

Closing Argument



Chapter Eleven



In December, 2004, Captain Don Burgess, assigned to the 167th Corps Support Group, 1st COSCOM, and attached to the 1st Infantry Division, flew from Forward Operating Base Q-West, Iraq, to give Law of War training to Soldiers in Mosul. While at a refueling point at night, an Apache helicopter landed on Captain Burgess's Blackhawk, causing catastrophic damage to both helicopters and killing the two Apache pilots. One of the few things that survived the crash was Captain Burgess's 2002 Manual for Courts-Martial, visible amidst the charred wreckage near the Blackhawk helicopter's tail. This tragic accident demonstrates the dangers of our dual professions, and reminds us that justice will survive, even in a deployed setting.

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I. SKILL OVERVIEW:

Goal: This chapter is designed to develop counsel’s ability to prepare and deliver a persuasive closing argument.

II. THE LAW:

- A. **Argument by Counsel on Findings:** “After the closing of evidence, trial counsel shall be permitted to open the argument. The defense counsel shall be permitted to reply. Trial counsel shall then be permitted to reply in rebuttal.” RCM 919(a).
- B. **Contents of Argument:** “Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party’s theory of the case.” RCM 919(b).
- C. **Limitations:** Prosecutors should not make arguments calculated to inflame the passions of the panel or that would divert the panel from its duty to decide the case on the evidence. *See generally* AR 26-27. In general, objections are sustained less often during closing argument because counsel are permitted to characterize and synthesize the evidence. Objections that are sustained often involve arguing facts not in evidence, grievously mischaracterizing the evidence, and making extremely inflammatory arguments.
 1. **ABA Model Rules of Professional Conduct Rule 3.4(e):** Counsel should not
 - a. “allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;
 - b. assert personal knowledge of facts in issue except when testifying as a witness; or
 - c. state a personal opinion as to the justness of a cause, the credibility of a witness . . . , or the guilt or innocence of the accused.”
 2. ***U.S. v. Sewell*, 76 M.J. 14 (C.A.A.F. 2017):** The Court of Appeals for the Armed Forces found improper several of trial counsel’s closing arguments. Primarily, the Court found objectionable counsel’s repeated suggestion that the accused had a propensity to engage in criminal conduct: “What kind of man has 118 photos on his phone? . . . Is that the type of guy that would do that to people? You all know the answer.” *Id.* at 17.

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III. THE FOUNDATIONS OF AN EFFECTIVE CLOSING ARGUMENT:

- A. **Theory and Theme:** Every part of the court-martial has led you to this point: the summation. This is where counsel explains in powerful terms how the case theory is supported by all the evidence. This is where counsel uses the case theme repeatedly to give the panel the moral ammunition it needs to vote in his or her favor. This is where counsel refutes the opponent's theory by showing how it is unsupported or contradicted by the evidence.
1. **Case Theory:** The case theory is the narrative of *what happened* in the case and the legal rules flowing from that narrative that constitute the claim or defense.
 2. **Theme** is the distilled essence of the case boiled down to one phrase. It should be one of the first things out of your mouth and repeated as often as possible during closing argument. This is the phrase that the panelists will be thinking as they deliberate.
 - a. "If it doesn't fit, you must acquit."
 - b. "If he couldn't have her, nobody would have her."
 - c. "SGT Mallick infiltrated the family to get to his prey."
 - d. "He was an NCO who took advantage of a Private who had been in the Army less than 6 months."
 - e. "This was no rape: SPC Moreland was a willing participant on a wild weekend in the wilderness."
- B. **Useful Framework—Tie the Elements to the Evidence:** A basic and useful framework for constructing a coherent closing argument is to tie the elements of each specification to the evidence. When possible, a chronological approach works best. For the prosecutor's closing, you must list each element of the offenses charged and demonstrate to the panel how the evidence satisfies each element. For the defense closing, you must list the elements and demonstrate where the evidence fails to satisfy them. Defense should spend most of its time arguing about those elements where there is factual dispute.
- C. **Humanize the Victim or Accused:** Counsel should carefully and thoughtfully bring the victim or accused to life by placing him or her in real-life scenarios and filling in human details. Members will remember these facts that humanize the victim or the accused, and they will help counsel get past the temptation to look at the case as merely a contest between lawyers. Just as with the opening statement, strive to tell a real story about real people.

