# CLOSING ARGUMENTS

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The evidence is in, the parties have rested, the judge has instructed the jury, and now is your last opportunity to convince the jury that your client should win. If you have waited until now to present a convincing case, you are too late. Based on my experience of trying cases for more than 45 years and having been on a jury, most jurors will have chosen sides before the closing arguments, and few will change after hearing them.

Although jurors are instructed throughout the trial to keep an open mind and not decide the case until they deliberate, human beings have great difficulty dealing with conflicting evidence and remaining neutral throughout the course of a trial. Think about the last time you sat down to watch a sports event between two teams that you didn't really care about. Inevitably, as the game progresses, you will find yourself rooting for one team or the other.

As trial lawyers, we cannot wait until the end of the trial and hope for a "hail Mary" closing argument to save the day. We must try to get the jury subconsciously pulling for our side during the opening statement. We do this by presenting a theme for our case that strongly resonates with human nature and by telling a story that builds on our theme. Then we must present evidence that supports our theme and proves our story and do our best to discredit any evidence that is inconsistent. If we have done our job effectively, most, and hopefully all, of the jurors will be ready to rule for us before we stand up to present our closing argument. Nonetheless, I'm not advocating that you waive your closing argument.

The closing argument is our opportunity to "tie the case up with a bow" before the jury deliberates. We can remind the jury of our theme and how the evidence supports the story we told them in our opening. And perhaps most importantly, it is our chance to provide favorable jurors with arguments they can take into the jury room and use to persuade any jurors who are not yet convinced.

I can't possibly teach you everything you need to know about closing arguments in the 15 minutes I am allotted. There are many books and articles on the subject and any good trial lawyer will immerse herself in the subtleties of the art.

What I would like to do in my limited time is to give you some thoughts on things that have worked for me.

I think the most important thing in trying cases is to know yourself and to be yourself (assuming you're not a jerk). Don't try to be someone you're not; particularly a Hollywood actor's version of a lawyer doing a closing argument. You will see two excellent, but different styles in a few minutes, but they are styles unique to Stew Walz and Dick Burbidge. Every person has his or her unique style and you shouldn't try to emulate someone else. Jurors are unsurpassed in spotting phoniness, and when they do, it does not bode well for the trial lawyer.

For myself, I know that I'm no Cicero. I'm not an orator who can hold an audience spellbound with my eloquence. We all must do the best we can with the skills we have. The goals are sincerity and credibility, not a perfectly polished presentation.

I don't like to think of closing as an "argument." Rather, I think of it as my chance to just chat with the jury about the case. For me, it's not a speech, it's not a Ted Talk, it's not a



4821-6850-8373v1

pedagogical presentation. But, you ask, how is it possible to have a dialogue when you are doing all of the talking?

Before I answer that, let's talk about mechanics. If you want to have a meaningful chat with someone, you don't write out a speech in advance. You don't lock yourself into a PowerPoint presentation. You want to sound sincere, not canned or rehearsed. Of course, you do think about your closing well in advance. You start thinking about your closing argument when you are preparing your opening statement. During the trial, you will maintain a closing argument file where you put points you want to make in closing, excerpts of critical testimony, and references to important items of evidence. Some lawyers write out their closing arguments, but I don't. I've learned that if I write it out, I'll take it to the podium and then I'll turn the pages and try to follow it. Rather, I prepare a short outline of points I want to be sure to cover, and I leave it at counsel table where I can refer to it in a glance if I have a brain cramp. It's a psychological crutch that I've never had to use, but it's a comfort to know it's there.

I like to have a few props handy to refer to during closing. These include the elements instruction and, perhaps, one or two other key instructions. They help provide an organizational structure. I also like to have a few key documents, photos, or video clips ready to use along with important items of real evidence. For electronic exhibits, I tell my legal assistant the order that I will ask for them to be presented on the screen. A little "show and tell" adds interest as you chat with the jury about how the evidence fits your theme and story.

Where should you stand for your closing argument? I never use a podium. People stand behind podiums to make speeches or present lectures; not to have a chat. Even when a judge requires that counsel use the podium, I stand beside it so that I'm fully exposed to the jury.

I prefer to stand about 6-8 feet in front of the jury box and move from side to side so that I can stand in front of every juror at some point. You will intuitively know the right distance—close enough for a chat but not so close that you are invading the jurors' personal space. If the jurors start leaning back from you, you know you're too close.

You will feel uncomfortable the first time you do this. You'll feel completely open and exposed without the security of the podium to hide behind. But that's the point—to be vulnerable and, hence, more credible. A little nervousness will not hurt you, but slickness and polish might. I promise you that once you start talking about the case, you will forget about your nervousness. Your demeanor will project honesty, authenticity, and knowledge of the case. In short, you will stand there, as Mark Twain said, "with the calm confidence of a Christian holding four aces."

