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IF I HAD MORE TIME, COULD I MAKE IT SHORTER?

(ABOTA Masters in Opening Statements and Closing Arguments)

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One of my favorite writers is Thomas Sowell. Whatever he writes I understand, even if I don't agree with him. Most often he makes so much sense and his points flow so naturally that his conclusions become unassailable. Examining his writings create an interesting exercise in the art of persuasion. He uses many of the techniques that are powerfully effective in the courtroom. He tells stories. He harnesses anecdotes. He connects his concepts to common values. He speaks in simple concepts to explain more complex ones. He uses real people and real experiences. He connects the dots. It is very simply all about effective story telling.

Every once in awhile, he will write an article or column that he simply calls "Random Thoughts." These are often the most enjoyable, untethered to any one point.

I have decided to borrow from such a master and approach this piece as my version of random thoughts on the art of final argument, the good and the bad, the mistakes and the bright spots.

Stephen Bochco's late eighties television series *LA Law* had the best arguments…all delivered in less than five minutes. Though it was "only television", these arguments were focused, lean, mean and effective. I would go into court almost daily in those days and cross my fingers hoping that I might get one of the those five minute firefights, but it almost always turned into hours of rehashing.

Operating from the premise that final argument is clearly an art and not a science, it follows that there is no single perfect way to approach the craft. There is no single "best" argument, no silver bullets nor surefire approaches. It is also terribly important to remember that lawsuits are human problems redesigned by legal experts to form artificial legal causes of action. Underlying every legal and technical factoid is the original human problem.

My first random observation is fundamental and a cornerstone of effective trial preparation. Never wait for the trial to gear up to start thinking about your argument. Actually, the best time to write it out, to structure it, is when you decide to take the case, and as you prepare. (It also makes practical sense to pull the jury instructions at this very early point. The instructions provide a focus and outline for what has to be developed and established.) After blocking out your argument in the beginning, pop things into an argument file through the life of the case, …analogies, quotes, events in the news….all of which can feed the theme of the human problem that walked into your office. Once you structure the legal chassis, you have your work cut out for you. Every deposition, every examination, every interview, can be effectively geared to collect the building blocks to deliver that final argument. Needless to say, none of this suggests that the structure shouldn't be reevaluated or that you are wedded to that original architecture. Things do change and what looks like a lion when it walked in the door may well be a whipped puppy. Nevertheless, this approach will save wasted energy, time, money and focus. It may also make it clear if you need to let that puppy go.

There are no guaranteed styles that will always work for every trial lawyer. A style, whether loud or soft, aggressive or humble, detailed or broad, fast or slow, gracious and polite or furious and relentless….may look great on someone else but may simply not work for you. An adopted style that is not natural is painful to watch. It is akin to seeing someone wear an expensive ill-fitting jacket with the sleeves too short or too long and the shoulders drooping. It distracts, and it looks like it belongs to someone else. In fact, it does.

The only certain variable is the trial lawyer's personal credibility. If lost, nothing else much matters. Jurors' trust and a lawyer's credibility are priceless and should be protected as the most valuable commodity the lawyer brings to the jury. This currency can be lost by misstating evidence or by sloppy presentations, by disrespecting a witness a juror likes, or disrespecting the jurors, by being late, by talking down to the jury and insulting their intelligence, by repeating interminably, or by boring the jury with unrelenting details. The list is endless.

Experts sometimes claim that jurors have already decided where they stand long before arguments are presented. That has not been my experience from three plus decades in the pits. I have had hundreds of jurors explicitly tell me that this was not true for them. While they may have leaned one way or the other, it was not at all unusual for them to switch camps. Rather, they tell me, the dynamic that swayed them most frequently were arguments made and perceptions revealed by their fellow jurors during the give and take of deliberations, not what the lawyers said. They already knew what the lawyers were going to say.

There is power in this view. Final argument can be used to provide jurors with the support they need to persuade those who might be against you. Fellow jurors can be more persuasive than paid advocates. They have no skin in the game. They use their own words and experiences. There are therefore two goals that litigators should keep in mind in terms of what they hope to accomplish with their argument: to persuade those jurors who may still be on the fence, and to arm those who are already in your camp with arguments to help them counter those who are not in your camp.

