The Power of Persuasion

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Introduction

It is a major premise of our profession that the presence of a skillful and devoted attorney will have some influence on the outcome of a controversy. This influence is exerted by our powers of persuasion on the court and the jury. We begin persuading during jury selection and that effort continues through every part of the trial.

However, the purest form of advocacy occurs during the opening statement and final argument to the jury. At those moments, when we stand face to face with the jury, all our skills and powers are brought to bear on the litigation. This presentation is devoted to ideas and techniques that are especially suitable for those two important segments of a trial. And, although some of the examples given relate to the defense of criminal cases, they can be used in civil litigation as well.
The Opening Statement

It has been said that the most electric moment in the theater is when the lights are dimmed and the curtain rises. Playwrights struggle to find the right line or action to capture the audience and hold them throughout the scenes that follow.

The equivalent for us is when we first rise to make our opening statement. Try to establish the theme of your argument in your opening remarks and seize the jury’s attention. At no time in the trial will you have the jurors’ minds so uncommitted or so unspoiled.

An editor of a major publishing house once told me that the opening lines of a novel should “grab the reader by the lapels and shake him.” Consider, for example, the following:

I have the awesome responsibility of representing Howard Littlefield in what will undoubtedly be the most important moment of his life.
For, you will decide whether he will be forever condemned to a criminal conviction and suffer all of the terrifying consequences that follow in the wake of such a personal calamity.

Howard has put his fate in your hands and that is the greatest act of faith a person is capable of.

Those opening remarks impress upon the jurors the seriousness of their responsibility and what is at stake for Howard Littlefield. Another option is to begin by stating the question the case presents. For instance:

This case involves the terrifying issue of misidentification.

The history of our criminal justice system is littered with the wreckage of men’s lives who have been misidentified in a criminal proceeding. This case, perhaps more than any other, will demonstrate the terrible dangers in identification testimony.

The same strategy can be employed with the opening lines of whatever you do -- whether it be the first thing you say in jury selection; the starting words of the opening statement; the initial question on cross-examination; or the opening words you speak in your final argument.
The one caveat that must consistently be borne in mind is that you should never risk overstating your case in the opening or make a promise that you cannot keep.

The Lure of a Quotation

Biblical and literary allusions are an authentic part of our craft. When listening to a speech, a sermon, or a lecture, recall how your interest is elevated when the speaker says, “It was Franklin Delano Roosevelt who said...” Our attention is heightened by the recognition of a great historical figure. If properly selected, a quotation gives an argument a special force because of the stature of the person who made it.

If, in your case, you have an important document upon which you will rely, consider the statement attributed to Carl Sandburg, “The best witness is a written paper.” If there is a missing piece of evidence in your opponent’s case, recall that Robert Louis Stevenson said, “the cruelest lies are often told in silence.”
For the defendant who relies on character witnesses, it was William Shakespeare who said,

He who steals my purse takes nothing, but he that filches my good name robs me of that which doth not enrich him, but leaves me poor indeed.

The over-aggressive act of entrapment by a law enforcement officer may warrant reference to, “The serpent beguiled me, and I did eat.” Genesis 3:13. For the dying declaration, consider Shakespeare’s “He who breathes his words in pain breathes the truth.”

Besides adding strength to the point you may be arguing, they are memorable and will remain with the jury because of their distinction. By simply consulting Bartlett’s Familiar Quotations, you can find an appropriate quotation for almost any circumstance.
A Picture is Worth a Thousand Words

Today, we live in a visual society. The image is slowly, but surely, replacing the word. As a consequence, the visual strategy of your opening or final argument deserves careful consideration. Photographs or charts stay in the reader’s mind longer than what they hear.

Studies have shown that over a 72-hour period, an audience will remember roughly 10 percent of what it hears but will retain 65 percent of what it sees. Most people relish visual details. Therefore, finding ways of illustrating what you want to convey to the jury should be an essential part of your trial tactics. Of course, the use of a chart, blow-up, or enlarged picture often requires court approval. Thus, make certain that the visual device is accurate and fairly represents the point you are advancing.
A chart is an economical way of delivering a large amount of information quickly and efficiently. If you want to convey an important chronology, the outline of an organization, a blueprint of a structure, a diagram of the scene of an accident, or the figures in a tax prosecution, make certain that it is clear. The main virtue of a chart must be its simplicity. If it becomes too “busy,” as advertising people would say, it loses its value.

If there is a critical part of the testimony that is decisive, have that page enlarged to poster size and displayed to the jury. The same can be done with a key exhibit. In virtually every courtroom there is a blackboard that provides a means of writing or drawing a message that will remain etched in the minds of your jurors. For example, a list of all the factors that will contribute to reasonable doubt can be effectively presented on the blackboard.

These devices are conspicuous because they are unusual and unique. As a consequence, they can have a significant impact if used properly.
Demonstrations

There are ways to demonstrate a point by using the courtroom as a stage. You can walk a jury through an important episode so that the scene is burned into their minds. For example, show how the robbery took place and, thus, how it would have been difficult for the witness to identify the defendant. Using the tables and chairs, or the well of the courtroom, to demonstrate what happened at the scene of the accident or crime, if fairly comparable, can be powerful.

