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SUMMATION: MORE THAN A *FINAL* ARGUMENT

By Ben Rubinowitz and Evan Torgan

Summation should be a carefully planned, well organized argument that, if delivered properly, leaves the jury no alternative but to vote in favor of your client. It is not something to be written at the end of the trial. Instead, planning for summation should begin at the time you first meet your client and continue until the Judge says, "Counsel, you may sum up."

WITNESS EXAMINATION

While every trial has its strengths and weaknesses, there are time-tested techniques that will unquestionably enhance the effectiveness of final argument. Promoting the strengths of your cause and dealing with weaknesses in the case are essential for a successful outcome. But before addressing any strengths and weaknesses in the case, counsel must be sure to lay a sufficient foundation of factual support, which, if delivered properly, will serve to maximize the effectiveness of final argument.

It is for this reason that a successful trial lawyer must be forward thinking at all times, especially while conducting direct or cross examination. Indeed, it is not sufficient to simply move down a preprinted checklist of prepared questions created before the trial starts. Rather, the astute trial lawyer must always do two things during witness examination in order to enhance the strength of final argument.

First, the trial lawyer must listen carefully to the witness's answers to make sure that the well prepared question received the anticipated and expected answer. For example, consider the following properly phrased and commonly asked question put to a witness during direct from a prepared checklist, along with the following answer:

Q: Describe the traffic conditions immediately before the accident took place.

A: I'd say traffic was moderate.

Although the witness answered the question, and the answer might seem appropriate, it remains ambiguous. Rather than simply moving on to the next question from the preprinted list, the astute trial lawyer must always evaluate the sufficiency of the answer with an eye to summation. In effect, the astute lawyer must always ask him or herself: Will that answer help or hurt my summation? If it helps, obviously he or she can move on. If, however, it does not allow for clear and unambiguous argument during summation, then additional inquiry must take place. In this example, the additional question is straightforward:

Q: Tell us what you mean by "moderate."

Here, the witness can offer a definition of the word "moderate" and clear up any confusion.

Second, the astute trial lawyer must not only listen carefully to the answer offered by the witness, but must lift up his or her head, look away from the pad, and watch the witness while the answer is being given. An example of the dangers of not looking at the witness while the answer is offered is seen in the following question and answer:

Q: What did the driver do immediately before impact?

A: He turned this way and then quickly went like that.

Although the witness may have given the anticipated answer, the answer itself is fraught with danger. Clearly, in this example, the attorney must protect the record, which reflects nothing, by following up in a meaningful way that will offer support for summation.

Q: When you say he turned "this way" what do you mean?

A: He turned hard to the right to try and avoid impact.

Q: When you said he "quickly went like that" explain in words what you mean.

A: The other driver was speeding towards him and he quickly applied his brakes.

Once again, all ambiguity must be removed:

Q: Tell us what you mean by "quickly."

By dissecting the witness's first answer through follow-up questions such as these, the lawyer provides a clearer picture for the jury, while simultaneously establishing an unambiguous and solid factual foundation that can be presented to the jury during summation.

JURY INSTRUCTIONS

Just as the attorney must be mindful of the answers offered by the witness in order to support summation, the attorney must be equally mindful of the instructions to be given by the

Court immediately following summation. In the same way that everything done during trial is done with an eye toward summation, the summation itself must be prepared with an eye toward the jury instructions. Without question, the trial attorney must be familiar with all the operative terms from the charge before uttering one word on summation. It is these terms that can make or break a case.

To illustrate this point, consider the following example. Imagine a case in which a pedestrian claims to have been severely injured as a result of the fault of a driver and the fault of a municipal defendant -- the city. The claim is that the driver negligently drove at an unsafe speed and that the city failed to properly warn the driver of lane closures due to roadwork ahead. Each defendant denied fault and summed up by arguing that the other was, in effect, the sole proximate cause of the accident.

For instance, the city summed up with the following argument: "The only reason this accident took place was because the (defendant) driver drove at an unsafe speed. That driver's failure to obey the speed limit was the cause of this accident -- he was **the sole** cause of the accident."

Similarly, the (defendant) driver summed up by arguing, "If the city had only obeyed its contract and followed the uniform rules of the road this accident would never have happened. The city's failure to provide signs -- to provide adequate and proper notice of the roadwork ahead was the only reason this accident took place. The city's failure to warn and notify motorists of the roadwork ahead was **the only** cause of this accident."

