

**NATIONAL DEFENDER TRAINING PROJECT
2017 PUBLIC DEFENDER
TRIAL ADVOCACY PROGRAM**

University of Dayton School of Law, Dayton, Ohio
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**CLOSING
ARGUMENTS**

*Bringing Your Story
To Life*

**NATIONAL DEFENDER TRAINING PROJECT
PUBLIC DEFENDER
TRIAL ADVOCACY PROGRAM**

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I. PERSUASIVE CLOSING ARGUMENTS

(The following was adapted in part from, Rench, Stephen C., Closing Argument As Powerful Persuasion)

Closing argument is a time to persuade jurors, not to rehash the evidence. It is the time to develop all the inferences which you have implanted in the minds of the jurors throughout voir dire and testimony. Closing argument does not begin at the end of the presentation of evidence, but rather it begins during jury selection. Jurors don't begin deliberating at the end of a trial, they begin deliberating as soon as they see you and your client. From the moment you open your mouth in voir dire through the moment you ask the jurors to send your client home to her family, your story must be told, persuasively.

A. Know and Understand Your Audience - this is one of your main goals during voir dire.

1. Establish Connections
2. Understand Jurors' Paradigm
3. Learn Juror Belief Systems, Attitudes, Life Experiences, Values
4. Measure Argument Against Juror Beliefs and Experiences
5. Argument Must Be Based On Human Experiences, Not Legal Concepts
6. Distinguish legal theories from your story and themes (emotional, etc.)
7. Delivery of Argument Must be Centered on the Jury

B. Basic Ingredients of Closing Arguments

1. The Law and Instructions: these must be discussed within the context of your story. Give these meaning within your story rather than rehash what the judge has told them (or will tell them).

2. The Facts - Evidence
3. Reasonable Inferences - Idea and Themes for Argument

C. Structure of the Closing

1. The Introduction

Throughout the trial the defense lawyer has developed the themes and theories.

The closing is the opportunity to bring it all together in an organized manner to achieve unity and coherence. Before one gets to the main points of the argument one you must captivate the audience by giving your case some identity. An introduction must be interesting, dynamic and memorable. The jurors want to hear your side, they want to be persuaded; help them remember what you have to say.

2. The Body

The body of the argument is made of the specific arguments which are then made up of specific points. These arguments can be based on points that are supported by legal, factual (facts from your case and facts from life – human experiences), and theoretical or inferential subject matter. Each point must be explicitly stated and developed separately from the others. Each point must be clearly communicated. Many times the point is extremely clear to the attorney and it may seem redundant to articulate the point after having related the supporting facts. However, merely rehashing the facts without relating them to a specific point may be obvious to the attorney but not always obvious to the audience. Likewise, stating a point over and over without supporting subject matter may reduce credibility. When all arguments, their related points and subject matter are in place, choose a sequence that creates the most effective flow of ideas. Choose how to tell your story.

3. Conclusion

Tell the jury what they need to hear. We (lawyers) all know that the defense usually doesn't have a legal burden. That reality is however not consistent with human experience. Jurors want to hear you say it: "My client is innocent." Bring them back to

what you talked about in voir dire and opening. Words such as truth, justice, freedom, fairness, hope, etc. should be flowing. Bring them back to the theory of the case. Help them remember their power and responsibility.

D. Acknowledge The Power of the Juror

1. Jurors Must Appreciate Their Role
2. Jurors Must Be Told That Their Job Is Much More Than Picking A Side
3. Must Find Creative Ways To Make Jurors Recognize Their Power (folklore and simply stories regarding the importance and meaning of their role as jurors.)

