



COLLECTIVE WISDOM

THE CLOSING ARGUMENT:
ESSENTIALS AND ADVICE

JULES EPSTEIN

Introduction

To many, the closing argument is the pinnacle of the trial, the place where the lawyer’s mastery must predominate and the jury will be swayed to endorse one’s position. Think of the O.J. Simpson trial, and how much people still invoke “If the glove does not fit . . .” Or of [Clarence Darrow arguing for mercy](#) in the Leopold and Loeb trial. Or of Gerry Spence and his oratory in the trial of Karen Silkwood’s case.

There is no definitive research confirming that the closing “seals the deal” or otherwise is the point in the trial most effective in swaying emotion and guiding the deliberative process. Yet there is ample research on the importance of recency, and some research makes clear that generating emotion and anger in a closing impacts the decision-making process, often in a negative way. There is also research confirming that the process of jurors deliberating can lend itself to having positions changed or ambiguities resolved—so the closing can give the jury or jurors already leaning toward your side the tools to reason or the talking points they need.

What can be said, with certainty, is that closings have multiple purposes and offer a multitude of opportunities. They may focus the issues, serve as a potent memory refresher, pose critical questions, and distill a trial to its essence. They must be done well.

The following are suggestions and insights from leading advocacy teachers and practitioners on essentials of and approaches for the design of a closing argument. They are the outgrowth of a panel discussion on essentials of a closing argument held at the Spring, 2021 EATS conference hosted by Stetson University School of Law.



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CLOSING ARGUMENT IS FOR WARRIORS WHO KNOW HOW TO HAVE FUN

Closing argument is one of my favorite aspects of trial—it is where fun, creativity, and cleverness thrive! I teach each of my students in trial advocacy courses to be warriors in the courtroom, and that includes letting themselves enjoy what they do. The following words of advice are trial techniques that I picked up along the war path while in the trenches of over 30 jury trials, including a few tips on how to keep your arguments entertaining.

Closing arguments are an art form of their own and each attorney is the artist that gets better with each completed masterpiece. Closings are meant to be fun and entertaining, while also a brutal test of skill and wit. The concept of having fun is often lost in the “I need to win” mindset. Instead, think of closing arguments as the need to prevail. You prevail if you played fair and still convinced jurors that your viewpoint of the case was the correct one. You prevail if you played fair and did not convince jurors that your viewpoint was the correct one. Wait—what? Yes, that loss will burn itself into your memory even more than the cases you “won,” because it will have been a difficult case, or a case



where you made mistakes, or had tough witnesses, or, or, or . . . it's where you learned the most about what worked and what didn't work for the next time. If you did what was right for that case and you were prepared and presented at your best, then all is not lost. A perfect quote for this practice is “Warriors are not the ones that always win, but the ones who always fight.” Closing arguments are imperfect, and that's what makes them so perfect: you decide how to present the analysis of evidence and how to word your argument. You have so much flexibility during closing arguments, so why not have a little more fun with it?

Don't talk at your jurors—instead, engage them to become your allies in solving this mystery. Ask your jurors questions! Jurors like to feel as if they are solving this case and coming to a conclusion with you, not just being lectured at by the “adults” in the room. If someone lied when giving a statement, ask jurors, “Now why would someone in their position tell these two different stories?” And then you answer the question for them. You solidify what answer they were already giving in their head, and you confirm out loud that you have come to the same conclusion. This builds trust. I know jurors like questions asked to them in closing, because many times I have had jurors accidentally answer the question out loud in court. They want to have a friend in the courtroom, and they want to be a part of the case, so let them help by using stimulating language.

Don't attack opposing counsel—attack their arguments. Frequently, we see attorneys on television disparaging opposing counsel for being shady or acting unkind. In reality, this is awkward to watch and can be a turnoff for the juror who sees this as a petty fight between supposed professionals. Instead, hit opposing counsel where it really hurts—their weak arguments. But you may say, “Well, they spoke poorly about me, so I should be able to respond in the same light.” Be the bigger person and show the jury that you aren't going to stoop to that level. The jury will see opposing counsel as distasteful and petty, and the reason they stooped to that level was because their case was weak on facts, the law, or both.

