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Expert-lay interaction in jury trials (case study of closing arguments)

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Abstract

This study arises out of the intention to examine the features of expert-lay interaction in a jury trial. The paper studies closing arguments constructed by legal experts as possible worlds which would be attractive for jurors. Theory of possible worlds is employed to present discourse practices as versions of the real world which may overlap, supplement or contradict one another. Legal experts construe and present possible worlds to jury members who deliver verdicts on the case, i.e. possess decisional power. Efficient involvement of jurors into the possible world constructed by the legal expert signals formation of discourse of concord. In order to make their own possible world more credible than the world of the procedural opponents, legal experts employ different interaction tools: description of legal concepts, empathy, appeals to social values, imperative and question utterances, personalization.

Keywords: discourse interaction, juror, legal expert, empathy, closing argument, possible world

Introduction

The language of courtrooms has been extensively investigated by a number of researchers (Danet, 1985; Cotterill, 2003; Heffer, 2005; Dubrovskaya, 2010; Palashevskaya, 2012). Most researches deal with successful communication strategies in courtroom discourse practices or juror's behavior and decision making processes (e.g., Bray & Kerr, 1979; Hastie, Penrod, & Pennington, 1983; Diamond, 1997; Bornstein, 1999). Another research field is based on the description of actual courtroom proceedings (Atkinson & Drew, 1979; Matoesian, 2001; Harris, 1984; Philips, 1987) or forensic linguistics (McMenamin, 2002; Olsson, 2004; Heffer, 2005).

Taking into account the increasing interest in the relations of law and language, this study focuses on discourse interaction of legal experts and laymen in jury trials. The legal experts possess expert knowledge and construe their utterances using terminology of the discourse expert community, while jurors construe and

interpret utterances through the prism of their phenomenological experience and knowledge. The special relationship between experts and lay persons in courtrooms is due to the fact that legal experts are in a more advantageous position as they possess communicative power and expertise, while the jury members assume the decision power. Jurors being passive spectators of a show are "the sole holders of decision power. They are not able to interact directly with other participants, but they are the sole decision makers regarding the verdict to be reached, so discourse practices constructed by legal experts are intended to the jurors" (Anesa, 2011). "While the decision power belongs to the jurors, communication power to guide discourse practices lies in the legal experts' hands" (Heffer, 2005).

The present study aims to understand the nature of the tools that emerge in the communicative relationship between members of the discourse expert community and laymen in jury trials. We will focus on the nature of language in jury trials, pay attention to the transition from legalese to plain English as an efficient expert-layman communication strategy.

The concept of discourse expert community used in the present article is based on the concept of discourse community developed by Swales (1990, 2016) and modified by Kaplunenko (2012). In his recent work, Swales identified eight characteristics of the discourse community:

1) a discourse community has a broadly agreed set of common public goals;
2) a discourse community has interaction mechanisms;
2) a discourse community uses its participatory mechanisms primarily to provide information and feedback;
4) a discourse community utilizes and hence possesses one or more genres in the communicative furtherance of its aims;
5) a discourse community has specific vocabulary;
6) a discourse community has a threshold level of members with a suitable degree of relevant content and discursive expertise;
7) a discourse community develops a sense of "silential relations"; 8) a discourse community develops horizons of expectation (Swales, 2016, p. 8-9).

Kaplunenko (2012) suggested the concept of discourse expert community as a final stage in knowledge evolution. He demonstrated how a concept has evolved into a notion and eventually into a term. Each evolutionary stage is a specific type of discourse practice. The concept is the basis for discourse of differences where there is no united nominations of objects and phenomena. The notion is a mark of discourse of concord where the semiotic entity acquires a nomination as a result of negotiating its various features. The term appears at the third stage which is called discourse of expert community. Terminology as an inherent feature of this stage helps differentiate between experts and laymen. Members of expert

communities possess special knowledge for handling professional issues, generating expert opinions and ideas. Terminology serves as a specialized limiting nomination of objects, phenomena, their properties and relations in professional settings, and prevents different interpretations. Entering a discourse expert community, individuals adopt its language, interpret professional phenomena on the basis of expertise and terminology rather than on phenomenological experience.

For analysis of court discourse practices, we also use the concept of possible worlds which was inspired by Leibniz' philosophy and developed by philosophers of the analytic school (Kripke, 1963; Lewis, 1986; Hintikka, 1989; Plantinga, 1976) as a means to solve problems in formal semantics. Further possible world theory was adapted to the fictional worlds of narrative by Lewis (1986).