E. Credibility (3 Components)

1. Verisimilitude - the quality or state of appearing to be true or real
 - a. You must have an honest case - believable
 - b. The feelings and intensity portrayed must be consistent with your cause
 - c. Back up your argument with specific facts - tie each allegation to facts and reasonable inferences
2. Congruence
 - a. Your argument must be consistent
 - b. Words you use must be consistent with the meaning of what you are trying to convey - don't give mixed messages
 - c. Use descriptive words that don't contradict each other
3. Integrity
 - a. You must believe in your case - you must be trustworthy
 - b. Your presentation must be dynamic - intense and full of life
 - c. You must have a cause the jurors want and need to believe in

F. Bring Your Theme To Life

1. Jurors Must Experience the Drama
 - a. Pitch
 - b. Rhythm
 - c. Volume

- d. Projection
 - e. Transitions
 - f. Movement
 - g. Silence
 - h. Vision
 - i. Tone
 - j. Trilogy
 - k. Pace
 - l. Emotion
2. Some Basic Enhancers to Use - (They must NOT be overused and each preserve and enhance the integrity and credibility of your theme)
- a. Quotes
 - b. Repetition
 - c. Metaphor / Simile
 - d. Analogies
 - e. Stories within your story that convey a specific point

II. STORY TELLING

Effective Storytelling - A manual for beginners, by Barry McWilliams

"Used by permission Copyright Barry McWilliams 1998"
<http://www.eldrbarry.net/roos/eest.htm>

Effective storytelling is a fine and beautiful art. A well-developed and presented story can cut across age barriers and will hold the interest and reach its listeners. Stories will be remembered long after other orations. Knowing and applying the basics of storytelling will strengthen your stories.

Characteristics of a good story:

- A single theme, clearly defined
- A well developed plot
- Style: vivid word pictures, pleasing sounds and rhythm
- Characterization

- Faithful to source
- Dramatic appeal
- Appropriateness to listeners

Baker and Greene, Storytelling: Art and Technique, p. 28

Adapting to our audiences:

The audience has a very important role in storytelling - for their minds are the canvas on which the teller paints his tale. *Oral storytelling involves much interaction between teller and hearer.* I have observed that our audiences have lost some of the skills to follow a narrated story and see things in their minds. Storytelling has become more difficult. Attention spans are shorter and more demanding, more sophisticated, yet less able to independently imagine or visualize. People seem to need more visual stimulation.

- **Take the story as close to them as you can.**
- **Keep it brief and simple**
- **Stimulate their senses** so they feel, smell, touch and listen and see vivid pictures.
- **Describe the characters and settings**, help them sympathize with the character's feelings.

Preparation:

Once you settle on a story, you will want to spend plenty of time with it. It will take a considerable period of time and a number of tellings before a new story becomes your own.

- **Read the story several times**, first for pleasure, then with concentration.
- **Analyze its appeal**, the word pictures you want your listeners to see, and the mood you wish to create.
- **Research its background and cultural meanings.**
- **Live with your story** until the characters and setting become as real to you as people and places you know.
- **Visualize it!** Imagine sounds, tastes, scents, colors. Only when you see the story vividly yourself can you make your audience see it!

Learn the story as a whole rather than in fragments. Master, and then simplify, its structure to a simple outline of scenes. Don't try to memorize it, though you should always know your first and last lines by heart!.

- **Map out the story line:** The **Beginning**, which sets the stage and introduces the characters and conflict; the **Body**, in which the conflict builds up to the **Climax**; and the **Resolution** of the conflict. Observe how the action starts, how it accelerates, repetitions in actions and how and where the transitions occur. If simplifying or adapting a story, do not alter the essential story line.
- **Absorb the style of the story:** To retain the original flavor and vigor, learn the characteristic phrases which recur throughout the story. Observe the sentence structure, phrases, unusual words and expressions.

Practice the story often - to the mirror, your cat, driving in the car, with friends, or anyone who will listen. Even when telling an old and familiar story, you must use imagination and all the storyteller's skills to make it come alive. Use your imagination to make the story come alive as you prepare.

Delivery elements:

- **Sincerity and whole heartedness** (Be earnest!),
- **Enthusiasm** (This does not mean artificial or noisy excitement),
- **Animation** (in your gestures, voice, facial expressions)

Stories are more interesting when there is animation and variety in the voice of the teller.

