

**19<sup>TH</sup> Annual DWI: Defend With Ingenuity**

**Super Summations**

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**Table of Contents**

	<b><u>Page</u></b>
<b>SUPER SUMMATIONS</b>	
1. Start Strong -- Finish Strong. . . . .	1
How Do You Do That?. . . . .	3
2. Finish Strong. . . . .	6
3. The Body of the Summation. . . . .	9
(a) Get the Judge's Charges. . . . .	9
(b) Frame the Issues. . . . .	11
(c) Preparation. . . . .	12
4. Transcripts & Documents. . . . .	13
5. Demonstrative Evidence. . . . .	14
(a) Eye Contact . . . . .	14
(b) PowerPoints. . . . .	15
6. Handle Your Problems. . . . .	16
7. The Second Seat. . . . .	17
8. Delivering the Summation. . . . .	19
(a) Talk to Them. . . . .	21
(b) Personal Opinions. . . . .	23
9. Wrap Logic in Emotion. . . . .	24
(a) The Pause. . . . .	25
(b) Trilogies. . . . .	26
(c) Analogies and Storytelling. . . . .	27
10. Movement. . . . .	28
11. Conclusion. . . . .	29

## SUPER SUMMATIONS

**TWELVE BOTTLES OF BEER! THAT'S WHAT YOU HAVE TO BELIEVE TO ACCEPT THAT MACHINE'S READING OF .14. YOU HAVE TO BELIEVE THAT JIM DRANK THOSE 12 BOTTLES OF BEER IN AN HOUR AND THEN SAT IN THAT POLICE DEPARTMENT FOR THE NEXT 3 HOURS, AND NEVER ONCE ASKED TO GO TO THE BATHROOM. . . .**

The hardest thing about writing or lecturing about the art of summation is to follow the rules and principles that you are teaching. "Twelve bottles of beer" was the theory of the defense from jury selection to closing statement in a felony DWI case. In the trial, an expert witness matched that volume of beer to the alleged test result. The 12 bottles of beer were placed on the jury rail to graphically illustrate the volume of liquid that was being discussed. The jury acquitted the defendant of the felony of Driving While Intoxicated, but did convict for the traffic infraction of Driving While Ability Impaired.

Closing argument, like virtually every other aspect of a trial, is an art; and like any art, it has a multitude of approaches. There is no "one size fits all," and you should view this article and, indeed, all trial techniques in the same manner as you would garments in a clothing store. Try them on for size, but buy only the ones that fit you.

### **1. Start Strong - Finish Strong**

In 1987, Deryl Dantzler, Dean of the National College for Criminal Defense, in Macon, Georgia introduced her class to the concept of Primacy and Recency. Essentially,

Dean Dantzler said that people remember what they heard first and what they heard last. Accordingly, every aspect of the trial: jury selection through summation, should be informed and influenced by this principle of psychology.

Traditionally, many lawyers begin their summation by thanking the jurors for the time and attention that they have given to the trial. Some attorneys will apologize for the intrusion into the jurors' lives and will engage in other such pleasantries prior to getting into the merits of their case. From there, many will engage in a chronological recap of the testimony going through each witness's testimony and the trial exhibits.

Well into the middle of their summation, they will first articulate their arguments as to why the jury should rule in their favor. They will then thank the jury for their time and attention, and sit down. Applying the principles of Primacy and Recency to that summation leaves the jury with a very strong impression that the lawyer was quite concerned about taking their time.

In the age of CSI, Boston Legal and T.V. summations, the above approach could be seen as a lawyer going through the motions on behalf of a losing case. While it is important to be courteous, summation is the time for effective argument; and effective argument is dependent upon your ability to weave logic and emotion into a compelling conclusion.

You have a magic moment at the beginning of your summation. It is during that moment when you have the absolute, undivided attention of the jury. They are focused and curious about what it is that you have to say. That moment must be used to articulate

the merits of your case. It is the time of the trial when you have the greatest latitude and the best opportunity to persuade.