Parenthetically, jurors have told me frequently how unsettled they were to find that other jurors had completely different views of the evidence that had seemed so clear and obvious to them. As a result, for years I included an admonition prior to argument, that jurors may find themselves shocked and upset at some point during deliberations because the story that they thought was so obvious may not have been as obvious to others. This warning seemed to prepare them for this inevitability.

Every trial is like a Rashomon play…different sides describing the same set of facts, with at least two versions of the same story. How that story is framed, how the theme is presented in its simplest form (the human problem,) often dictates the success or lack of success of trial advocacy.

Don't even think about telling jurors everything you know. Just tell them what they need to know to get to the result you are working to lead them to. This is so important it is worth repeating. Don't tell them everything you know.

Although the scope of this article does not include trial strategies, it is helpful to comment on the great value of summary trial statements. Try to get the judge to give both sides a bank of time, perhaps as little as ten or fifteen minutes each, to be used at will, broken up as frequently as desired up to the maximum allotment permitted. These minutes can be used to summarize the case to that point. This does not and should not qualify as argument, but serves as a summary reminder to the jurors of the significance and context of what they have been viewing. ("This is where we have been and this is where we are going. My next witness is going to talk to you about…..") Putting the trial into context in the midst of the presentations will keep jurors grounded, will help you keep the final argument focused and will control

the impulse to restate and re-ask what was already covered, such as after a long weekend or a break in the natural progression of the trial. (This promise of a reduction of repetition is a strong selling point for the trial judge!)

Don't tell jurors why they have to do something. Show them why they want to. Figure out a way to make them want to adopt your framework and let it be their conclusion. They will defend that position much more strongly and use it in their own words to persuade other jurors during deliberations. Jurors, once engaged, are almost always committed to figuring out what the right result is and then doing the right thing. Acknowledge that and then show them why the right result is to find in favor of your client, giving examples that inexorably lead to the conclusion you are building towards. Ordering them or demanding that they come to a particular conclusion is just as off-putting as it is when we are ordered to so something by someone in our lives. For instance, instead of saying "Mr. Jones has no integrity and can't be believed," give examples. Small ones count. "Mr. Jones was wrong on his times. He was wrong on what he was doing the day before and the week after. He tried to make you think that …. And if Mr. Jones would stoop to such depths when it doesn't matter, how much more likely is he to sell out his integrity when it really counts?"

Or…. instead of saying "Campbell Horn was an outstanding employee," lay out the proof and let the jurors figure out how exemplary Mr. Horn was. For example, this could be approached in this fashion: "Campbell Horn was always on time. He never took a sick day, he stayed late every time he was needed, he helped others when it was not his responsibility, and he was a solid team player the day their big client came into town and Vice President, James Smith, had to leave on an emergency..."

The most complex and difficult concepts can be presented with familiar metaphors and anecdotes. Give the jurors enough universal values reflected in your theme to allow them to understand it so that they can talk about the issues in their own words.

Anecdotal stories are always more compelling than cold statistics. Come up with an analogous comparison in everyday terms. For example, "if you knew that your brother in law had bought this new alarm system for he and your sister, and they were burglarized because of a glitch in the system, would you buy the system? If you were told that it was 99% failsafe, would you reconsider? Of course you would not!" Start with the anecdote then back up the message with your statistics and studies. Don't start with the stats.

Keep your argument as tight and short as you can. Various studies point out the limited attention span we seem to experience in our culture. This attention span seems to get shorter and shorter with our younger generations. In defiance of this truism, I would be rich if I had a dollar for every time a lawyer announced that his argument would be a perfectly reasonable 20 minutes or 45 minutes and the presentation was still going strong a couple of hours later. Lawyers often tell me they were shocked at how quickly that time went by. I guarantee that the time did not move as swiftly for the captive jurors. This is a disconnect that should not happen and is the mark of inexperience.

