

HEADLINE: **Trial Advocacy, The Use Of The Rhetorical Question On Summation**

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BODY:

Typically, lawyers utilize their summations to restate evidence that was adduced during the trial, and of course, argue the merits of their case, based upon the proof that was offered.

Often overlooked, however, are the arguments regarding that which was not proved at trial; specifically, what the opposing party could have done or what its attorney could have attempted to prove, but for some reason did not.

Indeed, "working with the negatives" the facts that were missing from the trial often can be more important than reiterating the proof the jury already heard.

To that end, few techniques are more effective on summation than the rhetorical question. A rhetorical question is one that is posed to the jury with no expectation that the jurors will actually answer it. It is up to you as the advocate not only to pose the question to the jurors but to answer the question for them. If used correctly this technique will serve as the basis for a powerful and compelling argument. It is also a technique that is portable and can be used in any type of case.

The rhetorical question must be carefully constructed and must lead to a logical and reasonable answer. If posed properly it can serve as a basis to support your theory of the case and to weaken your adversary's position. Moreover, it can serve as a basis to enhance a witness' credibility or as a basis to destroy it. The application of the rhetorical question is limitless.

Imagine, for a moment, the scenario in which you are trying to resolve a sharp, but dispositive, factual dispute. You are trying to convince a jury in a personal injury action that a defendant driver was intoxicated at the time of the accident. The proof at trial revealed that the defendant chose not to take a Breathalyzer test when asked to do so by the police. This same defendant testified at trial that although he had, in fact, consumed an alcoholic beverage, he only had one beer. It was that one beer that explained the odor of an alcoholic beverage. The defense summed up arguing that one beer does not equal intoxication and that you, as the plaintiff's attorney, had not met your burden of proof.

Sample Rhetorical Questions

True, you could tell the jury, in a direct manner, that the defendant was lying; however, that argument lacks power. The better argument involves working with the flip side of the defendant's lie his refusal to submit to the breath test. You can destroy the defendant's position and credibility through the use of carefully planned rhetorical questions that focus on the defendant's failure to act in a manner consistent with his story instead of focusing on the lie itself:

Ask yourselves why?

Why didn't the defendant take a breathalyzer test?

Why did he choose not to take it?

Why did he refuse to take it?

Isn't the answer clear? Of course it is.

Didn't he know he was intoxicated? Of course he did.

Didn't he know better than anyone in the world that if he took the test he would fail it? Of course he did.

And if he really had only one beer what was his fear? That he would pass? No! His fear was that he would be exposed.

What was his fear? His fear was that everyone would know he was intoxicated.

What was his fear? His fear was that he would not be able to fool you.

When asked to take the test what did he do? He made a conscious decision to try to prevent you from learning the truth. He made a conscious decision to try to prevent you from learning the test results. That decision was made for one purpose. To try to pull the wool over your eyes.

The rhetorical question can be used not only to resolve sharp and dispositive factual issues but can be used to bring life to the anticipated jury instruction by the court. Here is where the versatility of this technique becomes even more apparent.

While lawyers continually argue at precharge conferences as to what instruction should or should not be given by the court and the language to be used in the instruction, they often overlook the opportunity to forcefully argue that very point on summation through this technique. With proper preparation and appropriate delivery the rhetorical question can serve to prime the jury for crucial portions of the charge. In other words, your summation can prepare the jury for the charge it is about to hear from the court and, if delivered properly, will make it seem as if the court, by its instruction, is reinforcing the specific point you just made on summation.

The Missing Witness Charge

Consider, for example, the Missing Witness Charge or Missing Documents Charge. There is no doubt that the charge can and will help your cause. But there is also no doubt that the charge, without sufficient argument and explanation on summation, will not work nearly as well as it will when you have taken the time to alert the jury to its real meaning.

Assume you have a case where a neurologist has examined the plaintiff on behalf of the defense. At trial, however, the defense chose not to call the examining neurologist and offered no explanation for its failure to call this witness. This presents another situation in which the testimony that the jury did not hear speaks louder than anything that it did hear on that issue. At the precharge conference you, as the plaintiff's lawyer, ask for a Missing Witness Charge pursuant to P.J.I. 1:75. That charge reads, in part:

[a] party is not required to call any particular person as a witness. However, the failure to call a certain person as a witness may be the basis for an inference against the party not calling the witness. For example, in this case the defendant did not call his neurologist to testify ... and you may, although you are not required to, draw the strongest inference against the defendant on that question that opposing evidence permits.