It is crucial to put sidebar objection arguments, rulings, and judge reasonings on record outside the presence of the jury. All too often, an issue needs

to be preserved from closing arguments, but the microphone and the court reporter did not pick up one word of the sidebar discussion. If an appeal is to be raised later, and this is especially true for defense attorneys, you need to have articulate ammunition from the record to lodge the argument or the response in support of your position.

Cut down words on slides or remove PowerPoint altogether. Again, closing is supposed to be fun! Fun doesn't mean cracking jokes for 10 minutes or skipping around the courtroom. Fun means crafting an argument that your opponent can't refute. Fun means having an amazing demonstrative that organizes complex evidence into a simple visual. Fun means working on your feet to incorporate a last-minute witness's testimony. And fun means flipping your opponent's theme and painting it in a light more favorable to your side. Your effectiveness diminishes with every extra word on a slide. My suggestion is to incorporate more pictures and fewer words, and if you do need to present sentences or paragraphs, highlight what is most important and talk about it in simple terms. Overuse of text on slides is often utilized when an attorney is talking about a jury instruction. Break the jury instruction down into understandable concepts in your own words. You can tell the jury that this is what you are doing and if they want the exact language of the statute, they can review the jury instructions. This relieves you from misstating the jury instruction and helps your jury understand the charges more easily.

Be strong and skillful in closing arguments, and for you—the warrior, the jurors, and the bailiff who is half asleep in the back, try to have some fun with it!



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GRASPING THE CONNECTION BETWEEN CROSS-EXAMINATION AND CLOSING ARGUMENT

If you teach trial advocacy, you have probably made these comments when critiquing cross-examination performances:

“You asked the one question too many, and it came back you haunt you.”

“Save the argument for closing.”

“One of the main purposes of cross-examination is to get admissions of fact to use in closing arguments.”

Then, having given your students these bits of wisdom, you might have seen them repeat the same mistakes in their final trial exercises. Or maybe they make a different mistake with their cross-examinations. Maybe they get helpful admissions but then completely fail to mention them in final argument. If your experience has been like mine, perhaps you have seen “all of the above.”

So how can we better help our students appreciate the relationship between closing argument and cross-examination and use it effectively? I have

one suggested drill that may work. Let me try to explain it below.

Step 1: Assign a witness cross-examination where you are confident the student will get some valuable admissions of facts. (I’d like to say “certain” to get some admissions, but I’ve learned over the years that almost nothing is certain with students.) James Bier in *Nita Liquor v. Jones* is a good example of such a witness.

Step 2: Have a student do no longer than a four- to five-minute cross. The cross can be shorter if the student gets good admissions quickly. If a student gets three admissions quickly, then definitely stop before five minutes.

Step 3: Repeat the three admissions at the start of your critique. Writing them on a board or putting them on a screen might be helpful.

Step 4: Tell the student who just did the cross to give a “mini-closing argument” in which each admission should be used.

Step 5: Tell the student that in the closing, you want the student to mention the “What, When, and Why” for each admission, meaning: “What” are the exact words of the admission, “When” (or maybe



where) in the cross the student got the admission, and finally, “Why” the admission matters. How does it help prove/disprove an element or how does it affect the witness’s credibility?

Step 6: Tell the student how to start the closing, if necessary, especially if the class has not yet done closing argument. For example, you might have the student start out with “Let’s talk about a couple of things Investigator Bier admitted (said) on cross-examination. First, he admitted . . .”

Step 7: Praise the student’s effort afterwards, no matter how well it is done. After all, it may be their first time addressing a jury.

Step 8: Critique the “mini-closing,” emphasizing the “What, When, and Why” process.

Does this exercise always work? Of course not. However, if you have every student do it at least once, sometimes with different witnesses,

it hopefully reinforces the connection between admissions obtained in cross and closing argument. Students do improve with repetition.

I never let students use notes for this. Thus, it gets them on their feet, looking at the jurors and hopefully arguing to them with gestures. (This is another matter.)