### **How Do You Do That?**

Unlike the constraints of normal conversation, the dynamics of a group presentation give the speaker an advantage that is lacking in ordinary discourse. In both the courtroom and the lecture hall, the speaker has the power of the podium. The speaker has been appointed and anointed with the authority of the moment. In the courtroom, they are the attorney representing one side or the other. In a lecture hall, "they" have been asked or assigned as the person to speak, so they must know what they are talking about.

If you commenced an ordinary conversation in the same manner as you should begin a closing argument, you might be considered rude. Groups are not individuals and individuals are not groups. The individual judges the communication of the speaker in the isolation of the listener's own knowledge and experience. The individual is a far more critical, and less easily influenced listener than a group.

The group, subconsciously, extends its lateral vision to assess and judge not only the speaker, but the reaction of their fellows. If their fellows applaud, they applaud. If their fellows approve, they will try to find and understand the basis for that approval.

People are not sheep. They will not follow blindly, but there is a herd instinct among humans. There is a basis for the famous story about the king who purchased the marvelous set of clothes that were both weightless and invisible. It took a child to figure

out that the king was, in fact, naked. All of the adults had been told that only the sophisticated eye could appreciate the wondrous attributes of the king's clothing. Accordingly, all of them admired the king's sartorial splendor.

The corollary of this is that not only does the speaker in the courtroom, and the lecture hall, have the power of the podium, they also have a group that wants their presentation to be successful. This doesn't mean that they want you to win the case, it simply means that they want you to succeed in making a good presentation of whatever it is that you have to say.

The fear of public speaking is not confined to the speaker. It manifests itself in the audience by their discomfort when the speaker fails, forgets their line in a play, or is muted by stage fright. It is this dynamic that people who love public speaking, understand and enjoy.

The group will respond to a speaker in a way that an individual will not. When was the last time that you saw someone get a standing ovation in a one-on-one conversation. Similarly, if you tried to use the gestures, pace, and movement that are commonly associated with public speaking in a one on one conversation, you would be inappropriate.

Imagine a movie clip of Adolf Hitler addressing the multitudes and then imagine that display being given in a one on one conversation. Mr. Hitler would have been confined to the mental institution in which he so richly deserved to abide; and the world would have been spared the Holocaust and bloodshed of millions of soldiers and civilians.

To start strong in your summation, you have to have the confidence that comes from internalizing these principles of public speaking. Otherwise, you will get up and say the words that you rehearsed, but they will not convey the far more important confidence and certainty that you need to capture the jury's attention and enlist them in your cause.

Lawyers start off summations thanking the jury and expressing other pleasantries because they are attempting to achieve a comfort level with themselves and with the jurors. Social niceties are the lubricant of individual discourse and relationships. "Hi. How you doing?" is how the vast majority of communications between people commence in our society. We need, however, to have established a relationship and a comfort level with the jury long before the summation.

If you like them, the chances are that they will like you. People respond to warmth and humor and their comfort level with you is dependent upon your comfort level with them. Remember, the jury is a group of individuals who are largely unknown to one another. They start off as strangers to one another, and they are self-conscious and uncomfortable.

When they are asked questions in jury selection, they are insecure and very concerned about how their answers will make them look. They appreciate a lawyer who can warm up the atmosphere, relax the tension and allow them to begin to relate to one another. If you are that lawyer, and you create that comfort level, you will be well positioned to make the most effective argument on summation.

To start strong, we need to begin with words that not only encapsulate the theory of our case, but convey it with an emotional impact that the juror will retain, and use in arguing with other jurors during deliberations. Twelve bottles of beer was effective because it was tied to something to which the jury could relate and feel; the need to urinate.

The great principle of advocacy, teaching and all oral communication is that people remember that which they feel. Deliver a concept wrapped in an emotion and people will receive and retain that concept. Consider all of the jokes you have been told. Those jokes were told from person to person and remembered because people laughed. The jokes were wrapped in an emotion; humor.