The basis of possible world theory is the idea that reality as the sum of the imaginable is a universe composed of a variety of worlds. This universe is hierarchically structured by the opposition of one element, which functions as the center of the system, to all the other elements of the set (Kripke, 1963). The central element is known as the actual world while the other elements are non-actual possible worlds. For a world to be possible, it must be linked to the actual world by a relation of accessibility. The boundaries of the possible depend on the particular interpretation given to this notion of accessibility (Ryan, 2013). According to Eco (1984), a literary text is not a single possible world, but a machine for producing possible worlds. The same is true for courtroom discourse practices: communicants construe possible worlds with different degrees of closeness to the real one: from its adequate representation to the complete distortion, from the truth to the falsification, phantasy, from the immersed into the past to the predicted, desired future (Kubryakova, 2004, p. 529).

In adversary judicial systems, jurors receive information selected, managed and controlled by legal experts and decode it into semiotic signs according which they can be easily interpret as lay persons. A jury trial is a communicative event in which legal experts create contradicting possible worlds and present them to the jurors which deliver final verdicts. Legal experts struggle for discourse power to manage social interaction and jurors' behavior. The struggle in jury trials is always an antagonistic game of two individuals, a game with a saddle point (see Figure 1).

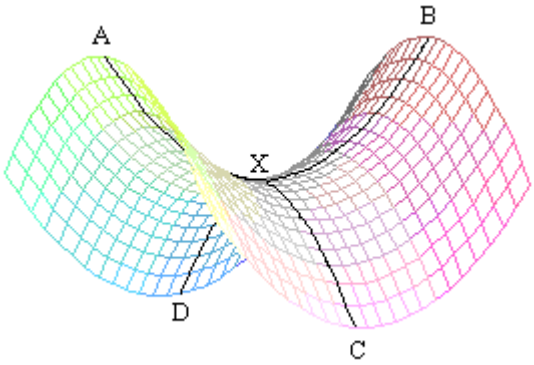

Figure 1: A game with a saddle point

In game theory, the saddle point (X in Figure 1) is a point on the surface of the graph of a function where the slopes (derivatives) of orthogonal function components defining the surface become zero (a stationary point) but are not a local extremum on both axes (Chiang, 1984, p. 312). At this point, the maximin of one player is equal to the minimax of the other one. The saddle point can be regarded as a world line of integration of possible worlds, an optimum strategy which is beneficial to all involved parties. The prosecution and the defense are antagonistic parties advocating their contradicting versions or possible worlds which should be constructed in such a way as that only one of them would seem winning to the jurors and be accepted as more credible. Successful involvement of jurors into speaker's possible world means formation of discourse of concord (DC) which is referred to as an open discourse process aimed at solving social interaction tasks for creating integrated intentional horizons and searching for the shared context of interpretation (Krapivkina, 2017).

Focus on the addressee makes discourse dialogic and interactive. The speaker construes utterances for the jury to achieve a certain perlocutionary effect: a verdict of non-guilty for the defense, and a verdict of guilty for the prosecution. These expectations encourage intensification of interactive characteristics of closing arguments.

When analyzing texts of closing arguments available at websites, we observed some common interaction tools in expert-lay discourse practices in jury trials. They include but not limited to: description of legal terms, empathy, personalization, appeals to social values, imperative and question utterances.

Description of legal terms

Legal language has often been treated as "a unity to be understood as the social image of the argot or language of élite or professionalized power and has been defined as the language of authority, which takes the discursive form of monologue, distance (temporal and hierarchical), and specialization" (Goodrich, 1984, p. 187). It has frequently been described as "wordy, unclear, pompous, dull" (Mellinkoff, 1963, p. 23).

Legalese terms as well as knowledge asymmetry are one of the main communication obstacles in jury trials where expert-lay interaction occurs. In any discourse practice, including lawyer-jury communication, it is crucial to know what our addressees know (Bakhtin, 1981). Thus, "the better a lawyer's knowledge of the human nature of the average person, the better chance a lawyer has to communicate successfully with a lay jury" (Aron et al., 1996).

Let us give an example taken from the research by Aron et al. (1996, p. 29) where they report the case of a lawyer who tried to explain the difference between *simple negligence* and *gross negligence*: *"Simple negligence occurs when you are 175 eating a plate of beans and you spill a bean on your tie. When you spill a whole knifeful of beans on your tie, that's gross negligence"* (Aron et al., 1996, p. 29).

