



Jury Argument

Winning Techniques

By James A. Johnson

A Few Tips for Summation

Much has been written about jury argument or summation. Many articles are replete with information on how to prepare for final argument. What follows is for the consummate trial lawyer and for those who aspire to such heights. I assume the serious trial lawyer does his or her homework and will prepare, rearrange, and hone the final argument from the time the client walks into the office to the close of the evidence. When summing up, I adhere to the KISS principle (keep it simple, stupid), logic, conversational tone, sincerity, and persuasiveness by the use of analogies and impact words and phrases.

Analogies

One of the greatest weapons in the trial lawyer's arsenal is the analogy. Analogies are powerful, and they dominate the deliberations after closing arguments. Analogies hold attention because they tell a story or make a point about something the jurors know from their own experiences. By using appropriate analogies, you permit the jury to be persuaded on familiar territory to support the theory of your case. Also, they provide a change of pace and create a little suspense as the point of your story becomes clear. However, analogies have to be examined and used with the particular makeup and sensitivities of the jurors in mind. You do not

want to appear sexist, biased, or untrustworthy. Moreover, analogies must be supported by sufficient detailed factual argument that focuses on the very essence of your client's case.

The key is to permit the jury to reach the desired verdict on its own. The jurors will hold that conclusion more firmly than if they are told what conclusion to reach. Jurors want something to do when they retire to the deliberation room. And it is the skillful and creative trial lawyer who provides them the ammunition. Enter the analogy:

"My father explained to me about Moses and the Ten Commandments. He said that Moses went to the mountaintop and spoke with the Lord. And when he came down he had two stone tablets, laws for the people. And the Ninth Commandment said, 'Thou shalt not bear false witness against thy neighbor.' But John Smith, he never got the message."

Can you imagine what the creative trial lawyer could do with one or more of the other nine commandments?

Here is an example analogizing the judge's charge to a blueprint to make certain that the jury will follow the law:

His Honor is going to give you a charge that's an accumulation of well over two hundred years of work by judges and juries just like yourselves. It's the law of the land. Let's talk about that for a minute. It's like a builder who builds a house. He starts out

FAST FACTS

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with a blueprint; the charge the judge is going to give you is just like a blueprint. And if the builder follows his blueprint, you get a good house.

If on the other hand the builder strays from the blueprint the result will not be proper if you stray from the charge of the law, the blueprint His Honor is going to give you; you’ll get an unfair result. If in that jury room you start talking about things, some things you have heard people here talk about that are not in that charge, the result will not be proper. Such things as it might ruin a doctor’s and hospital’s reputation if somebody found that on a given day, the defendants’ actions fell below acceptable standards.

Ladies and gentlemen, that’s not part of that blueprint and if the builder in building a house lets things like that interfere with his building and went outside the blueprint, he would get a house with defects in it. And the blueprint you’re going to be following, as I’m sure you will, is a blueprint for justice and it is justice for everybody in the courtroom, for all parties and all the lawyers’ clients. If you follow the judge’s blueprint of the law, and I feel sure you’re going to, you’re going to achieve justice for everybody.¹

Damages

Pain and suffering is the largest element of damages in a serious personal-injury case. How can the trial lawyer effectively communicate to the jurors the pain that your client feels without improperly telling them to put themselves in your client’s shoes? Moreover, pain is subjective. The jury cannot feel or experience the same pain as your client. The objective is to effectively communicate pain and suffering to the jurors so they can place a dollar value on this important element of damages.

Consider the “Want Ad” analogy:

How do you fairly compensate for pain? Each of us has a psychological defense mechanism which blocks painful experiences from our memory. That mechanism allows us to return to the dentist and allows a woman to go through more than one childbirth. It is an essential part of our makeup and helps us maintain our sanity. The difficulty is that it prevents us from evaluating the pain and suffering of someone else. We all, for example, understand

that we are entitled to an hourly rate at our job and do not have any question but a fair hourly rate for working at a job is proper. It is much more [difficult] to translate that analogy into the experience of a person undergoing permanent and hourly pain. Let me suggest a different [approach]. Suppose that one day you saw an ad in the paper which said:

“Wanted, For Hire: No education or previous experience necessary. Hourly rate (hourly rate should be commensurate with plaintiff’s normal hourly rate). Job requires applicant to undergo continuous (describe plaintiff’s pain). Note, however, that this job is a lifetime job with no vacations, no time off, no coffee breaks and no fringe benefits. Once accepted, applicant cannot quit.”

