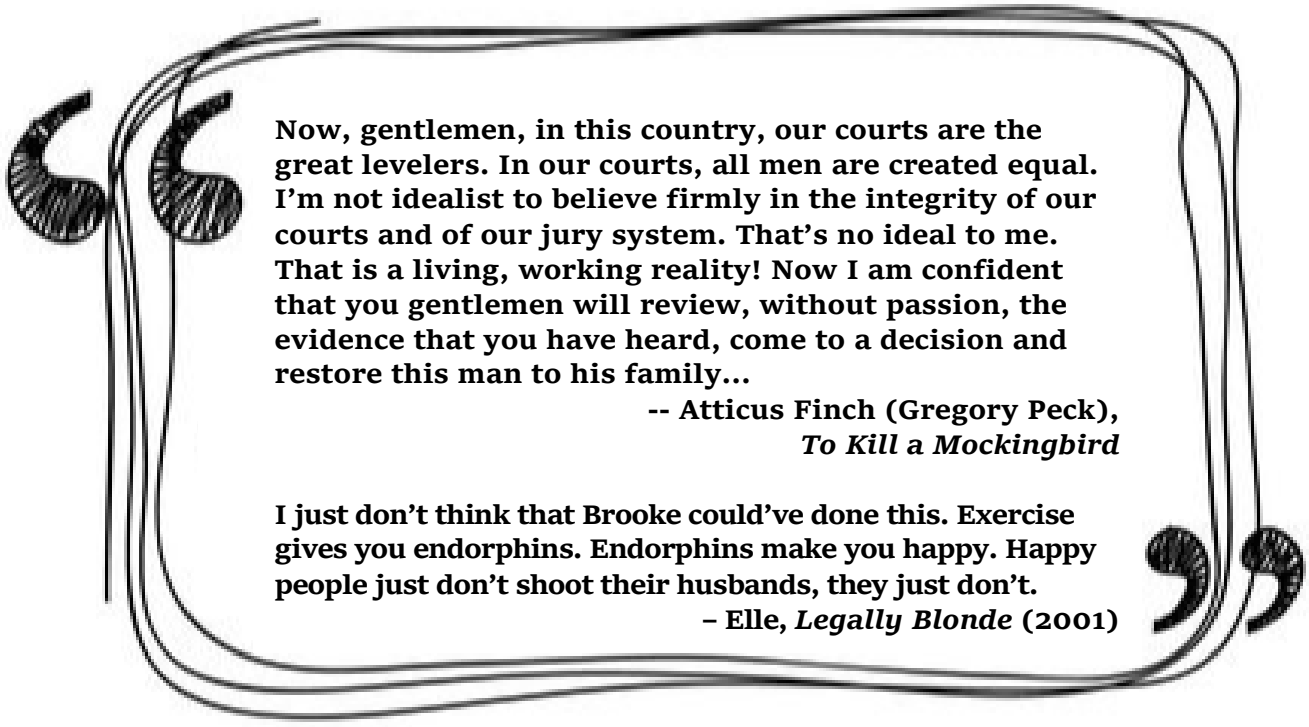
Chapter 10

CLOSING ARGUMENT

It's showtime! U*nless you are eight years old, Ringling Bros and Barnum & Bailey Circus is not THE GREATEST SHOW ON EARTH®. No, when you stand up to give your closing argument in your hotly contested trial, <u>you</u> better be THE GREATEST SHOW ON EARTH®. Not the clown, not the strongman, not one of the trained animals, not the trapeze act … though those all sound like awesome jobs. But the ringmaster … and maybe a bit of a juggler.*



Now, gentlemen, in this country, our courts are the great levelers. In our courts, all men are created equal. I'm not idealist to believe firmly in the integrity of our courts and of our jury system. That's no ideal to me. That is a living, working reality! Now I am confident that you gentlemen will review, without passion, the evidence that you have heard, come to a decision and restore this man to his family…

-- Atticus Finch (Gregory Peck),
To Kill a Mockingbird

I just don't think that Brooke could've done this. Exercise gives you endorphins. Endorphins make you happy. Happy people just don't shoot their husbands, they just don't.

– Elle, *Legally Blonde* (2001)

Chapter 10 – Closing Argument

After cross-examination of the accused or of the alleged victim, closing argument is the top "glory" moment for any litigator worth their salt. Remember the Churchill quote way back at the start:

> To each there comes in their lifetime a special moment when they are figuratively tapped on the shoulder and offered the chance to do a very special thing, unique to them and fitted to their talents. What a tragedy if that moment finds them unprepared or unqualified for that which could have been their finest moment.