In this example, both defendants distorted the court's charge regarding proximate cause. Without a clear understanding of the instructions and definitions of proximate cause and concurrent causes, the plaintiff's attorney might well snatch defeat from the jaws of victory. By fully understanding and appreciating the definitions of all dispositive terms before summation, the plaintiff's attorney can clear up such distortion during final argument by carefully tracking the language from the Court's charge:

"The question is not which one of the defendants is at fault. The question is not whether each was "the" only cause or the sole cause of the accident. The judge will never give you such an instruction. The question is whether each was "a" cause and whether the negligence of each was a substantial factor in causing the accident. So ask yourself why did the accident take place? Because they were both at fault. Because the failures of each defendant were a cause of the accident, each was "a" substantial cause -- although to different degrees. Can there be more than one cause of an accident? Of course and that's exactly what happened here."

By familiarizing oneself with the language in the court's charge before summation, the attorney can maximize the effectiveness of final argument by properly focusing the jury's attention on the critical points of the law, and by clearing up any misperceptions that may have been created by opposing counsel.

PROMOTING STRENGTHS THROUGH THE USE OF EXHIBITS AND VIDEO

The use of exhibits at trial is essential. Jurors learn far more by listening and seeing than by listening alone. For years, lawyers have been mindful of this fact. Indeed, it has become commonplace for lawyers to introduce photos, diagrams, blow ups and sketches during witness examination. But now, with the advent of instant video from cell phones, the use of video is becoming far more commonplace than ever before. If the saying "a picture is worth a thousand words" is true, then it follows that a video should be worth ten thousand words. It is during summation when these exhibits must be carefully and strategically used to reinforce key points. Moreover, if used properly, and if the jury is allowed to take such exhibits into the jury room during deliberations, these exhibits will continue to talk to the jurors when the trial lawyers are sweating it out waiting for the jury to return.

Using the same example as before, consider the power of a video in describing the driver's view of the road within the minute before impact. The argument on behalf of the defendant driver would certainly be enhanced with the proper mix of video and the proper use of rhetorical questions during summation:

"Ladies and Gentlemen, I could try my hardest to explain in words why the city's failure to properly warn the drivers was wrong. I could stand here all day and argue that the city should have had signs up notifying drivers of the upcoming roadwork. And I could try and convince you in words that the city's failures prevented (my client) from learning about the roadwork and allowing him to take appropriate action -- to anticipate -- and to avoid the accident. But I don't have to use

my words to show you how dangerous this road condition was. Why not? Because we have something better. Far better. We have a video showing the path of travel taken by (my client) and more importantly his view. So let's take a look together at the key piece of evidence in this case."

At this point the lawyer can play the video on summation. The beauty of the video is that during final argument the lawyer can stop the video at appropriate points, reinforce his or her theme, and argue more forcefully than ever before by posing reasonable rhetorical questions to the jury:

"I am going to stop the video right here -- right where you see this curve in the roadway -- because I have some questions for you. Look at that video. Look at that scene and ask yourself these questions: Where are the signs warning drivers of the roadwork? Where is the notice? Where are the instructions? How in the world can the city tell you the roadway was safe? The signs are not there. The warning is not there. The notice is not there. But it gets worse. Let's move forward in time. (Advance the video) Let's take a look at the driver's view of the roadway 500 feet before impact. Where is the notice? It's not there. Where is the warning? It's not there. Where is the safety we've heard so much about? It's not there and it never was there. Ladies and gentlemen, take this video into the jury room with you. Look at it. Study it. There's an old saying that I know you've heard, 'a picture is worth a thousand words.' Well there's a new saying in this case, 'a video is worth ten thousand words.' There is no question the city was negligent and its negligence caused this accident."

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By incorporating the video into summation in this way, and by interspersing rhetorical questions such as these while the video is playing, the lawyer can increase the chance that the jurors will relive the summation every time the video is viewed during deliberations.

Summation marks the attorney's final interaction with the jury before the verdict is returned. However, it is one of the first things that an attorney should think about when meeting with a client for the first time. With careful preparation, and an unwavering attention to every detail of the case that may impact the summation - from the preciseness of each witness's answer, to the language of the court's final charge - an effective attorney can deliver a final argument that leaves the jury with no alternative but to vote for his or her client.

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