In keeping with this, trial lawyers should always pay close attention to the jurors. Valuable information is available from body language: rolling eyes, uncomfortable shifting in seats, bored attendance and the lack of (or vigorous) note taking.

Our younger jurors are accustomed to visuals and flash bang excitement in the information they pay attention to. Using well-made and thoughtful visual exhibits and displays can make an important difference, both in keeping their attention and in explaining concepts.

If visuals are used in argument that have not been marked as exhibits, it is helpful to let the jurors know that a particular exhibit will not be coming into the jury room with them. This will alert them to take notes if want to remember the substance of the exhibit.

On the other hand, don't commit death by powerpoint. Too great a reliance on powerpoint slides and unimaginative lists can create as solid a barrier as hiding behind the podium or reading the argument.

In this economy, many jurors are struggling mightily to survive. There are also many who live or have lived in pain, or experienced losses sometimes worse than that described by plaintiffs. Trial lawyers will ideally have learned this information in the course of selecting the jury. It is helpful to review these details when choosing how to fine-tune the argument relating to damages and liability issues, and in the decision about what to ask for or what to concede.

Be aware of the generational differences among the jurors. This was reflected in stark contrast in a litigation exercise conducted for a law firm many years ago. The identical factual scenario was presented with attorneys switching sides. The recruited "jurors" in the morning were retired people and the group in the afternoon were college students. The older "jurors" were uniformly impressed and persuaded by the credentials and depth of experience of the "experts" and generally adopted their positions. The college students totally disregarded experience and resumes, tending to go with the "expert" they liked and could relate to. This dynamic should not be ignored.

Speak English. There is something about law school that strips the commonsense out of us. We are professionally trained to plug every hole and use every adjective imaginable to make sure nothing leaks. This may be fine for a legal document or contract but it doesn't work in communication and persuasion. A party's story is most effective when framed in the easiest way to be understood by the least informed juror on the panel. It is a rare complex issue that can't be broken down into simple concepts of greed/responsibility/innocence/guilt/good/bad. Also, for example, who "exits a vehicle?" We get out of our cars!

Never ever read your argument, no matter how good you sound on paper.

Prepare and memorize your opening and closing sentences. Don't script the rest. All points you want to make can be noted with bullet point reminders. The opening and closing sentences should be visceral attention getters.

Beware about underestimating juror cynicism. Many jurors assume that lawyers are hired to lie and deceive. They assume your experts are hired guns. It is not a surprise that lawyers are not generally well regarded in our culture. It helps to address this directly and defuse it by acknowledging and addressing it with humor and humility when the trial starts. It is also a reason to remember never to lose the trust of your jurors by exaggerating or leading them astray on even a small fact or issue. There are rarely second chances.

Jurors are influenced by what may seem to be trivial things…. the choice of words used by a witness, the clothing they wear, the car they drive into court in, whether they have an agenda, whether they seem to have compassion for the aggrieved parties even if they are not responsible. Jurors do pay attention to whether your client cares. A party's absence, for example, screams to them that the party doesn't really care about the dispute even as uninvolved citizens are dragged into jury duty without their consent, to serve as fact finders and judges. Pay attention to these small items with your client and your witnesses. Since jurors are not allowed to talk about the case, they will talk about these other things. One example comes to mind in a trial a few years ago. A witness was describing a meeting with one of the parties in the

case, referring to the meeting as an "audience." This imperial description shed a whole new light on the way the client did business, and it was not positive. In another premises liability case involving a fall, the plaintiff wore high platform shoes the first day. She lost the trial that day. In yet another example, a juror saw one of the parties talking on his cell phone while driving away from the courthouse during the lunch break. He also lost that juror that day.

Your case has weaknesses. All cases do. It helps to address them directly and early in argument. Get them out of the way. This dissipates the likelihood of jurors rejecting your witness/client/expert, and lets you emphasize how those weaknesses don't detract from the universal values of the human problem at stake. Ignoring your weaknesses also hurts your credibility. Any decent trial lawyer should be able to turn a weakness into a strength. Every blade is double edged. For example, inconsistencies in a witness's testimony can be used as support for its veracity. Nothing in nature is ever totally perfect or consistent. In fact, the argument can be made that the flawless witness should be looked at with a little more skepticism. Life is never that clean or perfect. It just isn't. Jurors know this.