## **2. Finish Strong**

Whoa, wait a minute. Why are we talking about finishing strong when we haven't addressed the body of the summation? After all of this talk about starting the closing argument, shouldn't we be discussing the body of the closing before we get to its finish?

Two things. One, the fact is that finishing strong is a lot harder than starting strong. Second, if you have the start and the finish down, it is a lot easier to construct the body of the summation. Once you know where you are starting, and you know where you want to end up; all you have to do is build the road between those two points.

So where do we finish and how do we finish strong? Hopefully, we finish where we started, with those same 12 bottles of beer. In the opening statement, we told them the story of the case, which started with the 12 bottles of beer, but we started with it as the



introduction to a narrative of how Jim, a beer salesman, had called upon a client at a bar, and had consumed two bottles of beer over the course of an hour and left the bar, only to be immediately stopped and arrested by the police. He was taken into custody and held for 3 hours during which he never went to the bathroom nor, indeed, even asked to go to the bathroom.

The officers will testify to this. We know they will testify to this because this was pinned down at the pre-trial *Huntley/Dunaway/Mapp* hearings. Pre-trial hearing transcripts are essential to any litigation. Do not go to trial without them. The following cases say you have a right to obtain those transcripts: *See People v. Peacock*, 31 N.Y.2d 907 (1972), *People v. Coleman*, 81 N.Y.2d 826 (1993); and *People v. Sanders*, 31 N.Y.2d 463 (1973).

Dr. Jones, a pharmacologist, will testify that for Jim to have a .14 at the time he was tested, he would have had to have consumed 12 bottles of beer in that hour at the Greenway Tavern. Joan Brown, the owner of the Greenway Tavern, will testify that she served Jim those two beers and spent the hour chatting with him about a promotion that Jim's company was doing, as well as business in general. She will also testify that Jim appeared completely sober when he left the bar.

So, in the opening, we told them the story of what happened on that fateful day of Jim's arrest. When the prosecutor objected to the narrative of the story, we responded: "the proof will show" and then continued the story. We avoided the appearance of argument, although the opening is one of the most compelling arguments that we can

make. It is simply structured as a recitation of what we expect the proof will show, as opposed to argument which is permitted only in summation.

So we will finish strong with "12 bottles of beer."

Twelve bottles of beer. That's what you have to believe in order to convict Jim. You have to be convinced beyond a reasonable doubt that he drank 12 bottles of beer in the space of one hour, and then spent 3 hours in custody and never once asked to go to the bathroom. Look at these 12 bottles of beer, look at all this liquid, and ask yourselves if that is reasonable. Is that believable, is that possible?

Jim didn't drink that much. He couldn't have drank that much and you know that he didn't drink that much. You know it because he didn't look like a drunk when he left the tavern. You know that because the officer saw no aberrant driving. They stopped him for speeding. You know that because the officer noted no slurred speech, and that he produced his license and registration without difficulty.

The officers told you that he flunked their field sobriety tests, but look at what they said about how he performed them. He did not stagger. He did not sway. He did not need the instructions repeated, and, nothing that you have heard describes Jim as being the drunk that he would have had to have been for that .14 to be accurate.

He didn't look like a drunk, he didn't talk like a drunk, and he didn't act like a drunk. He was not drunk and he did not commit this crime.

### **3. The Body of the Summation**

#### **(a) Get the Judge's Charges**

You need to know what the Judge is going to say to the jury at the beginning and at the end of the trial. If they're going to show the jury a movie about jury service, you want to get a copy of that and see that well before your trial date.

In the normal course of events, a criminal case is conducted like a dance. The prosecution leads and the defense follows. Contrary to popular belief, we do not cause the delays that are so common in the criminal justice system, and routinely attributed to the defense. Of course, we would if we could, but the truth is that we can't. The prosecutor and the Judge set the course of events, and we are compelled to be there as they direct.