Assuming that jurors lack legal expertise and legalese, the legal expert interpreted the legal terms employing analogy with life experience – *eating a bean*. Adaptation of expert discourse practices to the cognitive baggage of laymen can be regarded as an attempt to form DC – an area of shared knowledge. Positioning themselves as credible experts, lawyers "try to convey aspects of perceived similarity in their relation with jurors, in order not to distance themselves from laymen and from their presumed attitudes and values" (Anesa, 2011). Let us give one more example:

That deal was ***void, I mean, it was made by incompetent parties*** (Text 1).

The defense counsel considers the addressee as a non-expert in law who lacks knowledge of legalese, so he describes the term *void* using plain English. It helps form the shared context of interpretation. Using the concept whose meaning can be understood by any layman, he achieves DC with jurors. Their discourse interaction can be presented in the Venn diagram where the shaded area is the area of fusion of contexts of interpretation, i.e. DC area.

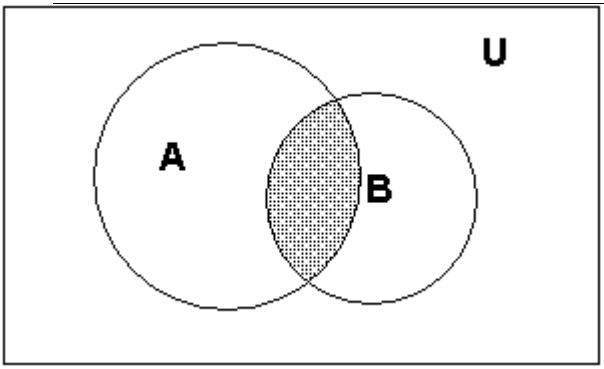

Figure 2: Expert-lay interaction

The communicants of DC are an expert (A) and a layperson (B). According to Grice's Cooperative Principles, the legal expert should construe DC where all participants have common context of interpretation (shaded area). Substitution of the legal term *void* with the description *made by incompetent parties* allows the jurors to correctly interpret the utterance. Let us give quite a different example:

My Lord, the plaintiffs also say this, because it is relevant to their ***claims for an injunction*** *and to the issue of* ***malice****, that the defendants have on numerous occasions from 1990 right up to yesterday published or caused to be published other material which makes similar allegations to those complained of in the leaflet which is the subject of the libel action* (Text 1).

The speaker addresses the judge who is the member of the same discourse expert community so there is no need to describe the legal terms employed in the utterance and create semantic redundancy. Their discourse interaction can be presented in the Venn diagram as follows:

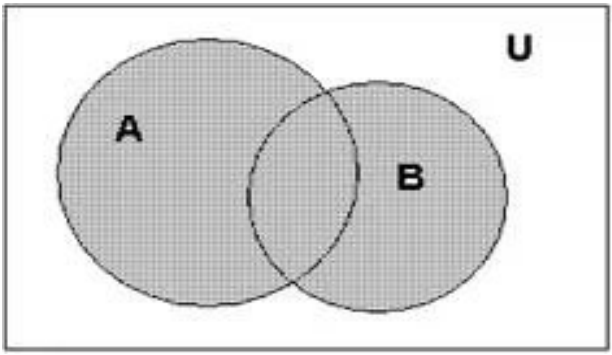

Figure 3: Expert-expert interaction

Figure 3 shows that the legal experts, the defense counsel and the judge, have common legal expertise (shaded areas) which allows them to interact using terms of the legal discourse community.

Thus, social interaction always focuses on the addressee of the utterance (Bakhtin 1979, p. 275). In order to achieve a required perlocutionary effect, the legal expert should have a precise image of jurors. When opposing their procedural opponents and attacking their viewpoints, legal experts construe possible worlds taking into account phenomenological experience and knowledge of jurors.

As far as jurors do not possess legal expertise, legal experts should abandon legalese and transfer legal terms into plain concepts. If the legal expert thinks a jury may have difficulty understanding a legal term, he should try to analogize it to some common experience:

*And you heard there was **actual possession** and **constructive possession**. You are in possession of the badge that's on you now. You have active control of that. These water bottles in front of you, you have constructive possession of them. You have control over them, but you do not have active control of them. It's not in your possession right now* (Text 2).