Would any responsible person accept such employment? The answer is obvious. Nevertheless, (name the plaintiff) has, without his/her volunteering, been given this job for life, 24 hours per day, 365 days per year for the rest of his/her life. According to the tables of mortality, (name the plaintiff), has a life expectancy of ___ years.

You folks have been given the job of deciding the fair salary for this position. Remember, when you are deciding that you must be reasonable in awarding damages for this unwanted job caused by the negligent conduct of this defendant.²

Good analogies also send another message—that the attorney should be believed.

Motivation

In closing argument, you must help the jury bring together all the disparate elements of the evidence produced at trial and shape them into a simple, understandable theory of your case. The most compelling arguments are those that convey a deep

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personal conviction of the client’s cause together with the evidence and the court’s instructions. The jury must be motivated to return the desired verdict. You must motivate them to act. Make the jury realize that this undertaking is special by involving them. Tell them that what they do here today will be heard in the community and that they are the conscience of the community. The following is part of what I expressed to the jury in one of the largest federal conspiracy cases in Houston, Texas:

“Ladies and Gentlemen. Everybody in the first row and everybody in the second row has been chosen, as an exclusive group of citizens who have come together for the business of doing justice. If you are guided by a greater than earthly

power, of course, in making up your own minds about this matter, then based on the evidence and the testimony, it should be your *duty*, as well as your *pleasure*, to find [the defendant] ‘Not Guilty.’”

In September 2008, the Michigan Supreme Court instituted a pilot project for jurors in civil and criminal cases to discuss the trial with each other before the case wraps up.³ They are encouraged to take notes and submit questions to the judge in writing before a witness is excused. Also, jurors will be given binders with legal instructions and copies of documents that were admitted into evidence. The Michigan Supreme Court is debating whether to change how juries operate during trials. Moreover, the Michigan Court Rules permit jurors to take notes⁴ and submit questions⁵ to the court in a criminal case.

What does all this mean for litigators? Make certain that you elicit from witnesses pertinent facts, raise questions and innuendoes in the minds of jurors, and provide analogies so that they will write them down. If you can achieve this, one or more of the jurors might argue your case or advance your theory in the jury deliberation room.

Rhetorical Questions

Does it matter if the case is criminal or civil? Enter the rhetorical question. Who? What? Where? When? and Why? Here’s a sampling of rhetorical questions:

“How do you know what the conversation was about?”

“How do you know who made the telephone calls?”

“Where is the weapon? Where is the cocaine?”

“When did the defendant turn left at the intersection?”

“Why did Mr. Smith wait two days before he reported the accident?”

“Does human life have value?”

“Why did Mrs. Jones sell 5,000 shares of her stock just before this event?”

You should answer a few rhetorical questions so they may be echoed by favorable jurors. Questions posed in a dialogue are the same questions that arise in the minds of the jury and the judge. Other questions should not be answered because you want each juror to answer those questions for himself or herself. When this is done, the answer becomes the juror’s idea or thought and not

that of the lawyer. Properly and sparingly employed rhetorical questions are very persuasive.

Impact Words

Powerful, descriptive impact words and phrases provide a window for the jury to see the righteousness of your client’s cause. For example:

“Who will teach his son how to throw a baseball, ride a bike, or say his prayers?”

“This insurance company sold John Smith an umbrella when the sun was shining and tried to take it back when it started to rain.”

“Only through your collective wisdom can John have a full cup of justice.”

“A jury speaks through its verdict. *Speak* to Mary and restore her to her family.”

I provide additional examples of impact words and phrases in my article in the January 2011 issue of this journal.⁶

Impact words and phrases can be tailored to fit the particular case. They provide a word picture for the jury. And they have a lasting effect. Jurors expect the use of words that have a legal ring. But be selective. Use the right impact words that also appeal to reason. An impact phrase such as “He is a prisoner in his own body” is an attention grabber that goes right to the jurors’ souls.

Impact words alone will not win your case. Exhibits, demonstrative techniques such as PowerPoint and charts, and jury instructions should be integrated and analyzed in jury argument. Look into the eyes of each juror. Talk to them in a cogent manner, in a conversational tone, and place the burden squarely on their shoulders by telling them that it is now their responsibility to do what is right.

Final argument is the last opportunity to communicate with the jury without interruption. It is a moment of high drama for everyone involved in the case. Do not take cavalierly your chance to highlight and imbue in the jury the importance of your client’s case. Some studies and lawyers suggest that 80 percent of the jurors have already made up their minds after opening statement. Believe it if you want. If 80 percent of the jurors have made up their minds, that leaves 20 percent still to be persuaded. And you need to fortify the 80 percent.