That moment at trial is closing argument. It is the moment when you cash in all that credibility you have built up from the moment the members laid eyes on you. It is your chance to persuade those members that your facts are the true ones, the ones they should focus on in reaching their decision.

In that moment, do not let the perfect be the enemy of being persuasive. I have never given a "perfect" closing argument. Ever. I have given lots of good ones (and a few bad ones), and been close to perfect once or twice, but I have never given a "perfect" one. After each I have always felt like I left something on the table, kicking myself for forgetting to argue something I wanted to argue or phrase something the way I envisioned phrasing it. But that is silly and I am sure a psychologist would have a field day with the implications of focusing on the disappointment of failing to achieve perfection.

Do not let the perfect be the enemy of being persuasive … Perfect is not the goal of closing argument, persuasion is

Perfect is not the goal of closing argument, persuasion is. You will not be persuasive if you are worried about perfect delivery of every big-and-small argument you planned to make or perfect phrasing each of those arguments. You will only be persuasive if you, as the most credible counsel in the courtroom, are confident, conversational, and if not entertaining at least not boring.

So my rule #1 for closing argument—shoot for 80-90% and be happy with 75%. And no more. Remember, just because you forget to make an argument you wanted to make does not mean it is legally waived. The members during deliberations are usually smart enough to stumble upon whatever argument/interpretation of the facts you were going to suggest and, if not, then your argument/interpretation was probably too convoluted anyhow. There are no cameras in the courtroom and no one is really going to care that during your watercooler boasting you claimed you turned a cute phrase when you actually intended to do so but forget to do so. Go ahead and exaggerate your performance a little—that is a time-honored custom of old-timey litigators everywhere … just make sure there are no witnesses around who heard your actual closing argument.

The problem with shooting for perfection is you lose the persuasiveness of a closing argument that feels organic, that comes across as conversational rather than rehearsed. This is so because, in the search of perfection, counsel write out their closing argument, word for word, and then practice and practice it until it is memorized, word for word. They then delivery it, word for word, with the passion of Siri reading driving directions to the local grocery store.

When you watch these counsel deliver their uninspired and inauthentic closing arguments, you can literally see them mentally accessing their next memorized line in the moment after delivering the previous one. Or more likely at some point they will have an access problem, stumble and bumble for a few moments, and then give up and just resort to rapidly reading the rest of their argument, eyes glued to their notes. It is so painful to see. The thing is, such an argument might be "perfect" in the sense that every carefully crafted phrase and argument travels from counsel's lip to the members' ears. But such a "perfect" closing argument is immediately forgettable and lacks any persuasive flair. It perfectly squanders the opportunity, squanders counsel's "moment."

Which leads to **my rule #2 for closing argument—generally, do not murder board it before trial**. Think about it, talk about it with your colleagues, jot down some potential themes, roundtable and red team those, start building some slides, even put a draft outline together, but do not prepare a complete closing

argument in anticipation of subjecting it to a murder board prior to the start of trial. I understand that this is contrary to common practice, but the benefit of the excessive investment of time in preparing a closing argument for a murder board, and the utility of a pre-trial murder board for a closing argument that is not likely to survive first contact with the actual facts of trial, are far outweighed by the negative effect of all of this effort.

It drives exactly what the pursuit of perfection does—completely, word for word, written out closing arguments (and attempts at a degree of memorization). In those crucial last few days before trial, counsel is immersed in a process of becoming completely comfortable and confident with their mastery of the facts of the case. Forcing them to divert their attention from this by spending time preparing a closing argument interrupts that process. As they are not as confident in their mastery of the facts at that point, but are expected to have a somewhat polished product for the murder board, the natural result is to write out a complete closing argument and then, so as to not look bad in front of their supervisors and colleagues, spend time memorizing and practicing it.

Besides the hours wasted in this pursuit, hours better devoted to mastering the facts, this tends to lock trial counsel into a closing argument that thematically may not be appropriate for the facts as they actually develop at trial—in other words, this murder board closing argument likely will not survive first contact with the enemy (here the "enemy" being the reality that trial never unfolds as expected). But human nature being what it is, no one wants to reinvent the wheel they have spent so long inventing. So rather than tossing a draft closing argument that has been overcome by actual trial events, counsel will nibble at the edges and attempt to tweak when trashing and starting from scratch is the better course. The result—a closing argument that makes an argument, but an argument that does not fit the actual facts as well as it should and is not as persuasive as it could be.