Something I will also do is a mini-demo after the students finish. I’ve found that a little modeling sometimes helps in a trial advocacy class.

Finally, if you use this drill, make sure to have the students cover at least the “What” and most certainly the “Why” for each admission. This reinforces that closing argument must be “argument” and not just repetition of facts.

I usually do this drill in the first few classes on cross-examination when we deal with easier witnesses.



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THREE THINGS ABOUT CLOSING ARGUMENT (OF COURSE IT'S THREE)

1. **Remember that your audience in closing argument is the set of jurors who are already on your side.** When a juror has had days (or weeks) of evidence and time to consider a verdict, there is very little chance that 30 minutes of closing argument will change that juror's mind. So, don't try to persuade your opponents; arm your allies. Give the jurors who are already on your side the tools they need to convince their fellow jurors to come along with them. Direct them specifically to the evidence that they need to answer in your favor the questions posed in the jury charge.
2. **It is traditional in some parts of the country (not here in Texas, by the way) to call this part of trial "summation."** It should be always referred to as closing argument because that's what it is: argument. Closing argument should never be a summary (or summation) of the evidence that came in at trial; it should be a concise, moving, to-the-point explanation (i.e., argument) of why your side wins, and why your side should win. Closing argument isn't about reminding the

jury what they saw, it's about telling them why what they saw matters. Interviews with jurors after verdicts show that overwhelmingly, jurors are confident that they made the right decision. (See, for example, the 2017 interviews with the O. J. Simpson jurors in "The Jury Speaks.") Your job in closing is to give the jury a reason to be proud that they rendered the verdict they did. When they go home and tell their family about their service, they don't want to say, "Well, we rendered our verdict because the language of the charge said we had to say 'no' if the evidence wasn't beyond a reasonable doubt." They want to be able to say, "We rendered this verdict because it was the right thing to do." Your job in closing is to give them what they need to be certain the verdict you seek is the right thing to do.

3. **"It's better to be real than to be perfect."** We have all seen closing arguments in movies (as have our juries) where every word is scripted perfectly. But you can't expect that to be true in real life. You don't get multiple takes and an editor: you get to do it once, often on relatively short notice. So, don't worry about being perfect. Be genuine. In the class I teach at UT, we call this "dead reckoning." (Credit to

my colleague David Gonzalez for adopting the term.) Dead reckoning is the ability to look the jurors in the eye and say with conviction why you should win. It's saying it in a way that gives the jurors confidence that you believe what you are saying. It's the difference between when someone asks you directions and you say, "Ummmm, errrr, I think it's the street after that corner you see up there, probably take a . . . right?" and

when you say, "Go two blocks, take a left on Broadway, one more block, it's the second building on your right with the big windows in front." That doesn't come from lining the words up in the absolute perfect order; it comes from knowing your case, knowing your evidence, and knowing in your heart that the argument you are making is right. Get away from your script, talk to the jury, and tell them why you should win.





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LET THEM SEE

Of law students and lawyers, I like to ask:

“When you’re on closing,
jurors seated before you,
what’s your goal?
How do you win?
How do you make the verdict yours?”

And time and again, it’s said to me this:

“I want to see into their *souls*.”

Really? Their souls? The ego . . .

You barely know these people, no matter how great your *voir dire*. Besides, it’s impossible—a mission fraught, for all your best intentions and ability. And also, it puts your persuasive skills to waste.

When it comes to captivating juror attention and soul-reaching—the important building of trust so jurors champion your cause on deliberation when you’re away—there is but one person in the courtroom you know well enough, whose soul is within your power to reveal, and upon whom you may always and should only rely.

You.

On closing argument, your job is not to divine juror souls.

Your job is to show them yours—to let them in, and let them see: what the case means, for you to advocate so; the client, who suffers; the injustice endured; the daily indignities; part of you, now. Achebe’s lions, glorified at last.

You are the Great Legal *Storyshow-er*.

That is what you let them see.

And that, in the end, is the way to their collective heart—by giving your jurors, as Ohio Northern Law Dean, professor, and all things advocacy Charles Rose teaches, the gift of self, “permission to connect,” that you trust them not to hurt you.