It is also quite effective when you start with your weaknesses, to acknowledge and reframe them, then dismiss them with a "but." "But" negates all that precede it. "Susan Strong did lose some of the documents that support her statements, but she deserves your full attention and sympathy because….."

Ideally the jurors have been admonished clearly and regularly about the prohibition against using the Internet to research, communicate or discuss anything related to their jury service. Argument would be a good time to remind them of this prohibition and to let them know again that if they have a question, they should submit them to the attorneys to address. Argument is a good time to remind them about the foundation of simple fairness that underlies our entire system of justice, and that the use of information that might influence their decision that has not been vetted, explained, corrected, presented to or acknowledged by any of the parties serves to destroy the integrity of trials.

Let the jurors know you trust them to come to the best, most wise decision, on behalf of your client as well as the other side.

Keep the level of civility high, no matter how low the other side might stoop. If the other side does degenerate into personal attacks, recognize and accept the gift that is being given to you. Don't throw it away by responding in kind. The contrast between the sides will inure to your benefit. If you are aware that opposing counsel tends to throw out objections during argument, often to simply disrupt your concentration, consider making an in limine motion in advance, or alerting the judge to your concern about this practice. Likewise, objecting to the opposing argument should not be done unless serious irreparable harm is contemplated. If there is concern about a particular improper argument that might be delivered, handle this in advance through an in limine motion or by alerting the judge. Objections, for the most part, are lose-lose propositions when handled in front of the jury. Even if the objection is sustained, jurors wonder what is being kept from them and what you are afraid of. If your objection is overruled, you are a loser. Jurors don't like objections during argument. They are disruptive and too often come across as gamesmanship. Considering offering to stipulate that objections made in advance (ideally before the trial starts) outside the presence of the jury, be deemed to have been made during trial to avoid the need for repetition, preserving the issue for appeal if necessary.

Make sure your client has a face that the jury sees and, hopefully, likes and can relate to. It is easy for a jury to demonize a bureaucracy or institution. It is not easy to do the same with flesh and blood sitting in front of them, especially if they like that flesh and blood.

Don't lose credibility by setting your numbers too high or too low. Being too greedy or too stingy can be

killers. In mediation, much time is spent (or should be) on the opening numbers, since these numbers will generally anchor the discussions. These anchor numbers often become a starting point…or a stopping point if they are unrealistic. Except in rare cases, jurors often negotiate down from the high number suggested by the plaintiff, and up from the low number offered by the defense. If those numbers are unrealistic and unreasonable, the attorney offering that number loses credibility. Choosing the optimal number may be one of the most important tactical decisions made by the litigator. The more credibility that has already been built up and "banked" during the trial, the more that number can be pushed, but only to a point. I have found many jurors primed to make sure they are not a "McDonald's juror" though some have seen the HBO television movie "Hot Coffee" (which might be a good question for voir dire.)

Numbers offered should be backed up by the evidence produced during the trial. It doesn't seem to help to have a number not grounded in some kind of justification based on the evidence. Random numbers won't help jurors persuade each other. Numbers anchored to evidence or a reasonable argument, even for noneconomic damages, are more compelling. Doubling the economic damages to support noneconomic damages is an example. Lawyers often refer to a "rule" that general damages should be a significant multiple of special damages. I have been told this time and again and have simply never seen it happen in the real world.

For general noneconomic damages, many lawyers effectively use the technique of providing a reasonable value for the pain and suffering experienced on a daily basis, provide information about life expectancy, and leave it for the jurors to do the math.

A number that is not rounded is often more credible. For jurors, $462,000 sounds more thoughtful than $400,000 or $500,000. The number starts to sound petty, however, if it includes pennies.

