

Final Argument

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Tips for Writing a Final Argument

FIND AN OPENING HOOK

START WITH A SCENE

AVOID LEGAL LANGUAGE

DO NOT WRITE AS IF YOU ARE GIVING A LECTURE. YOU ARE WRITING PERSUASIVELY TO DECISION MAKERS

BLOCK YOUR ARGUMENTS OFF OF YOUR THEORY

ORGANIZE YOUR ARGUMENTS OFF OF YOUR THEORY AND DETERMINE THE ORDER OF THE ARGUMENTS

DECIDE WHAT TESTIMONY CAME UP AT TRIAL THAT YOU WANT TO HIGHLIGHT IN FINAL. DECIDE WHEN IN FINAL YOU WANT TO INSERT IT.

USE DEMONSTRATIVE EVIDENCE/VISUAL AIDS

WORK ON CRAFTING YOUR LANGUAGE

USE TRILOGIES

REPEAT YOUR THEME

TELL TWO STORIES.

- Not about the case but about what really is

- Relate facts of the case but in story fashion

HAVE A BETTER STORY

BE A BETTER STORY TELLER

FIND A CLOSING HOOK

Tips for Delivering a Final Argument

ACKNOWLEDGE YOUR CLIENT

DEFINITELY USE VISUAL AIDS—PowerPoint, diagrams, maps, something

REFER TO AND HANDLE ALL ADMITTED EXHIBITS—either they help you or discard them because they are of no relevance or miss the point or do not go to guilt

1. ASSERT YOUR CLIENT’S INNOCENCE

2. THEME—say it once early and once late

3. THEORY—say nothing that is inconsistent with your THEORY

4. GENRE—one and only

5. WHAT IS NOT AT ISSUE?

6. WHAT IS AT ISSUE?

7. HUMANIZE YOUR CLIENT

8. HUMANIZE YOURSELF. BE CREDIBLE WITH THE JURY

9. CONSIDER TELLING TWO STORIES

- A story with a moral

- The story of innocence in this case

10. DECIDE WHAT FACTS YOU MUST MENTION

11. CONSIDER REFERENCE TO THE INSTRUCTIONS

12. POSE A QUESTION FOR THE PROSECUTOR THAT HE/SHE CANNOT POSSIBLY ANSWER

13. REMIND THE JURY THAT YOU GET ONE FINAL ARGUMENT AND THE GOVERNMENT GETS TWO IF YOU ARE IN A STATE WHERE THE GOVERNMENT GOES TWICE

14. BE TOTALLY HONEST

15. BE SINCERE

16. ARGUE WITH PASSION

17. LET EXPERIENCES IN EVERY PHASE OF YOUR LIFE ENRICH AND IMPROVE YOUR ARGUMENTS

a Ten-Step Guide to CLOSING ARGUMENT

by

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STEP ONE: LIST THE BLOCKS OF YOUR ARGUMENT

You cannot argue effectively that which you cannot yourself believe. List first for *yourself* all the facts that support the verdict you want the jury to return, whether that verdict is not guilty or a verdict of guilty on some lesser-included offense. Once you have them listed, group them together into related blocks and give each a working title. These will become the "chapters" of your closing argument.

Ex: 1. Problems with the identification.

2. Alibi

3. Physical evidence

4. Police screw-ups

TIPS: Try to come up with a minimum of three chapters, but make sure you have no more than seven. Listeners have a tough time retaining the cohesion of your argument if you throw more than seven categories at them. Four or five is probably ideal. List each block title at the top of its own page, then go on to Step Two.

STEP TWO: LIST BENEATH EACH CHAPTER TITLE *EVERY*

PIECE OF EVIDENCE WHICH SUPPORTS THAT POINT.

Scour the discovery in your case -- every police report, lab report, motion hearing transcript, witness interview, photograph, piece of physical evidence, record or fact of any other kind you can get your hands on. Pull out each piece of evidence which can be used to support your theory of the issues and list it beneath the appropriate chapter heading(s).