And they won’t—not on their watch.

When the watch is really yours.

You are vulnerable and powerful, at the same time.

It’s 8 Mile Theory, in trial—the truth, be real, say it first.

You become persuasion itself.

Terry MacCarthy calls it the “halo effect.” When you know your stuff. You’re prepared. Courteous



to all. Persuasion, borne of trust, borne of principle. *Integritas*. That leads to character.

Jurors can't get enough of the advocate they love.

And they'll love you more when you let them see you.

Which brings us 'round to this: Clients live their own lives and make their own trouble. In this sense, the cases we try are not about us (though

we do take it there, too hard, too often).

But they do come *through* us. Like the director of a great play, it is ours to set the stage, block the scene, and turn client lives into legally operative narratives—stories that liberate, vindicate, and validate. Promise-keep. Resurrect. Captivate. And make whole, again. Who we truly are. What we truly believe. Our canvas laid bare.

We need only the courage to see ourselves.

Sara Jacobson

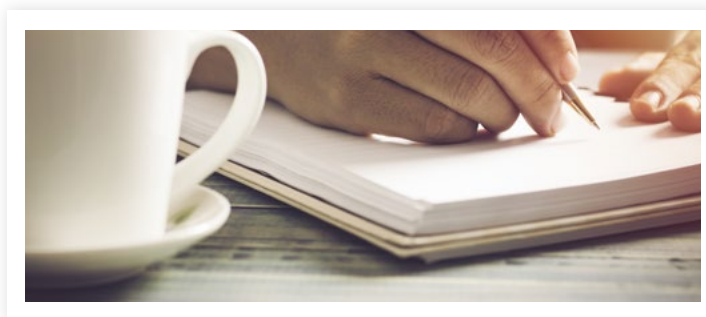
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CLOSINGS MUST . . .

It's easy to deal with our strengths, and good closings must speak to the parts of the trial that fell in our favor. Great closings, however, do what they can with the bad facts too.

There are, of course, always bad facts or bad law or both to deal with. If that weren't the case, the many pressures to settle the legal matter would have prevailed, and there would be no trial at all. You won't have perfect answers to your weakest points—if you did, they wouldn't be bad facts—but putting your spin on the bad facts is a must. Show the jury how they can be consistent with your theory of the case or how they don't assail the credibility of your witnesses or other evidence on your side. If you leave your bad facts in silence, you hand all of the power to shape them to your opponent. What's worse, if opposing counsel calls you out on your silence, it looks like you were hiding something from the jury. Leaving the jury with the options of concluding either “maybe the lawyer was scared of that fact,” or “maybe the lawyer was hiding the fact and trying to deceive us,” or “maybe the lawyer thought we were stupid and wouldn't notice the fact,” cannot be your best options.



A close codicil is to take advantage of important moments in the trial itself. Seems simple, right, to try the case you're trying rather than the case you planned for? It isn't always so easy in practice. While no lawyer should come to closing unprepared, it also isn't helpful to be so scripted from the outset that there isn't room for the closing to breathe or adapt. It can be useful to write out a draft closing at the beginning of the trial to help cement trial theory and word choice, but any lawyer who has tried cases knows that witnesses often go sideways and that no trial comes in entirely to plan. A persuasive closing directly addresses those moments, obvious to all when they happen, that involve genuine emotion, touch on humanity, or simply loom large when they occur. That moment might qualify as “good fact” for you, or it might not, but regardless, you can only make use of the power contained in those moments if you talk about them in your closing.