During the closing, I want to make eye contact with every single juror. Your peripheral vision will embrace the entire jury and you will occasionally scan back and forth as you watch their reactions to what you are saying. But I want to have some one-on-one time with each juror in turn. As you look that juror in the eye and talk to him, you can sense from his body language whether he is receptive. Often, as you talk directly to a juror, you will notice that she will start nodding as you make your points—always a good sign. If she is crossing her arms and shaking her head, however, your work is cut out for you.

A good way to begin your closing is to harken back to your opening: "Members of the jury, at the beginning of this case I told you that this was a case about [your THEME]. And I told you that the evidence would show that [STORY]." (This is the old notion of triple repetition: Tell them what you will say, say it, and then tell them what you told them.) "And a few minutes ago, you heard Her Honor, Judge Smith, tell you the three elements we must prove in order for you to rule in our favor."

Another thing I like to say is: "Before we chat about each of those elements and the evidence to support them, I'd like to mention one of the most important tools you have to evaluate the evidence in this case. Judge Smith told you that you must decide the case solely on the evidence and the law as she presented it to you. But you'll note that she did not tell you that you must leave your common sense at the jury room door when you begin to deliberate. Have you ever wondered why the United States is one of the few countries in the entire world that allows its regular citizens to decide disputes that arise among them, no matter how complicated? This is because we trust the wisdom and common sense of our citizens. So, you will note as we discuss the evidence in this case, I will often ask you the question: What does your common sense tell you here?"

This is one way that I try to turn a one-way presentation into something more akin to a "chat." I try to anticipate questions the jurors have and say: "You might be asking yourselves why did she do this, or what was he thinking, or how could this have happened." The answer I give them is: "You heard the evidence. Your common sense will tell you the answer."

On credibility issues, I also use rhetorical questions: "X told you this but Y testified just opposite, what does your common sense tell you about who is telling the truth here?" I almost never tell the jury how I think they should answer these questions.

You, as the trial lawyer, have lived with your case for years. You may be absolutely convinced that a witness is lying through his teeth, but the jury may just think he is mistaken. If you come on strong and brand him as a "liar" in your closing argument, you run the risk of putting the jurors off if they think it was just an innocent mistake. Your client wins the issue either way—whether the jury thinks he is lying or simply mistaken, and your credibility is enhanced by showing you trust the jury to get it right.

It's the same with your opponent. You may think that he has blatantly misstated the evidence. Do you say to the jury that he is lying, or, perhaps more gently, mistaken? I suggest not. I think its far more effective to say: "Mr. so-and-so told you that Witness X said this. My recollection is that the witness said [the opposite]. But you all heard the testimony and your collective memory is far better than any one of us. You know what the witness said."

Or, if you have the luxury of a daily transcript, then you might say: "Counsel said that Witness X said this. I asked the court reporter for the transcript and I'd like to read the testimony." Again, let the jury decide whether counsel was lying or mistaken. You win the point either way.

The bottom line is that you must respect and trust the intelligence of the jury. No matter how smart you are, or think you are, your intelligence does not hold a candle to the collective intelligence of 12 people (or even 8 or 6). Your memory of the evidence presented at trial will not match the collective memory of the jury. All you need to do is remind them of the critical questions and trust them to come up with the right answer. Nobody wants to be told how to think or what to decide. A skilled trial lawyer will lead the jury to the brink and remind them of the critical evidence—but let them reach the conclusion for themselves.

What about emotion? We all know that facts do not move people to action; emotion does. Anger is a much stronger motivator than sympathy. And, of course, it depends on the type of case and your role in it. A plaintiff's personal injury lawyer will want the jury to return a verdict that contains "mad money." A prosecutor wants the jury to be angry with the defendant; a defense lawyer wants them to be sympathetic, not angry with her client. Even contract cases and patent cases have potential emotion. In a contract case, one party did not keep his word. In a patent case, a defendant willfully stole another's invention. On the other hand, the challenge for the defense lawyer in these cases is how to diffuse or take the emotion out of the case.

No matter the case, I think trial lawyers have to be careful how they use emotion in their closing arguments. You can easily overdue it and turn off the jury. I believe that the art is in the understatement. I like to prime the pump by reminding the jury of the key evidence but allow the jurors to take the final step themselves. Rather than tell them how they should feel about the conduct of the other party, I like to use rhetorical questions: "Members of the jury, how do you feel about what XYZ Company did here"?

One final thing to keep in mind is that a trial is not a college debate. You do not need to—nor should you—respond to every single point your opponent raises at trial or in closing. Often in a trial there are one or two "credibility moments" or credibility issues that are critical, and you must address them. But you don't have to address every red herring or rabbit trail that your opponent raises. If you have done your job well, you can count on the phenomenon of cognitive dissonance and trust that the jurors will ignore these distractions that simply do not fit with the theme and story that you have presented at trial.

In case it's not obvious, I am a huge proponent of the jury system. It is the rare, rare case where I would consider waiving a jury and trying it to the bench. That would be a case where your client is so unsympathetic, your facts are so bad, and your only hope is a hyper-technical legal defense that might appeal to a judge. Other than that, give me 12, or 8, or 6 jurors, good and true!