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- D. **Argue:** The sole purpose of closing argument is to *persuade* the panel to do something, to *motivate* the panel to acquit or convict. Every word out of your mouth, every gesture, every movement about the courtroom should move the fact finder toward accepting your case theory as gospel. All the tools you used for the opening statement will be useful here:
1. Place yourself in a commanding spot before the panel;
 2. Deliver the closing without reading it;
 3. Move deliberately around the courtroom to underscore your narrative;
 4. Use body language and voice modulation deliberately to underscore your narrative;
 5. Be passionate but not angry—show how much you believe in what you say; and
 6. Look panel members in the eye.
- E. **Draw and Argue Conclusions and Inferences:** The evidence may support any number of interpretations—from the solid and plausible to the fanciful. Argue why only *your* interpretation makes sense.
- F. **Comment on Witness Demeanor:** Don't underestimate the extent to which judgments about witness credibility are based on appearance and demeanor: willingness to answer difficult questions in a straightforward manner, changes in attitude between direct and cross examination, and confidence or lack thereof are all proper areas for commentary during summation to persuade the fact finder that a witness is either worthy or not worthy of belief.
- G. **Prosecutors Beware Burden Shifting:** The government must never imply that the accused has the burden to put on a defense or to testify:
1. The government must not call attention to the defense's exercise of the right to remain silent; and
 2. The government must not make any comment on the accused's failure to speak to commanders or to law enforcement.

Such comments are a violation of the accused's right to remain silent, and they present a high likelihood of mistrial, reversal on appeal, or a sustained objection and a strongly worded curative instruction.

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- H. **Start Strong and End Strong:** While the closing argument should sound as if it is spontaneously delivered, it should be carefully planned. Part of the planning is to start with a strong and memorable step to get the panel’s attention. You should also end with a strong and memorable landing. Both the beginning and ending of your closing argument should be memorized and practiced *verbatim*. If you get sidetracked or an objection is sustained that interferes with your momentum, you must be able to quickly recover and deliver your most important remarks with confidence.
- IV. **PRACTICE POINTERS:**
- A. **Write It but Do Not Read It:** Do not read the closing argument to the panel. Your carefully planned closing should look spontaneous, natural, and conversational. So after you write it out, go through it several times, preferably in front of a mirror. To do all the above and look good doing it, you should plan, write out, and practice the closing well in advance.
- B. **Incorporate Instructions:** Counsel must be familiar with the instructions the military judge will provide to the panel and quote directly from these instructions during closing argument. The panel will then hear *your* very words repeated by the military judge during the instructional phase. This lends credibility to your argument while highlighting key points.
- C. **Exude Enthusiasm:** You do not need to be either a cheerleader or a table pounder, but you must care about your case and the position you are advocating. Enthusiasm is reflected not only in vocal inflection and word choice, but also in command of the courtroom, organized presentation of a case, and passionate advocacy.
- D. **Hold the Opening against Your Opponent:** Take notes during your opponent’s opening and remind the panel during your closing of promises made in the opening that your opponent did not keep. Expose weaknesses in opposing counsel’s theme.
- E. **Wield Exhibits:** If an exhibit is worth admitting into evidence, it is worth reinforcing at every opportunity. People learn best through multiple senses. So use exhibits and visuals to underscore your narrative.
- F. **No Personal Opinions:** Avoid using first-person at all. Avoid saying “the defense believes” or “it is the government’s position,” or “I think . . .” Using first-person is objectionable and ineffective in advancing a position. Instead of saying, “In my opinion, the evidence is weak,” it is much more powerful to say, “The evidence is so thin it is almost invisible, and here is why.”