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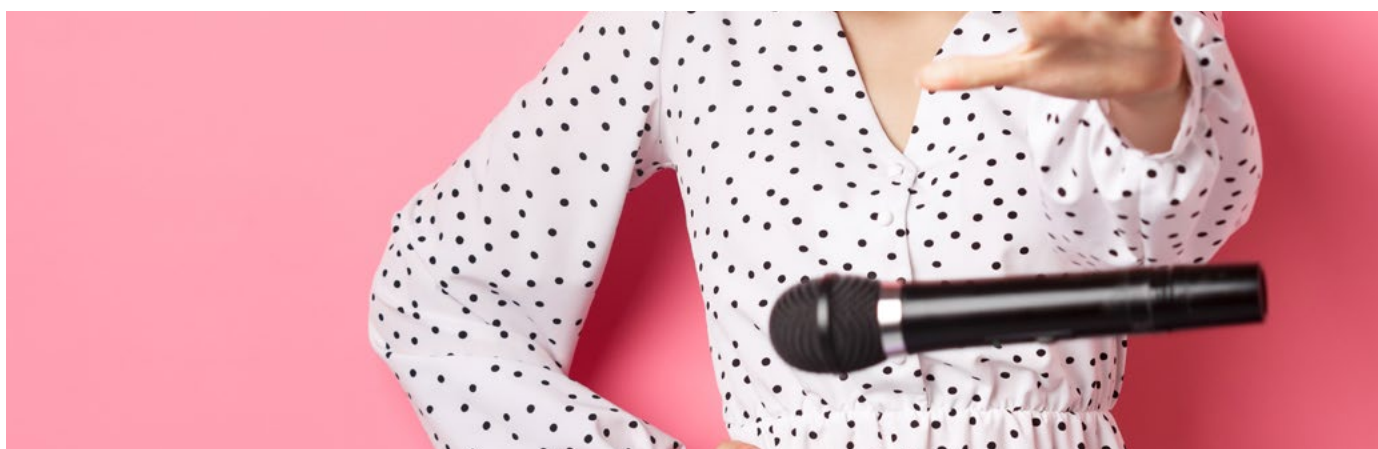
TIE UP LOOSE ENDS AND DROP THE MIC

Those are the two important goals of closing argument I'd like to address.

The closing argument needs to be the time when you tie up any loose ends for the jury. For example, if you had the opportunity to impeach a witness during cross-examination, you need to explain what that means to the jury in lay terms. Walk them through the idea of credibility and how an impeachment illustrated that the witness could not be believed. Another example of a loose end is why evidence or certain exhibits are important. Sometimes we introduce documents into evidence and don't walk the jury through the document line by line at the time of entering them

into evidence. Closing argument is the opportunity to be able to tie up that loose end and make sure they understand why an exhibit is important or what they should look at in the deliberation room.

“Dropping the mic.” What do I mean by that? I mean that the closing argument is your turn as an advocate and voice for your client to turn up the heat and passion and make sure the jury is engaged and interested during your closing. Unlike the opening statement, you have now earned the right to become more indignant and emotional during a closing argument. Don't go so far with those emotions that it offends the jury, but the closing argument is the time to show the jury that you care. Because if they see that you don't care, then they won't, either.





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“WHEN PLANNING A CLOSING ONE OUGHT TO . . .”

EMULATE THE SAN FRANCISCO 49ERS OF THE '80S

In the 1980s the San Francisco 49ers won multiple Super Bowls and are considered the team of that decade.¹ They were led by Hall of Fame coach Bill Walsh² and quarterback Joe Montana.³

Coach Walsh was famous for his meticulous planning, including scripting his first 15 or 20 plays before the game, while quarterback Joe Montana is remembered for improvising plays in the waning minutes of games to lead his team to comeback wins. In crafting winning closing arguments, trial attorneys should combine the preparation of Bill Walsh with the improvisation skills of Joe Montana.

Just as Coach Walsh scripted his team's plays before the game, a trial attorney should draft the closing argument well before trial. Remember—at the closing argument, you will have the freedom to directly state your theme and theory of the case with fewer restrictions than in other parts of the trial. In your opening statements, you cannot argue; with direct

examination, you must rely on your witnesses to make your points; and on cross, you must control potentially uncooperative witnesses. But in closing, those restrictions are lifted and you can directly state your case to the jury. Good early preparation will help you take advantage of this opportunity.

Preparing a draft of your closing argument before trial can also organize your entire trial strategy. Consider in determining which order you will call your witnesses to the stand how they will fit the narrative you plan to present to the jury during closing. In deciding which exhibits to introduce at trial, your draft closing argument can be a guide to help you determine which exhibits are truly vital to your case. Your overall case can then seamlessly build up to the closing providing the jury with an explicit roadmap for a favorable verdict for your client.