We have the power to obtain reasonable adjournments, but any sign of delay for the sake of delay is quickly met with a strong response. Indeed, engaging in specious delay not only adversely impacts the case at hand; it can, also, prejudice all of the rest of your clients. Competent defense requires a good reputation where you request, and are granted the legitimate adjournments that are essential to any attorney.

Once a trial date has been set, however, delay inures to the benefit of the prosecution and not the defense. Delay in providing discovery materials denies the defense the ability to adequately prepare, to think, and to consult with experts or other lawyers. Crafting your summation and, indeed, preparing all aspects of the trial, are seriously impaired if you do not have copies of the Judge's charge.

In most criminal cases in New York, Judges utilize Pattern Jury Instructions provided by the New York State Unified Court System, which can be obtained online under the heading Criminal Jury Instructions 2d. Once you have pinned down the charges that the Court is going to utilize in your case, you can use them in crafting your jury selection, opening statement and closing. You can, also, use the language of the charges in your cross-examination where appropriate.

The art of this is to use the language without crossing the line where you begin to instruct the jury on the law. This line varies from Judge to Judge and prosecutor to prosecutor. Since the prosecutor starts first, and since most prosecutors like to discuss the law with the jury during jury selection, do not object unless it is hurting your case. Let the prosecutor establish the precedent of discussing legal principles with the jury. You are then licensed to do the same so long as you do not go outside the parameters set by your colleague. With a little luck, you will not draw an objection from either the Judge, or the prosecutor. The key is not to push too far.

Weaving the words of the charge into *voir dire*, opening and summation enlists the weight and the credibility of the law into the substantiation of your argument. Jurors rarely can or will listen to all the contents of a Judge's charge. So much is lost in mind numbing verbiage. The words they heard from you, however, and that they, then, hear again from the Judge will stand out. Nothing brings greater credibility to your argument than to articulate something that the Judge later repeats.

If the charges aren't readily available, request a pre-trial conference a month or so in advance of your trial. Explain to the Court that you do not want to be discussing the jury charges with a panel of jurors sitting in the courtroom. It is in everyone's interest to have the charges and other procedural matters pinned down prior to trial so that you are free from last minute distractions, and the case can proceed in an orderly manner.

**(b) Frame the Issues**

Defense attorneys always lament the fact that the prosecutor has the last word in criminal cases. There is, however, something to be said for giving the first summation. We get to frame the issues and to ask questions that the prosecutor must answer. No matter what else happens, the prosecutor suffers the disability of not being able to fully craft their summation since it follows ours.

If we raise substantive and legitimate issues, the prosecutor ignores them at their peril. If they respond to our issues and questions, they mess up the sequence of their own summation. In addition, they risk losing credibility and looking awkward if they first respond to the issues raised by the defense, and then repeat things because they are now blindly following their planned summation. More commonly, they wind up with a mixture of their planned summation and "on the fly" responses to the issues raised in ours.

Framing the issues means posing rhetorical questions that shape the argument for both you and the prosecutor.

(1) Do you really believe that Jim could have drunk 12 beers in an hour? If Jim drank that much, wouldn't he have had slurred speech? Wouldn't he have staggered or swayed? Shouldn't the police know how to administer the field sobriety tests, and score them properly?

(2) If they want people to accept their breath test result, shouldn't they follow the proper steps in giving that test?

The answers to these questions are all favorable to the defense or, you would not be framing the issues in these terms. If the issues are framed in a compelling manner, the prosecutor will have little choice but to address them and wind up playing on a field that you have defined.

The body of the summation is where you make your argument and frame the issues of the case. The content of your argument and the organization of its points are a matter of preparation and repeated, out loud rehearsal.

### **(c) Preparation**

Trial is combat waged in a courtroom in lieu of a battlefield. As any good soldier will tell you, all battles are planned meticulously; but no battles go according to plan. Once the first shot is fired, the only thing that you can count on is the unexpected. Meticulous planning and, indeed, rehearsal allow the flexibility of dealing with the unexpected, because everything that could be anticipated, has been.

