

New York Law Journal

The Case for the Rhetorical Question as a Summation Technique

By: Ben Rubinowitz and Evan Torgan

The art of persuasion comes in many forms. Obviously, the trial lawyer's goal during every aspect of the trial is to persuade for ultimate success. It is the manner in which the trial lawyer chooses to present certain facts that will serve as the driving force behind a successful outcome. Since every aspect of the trial should be conducted with an eye toward summation -- toward creating the most powerful argument that can be advanced -- the trial lawyer must be acutely aware of how each part of the trial will affect the summation.

While it is important to focus on the affirmative facts that have been elicited during the trial to create a powerful argument on summation, it is equally important to focus on the "negatives," or the absence of certain facts. Specifically, it is the failure of the opposing party to produce certain proof or call certain witnesses that often serves as a hammer and one of the most powerful means of exploiting the opposing party's weaknesses. To illustrate this point, consider the following example: Assume that a plaintiff in a personal injury action suffered injuries to his neck and back. Prior to trial, the defense chose to have the plaintiff examined by both a neurologist and an orthopedist. However, at the time of trial, the defense chose not to call either of these expert witnesses. The plaintiff provided detailed testimony on direct examination, explaining that he had been examined by the defense neurologist and orthopedist. The plaintiff also testified as to the scope of those examinations.

Clearly, during summation, the plaintiff's lawyer must emphasize the importance of the defense's failure to call these experts to the stand, and illuminate for the jury the weakness of the

New York Law Journal

defense's case in this regard. But it is the manner in which these facts are presented during summation that will either make for a persuasive argument or result in a worthless critique of the defense's evidence. An effective trial lawyer should consider the following techniques for best exploiting the deficiencies of the opposing party's case in such a scenario.

THE RHETORICAL QUESTION

To ensure that the argument does not fall flat, a time-tested and powerful means of exposing the weakness is to make use of the rhetorical question. With this technique, each question posed to the jury, in rhetorical form, should serve to persuade. That persuasion is made stronger by reiterating and reinforcing the important facts prior to actually asking the rhetorical questions. An effective set up can also be accomplished by answering a series of preliminary rhetorical questions, and then continuing to pose additional questions as the line of argument progresses and gathers strength. The goal of the rhetorical question is to subtly influence the desired response:

"We know (the plaintiff) was examined not just by a neurologist but by an orthopedist. We know that each of those witnesses conducted a thorough examination. We know that each of those experts conducted physical and clinical tests. We know that each of those doctors was an expert in his field. And we know that the defense chose not to call them. Why didn't the defense call their examining neurologist? Why didn't the defense call their examining orthopedist? Isn't the answer obvious? Because they were afraid of something. Why didn't the defense call the very expert witnesses they hired? Because they didn't want you to hear what these witnesses had to say. What are we to gather from (the defense's) failure to call these witnesses? What is it that they are afraid of? What didn't they want you to hear? Isn't the answer simple? Do you think for one

New York Law Journal

moment that if either of these experts could have contradicted what the (plaintiff's experts) said (the defense) wouldn't have had them testify? Of course not!"

In this example, the jury already knew, by reason of the plaintiff's testimony, that the defense did not call its own doctors. However, the line of rhetorical questions serves to hammer home the importance of this point by reminding the jury of several critical facts: that these doctors are experts in their fields, that they thoroughly examined the plaintiff, and that if they had any evidence to contradict the testimony of the plaintiff's experts, then the defense would have certainly called to them to the stand to testify. In essence, the rhetorical questions are designed to lead the jury to one inescapable conclusion: that the defense did not call its own doctors because they would have helped the plaintiff's case and harmed the defense's case.