But just as the actual games forced quarterback Montana to improvise to lead his team to victory, you should be prepared to adjust your closing to account for unexpected events. At trial, you may not be able to get a particular document into evidence. And witnesses can change their testimony or not testify at trial at all. Your draft closing then should be a living



document that is flexible enough to deal with these unexpected events that will occur during the trial and incorporate them into your overall

strategy. Ultimately, combining careful planning with improvisation will lead to a winning argument.

¹ <https://www.sportingnews.com/us/nfl-news/861600-super-bowl-dynasty-of-the-1980s-san-francisco-49ers>.

² <https://vault.si.com/vault/1981/12/21/armed-for-the-playoffs-under-scholarly-bill-walsh-the-49ers-have-been-a-quick-study-in-winning>.

³ <http://www.espn.com/sportscentury/features/00016306.html>.



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TAKING FEEDBACK IS HARD

You've poured through the documents, walked the scene, examined the evidence, and mastered the facts. You've talked with the witnesses about what happened, how they felt, and how this incident impacted their lives. You've clarified relationships, made connections, and uncovered motives. You've sketched out your closing argument, then wrote directs and crosses, prepped your witnesses, and went back to edit some more. You've even recorded yourself and changed what looked or sounded different than you intended. You've spent countless hours perfecting this argument and have anguished over every word.

Now you deliver your masterful closing argument to a colleague. Cue the standing ovation!

Instead, you're met with a furrowed brow and your colleague tells you she didn't understand, didn't like your theme, or didn't agree with your word choices.

Taking feedback is hard; it's a skill unto its own. Try to remember that this outside opinion is worth its weight in gold. It isn't a judgment—it's a gauge of how the message may land on the factfinder. Instead of offering a knee-jerk reaction like, "I think



it works because," use this energy to improve your argument. Ask your colleague to explain what didn't make sense, was confusing, or was off-putting. Don't be defensive, don't justify, just listen. Consider making a list, sitting on it for a day, then thinking about the edits. Maybe only slight modifications are warranted, or maybe your argument requires a complete overhaul. Don't become overly attached to your theme, theory, or order, and be ready to let go of what doesn't serve your case.

A good attorney can write a good closing argument, but a great attorney can edit, practice, let go, and incorporate external feedback to perfect her closing argument.



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THREE SUGGESTIONS FOR CLOSING ARGUMENTS

There are a number of valuable insights I have learned during my trial career regarding drafting and presenting a closing argument. Some I have learned “in the well” where the scars of experience were endured. Others I have learned from my colleagues in the national trial advocacy academy, who are some of the most talented and brilliant people I have met in my life. I am thankful for both of these opportunities to learn.

Some general aspects I have learned are:

- Closing argument is the purest form of advocacy in a trial, with the fewest technical rules;
- Closing argument is the time to tell the jury not what evidence they’ve been presented (they already know that), but rather *why* certain pieces of evidence are so important; and
- Closing argument is the time to provide the *fodder* to your “hero jurors” who can go into deliberation and finish your job of convincing the still undecided or opposite-leaning jurors.

With those broad strokes in mind, here are three suggestions I employ when crafting my closing arguments.

First, start at the end. It is said at the beginning of any ship’s journey the captain first identifies the latitudinal and longitudinal coordinates of the journey’s final destination. Similarly, great novelists often conceive the final chapter of their book before they write the first sentence of their story. While neither Magellan nor Steinbeck am I, I have found the same approach to be true every time I have accepted the solemn responsibility to serve as trial counsel. The final chapter is the first point I identify, and it starts the moment I “meet” the case.

Whether sitting in the initial client interview; reviewing the raw facts, photos, and investigator’s notes of a case already pulsating; or accepting a case in the 11th hour before trial, my first step is to tell myself the story and craft that final narrative. Simply, I start with the closing argument. That’s not a novel idea, and you’ve probably heard that before. But here’s how I start.