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- G. **No Inside Baseball:** Skip all the boilerplate stuff about the argument not being evidence, the function of the military judge and panel, and the history of the UCMJ. Frankly, all that procedural stuff is pretty boring and the military judge will tell them anyway.
- H. **Highlight Strengths:** Your opponent will hammer at your weaknesses; but when you have a particularly strong element in your case such as an extremely sympathetic victim or a solid confession, mention it prominently and repeatedly.
- I. **Compensate for Weaknesses:** You should account for significant weaknesses. The obvious weaknesses in your case, such as a prior inconsistent statement made by your victim, lab errors, or your client's confession, should be addressed. But addressed with a plan. Admitting such weaknesses demonstrates your candor. But you should couple the admissions with explanations that lessen their impact or—better still—show why they are not weaknesses at all, but strengths.
- J. **Inferences and Matters not in Evidence:** Judges will usually give counsel liberal rein to argue inferences from the evidence. But be careful to rely *only* on evidence properly admitted during the proceedings. Defense counsel should also be careful not to comment on the absence of evidence when in fact that evidence was suppressed on a defense motion.

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DRILLS

- A. **Goal:** Train counsel to deliver a persuasive closing argument.
- B. **Conduct the drills:**
1. **Preparation:** Give notice of time and date of training with guidance to prepare a closing argument from a previous or upcoming case. Alternatively, counsel may use either *U.S. v. Anderson* or *U.S. v Mallick*, both contained in this manual’s Appendix, to create a closing.
 2. **Execution:** Instruct participants to create a portion of a closing argument focusing specifically on one of the skills outlined above:
 - a. Theory and theme;
 - b. Organization;
 - c. Transitions;
 - d. Humanizing witnesses and the accused;
 - e. Primacy and recency;
 - f. Powerful, simple language;
 - g. Use of exhibits; and
 - h. Use of electronic displays.
 3. **Critique:** Stop counsel during their summations if they make arguments that are objectionable, unclear, or misleading. But concentrate on the aspect of closing arguments that is the focus of this drill.
 4. **Play the Opponent:** For defense counsel, give them a sense of what the government argued, then have the defense deliver the closing *immediately*, incorporating rebuttal of the government’s argument into their prepared closing. For trial counsel, give them a sense of how the defense would respond to their closing and then require your counsel to *immediately* deliver a rebuttal. Give them a demonstration yourself if need be.
 5. **Find and Fix a Real Closing Argument:** The supervisor or delegate should find a real closing argument from an existing Record of Trial and make it available to participants. Use this closing argument to reinforce some of the

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lessons from this chapter. Participants should rework and deliver the argument, with the supervisor and all other participants providing critique:

- a. **Intro:** Tell counsel to draw a line at the point at which the argument starts to have something to do with the case at hand, *e.g.*, the facts, the witnesses, or the accused. Often counsel will start a closing argument with generalities about what a closing argument is, who has the burden of proof, or some other procedural matter. Instead, look at the first sentence that relates to the case or client and have counsel start with that, making a new argument as punchy and engaging as possible. Discourage counsel from generic beginnings that will quickly bore a panel into missing the real beginning of the closing argument.
 - b. **Outro:** Draw a line at the end of the closing argument when counsel diverges from the case at hand and goes into closing generalities about the burden, listening to the judge, *etc.* Look at the last line during which counsel actually talked about the case. Rework the ending to include a more memorable landing.
 - c. **Language:** Have participants examine the language in the argument and see where it can be improved by making it simpler, clearer, or more powerful.
 - d. **Organization:** Have participants examine the organization of the argument to see if it could be reworked to be clearer.
6. **Critique:** Critique should be based on counsel's ability to
- a. Argue;
 - b. Articulate a coherent theme;
 - c. Start and end strong;
 - d. Use powerful, persuasive language;
 - e. Present a forceful and credible theory;
 - f. Acknowledge important weaknesses;
 - g. Emphasize strengths; and
 - h. Refute *significant* portions of opponent's case.

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REFERENCES

Mauet, Thomas A., *Trial Techniques and Trials, Ninth Edition*, Wolters Kluwer (2013), pp. 443-504.

Mauet, Thomas A., Warren D. Wolfson, Stephen D. Easton, *Materials in Trial Advocacy, Eighth Edition*, Wolters Kluwer (2013), pp. 435-88.

View Video Vignette #2, Closing Argument in *U.S. v. Anderson*, available on the digital version of *The 2018 Advocacy Trainer* or on JAGCNet.