Before devising a line of rhetorical questions for use in summation, the trial attorney should always consider the language in the Pattern Jury Instructions. These instructions not only serve as a guide for the jury, but also for the trial attorneys, allowing them to create powerful arguments that fit neatly into those instructions. Consider, for example, the language in Pattern Jury Instruction 1:75, the Missing Witness charge. This instruction makes it clear that, among other things, the jury may draw the strongest inference that the opposing evidence permits against a witness who fails to testify in a civil proceeding. This instruction speaks, in part, about the negative inference that may be drawn by the jurors for the party's failure to call a witness, or to produce a relevant, important document (see PJI 1:75; PJI 1:77). When the language in the rhetorical questions tracks the language in the charge that the jurors will soon hear, the use of the rhetorical questions creates an even more powerful argument that will resonate beyond the attorney's summation. Needless to say, this type of argument is available to either side:

"Why didn't the (plaintiff or defendant) call their expert witness to the stand? Why weren't you allowed to hear what (that witness) had to say? What is the only real inference to draw from

New York Law Journal

that failure to call (the witness)? What is the only legitimate inference to draw from that failure?

What is the strongest inference to draw from that failure? Isn't the answer clear? They knew that if they called that witness it would not support their position. It would not support their claim. It would not support their case. But it would support our position and it would support it completely. It would support our position 100%. And it would ruin their claim. There is no excuse for their failure to call (that witness). That's why they didn't want you to hear from (him).

Similarly, a series of rhetorical questions can be used to demonstrate the importance of a missing document or exhibit. It is the rhetorical question that heightens the importance of that document in the mind of the jurors. When the rhetorical questions adhere closely to the language and principles in the jury charge for failure to produce documents or other physical evidence (see PJI 1:77), the use of the technique is even more effective:

"Ladies and gentlemen, there is one piece of evidence that is more important than any other piece of evidence in this case. You heard about that piece of evidence from the beginning of this case - from the opening statements forward. You know how important that piece of evidence was. And you now know how important that piece of evidence is. You know that it would answer the most important question in this case. So ask yourselves, why wasn't it produced? Why haven't you been allowed to see that (piece of evidence)? Where is it? And why has it been kept from you? The answer is clear. It wasn't produced for one reason and only one reason. If it was produced it would have made meaningless their claims. If it was produced it would have destroyed their arguments. And if it was produced it would have destroyed their case!"

At the end of any trial, the jury should be fully aware of what evidence it saw and heard, and what evidence it did not see or hear. It is the role of the attorney to provide a persuasive and appropriate context for that evidence, or missing evidence, as the case may be. By using rhetorical questions that track or adhere to the language in the jury charge, the attorney can ensure that his or her argument transcends the summation itself and follows the jury into the

New York Law Journal

deliberation room. The rhetorical questions should subtly and effectively guide the jury down a path to one inescapable conclusion: that certain evidence, or lack thereof, proves his or her client's case.

WORKING WITH BAD FACTS / WEAKNESSES

In every trial, there are facts and circumstances that can only be viewed as harmful. The true measure of the trial advocate is the manner in which he or she deals with these problem areas and weaknesses in the case. Confronting such issues must start well before summation. A trial attorney should address any potentially negative facts during jury selection, and then again during opening statements and witness examination. Often, by reinforcing a bad fact or set of facts, the jury will become immunized to the problem area. However, addressing such facts throughout the trial is not enough if the attorney does not meet the problems head-on during summation.

Assume, for example, a fact pattern in which the plaintiff was a drug addict who was convicted of first degree robbery, and spent 10 years of his life in jail. Clearly, the worst thing the plaintiff's lawyer can do is to fail to mention these "bad facts" on summation. Even if the plaintiff's lawyer has the last word on summation, the glaring failure of the plaintiff's lawyer to deal with these facts will unquestionably hurt his or her credibility during jury deliberations. In order to maintain credibility, the plaintiff's lawyer must "take it on the chin" and deal with these facts in a straightforward manner. Once again, the use of the rhetorical question is a powerful technique for dealing with problem areas, fears and concerns:

"Ladies and gentlemen, you have the ultimate say as to who you choose to believe and who you choose to disbelieve. You have the ability to evaluate the credibility of every witness who testified. And while it is not an easy task, it is at least a straightforward one. All you have to do when you evaluate the believability of each witness is to ask this question: Who told you the truth

New York Law Journal

and who told you less than the truth? There is no question that (the plaintiff) committed a terrible crime. There is no question that he was a drug addict. And there is no question that he cannot run from his past. From the beginning of this trial we told you about these facts. We did not hide anything from you. But ask yourself this question: Did he acknowledge those facts? Yes. Did he hesitate to answer any question about his past? No. Did he admit everything that he had done? Yes. But there is a concern and a fear that we have. And that concern and fear can be simply stated. Should we toss the plaintiff out of court, regardless of the facts, because of what he did in his past? Should we vote against him because he committed a crime a long time ago? Should we vote against him because he was a drug addict? If the answer to any of those questions is yes then we have not done our job. Because the only right answer is to recognize those facts as true and to decide this case based on the underlying facts of this accident and not based on any prejudices stemming from what took place a long, long time ago."