To form DC, the defense counsel describes the meaning of *actual possession* and *constructive possession* using the analogy. Analogy is a widespread interaction method employed by legal experts to explain elusive terms. Description of complex terms through examples of personal experience of the addressee is one of the most efficient tools in asymmetric communication. It allows to produce an adequate interpretant of the described phenomenon and form DC. In the example, the defendant represents complex legal terms *actual possession* and *constructive possession* by means of the clear image of a badge which can be easily visualized.

*This is just a **preliminary hearing**, not a **trial**. The purpose of a preliminary hearing is to determine if there is enough evidence that a crime has been committed to bind these defendants over to the grand jury* (Text 2).

The legal expert explains laymen their procedural rights and obligations. For this purpose, he construe DC where experts and laymen are able to interact in an efficient way. The defense attorney describe legal terms which allows laymen to correctly interpret legal utterances. The concepts *evidence, crime, defendant* as distinct from the term *preliminary hearing* can be easily understood by any layperson. It allows to achieve a required perlocutionary effect. DC can be regarded as a bridge which links experts and laypersons.

… remember the defendant is presumed to be innocent. Right? You know, I just took the instruction, I had it blown up. It's bold-faced. The defendant is presumed to be innocent. That's the law. And in case of a reasonable doubt, he's entitled to a verdict of not guilty. Entitled. Reasonable doubt is defined as follows: as the judge

told you, it's not a mere possible doubt because everything relating to human affairs is subject to some possible or imaginary doubt. It is that state of the case which after an entire comparison, consideration of all the evidence leaves the mind of jurors in that condition that they can't say they feel an abiding conviction to a moral certainty of the truth of the charge (Text 8).

The defense attorney adopts an explanatory stance providing the jurors with the tools to interpret legal statements correctly. It helps him create a sense of collaboration, foster solidarity and strengthen relationship with the jurors. Anesa (2011, p. 218) argues that "lawyers aim primarily to enhance their credentials as legal experts, and show their knowledge of the law". "Apparent command of relevant information correlates strongly with believability" (Lubet, 2004, p. 40). As far as credibility is very important in the acceptance of a possible world, legal experts explain legal terms, principles and procedures to build their credibility and encourage jurors accepting their version of the criminal case.

In jury trials, witnesses can be both lay and expert. The latter ones employ professional terms which require descriptions and definitions for their adequate understanding by jurors. In order to prevent jurors from misunderstanding experts' statements, Lubet suggest some techniques, among which one can mention use of plain language, examples and analogies (Lubet, 2004, p. 229).

Attorney: Would that stab wound, nevertheless, have caused some bleeding?

Expert: Yes, it would. It is a ***highly vascular*** *area of the neck.*

*Attorney: When you say '****highly vascular', what does that mean in lay****?*

Expert: The term – has got a lot of branches from the arteries and a lot of venous channels, and a wound to this area of the neck, which is one and one-half to two inches deep would cause significant bleeding. (Text 2).

The defendant's counsel examines an expert who employs a medical term *highly vascular*. The legal expert assumes that the jurors lack knowledge of medical terminology. Improper interpretation of the term can cause communication failure, failure to achieve DC, so he asks the expert to describe the meaning of the term *in lay*.

Empathy

We have already emphasized that effective interaction is dependent on the legal expert's ability to involve the jurors into his possible world, to form DC by demonstrating narrative skills. One of the methods legal experts use to form DC is to establish a relationship with the jury members. In order to do so they often make use of inclusive pronouns which create a visibility of empathy.

There is an opinion that the passive role of the juries in jury trials prevents their involvement in communication. Empathy is a common way of involving jurors into the possible world constructed by legal experts. The term *empathy* is

associated with sympathy in psychology, but in linguistics it is used to describe one of the ways of transferring information from the speaker's viewpoint (Chafe, 1982). According to Chafe, the meaningful aspect of empathy is to ascribe the ability to view the world through the eyes of another individual or from their viewpoints. This ability might influence the choice of language (ibid., p. 313).

The inclusive pronoun *we,* one of the linguistic tools of empathy, signals interaction of communicants (Hyland, 2001; Khutyz, 2012; Krapivkina, 2014). Let us examine some examples.

We *listened to the doctors explaining what a dismal future he has. He is going to be in a wheelchair, unable to walk more than a few steps because of his paralysis, a boy with no arms, only grotesque mechanical claws, for the rest of his life. That is a fact, and* ***we*** *have to accept it and base our decisions on it* (Text 3).