While the charge, on its surface may seem helpful, it neither provides guidance as to the severity of the failure by the defense to call its examining neurologist, nor does it help to define the operative terms contained within the instruction. It is up to you as the advocate to explain to the jury why the failure by the defense to call this witness is so meaningful to your case. This explanation is best achieved through the use of the rhetorical question. Here, you must carefully construct rhetorical questions that leave the jury with no doubt as to the real meaning behind the instruction it will shortly receive. Consider first the argument without the rhetorical question:

Members of the jury, the defense failed to call their examining neurologist. They chose not to bring forth testimony that you had a right to hear.

Clearly, this argument lacks the pizzazz that is needed to carry the day. It fails to effectively state the inferences the jury should draw about your adversary's omission. It does not even explain what the words "strongest inference against the defense" mean.

Pizzazz, Tone of Voice

Now, consider the same argument by first posing rhetorical questions and then answering them. Obviously, you must change the tone of your voice when asking these questions and deliver them with a sense of righteous indignation:

Why didn't the defense bring in their examining neurologist?

Why didn't they allow you to hear what their expert had to say?

What were they afraid of and what were they trying to hide? Isn't the answer clear?

Now, answer the questions and let the jury know in no uncertain terms what inference you want them to draw:

The reason the defense deliberately chose not to bring in their examining neurologist was because he would have confirmed everything our neurologist said. He would have explained that the plaintiff did, in fact, suffer a permanent injury. He would have made it absolutely clear that those injuries were directly caused by this accident and that those injuries would remain with (our client) for the rest of her life. You saw the way the defense fought us in this case.

Now, go back to the rhetorical question:

Do you really think, for one second, that if the defense could have contradicted a single word our expert said they wouldn't have done it? Of course not.

Do you think for one second that they wouldn't have presented testimony that would be helpful to them? Of course not.

Do you think for one second that they wouldn't have brought in proof or evidence that would have helped them? Of course not.

By posing the rhetorical questions and answering them in this manner you have made clear to the jurors what the "strongest inference" means. Hopefully, you have also irreparably damaged your adversary's position and more importantly, his credibility.

The rhetorical question can even be used to review the very interrogatories that the jurors will be asked to decide at the end of the case. Here, you can actually verbally dissect those interrogatories and explain to the jurors how to answer them leaving no room for confusion. Further, you can anticipate areas where the jury might misunderstand the charge, and disabuse the jurors of certain notions they might possess. Specifically, you can remind jurors of that which you do not have to prove in order to win your case, and thus, allay your fears that the jury will hold you to a higher standard than the law demands. Depending upon the court's rules, you can even show a large blowup of the verdict sheet to the jurors, review the questions with them and, through the use of rhetorical questions, tell the jury how to appropriately answer the interrogatories.

For example, in a general negligence case the first two questions are often: 1) was the defendant negligent? and 2) was the defendant's negligence a substantial factor in bringing about the accident?

What Jury Considers

By posing the rhetorical question not only can you, as the advocate, answer the questions, but you also can make

the juror's job an easier one by telling them what to consider and what not to consider:

Do we have to show that the defendant intended to cause this accident? No, of course not. Intentional conduct has nothing to do with this case.

What do we have to show? All we have to show is that the defendant was careless. All we have to show is that the defendant was negligent.

And isn't it more likely than not that he was careless? Of course.

Isn't it true that he was negligent? Yes.

Do we have to prove that the defendant's negligence was the only cause of this accident? No, of course not.

Can there be more than one cause of an accident? Of course.

So, when you're asked to decide if the defendant's negligence was a substantial factor in causing the accident, what don't we have to prove? We don't have to prove that the defendant's negligence was the only cause, just that it was a cause. Nothing more and nothing less.

Forceful Way to Argue

The rhetorical question, when used as a vehicle to argue the inferences beyond the four corners of the record, allows you to make a more persuasive and compelling argument. By working with the negatives that which is missing from your adversary's case you can successfully expand a simple thought into a devastating closing.