It may prove valuable to have a witness step down from the witness stand and mark a diagram showing where he claims to have observed the accident or incident. There are risks in these endeavors but there can also be danger in too much caution.

The stagecraft in all of this requires an element of good judgment. Be certain you rehearse the demonstration or portrayal you intend to use so it goes smoothly and does not backfire.
“There is No Such Thing as a Good Extemporaneous Speech”

Daniel Webster said, “There is no such thing as a good extemporaneous speech.” How true that is. In a way, opening and closing statements are speeches. One must become fluent and comfortable with the argument. And, that can only be attained by rehearsing. For some reason, there is reluctance among some lawyers to actually rehearse an opening or closing. But, only by running through the arguments will you become comfortable with them and develop a fluency that will improve the presentation.

The argument should also have a good pace to it. Today, as the attention span of the public continues to shrink, one cannot afford to dawdle. A brisk pace must be maintained to hold the jury’s interest.

Some lawyers deliver an opening or closing without relying on a single note. That certainly is dramatic. But, with the strict time limitations that are often placed upon openings and closings, a written outline gives the argument structure and will help keep you on track.
Your notes should only be a roadmap that can be glanced at periodically. Sometimes an argument is interrupted by objections or by a sidebar. The outline helps you regain your bearings. Notes also insure that each and every point of the argument is accounted for and that nothing is left out.

The Peril of a Podium

There should be nothing between you and the jurors when you are speaking to them. A lectern or podium distances you from the jury and is immobilizing. Calculated movements around the courtroom animate the argument and make it less static.

However, most of us need notes to give organization to our argument. Thus, the podium is necessary to hold the outline, as well as exhibits or transcripts you may wish to use during the argument. Try to move away from the podium while speaking to the jury. Only return to quickly review your notes and keep the argument focused.
Metaphors and Analogies

A single metaphor is sometimes worth a thousand words. A sudden compression of isolated particulars into a compelling metaphor allows the speaker to introduce a point rapidly and, at the same time, make it memorable. The metaphor is a way of thinking that is available to everyone. As one writer put it, “metaphors nudge the brain along well worn paths.”

All great speakers have used them to drive home a point. Abraham Lincoln, perhaps more than any other historical figure, used metaphors extensively: “A house divided against itself cannot stand.” And, Shakespeare wrote almost exclusively in metaphors: “Now is the winter of our discontent.” Where appropriate, try to find a suitable metaphor to enliven and reinforce your argument.

For example, judges charge jurors that if they find that a witness falsely stated a material fact, they can disregard that portion of the witness’ testimony -- or all of it. You can use the following metaphor to show the jurors why they should discredit the witness’ testimony in its entirety.
Suggest that at some time they may have gone into a restaurant and ordered a dish of beef stew. When they took the first bite, they realized that the meat was spoiled. Ask them if they picked through the rest of the stew trying to find an unspoiled piece of meat -- or, did they push the entire dish away and refuse to eat any more. Of course, they did the latter. Then, they should do the same with the witness who lied and reject all of her testimony! The metaphor makes it real.

Try to take the major rule that bears on your case and find an example of how it applies in everyday life.
The Rhetorical Question

One way of building suspense is to put a rhetorical question to the jury. For example, “Do you know what the most important exhibit produced in this case is?” Hesitate for a moment to let them think about the question. And then, pick up the document upon which you rely, and stress its importance. Another example:

Something extraordinary happened during this trial and I sensed you experienced it when I did. It was when the complaining witness, on cross-examination, admitted that she spoke to the police officers for more than an hour before the lineup.

This is a well-recognized means of highlighting a point you wish to make.
The Power of the Pause

Many of us, either because we have argued many of these issues before and are accustomed to them, or because of our enthusiasm for what we want to say -- or, perhaps because we are just plain nervous -- tend to talk too fast.

Try stopping at a planned point in your argument and just pause for a few seconds (it will seem like an eternity), but nothing can attract a jury’s attention more than silence. Then, put to them a rhetorical question or stress a particular point. It can be powerful if used once or twice during a summation. But remember, nothing in your opening or closing should happen by chance. A pause should have a purpose and, when it is employed carefully, should be calculated.
The Most Powerful of All Human Forces

Language is still the most powerful of all human forces. Once a lawyer masters the facts and law bearing on the case, it is language that carries your cause forward. However, our eloquence should be an elegance of simplicity. Nourish your arguments with strong words, not long words. Emotionally charged words that ignite your argument with a sense of urgency are preferred over those that are more passive.

Great language has to be recruited from sources such as a thesaurus or good dictionary. John Steinbeck’s favorite book was the Oxford English Dictionary. And, they say that Truman Capote, as a child, carried around a dictionary and told his aunt that he was going to memorize it.