Ex: Problems with the Identification

> Only saw man 1 to 2 seconds across parking lot

> Orig told police could give no description

> 2d time, gave descrip of beige pants

> 3rd time, descrip changed to bib overalls

TIP: You will often encounter one piece of evidence that supports more than one chapter of your argument. Go ahead and list it under as many chapters as it fits.

Caveat: The first time a piece of evidence or a particular witness is mentioned in your argument, the temptation is to launch into a discussion of all the other inferences that can be drawn from that same piece of evidence or particular witness. *"As-long-as-we're-talking-about-so-and-so . . . "*

DON'T DO IT!

Think of it as a play. The *issue* you are arguing is the scene. The pieces of evidence and the individual witnesses are the actors, brought out to say their few lines in support of the issue currently on center stage *and then sent back to the wings* to wait for their next scene. If they have more lines to share on other blocks of your argument, call them back out when *that* block moves onto center stage and refer to them again. But do not allow them to destroy the progress of the show by launching all of their lines for

the entire production the first time they make an appearance!

STEP THREE: DEVELOP A *COMPLETE* ARGUMENT WITHIN EACH CHAPTER

Every chapter must have a beginning, a middle, and an end:

1. In the **beginning**, tell your listeners what your point is.

In other words, *tell them what you're going to tell them*.

2. In the **middle**, discuss each piece of evidence that supports your point, using to your advantage the good facts and neutralizing as best you can the negative ones.

In other words, *tell them*.

3. At the **end**, *repeat* the overall point you are trying to make, highlighting its connection to the verdict you seek. In other words, *tell them not only what you told them but why you told them*. Don't just set out the facts and fail to articulate the significance of those facts to your theory of the case. The close of each block of your argument is often an ideal place to repeat your *case theme* if you can make it fit smoothly.

PREPARATION TIP:

Talk first, write second. None of us talks the same way we write. If you write out your argument first, and *then* practice speaking it, your end product is much more likely to sound stilted and to be unpersuasive. Instead, try developing each of your arguments by *talking* aloud to yourself. Make each point of your argument, playing with the phrasing, word choices, points of emphasis, etc. When you're satisfied with a particular point, *then* stop and write down whatever notes you need to help you remember what you've just developed beyond the next 30 minutes and move on to the next point of your argument.

CONTENT TIPS:

I. Avoid Legal Arguments!

Only lawyers are persuaded by legal arguments (and sometimes not even them!) The rest of the world is persuaded by *higher* principles than legal loopholes -- things like justice, fairness, right & wrong. If your case is built on a legal argument, find a way to argue your point *without* invoking the dry, legal technicality itself. Remember those technicalities jurors detest were in fact created to protect or implement those very principles that so appeal to their hearts. Find ways to tie your argument to the *principle* rather than to the *technicality*!

Ex: To most jurors, the requirement of proof beyond a reasonable doubt is a legal technicality. The fear of convicting an innocent man is not.

II. Consider Your Audience!

David Ball, a trial consultant extraordinaire, teaches that you have three audiences during your closing argument and a different mission to fulfill with each. Your audiences are:

a) Jurors who are already in your favor. *Your mission is to give them the ammunition with which to fight your battle for you in the jury room.*

b) Jurors who are undecided. *Your mission is to persuade them to your point of view and likewise give them the ammunition to support it.*

c) Jurors who are already against you. *Your mission is to avoid entrenching them further and allow them room to both save face and change their minds. (In other words, you don't want to say things like "only an idiot would believe . . .!")*

STEP FOUR: DECIDE UPON THE ORDER AND WEED OUT THE CHAFF

1. Select the chapter that you believe is your very strongest argument. Place it at the very end of your closing.
2. Select the chapter that you believe is your *second* strongest argument. Place it at the beginning of your closing.
3. Evaluate each chapter of your argument for weak or inconsistent arguments. You will often find that some don't really carry their weight. They're throw-away arguments, so throw them away. Less is more.