Particular Oral Storytelling Skills:

A Storyteller's skills include: *emphasis, repetition, transition, pause and proportion.*

- **Dialog** should make use of different voices for different characters and using the **Storytelling "V"** - where you will shift your facing (or posture) as the dialog switches from character to character.
- **Use your voice** to create the atmosphere or tension as the story progresses.
- **Use gestures and facial expressions** add much to the visualization of the story. Be sure they are appropriate and natural. Practice them!
- **Pacing** involves both the volume and rate at which you speak, and the progression of the action in the story. Dialog slows a story's pace down, while narrating action speeds it up.
- **Repetition and Exaggeration** have always been basic elements of story telling.

Experience will hone these skills, and when - and how - to use them most effectively.

Most importantly --- relax and be yourself. Develop your own style - one you are comfortable with.

Beginning a story: (REMEMBER: AT THE BEGINNING OF YOUR CLOSING ARGUMENT YOU HAVE A CAPTIVE AUDIENCE, DON'T BLOW IT!)

Storytelling is best done in a relaxed atmosphere free of distractions. The audience ought to be comfortable and close. Candle light and campfires are ideal situations for telling stories, but often impractical. The teller needs to give careful attention to the setting before hand - and be prepared to rearrange a room to bring his hearers closer, or use a backdrop or hangings to create atmosphere - especially in classroom settings. Props, costumes, or some getting acquainted patter may also help in getting and keeping attention and creating a mood.

Storytelling traditionally begins with a "Once upon a time..." opening, and then a storyteller's silent pause to gather his thoughts. The traditional openings, of which there are many (often with responses from the audience), were "rituals" that served as a signal that the teller was suspending "time and space" as we know it and transporting the audience to a world of imagination and play. They identified the teller and established the audience's commitment to accept for the moment that imaginary world and its "rules".

Similar "rituals" also signal the end of the story and their return to reality. Many adults today have forgotten these "rules of the game." There are online lists of beginnings

<http://www.folktale.net/openers.html> and endings <http://www.folktale.net/endings.html>

Some attention keepers:

Many factors affect the attention of your listeners. A storyteller always needs to be sensitive to his audience and may need to regain their attention before continuing.

- **A distinct change** in your pace, voice, or mood.
- **An unusual or unexpected twist** in the narration.
- **Throw-away lines or asides** work well as does **comic relief**.

Concluding:

Once you finish the story - stop! Don't ramble on. Leave their thoughts lingering over it. Don't feel you have to explain everything, or tie together all loose ends. Let them go away thinking about what has been said, and drawing their own meaning from it!

***Finally...and most importantly:** The more you practice- the more skilled you will become. Don't be afraid to try different methods. Be creative.*

III. THIRTY-SIX DRAMATIC SITUATIONS as named by Georges Polti

All situations in any story or drama are supposed to fall into one of these categories. There may be more than one situation in the plot of a story if it's long enough. The list was developed to help writers, but perhaps storytellers will also find it interesting. See Polti's book of the same name for explanations. Various other longer categorizations have been made of such situations, and very comprehensive, extensive lists may be found in the various Motif Indices.

1. Supplication
2. Deliverance
3. Crime Pursued by Vengeance
4. Vengeance Taken for Kindred Upon Kindred
5. Pursuit
- 6 Disaster
7. Falling Prey to Cruelty or Misfortune
8. Revolt
9. Daring Enterprise
10. Abduction
11. The Enigma
12. Obtaining
13. Enmity of Kinsmen
14. Rivalry of Kinsmen
15. Murderous Adultery
16. Madness
17. Fatal Imprudence
18. Involuntary Crimes of Love
19. Slaying of a Kinsman Unrecognized
20. Self-Sacrifice for an Ideal
21. Self-Sacrifice for Kindred
22. All Sacrificed for Passion
23. Necessity of Sacrificing Loved Ones
24. Rivalry of Superior and Inferior
25. Adultery
26. Crimes of Love
27. Discovery of the Dishonor of a Loved One
28. Obstacles to Love
29. An Enemy Loved

- 30. Ambition
- 31. Conflict With a God
- 32. Mistaken Jealousy
- 33. Erroneous Judgment
- 34. Remorse
- 35. Recovery of a Lost One
- 36. Loss of Loved Ones