The idea of writing out a summation is not to read aloud that which you have written, but to internalize the words and concepts by writing them down. We tend to remember that which we write. When you sum up, you should have very few, if any, notes with you. If anything, a list of the points in the order that you want to cover them might be helpful. Your mastery of what you are going to say should be such that you have the flexibility to respond to objections from your adversary, as well as adverse rulings from the Court.

So let's say that we have made a list of the points that we want to cover in the body of the summation. We structure that list for maximum, logical and emotional impact. What can we do to bolster the points that we are making?

#### **4. Transcripts & Documents**

There is nothing more authoritative than paper. If it is written down, it must be so. We are far more ready to believe that which we read, than what we hear. Even the most absurd ideas are given credence when they are reduced to writing. You only have to stand in line in a grocery store and look at the tabloids to realize the power of the written word.

Thus, the power of paper is a tool that should be used in the courtroom. On summation, reading a transcript of the witness's actual words is far more powerful than recounting them from memory. Documents that have been received in evidence are good sources of argument. The power of a particular point can be enhanced by a slow, emphatic reading of the particular piece of testimony or evidence.

Similarly, the use of demonstrative evidence is very helpful in illustrating a point in such a manner that the jury will retain it and use it in their deliberations.

## **5. Demonstrative Evidence**

Demonstrative evidence is like an umbrella. You should have one, but you only use it when the circumstances warrant. Unnecessary demonstrative evidence is counterproductive. Worse, demonstrative evidence can hurt you if it is too slick or sophisticated when the facts of the case do not warrant that.

For example, in a multi-million dollar products liability case, it is difficult to conceive of demonstrative evidence that is too sophisticated. In a misdemeanor DWI case, however, a really well done PowerPoint® can imply that the defendant has bought the best defense available. The "KISS" (keep it simple stupid) principle is as applicable to courtrooms as it is to other areas of endeavor.

### **(a) Eye Contact**

People listen to people who have contact with them. That contact can be either physical, or it can be eye contact. Years ago, a child psychologist taught my wife, Karen, that if she wanted our children to listen to what she was saying, she should first establish physical contact by touching their arm or shoulder, and obtain eye contact before she began to speak.

Thirty-some years later, I am still forced to listen, and to suffer interruption of what I am doing by that light touch on my shoulder calling me to attention.



Since we are not allowed to establish physical contact with jurors, the next best thing is eye contact. Eye contact commands attention and conveys sincerity, conviction, and confidence. Any PowerPoint, graph or chart that breaks that eye contact, and that command of the jury's attention, had better be compelling, necessary and legitimate.

**(b) PowerPoints**

PowerPoints have become the rule rather than the exception in most public presentations. Many lawyers use them routinely throughout the various aspects of the trial. They can be utilized in openings, direct and cross-examination; as well as closing argument. As with the previous analogy of trying on clothes in a clothing store, the use of demonstrative exhibits are as dependent upon the comfort of the person using them, as they are upon their effectiveness with the audience viewing them.

Demonstrative evidence, however, is not limited to PowerPoint or other computer generated documents, graphs or charts. Some of the most effective techniques utilized are objects found in the courtroom as symbols. For years, I have used the glasses and pitchers of water to make points in both a lecture hall and the courtroom. Whatever you use, it must be something that you are comfortable with.

If you are going to use a PowerPoint, rehearse with the PowerPoint until you have internalized the order of the slides and you have the mechanics down cold. In lectures, I have noted a fairly frequent occurrence of malfunctions and problems with PowerPoint presentations. If you are going to use one, get to court early and set it up. Do a dry run in

your office to make sure that it is working perfectly before you actually need it. This is something that should be done days before the trial.

## **6. Handle Your Problems**

Just as the wise prosecutor prepares for the defense summation, the astute defense attorney prepares for the prosecution summation. Do it out loud. Stand up and do your opponent's summation with emphasis, feeling and gusto. You are one of two lawyers dealing with the same facts and evidence. It is not hard to anticipate what is coming, particularly if you have had the benefit of pre-trial hearings and discovery.