TIP: When selecting the order of your remaining chapters, you want your arguments to build upon each other both logically *and emotionally*. The emotion of your argument should *build* throughout to a strong ending, not wax and wane. 'Tis not a tide we're creating here. If you have a very emotional plea in one chapter and another which is not so emotional, you will generally want to put the emotional argument toward the end of your closing and your less emotional chapters toward the front.

STEP FIVE: POLISH THE PERSUASIVENESS

There are ways to say things and there are *ways to say things*. All is *not* equal when it comes to the power of the spoken word. Listed below are a number of devices to consider when you begin putting together your argument:

1. **Trilogies** -- For reasons known only to those folks who study such things, the human mind seems to hang on to things that come in threes *longer* than it does to things that come solo or in any other combination. There is something poetic and memorable about trilogies, so look for opportunities to build trilogies into your argument. Those who doubt the power of the trilogy need only look at those built into their own history:

Ex: "drugs, sex, and rock & roll"

"blood, sweat, & tears"

"red, white, & blue"

2. **Metaphors** - Sentiments, which may be difficult to understand when expressed in the abstract, can often be made much more real and memorable through the use of metaphorical word pictures. Not only do such word pictures capture our imagination and, therefore, our memories more than any abstract concept can, they also appeal to our other senses in ways the word alone does not.

Ex: "All of his life, he'd been pricked with sharp needles of humiliation."

--Robert Pepin

3. **Alliteration** - A series of words that begin with or include the same sound tend to be more memorable and more powerful than words with no auditory connection to one another.

Ex: "A small-time snitch searching for someone to sacrifice."

"Close enough for Callahan" (the sloppy investigating officer)

"Like most teenagers, she was curious and confused, seduced by and scared of sex."

4. **Quotations** -- Not only are quotations a much more succinct and powerful way of making the point we want to make, they also invoke the imprimatur of the wisdom of the ages upon the actions of your client.

Ex: Where your client remained at the scene until police arrived, you may want to invoke the wisdom of the Proverbs: "*The wicked flee when no man pursueth, but the righteous **stand**, bold as a lion..*" Or if you want to highlight how a witness has been caught in his own lies, there is always Sir Walter Scott's wonderful quote, "*Oh, what tangled webs we weave when first we practice to deceive.*"

TIPS: When using a quotation in your argument, play with placing the emphasis upon different words within the quote to vary the meaning and power. In the Proverbs quote above, I had always placed the emphasis on the word "righteous" and was surprised at how much more powerful the quote became for my case simply by shifting the emphasis to the action of my client!

5. **Analogies** -- As with metaphors, it is sometimes easier for us to understand a situation if we can analogize it to an experience or story that is familiar to us. This is true for jurors as well. Fairy tales, children's stories, or everyday experiences can all be valuable tools for analogy in a closing argument.

Caveats:

(a) Make it *succinct*. Analogies are notorious for running rampant and swallowing up large chunks of argument time while your jury fidgets and wishes you would get to the point!

(b) Only use an analogy if it is *unquestionably* and *directly* on point to a *significant* issue of your case. Analogies are too time-consuming to waste on an insignificant point; nor do you want to get bogged down in a side battle over whether your analogy fits the point you're trying to make. (Such battles can be loud and painful if the prosecutor chooses to ram it down your throat during rebuttal, or silent and secret within a juror's own mind. Either is deadly to your case.)

6. **Silence** -- This is an incredibly powerful tool often overlooked by lawyers who are uncomfortable with it.