Verbal prowess is an act of faith, not a trick of grammar. The weariness that comes from gaining command of a large vocabulary must be borne if success is to be gained. Developing a hardy vocabulary is like keeping your body strong. It has to be exercised every day.
When reviewing all outlines of your argument check those words that appear anemic, inadequate, or overworked. Then find a replacement that is more powerful or more suitable. Consider The Synonym Finder published by Rodale Books and Webster’s New World College Dictionary (4th ed.), which are portable and authoritative. Speaking well requires taking the time to find the proper words that will fortify and sharpen your arguments.

Also, episodes that have happened to a person that are attended by alarm or dread should be dramatically described. Through the use of words, make the jury see, hear and feel the pain and suffering endured by your client. There is no place in our work for verbal squeamishness. A lawyer must learn how to bring the jury face-to-face with the brutal aspects of a criminal conviction or the horror of a terrible injury. Sometimes the nature of your client’s cause requires that you strive to drive language past the point of endurance.
One final caveat: no amount of rhetorical achievement, exciting visual detail, or colorful words can make an argument succeed that is not sound in both authority and logic. The ideas discussed here can never be used to cover up faulty or inept preparation.

If “You Want to Excite Prejudice You Must Do So at the Close, So that the Jurors May More Easily Remember What You Said” -- Aristotle

Summation is to trial work what a final infantry assault is to warfare. It is a time when both sides meet at full strength and winning or losing -- victory or defeat -- often hangs in the balance. It is a time when our powers of persuasion must be at their height. It should be the most glorious moment of the trial because it represents the purest form of advocacy.

In the final argument there is a temperament that simply cannot be found in other parts of the trial. Good speech can convey an urgency or an emotional intensity that will lend significant force to your case. In the summation, the transforming powers of voice, gestures and physical presence, as well as the full force of the attorney’s personality, are brought to bear on the litigation. The depth of your personal commitment to the client’s cause is
better conveyed here than any other place in the proceedings. All the devices mentioned above can be brought together and used to great advantage in these last moments of the trial.

And yet, it is often one of the most neglected parts of our work. This may be because it comes last -- and, therefore, its preparation is easily put off. The quality of our work is constantly endangered by a scarcity of time. That is certainly so when it comes to the final argument.

Begin your preparation for the summation before the trial starts by composing those arguments based upon what you already know about the case. Keep a separate folder in your file labeled “Summation” in which notes of ideas, possible visual aids, metaphors and especially good language that may be appropriate for the summation can be collected. As the trial progresses, continue to add to this inventory, so that when the end of the trial is reached, all that is necessary is organizing and embellishing this material.
Delivery of the Summation

In the opening of your summation you may wish to remind the jurors of the pledges they made to keep open minds and require the prosecutor or plaintiff to prove its case beyond a reasonable doubt or by a preponderance of the evidence.

Abraham Lincoln is reported to have argued to juries that discovery of the truth is really not that hard: You take all that one side says, and all that the other says, and see which conforms itself to a normal human experience. That is remarkably simple and direct, and can be used as a platform to argue how improbable the case against your client is. But, if you are on the defense side, do not lose track of the burden of proof. You do not want to say anything that will cut against that advantage.
The Silver Thread of Truth

For years, lawyers have used the “silver thread of truth” metaphor to support their trial position. It is an effective device that can be referred to throughout the summation every time you connect a piece of vital evidence to your theme, or the “silver thread of truth” which forms your defense.

A summation should have a strong conclusion. Don’t allow it to sputter and die out like a flickering candle in a high wind. A powerful closing, to be effective, must be committed to memory.

On the morning you are scheduled to deliver your final argument, do not go to the office. Go straight to the courthouse so there are no distractions and you can maintain your concentration. You want to keep it fresh and stay up with it.
Babe Ruth Struck Out More Times than Anyone

Ours is the only profession where our future lies in the past. Our system of justice is built on precedent and, thus, we are forced to spend too much time looking backwards. To a large extent, we are handicapped by a tradition that often scorns eccentricity and innovation. And, tradition can provide the most oppressive confinement of all.

Remember that our greatest enemy is habit. New and imaginative techniques always seem extreme to those whose tastes have been dulled by habit. To be inventive, we must shake off the shackles of convention. Albert Einstein said, “Imagination is more important than knowledge.” That is so true. As lawyers, we don’t always connect our imagination to our work.

In 1927, when Babe Ruth established the world record, at that time, for hitting more home runs than any other player, he also set another record that no one ever reads about: He struck out more times than anyone in the American League!
If there is a lesson to be learned from those seemingly inconsistent statistics, it is that to be distinctive, you have to swing for the fence. And, sometimes you’ll miss -- and, miss badly. But, better that than a life of professional mediocrity. Let your imagination take flight. Don’t be afraid to try new techniques that will make your arguments more effective, more compelling and more persuasive.
Conclusion

No undertaking places greater demands on a lawyer’s ingenuity, intellectual resources and stamina than being persuasive in a trial. Reaching this height of achievement requires an enormous investment of time, effort and imagination. If we are to be effective advocates, we must continue to search for more dynamic ways to advance the claims of those we represent.