Try to see your client and your case from the perspective of your specific jurors. It is helpful to try to understand your jurors, but don't even think about getting it completely right. No voir dire ever conducted can produce enough information to solidly predict juror responses, whether by professional consultants or lay observers. Even if weeks were devoted to jury selection, it doesn't mean that predictions are much improved. I have not talked to a judge yet who did not agree that in virtually every trial, the lawyers, parties and court staff were surprised by a juror who voted or behaved contrary to initial evaluations or voted against type. Lawyers regularly find their cases being championed by a juror they were convinced hated them or their client, or were destroyed by the lead of a juror they thought was in their camp.

Once you have a feel for your jurors' perspectives, find a way to talk to them in terms of their problems, concerns and values, and couch your client's problem in a way that is familiar to theirs. For example, "Many of you told us you have kids getting ready for college. We all struggle with the problem of paying for school, figuring out where they should go, and keeping them close to home but not too close…. Susan Bowers here will also have that problem, but her plans for protecting her kids and projecting for their future have been crushed."

Be cautious, though, that jurors are not inadvertently offended by the presumption that you know what they think or feel. It is more subtle, therefore, to refer to a generic "us" or "some jurors" when incorporating what you believe are their perspectives.

Determining who the leaders and followers are, and watching the natural leadership that develops during a trial is important information in shaping the final argument and deciding to whom it should be directed. The most valuable pieces of information potentially available during voir dire and to keep in mind when delivering the argument is to learn who are the leaders and who are the sheep, how they gather information, what their personalities are and how they view the world (i.e. corporations are evil vs.

corporations keep our economy pumping.) It makes sense to spend sufficient time to design arguments to persuade or arm the leaders on the panel.

Try to figure out what a juror might ask as they sift through the evidence. Articulate that question for them, then suggest how they can answer it. "Some of you may be wondering what in the world you are going to do with these stacks of exhibits? You are free to look at every single one and I suggest you spend all the time you need on them, but I think you will find that the most important ones that will help you are……."

Walk jurors through the verdict form. It is distressing to see how infrequently something this basic is ignored. Jurors often view the verdict form as their final exam. You might want to acknowledge that jurors have, in the past, indicated that the form felt like a final. Offer to make the form more clear for them. Explain that the foreperson will sign it, that they need to answer the questions in the order the questions are posed, though as the jury instructions dictate, they can talk about the issues in any order they like.

Walk them through the most critical pieces of the jury instructions. The operative word here is "critical." (I have come to believe that a best practice is to give the jurors the complete and full set of instructions right at the beginning of trial, with copies for them to read along, make notes on and refer to during the trial. These instructions will have provided the jurors not only with the elements of the causes of actions, but also guidance on dealing with deposition transcripts, expert witnesses, and so on. This gives them direction when it is needed and not long after the issue is forgotten.) If at all possible, ensure that the jurors have been provided with their own copies of the jury instructions so that they cannot be commandeered by the foreperson or a juror with an agenda. Individual copies also allow jurors to make notes on them as you walk them through key language.

Let them know that contrary to every television show and movie, the foreperson will NOT have to stand and announce the verdict. This has caused many a capable leader from taking on the role of foreperson in fear of that eventuality.

Encourage jurors to stand up for what they believe. Let them know that it is important to express and listen to dissenting views. This will help avoid the problems generated by a vocal leadership clique dominating and silencing opposing viewpoints. The value and power of our jury system is truly grounded in the broad range of experience and viewpoints brought by twelve randomly assembled human beings. Jurors have consistently told me that they were amazed (and sometimes shocked, as noted above) by the different perspectives brought into the discussion, perspectives that never dawned on them individually. The presentation of alternative viewpoints usually tends to animate the discussions and draw everyone in. Jurors can and should be reminded that the reason group decision making is superior to individual decision making is because of the value of different perspectives examining the issues.

Make eye contact.