And realistically, when I roll into bases where my junior co-counsel has prepared a closing argument for an upcoming murder board, my question is always the same, "why?" … followed by "my friend, hello, glory moment, sorry but I'll be handling closing argument and yours is not the one I'm going to give." Which is

another reason for **rule #2**—with a more senior counsel on the case, the chance of junior counsel handling closing argument is between slim and none with the latter more likely than the former.

All this being said, maybe in the simplest of (likely) one-day special courts-martial, where there is little chance that the facts presented at trial will differ from those expected before trial, maybe then a pretrial closing argument murder board is useful. Maybe. Or if junior trial counsel really wants to do the closing argument, their boss believes they have the ability to do so, and preparing a closing argument for a murder board will not divert their attention from mastering the facts of a case, then maybe a murder board is useful (and then only as an audition for the when the senior counsel rolls into town).

But even then, no surprise here, **my rule #3 for closing argument (really rule #1a and #2a)—do not write out your entire closing argument**. Here is what you do:

> (1) Write out word for word the attention-grabbing, theatrical introduction that you intend to land like a heavyweight punch;
>
> (2) Memorize that section so you can present it word for word;
>
> *-- This will get you off to a strong, confident start --*
>
> (3) Outline the rest of your argument, write out the transition/topic sentences if you must, bullets for the substance under each topic;
>
> *-- This will get you in structured conversational mode --*
>
> (4) Write out word for word the hard-hitting, inescapable conclusion that neatly, and hopefully dramatically, ties up your argument;
>
> (5) Memorize that section so you can present it word for word.
>
> *-- This will ensure you end with a flourish --*

Bullet (3) is the one that gets me the most pushback from junior counsel, who really like the permission to write out and memorize their introduction and conclusion, but also really want permission to write out and memorize their entire argument. "But

my style is more formal, conversational is not me." Nope. Until you have at least a handful of litigated trials under your belt you do not know what your style is. Once you do you will realize that if you are any kind of litigator your style is going to be some version of conversational. It may be more formal conversational, more professorial in approach, or it may be more informal, more chit-chat in approach, or somewhere in between, but to be successful it needs to be some version of conversational. The tone needs to be as if it was counsel's side of a conversation with the members, not a regurgitation of written words flung at them. It needs to appear to the members as if it comes from a place of confidence, not from a piece of paper. The delivery needs to be authentic. The deliverer needs to be believable and no member is going to put a lot of belief in a delivery that is merely reading to them or sounds like something is being read to them (because it has just been written down and then memorized).

And the thing is, most junior counsel have the ability to be conversational and just do not realize it or believe it. They just need a push into the deep end to realize that, yes, they can swim. I love to push them right in. At litigation courses and in murder boards (opening, and the rare closing argument ones) invariably the written/partially memorized presentation is stilted, inauthentic, and unpersuasive. So I will take counsel's notes away and ask them a series of questions. The trick is that when stitched together this series of questions is really an outline of the presentation they should be giving. For example, "Give me your elevator pitch, your one minute argument why should you win this case?" "What was the relationship between the Accused and the victim" "What happened in the house that night?" "Why is the victim credible?" "What about the argument that the victim did not disclose the attack until years later?" "What was important about the Accused's testimony and the cross examination?" "Which of the judge's instructions should the members pay special attention to?" "And tell me again why you should win this case." This question-and-answer approach invariably produces a presentation that is conversational, authentic, and persuasive. Rarely has the consensus from those observing this been anything other than that the presentation that resulted from the question-and-answer approach was leaps and bounds better than the written and memorized version that counsel

started with. So if you are an instructor, colleague, or supervisor of a junior trial counsel at a murder board or training session and it is not going well, feel free to use this push-into-the-deep-end-of-the-pool approach to put them on the right track, the conversational one. Or if you are the junior trial counsel, jot down the questions you want to answer for a particular case and then have a conversation with yourself (internal monologue probably best if you are in doing this in a crowded location).

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As for the content of the closing-argument conversation … well that is determined by the facts of your case. But there are consistent aspects of all good closing arguments, which leads to **my rule #4 for closing argument—make sure it is loopy**. Just as you use the looping technique in direct examination to subtly highlight (argue) key points of the witnesses' testimony, you do the same in closing argument for all those key moments you saved to the end to highlight for the members' consideration.

