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HEADLINE: Good as Gold: Using Analogies and Short Stories in Summation

BYLINE: Ben Rubinowitz and Evan Torgan,web-editor@nylj.com, Special to the new york law journal

BODY:

The task for trial lawyers in delivering a powerful summation requires them to find a way to captivate the jurors' attention and compel them to vote in your favor. Too often, lawyers merely recite the facts that the jurors have heard ad nauseam without any regard to meaningful advocacy. The summation is the time to make the argument come alive. It is the time to persuade. It is the time to give the jurors ammunition to support your position during their deliberations. Some of the most effective tools to achieve this goal are analogies, metaphors, memorable phrases and short stories. These devices can, if properly used, not only take the presentation from mundane to magnificent, but can work to help the jury reach the right verdict for the right reason.

The power of an analogy or metaphor is simple: It compares a highly contested, complex set of issues, such as a trial, to a readily understandable situation in which the virtues of the good and the failings of the evil are readily discernable. Moreover, if successfully delivered, all of these techniques allow the jurors to view your case in terms that are more familiar to them.

A downside to using these devices does, however, exist. That potential pitfall depends upon two factors: the order of presentation and the logical sway of the comparison. In state court, the plaintiff sums up last. For any defense lawyer considering the use of such a technique, careful consideration must be given to the opposing lawyer's advocacy skills and ability to think on his feet. Before utilizing any analogy, metaphor, phrase or story, a defense lawyer must calculate its vulnerability to attack by the opposing lawyer. If it can be attacked and turned against the lawyer who sums up first, it should never be used.

Additionally, the device must be appropriate for the specific issue involved in the claim. It must be a fair and logical comparison that can stand up to scrutiny and testing by the jurors. Simply put, before any one of these advocacy devices is used, it must be vetted from all sides.

For example, defense lawyers often attempt to discredit the plaintiff's damages claims by comparing the trial to a person buying a lottery ticket: "Look at what's going on in this case. The plaintiff hasn't worked since this accident occurred. He thinks you're his meal ticket. He wants to hit the jackpot. He's here to win a lottery, and he's expecting you to provide the payout."

Such an argument should steadfastly be avoided, regardless of the amount the defense lawyers anticipate plaintiff's counsel will request, in cases in which plaintiff's injuries are objectively severe. In that situation, a skilled plaintiff's attorney will adopt the analogy, rather than object to it, and turn it on its head: "Let's take a look at what the plaintiff has won. He's won a lifetime of pain. He's won a lifetime of suffering. Through no fault of his own, he's won the right to never sleep through a night pain free. It's remarkable that, in the face of this suffering, the defense views this case as a game. If this is a lottery, who's buying a ticket for this prize?"

There is no question, though, that final argument can be enhanced through the appropriate use of such rhetorical devices. Like all audiences, jurors enjoy and appreciate vivid analogies and metaphorical comparisons. Throughout our lives, we have all used analogies, metaphors (and similes) to make a point. Indeed, some of these were learned at an early age; some are humorous, such as "he placed the cart before the horse" or "it was slower than a herd of turtles running through peanut butter."

The job of the advocate is to find the right analogy for the right case. For example, in a complex case in which a defendant has continually denied fault and refused to accept any responsibility for the injuries sustained by the plaintiff, an appropriate analogy might compare the defendant's conduct to a situation every juror has experienced:

"Folks, I was home with my 4-year-old child the other day. I had just given him a glass of milk, I turned away for a moment, and suddenly I heard a loud crash in the kitchen. I came in and saw his glass lying on the floor, and my child covered in milk. Before I could ask what happened, he looked at me with his most sincere expression and said, 'I didn't do it.' Well, we've all seen kids behave that way. I understand that's how 4-year-olds act. But you know, it's still not okay. I explained to him that when you make a mistake, you've got to take responsibility for it. The last thing I want is for him to grow up and be the kind of person who says 'I didn't do it' or 'not my fault' no matter how bad his conduct or severe the damage it causes."

Witnesses

In a case where an expert witness has tried to offer an opinion which reeks of exaggeration or has tried to convince the jury of something that just isn't true, there are myriad analogies or stories that can be used:

I didn't waste your time with a long drawn out cross-examination of such an expert. It's like my mother always said, "There is nothing to be gained by getting into a spitting contest with a cobra."

or

Trying to pin down that (expert) to a single straightforward answer was like chasing feathers in a windstorm.

or

Trying to get a straight answer from that witness was like trying to sew a button on a whipped cream pie.