Move around periodically to keep the pace flowing and to keep jurors' attention. Parking and hiding behind the podium is never a good way to connect with jurors. Use your space with your body but don't invade their space by getting too close to them. I have heard six feet is as close as you "should" get, but since the jury box already creates a "wall", four feet seems to work. Don't do what I have seen one lawyer do, which was to lean right into the box. (This lawyer was so spectacular in his inability to sense space that as the jurors were pulling back from him, he actually fell into the box. It was quite impressive.) Moving too much, rocking or pacing, is also distracting and signals a lack of discipline and confidence. Watch for personal tics or gestures that don't match the words being spoken. It is immensely helpful to

deliver the closing argument in advance on tape and watch it. There will be small things that the speaker is often completely unaware of that are annoying, distracting or offensive.

Be enthusiastic but not rabid.

If you number your points, make sure your points add up. It focuses listeners to tell them there are three or four or five great reasons why they should accept the truth of a certain witness or why the opponent's expert should be disregarded. Using numbers will engage those jurors who like to take notes and keep track with numbers. However, if you say you have five points, make sure you give them five and identify what they are. Audiences become more attentive as they wait for the numbers to be delivered.

Ignore the natural impulse to answer every point raised against you. There are usually two many red herrings thrown in the mix. Chasing herrings will cut into the strengths of your case and you will lose your jury as you find yourself focusing on your weaknesses. You don't have to accommodate the other side in this strategy and you don't have to answer every challenge. If the jury likes you, they will figure out how to answer every one of the arguments. It can in fact be rather scary to see how creative they are willing to be. Pick and choose the few arguments made by your opponent you need to respond to, as they fit into your strengths.

On the other hand, as a strategy, it also helps to challenge the other side, to ask the jurors to think about why the other side has not explained X, Y or Z. If you can draw them into responding to each of these, you have forced them to focus on their weaknesses.

Avoid hyperbole. Just set up the facts and let the jurors hybolate for you.

Don't call someone a liar easily. If you decide to take this aggressive step, understand that this is what you are doing and make sure you have plenty of hard evidence. It is more effective to claim that perhaps they were mistaken, or wanted to believe it, or they may have convinced themselves to believe it, or they simply were embarrassed and they were just covering themselves. Note that just because you may have proven something to be false, this does not automatically make that person a liar. Calling someone a liar is pulling out the heavy guns. There may be times where that is appropriate but you may lose a juror who liked that witness or party. The point is to have the jurors disregard the evidence that has been shown to be false. Whether the jurors then decide the witness is lying can be left up to them. If the witness's statement is based on his or her own point of view and you can demonstrate that the evidence does not support this particular point of view, this is all you need. Jurors, unlike lawyers, think that the oath to tell the truth carries some weight and they tend to be reluctant to determine that someone is a liar, though they may not be reluctant to find that a witness was mistaken.

Speak in positive themes, and avoid negatives. I have repeatedly seen experts claim that our brains see in images. You can tell someone not to think of an elephant and all you can see in your mind is an elephant. I recall first learning this concept when I took my dog to a training class. Dogs' brains, I am told, do not hear the "no" or "not" in front of the issue being discussed. "Don't bark" sounds like "bark. "Don't chew on the furniture" is heard as "chew away…" This concept was reintroduced to me when I was trying to figure out how to be a parent. "Don't pick up that vase" translates in the brain as "pick up that vase." Anything can be rephrased in the positive mode. "Don't be late" can translate to "I know you'll be on time." The same happens in the employment arena. "This is our most important client. Don't irritate them" sets up a visual of what "irritate" looks like. The same message in the positive might sound like "This is our most important client. You'll do terrifically as you handle them with sensitivity and confidence." To counter this phenomenon, do the same with jurors. Don't tell them what you don't want. Ask for what you do want. For example, the negative would be "Don't leave my client with responsibility

for what he did not do." Instead, rephrase it "Protect my client from these false allegations."

Believe in your position or your jury won't.

Again, and it cannot be repeated enough, your credibility is key. It won't overcome weak facts but the jurors will try mightily to find a way to give you what you ask for. If they can't, I've seen them approach trial lawyers whom they like to personally apologize after the case.

Accept the inevitable that when you sit down, you will remember absolutely brilliant thoughts you failed to include. Forgive yourself. The jury will.

And take a serious cue from Bochco!

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