Voir Dire: During voir dire you had the members commit to your one theme or theory question. Now is your chance to hold them to the bargain: "Remember when in *voir dire* we talked about X and you all agreed Y."

Opening Statement: Remember the robust promises you made in your opening statement about how the case would unfold? Remind the members that you kept your promises. Or if the actual evidence did not exactly match your implicit promises, spin that evidence (within reason) to argue it was even better for your case than you expected (as otherwise defense counsel will argue you broke your promise).

Member Questions: If one of the members asked a question during trial, find a way to explain why that was an awesome question and why the answer to it seals the win for your side (without pandering too obviously).

Cross Examination: Remember your pointed, controlled, and structured cross examination of the Accused or main witness? Remember how you had a limited set of goals and were laser focused on just those? Remember how you controlled the witness

without arguing? Remember how the structure kept the witness off balance? Remember in all of this how you got what you needed to argue the case and did not belabor a line of questioning in an effort to drive the point home? How you fought the urge to ask that one question too many and prematurely tie the pieces of the cross together, like Tom Cruise in *A Few Good Men* when inexplicably in the middle of the cross examination of the doctor he turns to the jury and starts arguing the importance of a particular answer [love that movie, but jeez, some of it crosses the border into science fiction]. In closing you can stitch that cross examination into a more coherent narrative, putting those pieces together, highlighting particularly important questions and answer: "Remember when I ask the witness [X]? Remember when he said [Y]. Now you can understand why that exchange is so important because the evidence actually shows [Z]."

Gratuitous *A Few Good Men* insert

Instructions: The judge is going to give the members a roadmap to guide their deliberations—the instructions. Next to you, the judge is the most credible person in that courtroom. Why not trade on the judge's credibility by publicly thanking him or her, indirectly, for giving the members a set of instruction that, when applied, wins you the case. "As the military judge instructed you, you must [A]. Works for me because the evidence establishes [does not establish], beyond a reasonable doubt, [B]." The [A] varies, but it usually will be the instructions on the elements and definitions, credibility, and for the defense, the burdens.

There are other opportunities to loop (*e.g.,* reloop in closing the looping you did in direct … if a particular point was important enough to highlight with the looping technique it probably is important enough to mention in closing). You cannot go wrong by referring back to something that actually happened during the trial. If you are credible the members will buy what you are selling during closing, but they will pay even more if you bring the receipts (receipts being of course reference to the actual evidence).

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They will literally be throwing dollar bills at you if in addition to conversational in closing argument you are entertaining or at least not

boring [okay, maybe I have taken this metaphor too far at this point, but I needed an entertaining transition]. Sure, you can be not boring in language and in tone and you should strive for that every single time. But you can also look for those opportunities to be not boring in actions during closing argument as well, to give the members the respectful show they expect and deserve. So **my rule #5 for closing argument—just don't tell, but show**.

In this day and age, every closing argument (particularly in military courts) must take advantage of widely available and relatively easy-to-use presentation technology. Whether it is the basic PowerPoint (or Apple's Keynote), something more advanced like Prezi or TrialPad for iPad, or the more sophisticated (and expensive) programs like Sanction, or TrialDirector, or OnCue, you must aim to appeal to those members who are more visual than auditory learners … and give them all something to stare out rather than just you the whole time you are up there.

This deserves an entirely separate chapter, but a few points on courtroom technology:

> (1) Know how to use it (duh), practice with it as if you are using it in an actual trial, and assume it or something within it will fail when you need it the most and thus have a backup. I often use a clicker to advance slides, but also have co-counsel sitting near the computer in case something goes wrong—I also practice with them so they know when to advance the slides so I do not have to break my narrative with the monotonous "next slide," "next slide," "next slide," "oops, back one slide."
>
> (2) DO NOT just splash words up on a slide and then read the slide to the members. Bulleted lists are one thing; reproducing your outline is another. Timelines, Venn diagrams, snippets of transcripts, videos, and pictures of exhibits are better uses of the technology. They provide a good backdrop to your conversation, whereas reproducing your outline is a distraction, particularly as the members can read it to

themselves faster that you can read it to them so you are essentially just repeating something they have already "heard."