Having heard yourself pound away at the weaknesses of your case, you are now prepared to anticipate and to "drain the poison" from the prosecutor's remarks. In fact, you can derail the prosecutor's summation by anticipating it: "The prosecution will tell you Jim was intoxicated. He will tell you that Jim had the odor of an alcoholic beverage and bloodshot eyes. He will tell you that Jim failed the field sobriety tests. What he won't tell you is that Jim had slurred speech or that he staggered or swayed because Jim didn't. Jim was drinking and did have the odor of an alcoholic beverage. He did have bloodshot eyes, but those things don't mean that he was intoxicated. Listen to all of the things that the prosecutor can't and won't tell you. . . ."

The prosecutor will try to tell you that that .14 was the product of a machine that was checked by a lab and tested by the officer. He will try to tell you that it is accurate and reliable.

What he won't tell you was that it was clearly wrong in this case. He won't tell you that the officer followed proper procedures because you know that the officer did not. The officer did not conduct a proper 20-minute observation period. The prosecutor will try to tell you that that wasn't necessary. That the machine would pick up on any error. That is what he will try to tell you.

When he does, ask yourself why would they require an officer to conduct a 20-minute observation period if it wasn't necessary? Why is that on the operational check list? Why does the officer have to tell the machine that he has done that before the machine will process the sample? Ask yourself those questions and listen to the prosecutor as he tries to explain away the requirements of the manufacturer, the police department, and the State of New York.

By properly framing the issues and raising questions, you can derail the prosecutor's summation and substantially reduce the prosecutor's advantage of having the last word. Confronting your weaknesses not only neutralizes the prosecution's advantage, but significantly impairs the quality of their argument.

## **7. The Second Seat**

Most clients cannot afford the luxury of "daily copy." Even if they can afford having the proceeding transcribed, you will not get a chance to see it until the end of the day or the next morning. Being second seated by someone with good handwriting or typing skills is a great advantage. While you can take copious notes during the prosecutor's direct examination, you really should be listening and watching the witness

for those subjective psychological clues that are essential to an effective cross-examination.

You need to feel the witnesses as well as hear them. You need an understanding of their psychology. Do they have to be right? Are they rigid and inflexible in their need to be right? Will the simplest impeachment on a minor detail crack them like a pane of glass?

Are they flexible and suggestible? Do they go with whatever they think the right answer might be? Some witnesses will tell you whatever you want them to say so long as you are holding an authoritative looking book or document in your hand, and appear to be referring to it as you ask the questions.

You need to learn all of this while the witness is on direct-examination. You need to be listening intently and internalizing the testimony rather than writing it all down. Take necessary notes, but have someone else write down the testimony. It is always good to be second seated by an attorney, but you should be second seated regardless of whether that person is a lawyer or not.

In fact, the requirement of having readable handwriting trumps their legal acumen. Do not be second seated by a lawyer whose judgment you regard as being better than your own. Second guessing yourself will almost always lead to disaster. Having someone else second guess you is just as bad or worse, because it creates doubt in your mind as to all of your judgments.

Trial work requires instantaneous decisions. These decisions arise from your instincts and are made in the context of your personality, and fit into the totality of the manner in which you are trying the case. Your approach works for you. Trying to use someone else's approach is generally ill-advised. A trial is a mix of the objective and subjective. If you start using someone else's judgment, you will get the same result as two artists trying to move the same paint brush at the same time. You must have faith in your judgment or no one else, including the jury, will.

That does not mean that you should not consider the opinion of the person second seating you in jury selection as well as other issues. You should also consult your client, but you should have no hesitation in rejecting and overruling any opinion that does not accord with your own judgment and instinct.

Having said all that, the notes from the person second seating you are essential. They will give you a virtual blow-by-blow of the testimony. Being second seated allows you the luxury of truly listening to the testimony. The almost verbatim notes of the proceeding are a huge advantage in preparing your summation.