- *Use silence at the beginning* of your closing argument to build tension in the courtroom and to gather the attention of your audience. Have you ever been in a noisy classroom where the teacher suddenly stops talking? You can literally watch the silence move, row by row, all the way to the back of the room until every eye is turned to the teacher and you could literally hear a pin drop in that room. THAT is a level of attention you want to use your benefit in a courtroom. You get it, easily and instantly, by using silence.
- *Use silence during your argument* as a nonverbal parenthesis to set apart and emphasize a powerful point or to let an argument float in the air for a bit before moving on to the next one. Give the jurors time not only to taste but to savor your point, before moving to the next one.
- *Use silence at the end* of your argument after you have said your last words. Simply stand for a moment, meeting the eyes of each of your jurors, letting your last words soak in before you simply, softly say *thank-you* and return to your seat. All that will happen when you sit down is the prosecutor starts talking again. That alone is worth postponing. But the silence also again gives the jurors time to savor and absorb your argument and to note your obvious belief in what you're saying as you solidly stand your ground and meet their eyes

Do not clutter it up by moving about! Movement destroys the power of the silence. Learn to simply stand and let the silence speak for you on occasion.

BUYERS BEWARE: Each of the techniques discussed above is a valuable tool that you need to know how to use. Each can be very powerful *if* used effectively. As with most good things, however, they must be used in moderation! Too much of even a good thing can quickly descend into gimmickry and undercut the sincerity of your plea.

STEP SIX: CREATE CHAPTER HEADINGS & TRANSITIONS

Ever try to read a book of several hundred pages with no chapters? Probably not. There is a *reason* for that. Without some framework for processing it all, the reader gets information overload and just gives up. The same is true for closing arguments. *You* have lived and breathed this case for days, weeks, and months by the time of closing. *You* can jump back and forth between issues & topics & players without once losing the action. Jurors don't have that luxury. This is their one and only time through. It is much easier for them to get lost than you realize! And if you lose them? You lose.

1. Chapter Headings:

Always give your jurors a "heads-up" that you are moving to a new topic. This can be as simple as a "*Now let's talk about the sloppy police work brought to you in this case.*" Or you may want to use a flip chart to list "*the five things you heard in this case that show us the police have the wrong man,*" then simply flip the page to the next chapter of your argument when you're ready to move on. Another excellent method of chapter headings is to simply ask the questions you know the jury wants answered. *Ex.* In a rape case where the defense is consent but all parties agree the victim was found in tears, *If this is what she wanted, if this were her choice, then why was she crying?* Then answer the question! There are any number of ways to communicate your chapter headings to your jurors and by all means draw upon your own creativity in the process. Just make sure you DO it.

2. Transitions Between Chapters

Even *with* a chapter heading, shifts of topic can be jarring if they are too abrupt or seem wholly unrelated or unconnected in any way to what has gone before. It's as if you're speeding down a street and suddenly slam on your brakes to make a sharp, right turn. Your passengers may be dragged along with you, but if they didn't know it was coming they may take a few minutes to catch their breath again. You cannot afford for your jurors to spend a few minutes "catching up" to you during your closing argument. After all, you only *have* a few minutes! How to avoid it?

Make sure you slow down *before* you reach the turn:

a) Give each chapter of your argument a clear and definite closure;

- b) *Pause*;
- c) Announce your next chapter heading; (ask your question, flip your chart, etc.)
- d) *Pause* briefly again to give your jurors time to make that move with you, then begin.

TIP: One excellent transition technique is to tie each of your chapters back to your theme. Not only does this give you added opportunity to repeat your theme, it also helps jurors understand that the various chapters of your closing are simply different branches of the same tree.

Ex: [Closing of Chapter One] *The victim's description does not match Joe Defendant because the police have the wrong man.*

<pause>

[Heading of Chapter Two] *What's the second piece of evidence you heard from that stand that shows the police have the wrong man?*

And then launch into your second chapter.

step seven: DECIDE YOUR OPENING HOOK

the first few moments of your closing is the most attentive your jury will be throughout your argument. *Do not waste it with thank-you's or apologies for how long the trial has taken.* Start with something strong and attention-grabbing that will make your jurors want to stay with you beyond your opening lines!

STEP EIGHT: DECIDE ON YOUR CLOSING LINES:

All too often you will see an otherwise great closing argument trickle off into a mumbled thanks at the end, draining the power of the defense away with it. Don't leave your closing lines to chance! You want to take that opportunity to ask the jury for the verdict you want, but there are thousands of ways to do just that. The goal is to find a way that is powerful, persuasive, and that comes from your heart.