My first step is drafting my “**Initial Memo to Me**” (or the “Initial Memo to File”). Regardless of the method by which I am first exposed to the facts of the case (e.g., client interview, review of initial notes and facts, etc.), I *immediately* draft a two-page, stream-of-consciousness memo that captures my first impressions from that first exposure to the case. These first impressions usually focus on the credibility of the facts and the client (or victim/witness, etc.).

The timing of drafting this Initial Memo to Me is key. I draft it *immediately* after my first exposure to the case. It is at this time that my first impressions are untainted, uncorrupted. It is at this time my mind is closest to the mind of a potential juror (or trial judge). Simply, first impressions matter. It is important that I capture and memorialize those first impressions because if I wait a day or two

before drafting the Initial Memo to Me, then my subconscious has gotten a head start. With each passing hour, other influences may begin to taint or corrupt my true first impressions.

And yes, it is also during this time that I begin exploring the “Universal Question” or “Fundamental Truth” of the case—i.e., the aspect of the case that speaks to me most deeply. That question or truth will likely serve as the mast to which all aspects of my case are tied.

It’s also important to remember the Initial Memo to Me is not a one-off. I return to The Memo throughout the life of the case to keep myself honest. While always staying flexible and keeping an open mind regarding the case as it develops and continues to grow, the Memo provides the latitudinal and longitudinal coordinates that help

prevent me from steering too far from the original course that I had set for the case. Emotion, haste, rising costs, client fears, and client demands are just some of the many Sirens that may attempt to steer me from the original course during the journey.

My second step in crafting my closing arguments is to create my “**Top 10 Facts List.**” The spirit of the list is simple. If I had ninety seconds to speak to the jury, these ten facts are the most important facts I would communicate to persuade the jury of the merits of my client’s side of the case. Typically, these ten facts will provide the jury with the “Who, What, Where, Why, and How” of the case, along with some persuasive colorations.

Put another way, if my Initial Memo to Me is **the map** for the journey, the Top 10 Facts are the map’s **key landmarks.**

Here is an example of a Top 10 list. (See how quickly you can identify the core facts of the case.)

1. Murdered 8-year-old boy.
2. Stabbed in heart.
3. At mother’s house.
4. With mother’s kitchen knife.
5. Jealous mother.
6. Thrice denied custody.
7. “I hate my ex-husband.”
8. “If I cannot have Bobby, no one will.”
9. “Bobby would be better off if no one had him.”
10. No evidence of intruder.

From just these top 10 simple facts, you likely formed a good idea of the nature of the case: an angry, jealous mother killed her 8-year-old son by stabbing him in the heart at her house with her kitchen knife because she wanted to exact revenge on her ex-husband who kept winning repeated custody battles.

While my Top 10 List may appear to be overly simplistic, I was guided by “The Magic Number Seven,” also referred to as *Miller’s Law*. In 1956, cognitive psychologist George A. Miller of Harvard University’s Department of Psychology posited in *Psychological Review* that the number of chunks of information the average human can hold in short-term memory is 7, plus or minus 2 chunks. With Dr. Miller’s paper being one of the most oft-cited works in the field, the takeaway is clear: simplicity is key.

With my map and its landmarks in hand I begin drafting the first version of my closing argument. I sometimes refer to the sections of this draft as “stanzas,” because hopefully they will flow together and some of the more poignant sections will rhythmically repeat as impactful refrains. And yes, I am doing all of this before I have drafted my opening statement, and before any discovery has been initiated. It is understood nothing is set in stone regarding my closing argument. Changes will be made along the way. But these two steps have provided me a wonderful foundation.

But that foundational closing argument is rarely more than 75 percent complete. The remaining 25 percent will be completed after all the evidence has been presented at the trial. This 25 percent is my “surfing zone.” As a ship surfs the waves of

the ocean during its journey, a trial attorney surfs the evidence of the trial. A trial attorney has to stay flexible and adjust to the ebbs and flows of evidence.

My third suggestion now comes into play: **The Red Folder.**

The Red Folder was birthed from necessity. The first case I ever presented for trial was to a jury. A live jury stared at me for days as I stumbled and clawed my way through the trial. I was not given the luxury of a bench trial with a lone judge witnessing my greenhorn ways. I had the privilege of full-frontal embarrassment.