The use of rhetorical questions in a scenario such as this will challenge the jury to reconsider any preconceived notions it may have had about a witness's credibility. Through a series of rhetorical questions, the trial lawyer can effectively remind the jury that the witness has taken ownership of his or her past, and that his or her credibility with respect to the facts of the instant case should not be placed in doubt simply because of that past.

WORKING WITH EXHIBITS

As has been said many times, a picture is worth a thousand words. At trial, however, it is the exhibit that, if used properly, is worth a thousand words. To persuade, the exhibit must be used effectively. Often, lawyers spend inordinate amounts of time working with exhibits during witness examination but fail to appropriately use those exhibits during summation. It is during final argument that the trial attorney not only has the ability to reinforce the testimony of the witnesses by working with the exhibit but also has the ability to persuade with that same exhibit. One of the

New York Law Journal

most effective ways to work with exhibits is to show the exhibit while posing clear and concise rhetorical questions to the jury.

Imagine a scenario in which a young child, while walking with his father, was struck by a cab and severely injured. The cab driver insisted that he had the right-of-way. The child's father insisted that he and his son had the right-of-way. Needless to say, it was confusing to listen to the witnesses speak in terms of compass directions (north, south, east and west) when explaining the accident. However, once the exhibit was used, the directions of travel became clear. During summation, an effective trial attorney should make use of the same exhibits that clarified the witness's testimony during the evidentiary portion of the trial in order to provide a clear, concise and persuasive argument at the end of the case. The use of rhetorical questions can help immeasurably in this process:

"Ladies and gentlemen, we spent a good deal of time using this very exhibit when witnesses testified. But the question remains: Who had the right-of-way? Who are we to believe? Let's take a look at (this exhibit) together. Where is the crosswalk? It is right there (Pointing). Where is the walk, don't walk sign? It is right here (Pointing). Where is the traffic light? It is right here (Pointing). Where was the boy when he was struck by the cab? He was right in the crosswalk. And he was crossing with the light in his favor. True, the cab driver suggests that he had a green light. He did. But that doesn't mean that he had the right-of-way. What does it mean? It means that he can make a left turn with caution. It means that he must yield to pedestrians. It means that he must take the time to see that which is there to be seen. But what did he do? He made a left without using appropriate care and caution. He failed to yield the right-of-way. He failed to use that degree of care that he should have under these circumstances. He failed to meet his responsibilities as a driver. And what is the result of those failures? The answer is clear. A young child was seriously injured by a negligent driver."

New York Law Journal

A well-chosen set of rhetorical questions in conjunction with the use of an exhibit can remind the jury of the essential facts in the case. Additionally, by using the exhibit during summation, the attorney can ensure that his or her argument is both clear and concise. By reiterating the relevant facts through a set of rhetorical questions and demonstrating how those facts are favorable to his or her client, an effective trial lawyer can send the jury to the deliberation room without any doubt as to how it should rule.

CONCLUSION

The rhetorical question is an effective and persuasive tool for summation. It is subtle in its delivery and potent upon its receipt. When used properly, it can persuade a jury without the insult of a more heavy-handed approach. A seasoned and accomplished trial attorney has to ask, what could be better?

Ben Rubinowitz is a partner at Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz. He also is an Adjunct Professor of Law teaching trial practice at Hofstra University School of Law and Cardozo Law School. GairGair.com; speak2ben@aol.com

Evan Torgan is a member of the firm Torgan & Cooper, P.C.

TorganCooper.com; info@torgancooper.com

Timothy Wasiewski is an associate at Gair, Gair, Conason, Steigman, Bloom & Rubinowitz, assisted in the preparation of this article; Twasiewski@gairgair.com