Other research suggests that the majority of the jurors have decided at the close of the evidence on a story of what occurred between the parties. This decided story is not necessarily a verdict. It is termed a “predeliberation decision.”⁷ What better way to develop and present a persuasive and credible trial story than by analogy? Implementing a *simple but persuasive analogy* in closing argument, encompassing your central theme, can make the difference between winning and losing.

Final argument should track the opening statement. One of the biggest challenges in preparing a complex case for trial is choosing the central theme on which you will base your case. To deliver a memorable final argument, you must have made a good



opening statement with a central theme. My article in the January 2011 issue discussed strategies for preparing an effective opening statement.⁸ The theme should be the reason jurors must decide the case in favor of your

client. In opening statement, tell them what you're going to tell them, tell them at trial, and then in summation tell them what you told them, sprinkled with an analogy, rhetorical questions, and impact words. The following is a capsule version of one of my pet arguments against an insurance company in a substantial uninsured motorist or bad-faith-denial-of-insurance case. Like most final arguments, it should be delivered in a conversational tone, raising your voice occasionally when appropriate.

"Ladies and gentlemen of the jury. I rise to speak to you on behalf of Mary Jones. Mary, just like most of us, bought a promise when she purchased her automobile liability policy. A promise that when we are harmed, we will have a fair, rock solid, good neighbor who will be there for us. And will use its resources to repair our damaged lives. As Mary did, we only call on our insurance company when we have been harmed by some misfortune.

"Just like Mary, we take our paid-for promise with peace of mind, knowing that when we put our trust in the hands of our rock solid, good neighbor, we will be secure, safe, and protected.

"Did XYZ keep its promise?

"XYZ insurance company sold Mary an umbrella when the sun was shining and tried to take it back, right away, when it started to rain.

"How will Mary pay for her medical bills?

"Who will teach Mary's daughter how to ride a bike or say her prayers?

"During this proceeding, everybody has had an opportunity to speak. The lawyers have had an opportunity to speak by asking the witnesses questions. The witnesses have had an opportunity to speak by answering those questions. This honorable court has had a chance to speak by controlling this proceeding and giving you its instructions.

"Now ladies and gentlemen, it is *your* opportunity to speak. A jury *speaks* through its verdict!

"*Speak* to Mary and tell her that you understand how she was forced to face alone the consequences of the collision.

"*Speak* to XYZ insurance company and tell it that when a citizen of Oakland County pays the premium for a promise, it is going to have to keep that promise.

"What you do here today will be heard in the community. And if you speak loud enough, it will be heard in XYZ's home

"XYZ insurance company sold Mary an umbrella when the sun was shining and tried to take it back, right away, when it started to rain."

office. Only through your collective wisdom can Mary have a full cup of justice.

"This awesome responsibility is now yours. I am confident that you will enter a fair verdict that you can be proud of."

Keep in mind that if you represent the defendant, you can easily reverse the central theme and rhetorical questions in favor of the defendant.

There is a plethora of reading material to help an advocate in preparing for final argument, such as the publications and seminars of the Institute of Continuing Legal Education.⁹ ICLE is the education provider of the State Bar of Michigan. Also, join and become active in one or more of the State Bar sections. Read the works of a bevy of the masters: Larry Charfoos, David W. Christensen, Bob Zeff, and F. Lee Bailey, to name a few. A trial lawyer should also read newspapers for current events, the Bible, poetry, and *Bartlett's Familiar Quotations*. There is nothing wrong in adapting someone else's words if they fit your style and the facts of your case. Or you can really do some work and develop your own analogies, rhetorical devices, impact words, and other winning techniques. ■

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FOOTNOTES

1. Smith, *Art of Advocacy: Summation* (New York: Matthew Bender & Co, Inc, 1978), §26.25.
2. Lee, *Pain analogies for closing argument*, 16 NM Trial Lawyer J 165, 168-169 (August-September 1988).
3. Adoption of a Pilot Project to Study the Effects of the Jury Reform Proposal, Administrative Order No. 2008-2.
4. MCR 6.414(D).
5. MCR 6.414(E).
6. Johnson, *Persuasion in opening statement: Generating interest in a convincing manner*, 90 Mich B J 42, 43-44 (January 2011).
7. Call, *The psychology of jury deliberations*, 50 Tex B J 590 (1987).
8. Johnson, n 6 *supra*.
9. Institute of Continuing Legal Education <<http://www.icle.org>>; (877) 229-4350.