The counsel uses inclusive *we* to construe a shared world line of his own and jurors' possible worlds in order to form a relationship with the jury, involve them in his own possible world, as "a juror-centered approach is vital for successful interaction in a jury trial" (Mauet, 2009). Khutyz says that inclusive *we* can be an efficient interactional device to create an aura of solidarity (Khutyz, 2012, p. 68). *We* allows the addressee to hold the same discourse position as the speaker holds by uniting *I* and *yo*u.

Ladies and gentlemen of the jury, the judge has told you that ***we*** *must prove three things. There is absolutely no question about the first two things* ***we*** *must prove … According to what the judge just told you, that is all* ***we*** *have to prove* (Text 4).

Inclusive *we* involves the addressee into the argumentation process. The pronoun construes empathy which presupposes confidence. The legal expert considers the jurors as co-thinkers whose possible worlds will be based on the same interpretant. The obligation added to the empathy (*must prove, have to prove*) allows to achieve more reliable shared context of interpretation.

How do ***we know*** *it was foreseeable that children will climb utility poles? You can look to the common experiences of* ***all of us*** *when we were young.* ***We were all*** *probably tempted to climb poles at one time or another* (Text 3).

We creates the visibility of shared knowledge and experience, signals overlapping of possible worlds of communicants. That strategy can be regarded as "imposing of presupposition" when the speaker presents the statement requiring substantiation as axiomatic. From a linguistic perspective, the statement is located in the clause (in that position, it is taken to be true a priori). The speaker carries out "forced" involvement of the addressee into his own possible world.

Thus, empathy creates the effect of shared experience, makes the addressee feel involvement into the speaker's possible world.

Personalization

Defense attorneys often depict their clients to their best advantage. Mauet recommends legal experts "to personalize their characters and depersonalize the other side's" (Mauet, 2009, p. 93). It is an effective way of gaining sympathy for the defendant.

David Westerfield *is a 50-year-old man. He's a design engineer. He has patents. The patents that he's been involved in, the inventions that he's been involved, in relate to prosthetic devices that benefit many in our society* (Text 8).

The defense attorney presents his client as a respectful, considerate individual.

Carl Lee *had a daughter. Her name was Tonya. She's a beautiful little girl, ten years old …* (Text 2).

The defense attorney depicts the defendant as a father. That social role of a father has been always considered deserving respect. By using defendants' names, the legal experts create emotional solidarity with them, enhance jurors' sympathy towards their clients.

Appeals to social values (shared judgement)

In closing arguments, legal experts often appellate to moral norms and values as all social phenomena are judged from an axiological perspective. Appeal to human, social values has a persuasive force and can impact jury's decision in favor of the speaker. Appeals to values are used not "for jurors knowledge of the law but for their knowledge of life" (Heffer, 2008, p. 49). Jurors make decisions on the basis of moral norms and values rather than legal rules.

According to Whitehead (1990), we think about the World of Values in terms of entities, truths. The World of Values is closely connected with the World of Action – the world which communicants construe on the basis of reality. Appeals to human values and truths shared by all people are one more interaction tool used to involve the addressee into the possible world of the speaker and form DC. The World of Values can be regarded as a world line of integration of possible world of communicants. Let us give some examples:

Finally, I apologize to you for the length that this journey has taken. But you know when you're seeking ***justice*** *there are no shortcuts* (Text 5).

Member of the jury, ***Justice*** *will not be done by convicting the wrong person.* ***Justice*** *demands that you return a verdict of Not Guilty. Do not punish this remarkable young woman for something she did not do* (Text 6).

The speaker aims at achieving a perlocutionary effect, persuading the jurors to deliver a verdict of non-guilty. *Justice* as an object of the World of Values is a measure of acceptability / unacceptability. That type of appeal to human values has a persuasive impact on the emotional state of the addressee.

Now, gentlemen, in this country our courts are the great levelers. In our courts, all men are created ***equal****. … Now I am confident that you gentlemen will review without passion the evidence that you have heard, come to a decision, and restore this man to his* ***family*** (Text 7).

The counsel appeals to *equality* and *family* – apparent social values. The quotation *all men are created equal* has been called an immortal declaration, and perhaps the single phrase of the American Revolutionary period with the greatest continuing importance (Green, 1976, p. 5). Appealing to the truth from the World of Values, the legal expert creates an integrated context of interpretation required for DC formation.