In discrediting this type of witness after a collateral attack on cross, a memorable phrase can be used: "He's one of those witnesses who can't be bought, but you can sure rent him."

When it comes to discussing a witness who has lied, a short story is, at times, a powerful way to drive home the point. Imagine the scenario in which a defense (or plaintiff's) witness has testified falsely about certain things but truthfully about others. The defense has argued that the jury should accept parts of what he said as true and simply disregard the other parts:

Ladies and gentlemen, there is a story that is particularly appropriate for this case. A man had promised to take his wife to the finest restaurant in town for their anniversary. They saved their money. They were excited. They went to the restaurant. They were finally celebrating. They both ordered the specialty of the house--beef stew. They had heard about the beef stew for years, and were thrilled to finally taste the delicacy. But when the man bit into the stew, it tasted bad. When his wife tried it, she immediately said the beef was rancid. They called over the waiter and explained that there was something wrong with the beef. The waiter said, 'That's okay you can pick around the beef. The rest of the stew, all of the vegetables, the carrots, the potatoes, the celery, are all very good.'

Needless to say, the couple got up and walked out of the restaurant. They knew they couldn't pick around the bad parts. It was ALL bad. Just like in this case, you don't have to pick around that witness' testimony. You can throw it all out--because it's just not worth believing.

Liability and Damages

The same type of rhetorical device can be used to explain liability in clear and compelling terms. Imagine the scenario in which a claim is brought against a doctor for medical malpractice for failing to diagnose cancer. Although the defendant doctor took an X-ray, he failed to order a CT-Scan or conduct clinical examinations of the patient. Due to the failure to order appropriate tests and studies, the diagnosis was not made. Needless to say, the patient died. On summation, the following story could be used to illustrate the negligence:

The doctor took just one X-ray. He read that correctly, but it didn't give him the information he needed. No CT-Scan was ordered. No clinical exam was conducted. He stated he did not depart from good and accepted practice. Is that true? Perhaps I can answer that question this way:

I had a grandmother. I loved her dearly. She would go grocery shopping and I would watch her. If she wanted to buy a piece of fruit--a cantaloupe melon for example --she would look at it, she would pick it up, she would turn it around, she would turn it upside down, touch it

and press down on the skin, and then she would smell it. She would do all of this before she would buy it. And this was just for a piece of fruit. Here we're dealing with a human life. Was that doctor's conduct reasonable? One X-ray. Nothing else. Of course not.

These same rhetorical devices can be used during damages arguments as well. One of the difficulties plaintiff's lawyers have is trying to explain the significance of an injury and why a large damage award is appropriate for the particular case. Consider the situation in which a very young child or baby has been injured. That child cannot articulate the amount of suffering or the degree of pain she endured. The fear, for a plaintiff's lawyer, is that the jurors might not return a fair amount in compensation because of an inarticulate description of suffering:

Pain does not come to a small child in children's sizes, like baby aspirin. Pain does not come in small doses like a baby bottle. Pain is the same whether you are 5 or 85, whether you're Donald Trump or the poorest person in the world.

Many rhetorical statements have been used during summation to describe pain:

Pain is the brother of death.

A man in great pain has asked for death to give him peace, but no man ever asked for pain.

An hour of pain is a sample of hell.

Pain is the opposite of pleasant, the antithesis of comfort.

The art of summation requires the trial attorney to condense all of his proof into smaller, digestible winning arguments. Analogies, short stories and catch phrases accomplish this goal in ways that the jury will both understand and remember. "If it doesn't fit, you must acquit" remains instantly memorable, 15 years after it was famously uttered. Equally memorable is Lloyd Bentsen's rebuke of Dan Quayle's attempt to compare his own lack of experience with that of a former president's during the 1988 Vice-Presidential Debate ("I served with Jack Kennedy. I knew Jack Kennedy. Jack Kennedy was a friend of mine. Senator, you're no Jack Kennedy").

Thus, use of the right analogy or short story can be a key to an effective summation. Use of the wrong device, however, can spell doom for your argument, and your case.

Ben Rubinowitz

is a partner at Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz and an adjunct professor teaching trial practice at Hofstra University School of Law and Cardozo Law School. He can be reached at speak2ben@aol.com

Evan Torgan

is a member of Torgan & Cooper and can be reached at info@torgancooper.com

Richard Steigman

, a partner at Gair Gair, assisted in the preparation of this article.

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