(3) Simplicity always trumps complexity in design. Unless you are an expert with the software, avoid complicated builds on slides or animation in video. Refer back to the truism of (1) – technology will always fail and the more complicated the use the more likely the failure. Do not hesitate to become an expert, just do not debut your expert skills until you actually are a time-tested expert and, as noted in (1), always have a backup. Simplicity includes tidiness. Fewer but bigger pictures per slide. Big-picture versus granular timelines. Fewer words, bigger fonts. If you go below 24-point font size to fit everything on your slide your slide is probably too wordy. In the same vein, if the oldest person in your office cannot "read" the slide from the furthest corner of the courtroom (glasses or not), it is too busy, too cluttered. Keep it simple or it will be distracting and a distracted member is not paying attention to your glorious argument.

(4) Learn how to "mute" a slide or the presentation when you move on to the next topic. Use the [B] button when in PowerPoint to make the presentation go black, or insert a blank/black slide when you move on to your next point but are not ready for the next slide. Getting to a slide too early or leaving a slide up when you are done talking about it is only going to distract. I see this almost every time junior (and even some senior) counsel uses courtroom technology. Distraction is bad.

It is also acceptable to be respectfully and passionately theatrical in a closing argument, the "show" to amplify the "tell." As long as it is organic to whatever argument you are making, and does not come across as forced, your passion in the theatrical action will further enhance your credibility with the members.

Look for those opportunities to be not boring in actions during closing argument as well, to give the members the respectful show they expect and deserve

Thus, it is acceptable to detach from the podium and move around the courtroom during your argument (as long as you are moving with a purpose and not just pacing back and forth). Just as in opening statement, it is acceptable to grab a piece of evidence and wave it around (though maybe do not point the murder weapon directly at the members, even if it is not loaded). It is acceptable to bang on a table as you … Make.Your.Important.Point. There are so many ways to "show" in a closing argument.

For example, I have had a couple cases where defense counsel focused on the amount of time available for a particular offense to have occurred, arguing the amount of time (let's say a minute) was not long enough. I have stopped in the middle of my closing argument on this point, drawn the members' attention to the clock, and stood silently as a minute clicked off. A minute of silence in a tense courtroom feels like an eternity, certainly feels long enough to commit almost any crime. That minute of silence was worth more than the 100 words that otherwise would have filled up that time.

Or in a murder trial, when the Accused testified and suggested an alternate and accidental way by which the strangulation occurred, I had two of my co-counsel come to the well of the courtroom and act as my props as I explained why the Accused's explanation was implausible and then how the evidence showed the strangulation actually occurred. Seeing is believing.

Or when I was a defense counsel and had a case in which the government failed to call to testify what I characterized as "essential" witnesses, I grabbed the witness chair and plunked it in the middle of the courtroom to symbolize the prosecution's missing witnesses—my empty-chair defense. [Teachable moment: probably best to let the judge know you are going to re-arrange furniture before you do so … Judge Pavlik let me do it but I could tell, and he mentioned afterwards, he almost stopped me.]

There are others, but you should get the idea. "Show" and "tell" during closing argument is better than just the "tell." Look for the opportunities to do both.

Now this may seem like a lot of "stuff" to deal with in closing argument, which leads to my next rule, which also answers the question I always get from junior counsel: "how long should a closing argument take?" The answer, and **my rule #6 for closing argument—it'll take as long as it takes, but only half as long as you think**. I have given 10-minute closing arguments (assault, drug possession cases). I have given 2-hour closing arguments (murder case with lots of video playback). The facts and a narrative retelling of them drive the length of closing argument in each of those cases.

Closing argument is not a line-by-line survey of all the testimony and all the other evidence offered at trial. This becomes repetitive and boring. As the name suggests, closing argument is an argument, an attempt at persuasion, which highlights the evidence that supports it and discounts the evidence that does not. Too often, closing arguments are too long because counsel forgets that the narrative should drive the argument, with the evidence weaved in to support it. Rather, counsel gets bogged down in that repetitive, hyper focus on a line-by-line survey of every piece of evidence with the narrative becoming disjointed and muddled.

Let the narrative (your point) drive the presentation and use only what you need of the evidence to support. Like this: "The evidence is overwhelming that the light was red and you know that because witness [A] told you that, witness [B] told you that, and witness [C] told you that."

Do not let the evidence bury the narrative (your point). So not like this: "Remember how witness [A] testified that he was out driving with his wife, stopped at *Krispy Kreme* for a chocolate donut, at then parked at the corner of 2nd and Main as they were on their way to a doctor's appointment. As they were crossing the street, they noticed that the light was red for northbound traffic. And remember how witness [B] testified …. And remember how witness [C] testified …. Thus all of these witnesses testified that the light was red." Perhaps that level of detail is unnecessary to establish your point. Certainly if a witnesses ability to perceive that the light was red is in question, go into detail of why the witness is credible but even then start with the narrative (your point) and weave in the specific evidence that supports it.

