evidence. It is essential that the first closing meet these goals. Trial counsel should not rely on rebuttal to pull victory from the jaws of defeat. Rather, the primary mission of the rebuttal is to restore commitment to the theory of guilt that was clearly constructed in the first closing. It is a restoration project, not a new building. The themes and structure of the two arguments must be carefully coordinated to contribute to the same persuasive goal.

Counsel should avoid two pitfalls. One is the temptation to anticipate fully and to neutralize defense arguments in the first closing. While there is an advantage in immunizing the panel against defense arguments, too much attention to the defense argument distorts the focus of the first closing. The focus should be kept on your affirmative proof with occasional warnings against specific defense sophistries to come. This approach sets up rebuttal on those points. Save the full refutation for the rebuttal. Too much anticipation weakens the rebuttal by tipping off the defense counsel to your best rebuttal arguments and gives him the chance to respond to your rebuttal as well as your case-in-chief. A second pitfall lies in the temptation to sandbag the defense by saving everything for rebuttal. This tactic surrenders the advantage of primacy, which is the benefit of going first. It may also run afoul of the scope limitations on rebuttal argument. Rebuttal is generally limited to matters that are raised by the defense argument.[2] For example, if the defense counsel ignores the premeditation issue in a homicide case and exclusively argues the issue of identity, the trial counsel may be precluded from arguing the premeditation issue during the rebuttal. The defense counsel could also counter the sandbagging tactic by offering argument only on some of the charged offenses or by waiving argument entirely.[3]

Control the Agenda

Since the first closing established the agenda of key issues, the rebuttal can begin by reminding the panel that resolution of those issues will determine the verdict. It makes sense to organize the negative rebuttal around those issues. You must resist

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1. The *Manual for Courts-Martial* states simply: "After the closing of evidence, trial counsel shall be permitted to open the argument. The defense counsel shall be permitted to reply. Trial counsel shall then be permitted to reply in rebuttal." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 919(a) (1995). Although the *Manual* clearly gives the government a right to present rebuttal argument, the length and scope of the rebuttal remain within the discretion of the military judge. *See id.* R.C.M. 919 discussion. "The military judge may exercise reasonable control over argument." *Id.* R.C.M. 801(a)(3).

2. The discussion following Rule for Courts-Martial. 919 further states: "The rebuttal argument of trial counsel is generally limited to matters argued by the defense. If trial counsel is permitted to introduce new matter in closing argument, the defense should be allowed to reply in rebuttal. However, this will not preclude trial counsel from presenting a final argument." *Id.* R.C.M. 919 discussion.

3. Defense counsel will, however, be reluctant to use these tactics because of this risk of raising an ineffective assistance of counsel claim.

the temptation to engage in a point-by-point response to the defense argument. That practice allows the defense to control the agenda and causes the rebuttal to deteriorate into an uncoordinated attack. A better method is to identify the three main issues in the case and to construct an outline for rebuttal based on each of those issues. You should anticipate and wargame the defense arguments on those main points. You will then be fully prepared to listen and to refine the rebuttal during the defense argument. If the defense fails to address one of the issues that you selected for rebuttal, you can then explain to the panel why that omission is so glaring. Having analyzed the key issues in the case, trial counsel can prepare an outline of rebuttal argument before trial.

Structure the Rebuttal for Maximum Effect

A standard format for organizing the rebuttal arguments will help counsel focus on the goals of rebuttal and help them get started. This format can be modified as required to meet the exigencies of each case.

Part I: Introduction

In the opening seconds of the rebuttal argument, the trial counsel must regain the momentum for the prosecution. This can be done by identifying the crucial shortcoming in the defense argument or by turning the defense theme against them. Counsel should develop an arsenal of responses for standard defense themes and use them to fashion a one-line rebuttal introduction. The next step is to reassert the government theme. A strong first closing puts you in the best position for rebuttal. Having already made your case, you can confidently begin the rebuttal argument by recapping the most compelling evidence of guilt. If the defense has stressed the reasonable doubt standard, acknowledge the government's burden of proof and confidently embrace it. This restores the proper focus on what you perceive as the real issue or issues in the case and sets up the outline for rebuttal.

Part II: Key Point Rebuttal

Having set the stage by restoring focus on the crucial issues, you are ready to proceed with the negative aspect of the rebuttal—refuting selected arguments of the defense. The following three-step process should be used to address each key point that you that you selected for rebuttal.

The first step is to restate the defense argument. You cannot cut off a snake's head while it is moving, and you cannot effectively refute an argument without clearly restating it. Any attempt to make a strawman out of the defense argument will undermine your credibility with the panel and will draw an objection from an attentive defense counsel. If you fail to restate the defense argument accurately, the snake will still be moving in the panel's mind.

The next step is to refute the defense argument. This is the heart of negative rebuttal. Having immobilized the snake, you can safely and cleanly cut off its head. Refutation can take a variety of forms, but it all boils down to this: you can refute the fact or you can refute the inferences drawn from the facts. No matter which tactic you use you must always appeal to common sense and explain why your theory offers a better alternative. The quality of this part of the argument will dramatically increase if counsel devote time during case preparation to anticipating defense arguments and thinking through avenues of rebuttal.

Finally, you should recap your theory of the case. After each argument is identified and refuted, explain how that conclusion affects the big picture and why it makes your theory of guilt the only certain conclusion.

Part III: Final Appeal for a Verdict

The final appeal for a verdict is the final word before instructions. Use it to make your final appeal to the panel or judge. This appeal combines the plea for justice, the restatement of your theme, and a summary of the reasons that compel a verdict of guilty. This portion of the argument should be committed to memory.

Feel Their Pain

An effective rebuttal argument must be concise. Trial counsel must be clear, be brief, and be seated. At this stage of the trial, the panel is tired and restless. They want to get on with the task of deliberation. You must ease their pain. You must show them the light at the end of the tunnel while projecting confidence in the importance of your final words. Several techniques will help to enhance the persuasive force of the rebuttal. First, put a fresh face up there. If the trial counsel makes the first closing, the assistant trial counsel should make the rebuttal. There is no rule against tag teaming, and it adds a new element of interest to recapture the attention of the court. Second, unleash your passion. The first closing puts a premium on the careful construction of the affirmative case. At the rebuttal stage, trial counsel can afford to convey a sense of anger and sarcasm toward the defense efforts to divert the course of justice. Of course, this tactic works only if you have established credibility with the panel. If you have been overreacting throughout the trial, another tantrum in rebuttal will only induce yawns.

A third technique for gaining the attention of the panel during the rebuttal is to be clear about the aims of the rebuttal. Tell the members your plan for rebuttal; for example, a trial counsel might say: "It is not necessary to prolong this trial with a lengthy point-by-point rebuttal of every fallacy contained in the defense argument. I'm sure you detected many errors yourself. Instead, I have identified three issues that go to the heart of this

case." Finally, save something fresh for the final argument. If you have a particularly devastating argument, or a persuasive analogy, story, or other rhetorical device, consider saving it for the rebuttal. Saving something good for the end will exploit the benefit of recency and deny the defense any opportunity to respond to your best stuff.

Conclusion

The rebuttal argument can be an insipid postscript that tries the patience of the court, or it can be the *coup de grace* that secures the verdict. The difference lies in the preparation and organization of the argument. Success is more likely to be achieved through old-fashioned perspiration than momentary inspiration. A well-structured rebuttal frees counsel to focus on the art of expression that transforms a good rebuttal into a truly inspired one. Major Einwechter.