IV. DEFENSE COUNSEL STANDARDS

An attorney representing a client at trial is an advocate but, as an officer of the court, cannot be a zealot or mouthpiece. The attorney's role is to help insure that the client's case is decided not on the basis of extraneous matters but on the basis of evidence relevant to the issues raised and the legitimate inferences from that evidence. *State v. Salitros*, 499 N.W.2d 815 (Minn. 1993)

A. American Bar Association Standards for Criminal Justice

1. The Defense Function, Standard 4-1.1

Defense counsel is neither a mouthpiece nor an ordinary agent, but a professional advocate governed by rules of professional ethics and decorum.

2. Argument to the Jury, Standard 4-7.8.

- (a) In closing argument to the jury the lawyer [i.e. defense counsel] may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for a lawyer intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
- (b) It is unprofessional conduct for a lawyer to express a personal belief or opinion in his or her client's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence, or to attribute the crime to another person unless such an inference is warranted by the evidence.
- (c) A lawyer should not make arguments calculated to inflame the passions or prejudices of the jury.
- (d) A lawyer should refrain from argument which would divert the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions of the consequences of the jury's verdict.

- (e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds.

The standards, of course, are not a complete and detailed guide as to what is appropriate and inappropriate. Rather, they provide a general outline of what is appropriate and inappropriate.

B. The National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation, Section 7.6:

- a. Counsel should be familiar with the substantive limits on both prosecution and defense summation.
- b. Counsel should be familiar with the local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.
- c. In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:
 - 1. highlighting weaknesses in the prosecution's case;
 - 2. describing favorable inferences to be drawn from the evidence;
 - 3. incorporating into the argument:
 - a. helpful testimony from direct and cross-examinations;
 - b. verbatim instructions drawn from the jury charge;
 - c. responses to anticipated prosecution arguments;
 - 4. the effects of the defense argument on the prosecutor's rebuttal argument.
- d. Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:
 - 1. whether counsel believes that the case will result in a favorable verdict for the client;
 - 2. the need to preserve the objection for a double jeopardy motion;
 - 3. the possibility that an objection might enhance the significance of the information in the jury's mind.

V. PROSECUTOR STANDARDS

“As we have said many times, a prosecutor may not seek a conviction at any price.” *State v. Salitros*, 499 N.W.2d 815, 817 (Minn.1993).

A. American Bar Association Standards for Criminal Justice

1. The Prosecution Function 3-1.1

In a criminal trial the prosecutor may not seek convictions at any price. Rather, the prosecutor is a "minister of justice" whose obligation is "to guard the rights of the accused as well as to enforce the rights of the public."

2. Argument to the Jury, Standard 3-5.8.

- (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
- (b) It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
- (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
- (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.
- (e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds.

B. Comment to MRPC 3.8. Special Responsibilities of a Prosecutor

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

C. Preserving The Record

In every jurisdiction you will find case law that reminds us that failure to object is a waiver. Most jurisdictions tell us that defense lawyers do not object in closing arguments for strategic reasons. Therefore, many jurisdictions will require an “unduly prejudicial” standard before relief can be granted. The fact that the defendant has been prejudiced, apparently is not enough. The reasoning goes something like this: If the defense lawyer did not believe that remarks made by the prosecutor were sufficiently prejudicial to warrant an objection at the time, it is difficult for the court to reach that conclusion upon review. This is one of the few time courts of appeals give deference to defense lawyers. It is critical that trial lawyers preserve the record for post trial motions and appeal. Depending on your jurisdiction, this can be done in a variety of ways.

1. Immediate objection in front of jury.
2. Requesting a cautionary or curative instruction.
3. Waiting until the end of the prosecutor’s case to address specific areas of the law and facts that have been misstated or misrepresented. Have the judge make the corrections.
4. Motion for surrebuttal to correct errors and misstatements.

VI. PARTING WORDS

There is no substitute for preparation. Good stories and even good facts can’t make up for lack of preparation. Know your facts, know your case, and know yourself. Believe in your story and believe in yourself. Your client’s freedom is depending on it!