> **Closing argument is an argument, an attempt at persuasion, which highlights the evidence that supports it and discounts the evidence that does not**

This approach ensures that your argument remains just that, an argument, provides a more forceful structure than a mere line-by-line recitation of the evidence does, and streamlines the presentation by forcing focus on the "important" facts. The members have been paying attention, they have likely been taking copious notes, and they are focused on that facts just like the judge told them to be. They have been waiting to understand why all these facts matter and the time for them to learn why is closing argument. If you just repeat the facts to them during your closing, they are not going to be satisfied. Not satisfying a member is not good for your case. Don't do that. Satisfy them by placing the important facts, the operative facts, within a narrative that persuades them that they should find in your favor. Trust that they are not going to forget some fact or discount some fact just because you do not dwell on it in your closing argument.

Finally, no discussion of closing argument is complete without dealing with rebuttal. To the extent the defense case still has one, rebuttal is the dagger plunging into its still beating heart. To be effective, however, it needs to be short, non-repetitive, and purposeful. Which leads to **my rule #7 for closing argument—"liar, liar, pants on fire" is not an effective rebuttal argument.**

The members have likely been listening to arguments for at least 90 minutes by the time you get back up for rebuttal. When the judge turned to you and said "Counsel do you wish to present rebuttal argument?" many of the members likely said to themselves "please say no, please say no," and mentally sighed when you said "yes your Honor." That is unless, of course, you have fully incorporated the **PrimeCOLE** method of litigation, then they said to themselves "awesome, let's hear it superlawyer."

But assume they are a little tired of listening, even to the best of closing arguments. Keep it brief. A long rebuttal is a sign of weakness, sending a message that the defense made substantial headway in their closing argument. Rebuttal is a dagger, not a Band-Aid (or tourniquet) to stop the bleeding in your case. If your case is dying as you reach rebuttal, nothing you say is going to take it off life support—remember,

facts decide the outcome, not the arguments of counsel. If you "must" argue in rebuttal for more than 3-5 minutes, you are in trouble. If you can argue everything you need and want to argue within 3-5 minutes, you are golden.

Do not waste that 3-5 minutes countering every factual misstatement you believe defense counsel made … you are so wrapped up in the battle that you will believe that not a single thing defense counsel argued accurately stated the facts and 3-5 minutes will not be nearly enough time to counter all the perceived misstatements. Pick the most egregious and argue that for no more than about a minute: "What you just heard was what defense counsel had hoped the evidence in this case was going to be, not what it was. I trust that you paid close attention to all the testimony in this case and will be able to separate that fantasy from the reality of the evidence before you. But do recall that witness [X] actually testified [A] and witness [Z] testified [B]. That's an inescapable reality." [And yes, I know that is not a "de-personalized" argument (see Chapter 14 – **Civility**), but like I say there I am not perfect].

> **To the extent the defense case still has one, rebuttal is the dagger plunging into its still beating heart. … [It is] not a Band-Aid (or tourniquet) to stop the bleeding in your case. If your case is dying as you reach rebuttal, nothing you say is going to take it off life support**

And do not waste that 3-5 minutes repeating verbatim the arguments you already made in your closing or rambling through an unprepared repackaging of that closing. You should have a specific purpose in rebuttal and that purpose is to make three points, exactly three. The first is the factual rebuttal as phrased above. The second and third, which you prepared at the same time you prepared your closing, are the primed repackaging of your two knockout punches. These are the two most powerful arguments for why the members should convict. Delivery them in phrasing differently than you have before, but deliver them just as forcefully, and then sit down, your work is done.

Closing argument is your moment. It is the culmination of all the effort you have put into developing the case and the credibility you have earned from the opening moments. Follow the rules above and rise to your moment, and earn the glory that you so richly deserve.

CLOSING ARGUMENT RULES

#1 – Shoot for 80-90%, and be happy with 75%

#2 – Generally, do not murder board it before trial

#3 – Do not write out your entire argument

#4 – Make sure it is loopy

#5 – Just don't tell, show

#6 – It'll take as long as it takes, but only half as long as you think it should

#7 – "Liar, liar, pants on fire" is not an effective rebuttal argument