Appeals to common sense are one more way of integration of possible worlds:

You use your ***common sense*** *when they tell you things like that* (Text 5).

Thankfully you have brought your ***common sense*** *with you today. Putting Whitney Dwight's actions in proper context is one more reason that you jurors should hesitate in this case* (Text 6).

Feelings, statements and conclusions which defy common sense cannot be true. In trials, common sense is a truth indicator. Common sense is the elementary mental outfit of the normal man (Lewis, 1989, p. 146). It consists of knowledge, judgement, and taste which is more or less universal and which is held more or less without reflection or argument (Holthoorn & Olson, 1987, p. 9). Common sense gives us shortcuts so that we don't need to think our way through the same or similar problems time and again.

Appeals to values are significant operating arms. They stimulate a required perlocutionary effect, being drastic remedy for making jurors accept the speaker's possible world. Jurors who deliver verdicts are laypersons who make emotional rather than rational decisions. The legal expert is eligible to indulge in all fair argument in favor of the right of his client. Emotions, appeals to human values are an inherent aspect of court discourse practices.

You know, Abraham Lincoln said that jury service is the ***highest act of citizenship****. So if it's any consolation to you, you've been involved in that* ***very highest act of citizenship*** (Text 5).

The defense counsel appeals to *citizenship* as one of the basic values of the American society. Values shared by all the citizens allow to integrate possible worlds of communicants. The name of Abraham Lincoln intensifies the persuasive force of the utterance as the 16th President of the USA has always been one of the most popular Presidents. His personality is associated with industriousness, integrity, justice, and social mobility.

Imperative and question utterances

Let's move *toward justice* (Text 5).

First, ***let's talk*** *about whether the Electric Company is liable … **Remember** the testimony of Brian Weiss of the highway patrol* (Text 3).

Remember*, there's a dog here.* ***Isn't there*** *a dog there, named Chachi? …* ***Isn't it reasonable*** *to assume there's golf balls in there? …* ***Consider*** *everything that Mr. Simpson would have had to have done in a very short time by their timeline* (Text 5).

Use of imperative and question utterances helps involve the jurors into the argumentation process and create an aura of collaborative decision making. Cooperation increases solidarity among the speaker and the addressee, and contributes to the required perlocutionary effect (verdict of non-guilty for the defense). Development of interaction situations encourages integration of possible worlds of communicants.

Conclusions

This study attempted to describe expert-lay interaction in the courtroom, show asymmetries in courtroom interaction and identify ways of eliminating their negative impacts.

Persuasion is the purpose of trial interaction and, therefore, concentrating on jurors is crucially important. The relationship between legal experts and jurors is particularly complex. In order to persuade jurors, lawyers should express solidarity towards them, construe possible worlds which would be attractive for them. That is a form of discourse power allowing legal experts to exercise control over jurors' behavior.

Use of the concept of possible world for analysis of courtroom discourse practices emphasized new aspects of lawyer-jury interaction in courtrooms - DC formation as a result of integration of possible worlds of legal experts and jurors.

We identified five interaction tools which legal experts employ to involve jurors into their possible worlds: description of legal concepts, empathy, appeals to social values, imperative and question utterances, personalization.

Identification of other interaction tools employed for DC formation and analysis of lay-lay interaction during jury deliberations in order to identify discourse tools used for the most beneficial DC configurations can constitute a productive filed for further discourse studies.

List of analyzed texts

Closing argument. Accessible from:
http://www.mcspotlight.org/case/trial/story.html. (Text 1)
Closing argument. Accessible from: http://www.e-reading.club/book.php?book=73752. (Text 2)

Closing argument. Accessible from: http://www.law.indiana.edu/instruction/tanford/web/reference/09close.pdf. (Text 3)
Closing argument. Accessible from: http://www.courts.ca.gov/documents/mocktrialscript-contra.pdf. (Text 4)
Closing argument. Accessible from: http://famous-trials.com/simpson. (Text 5)
Closing argument. Accessible from: http://sarahjlewis.com/project/sample_closing.html (Text 6)
Closing argument. Accessible from: https://ncowie.wordpress.com/2008/03/23/atticus-finchs-closing-argument/ (Text 7)
Closing argument. Accessible from: http://defensewiki.ibj.org/images/c/c2/People_v_westerfield.pdf (Text 8).

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