## **8. Delivering the Summation**

By the time you stand up to deliver your summation, you should know and be completely comfortable with it. Your notes should merely be a security blanket that you have just in case. A separate sheet of paper should have a list of the essential points of your summation in the order in which they are to be delivered. The chances are you will refer to neither of these documents, but you will feel better having them.

How do you get to this point? You get there by doing the summation out loud over, and over, and over again. You do it in the car on the way to work. You do it in the shower. You do it on the phone for your mother. You do it again separately for your father. You do it for friends and neighbors. Essentially, anyone and everyone who loves you enough to tolerate being subjected to this.

If you are new to litigation, one of the best things that you can do is to hire a 12 or 13 year-old to listen to you with the understanding that they will have to explain back to you what you said. Ask questions afterwards and ascertain whether the child thoroughly understood what you said. Figure out what areas were difficult to comprehend and rework them. The kids can use the money, and you can definitely use the help.

The out loud rehearsals of your summation will help you work out problems you would not perceive if you did not do the rehearsal. Many things look great on paper, but do not work well when you try to say them. The rehearsals will, also, give you an absolute mastery of the facts, and will give you the flexibility that you need to respond to unexpected testimony, objections, or adverse rulings.

I once served as the unofficial coach of my friend's tenth grade daughter who was on her high school's moot court team. Following my instructions, she composed, rehearsed and internalized her summation. What she did not do was prepare a written copy of the final draft of her summation.

When she went to deliver the summation, the official coach asked for a copy of her closing argument so that he could review it. He was surprised, and critical when she told

him that she did not have a written copy. He told her that she would look far more professional if she had a yellow pad in her hand when she delivered her summation.

She persevered, and spoke with no notes. She was the only advocate complimented by the Judge for doing exactly what her coach criticized. She went on to win moot court competitions throughout high school and college. She is now a criminal defense lawyer.

**(a) Talk to Them**

Freeing yourself from your notes allows you to talk, really talk to the jury. In what voice should you speak to them? Should you be formal and professional? Should you be gracious or folksy? What voice will best communicate the logic and the emotional merit of your cause?

It is said that the fear of public speaking is one of the most pervasive in our society. In virtually every formal interaction, people assume voices and personas that they do not, otherwise, employ. Law schools have mock interviews of clients so that students can learn how to interview and speak to clients. Telemarketers are given scripts and taught how to deal with irate customers.

In the art of persuasion, the manner in which you speak is as important, or even more important than the content of what you say. Artifice is the hallmark of insincerity. The more you assume a voice that is not authentically you, the less credible you become.

How many telemarketers have made you feel that they were genuinely concerned with your well-being? Alternatively, when was the last time that you doubted the authenticity of the care and concern expressed for you by a friend or someone that you love?

In what voice do you speak to your friends and your family? That voice is rarely questioned or doubted. People believe the content of the communication because of the authenticity of the communicator. As Marshall McLuhan famously said, "the medium is the message." If you want the jury to credit what you say, the words must come from you, the real you; and not the professional voice that you think that you are required to assume. If you assume a demeanor that is not really you, that will come across. The jury will conclude, subconsciously, that you are playing a role and that you are saying what you are required to say and they will listen.

They will listen, but they will not be compelled, nor will they credit the communication in the way that they would if they heard it from the real you. We read and are read by the people around us. We are open and honest with the people who are open and honest with us. We are closed and formal with the people who are formal and closed with us.

In court, we assume a professional demeanor with the judge and the prosecutor. This is so even if we are close friends outside the courtroom. I used to work for a town judge part-time in a teaching capacity. Her full-time job was to administer a training program and I was one of her teachers. I, also, appeared before her in the courtroom. When I am working for her, I addressed her by her first name. When I appeared before



her, I was appropriately formal and never referenced the other relationship. If, in the course of a casual conversation, a court matter came up, the tenor of the conversation immediately took on a formal tone and familiarity disappeared from the communication.