STEP NINE: Practice it

You must prepare not only the content of the closing, but the delivery, and that can only be done through practice. Practice it aloud -- to yourself, to your mirror, to your spouse, colleague or pets -- but ***practice it.***

Do not *memorize* it. Few of us are sufficiently gifted thespians to deliver a memorized monologue and make it ring sincere. Simply talk it through several times. Each time you do, your argument will come out slightly different and that is the way it should be. That's what keeps it fresh and sincere and real. What you want to *remember* are those key phrases you've chosen, the metaphors, analogy, or trilogies; the silences you've built in; the transitions you've decided upon-- as well as, of course what evidence you want to discuss under each chapter!

STEP TEN: reduce it to outline form

You cannot read a closing argument and persuade anyone of anything. Your persuasiveness comes from your own passion about that of which you speak. If you don't know it well enough to remember it without reading it, you've just spoken volumes to the jury about just how passionately you feel about it!

"But there is SO much to remember!!" Yes, there is. That's why you must PRACTICE, PRACTICE,

PRACTICE until you know your arguments so well that you *can* speak from the heart about each and every one of them.

Then reduce your argument to a **one-page outline form** which you can lay on the lecturn or table corner as your safety net in case you go blank. The outline will list your chapter headings and *no more* than a word or two prompt for each of the pieces of evidence you plan to discuss under that heading.

*Ex: **I. ID Probs***

> 1-2 secs

> distance

> descriptions

If your notes are any more detailed than this, you will not be able to even find your *place* in a glance, much less your *prompt*; and a glance is all you can spare for notes during closing!!

TIPS: Place your cup of water beside your outline during your closing. Then if you DO go blank and have to refer to them, you can simply pause, walk to your cup, take a sip (while you're frantically scanning your outline) and as far as the jury knows, you simply had a dry throat.

Or you can list your chapters and supporting evidence on a flip chart for use as demonstrative evidence during your closing argument. Not only does this allow the jury to follow your argument more easily as you go through each topic, you don't have to worry about using your notes!

A Word About Storytelling:

The new touchstone in trial practice is *storytelling* and I am one of its avid disciples. However, I am convinced that the best storyteller will fail to persuade the jury if s/he uses closing argument *only* as an opportunity to tell a story. A story told well may hold the jurors' interest and even entertain them, but if the lawyer fails to explain why it matters to their verdict, in the end, the lawyer will still lose. For that reason, I encourage you to think of a good closing argument not as a single story, but as a well-organized photo album; each page of vivid, vibrant photographs carefully attached in its appropriate place beside a succinct, running commentary. The commentary points out the significance of and subtleties within each photograph that might easily be missed or overlooked by the casual observer.

The photographs in your closing argument are the vignettes and scenes carefully culled from the evidence and vividly painted for your jurors through the skills of storytelling to prove a point. The moment your innocent client learns he's falsely accused and yet does not run away is a photograph that supports his innocence. The harsh reality of an interrogation room is a photograph which explains why the confession does not match the physical evidence and is therefore not believable. Each of these scenes must be brought to life again for the jurors during your argument through the skill of storytelling. *Yet they do not and cannot stand alone.* Without benefit of an accompanying commentary, a carefully-crafted explanation of how each of these events fit together to paint a picture of innocence, you run the very real risk that your jurors may never understand the significance of or subtleties within your photographs. Absent that understanding, the likelihood they will reach the conclusion you want them to reach is a risk no gambler would want to take.

Of course, the opposite extreme is equally ineffective. The perusers of our proverbial photo album will quickly lose interest in the most thorough of commentaries if there are no photographs to accompany it! A dry exposition on how the evidence supports a finding of not guilty does not move us, capture our attention or imagination, or make us care. BOTH vivid photographs (storytelling) and carefully crafted commentary (argument) are critical to an effective closing. Equal attention must be paid to both.