The necessity of the Red Folder became apparent on Thursday evening of the trial when the judge sent us home with closing arguments to follow the next morning. I dutifully went home to complete my closing argument, intending to add meaningful quotes and persuasive bits of testimony that witnesses had articulated during the prior four days

of the trial. But there was a problem. When I sat down to complete my closing argument, to fill in my “surfing zone,” I could not remember one single line of testimony of any witness. Whether due to sleep deprivation or the sheer exhaustion of keeping my head above water in the weeklong trial, my brain had simply shut down. I had nothing of value to add to the generic closing argument I had drafted prior to the commencement of the trial. I was devastated.

But in every trial from that day forward I have kept a simple bright red folder on my counsel table throughout the trial. Its purpose is simple but invaluable. At the conclusion of each witness’s testimony, I write on the inside jacket of the Red Folder the most important line of each witness. On the eve of the closing argument, I finish drafting my closing by opening the Red Folder and *Viola!* I have the “greatest hits” from the trial, a veritable treasure chest of the most meaningful testimony of the trial. Jurors have articulated these “greatest hits” in my closing argument have provided “heightened context,” “a contemporaneous feel,” and a great refresher of the most impactful points of the trial.





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TWO “WHYS” AND A “DON’T FORGET WHAT HAPPENED”

What is an effective closing argument?

Sometimes it is easier to answer the question of what isn’t effective—a regurgitation of the facts the jury has already absorbed; a demand for the desired outcome; a lack of coherence; a disrespect for juror intelligence; stream-of-consciousness “reasoning”; adverting to anecdotes or quotes that go over the heads of the jurors or that make sense only to the advocate—the list goes on and on. But what is needed for effective persuasion?

At a minimum, the answer is “why”—twice—and “did you notice this?” Let’s take them one at a time.

The First “Why”

Unless your trial has lasted for months, repeating what was said has limited efficacy. It doesn’t matter the format—witness by witness, or in a more coherent narrative—the jury does not need a reminder of the gist of the case. What must be confronted are the dueling narratives the jury must choose from, and what is needed are the tools to make that choice. So the first “why” is

“why is our version credible/accurate” or “why is the opponent’s version unbelievable [or not sufficient to meet their burden]?”

Find those whys—the corroborating independent witness; the party opponent admission; the behavior of one of the “players” that itself tells a story, the link of disparate facts into a logical retelling of the event, the use of “character”—explicit or implicit—to confirm behavior.

What Happened Right in Front of Us

Before the second “why,” attention must be turned to “did you notice that?” Things happen in a courtroom that rightly or wrongly, scientifically or based on myth or community belief, create “tells.” What are “tells?” In Poker, tells are “the habits, behaviours and physical actions of your opponents in a poker game that will give you insight into their likely holdings.”⁴ In court, they are the in-the-moment occurrences that confirm your version or eviscerate your opponents.

Things like:

- Hesitations
- Looking away, embarrassed

- Turning to counsel for clues
- Refusing to answer a single question (a reason to count and take notes when this occurs)
- The impeachment that can't be explained away
- The “gotcha” moment
- The refusal to concede the obvious
- Concessions that favor you

What occurs in the moment could not have been in the opening statement and has the virtue of being unscripted and thus, at least potentially, sincere. Look for those moments.

The Second “Why?”

Here, the why at issue is the application of the law to the facts, and the focus is why the law

compels a verdict in your favor. The “why” can be negative—why this is not a case of self-defense or contributory negligence—or affirmative, as in why your facts are what the law was meant to apply to and resolve in your favor.

Are there other essentials? Of course. Thoughtful return to exhibits, drama, showing respect for each of the individual jurors, and of course a coherent link back to the opening statement's theme(s) and promise(s) are all core to a strong closing, and all give ammunition and support to those jurors inclined toward your position who must then take those arguments into the deliberation room and advocate for you. But never forget “why,” “what happened here,” and “why” again, as without these a closing argument is less than what it should be.

⁴ <https://howtoplaypokerinfo.com/poker-tells/>