We all play roles and we are expected to play different roles in different situations. When you address a jury, however, they need to know that you are saying what you believe and that you believe what you are saying. They need to know that it is coming from you, the real you. Sincerity and authenticity are the hallmarks of an effective closing argument. The corollary of this is to never articulate an argument in which you do not believe. If you do not credit your client's claims of sobriety, do not argue that he was sober. Argue that the evidence does not support intoxication, and the People have not proven their case beyond a reasonable doubt.

**(b) Personal Opinions**

Keep your personal opinions out of the case. Even if you passionately believe that your client is innocent, you may not express your personal opinion. You may not personally endorse the credibility of a witness. You and your beliefs are not evidence and the expression of your personal opinion is completely inappropriate. You should be vigilant for any such expression on the part of the prosecution. Statements like "I've known Officer Smith for 20 years. He has testified for me in at least 100 cases . . . ." At the very least, this should be objected to and the statement stricken. At most, it will result in a mistrial.

Your belief in your case and your cause must come from the authenticity of your personality and the sincerity of your demeanor.

**9. Wrap Logic in Emotion**

As previously discussed, people remember what they feel. Many years ago, our family went on a cruise and we stayed at a Club Med. I have only a vague recollection of the resort, but I remember the airport parking lot in great detail. When we returned, the weather was incredibly cold and I had to run to the car because the chill was so intense that it was painful. I will never forget trying to get the snow off that car and get the engine started and doing so with shaking hands and intense discomfort. We remember what we feel.

In delivering your summation, you must remember that it is not what you say that will determine the verdict, rather it is what they retain and feel after your summation has been followed by your opponents and the Judge's charge. Accordingly, wrap your points in emotion, or punctuate them with some feeling, so that they are later used as arguments by the jurors who agree with you.

How do you do that? How does anyone do that? We do it every day. We do it unconsciously. The most obvious is the one already stated. People tell jokes. Other people remember them and tell them and retell them in almost the same words that they heard them. We remember words and phrases from television shows and ads. We remember the things that made us feel.

There are a multitude of techniques that can be brought to bear to accomplish this goal. Watch television ads and analyze how they are structured to get the viewer to retain the message and buy the product. In your delivery of your summation, you can use analogies, trilogies and storytelling. Even the humble pause has its place in a closing argument.

**(a) The Pause**

When you were in school and kids were talking and the teacher wanted your attention, what did the teacher do? He or she would pause. The teacher would stop talking and simply stare at the class until quiet and order were restored.

The pause in the middle of a summation is one of the most effective, and rarely used techniques for riveting people's attention. It is rarely used because it makes people uncomfortable. Typically, it signifies that someone has forgotten their line or does not know what to say next.

A pause, however, accompanied by a confident and calm demeanor can be extremely powerful and riveting. Slowing your pace and putting a slight pause between each word dramatically enhances the significance of what you are saying. Note how actors portraying emergency service providers in dramas direct people to proceed to an emergency exit. There is always a slight pause between the words "do not panic," "walk slowly to the nearest exit," "do not run." These words are said with dramatic pauses to maximize impact.

Combine strategic use of pauses with statements that capture the essence of your case and you will convey concepts that may survive long after the verdict. For example, in the O.J. Simpson trial, the statement in the summation in regard to the glove survives to this day: "[i]f it doesn't fit, you must acquit."

I am not sure that that is the exact quote because I did not watch the trial, but that fact also illustrates the power of the spoken word because the phrase is remembered by people who never heard it at the time, and by others who do not even know the context in which it was spoken.

**(b) Trilogies**

People remember and retain things that come in threes. *Veni, vidi, vici* translates to "I came, I saw, I conquered." This is a phrase that is still used and referred to on television shows and in literature. It was a phrase that was reportedly written by Julius Ceasar in 47 B.C. commenting on his war on Pharnaces II of Pontus; at least that is what Wikipedia says about it.

For example, the failure of the police to conduct a 20-minute observation period in a DWI case could be turned into something like this: They knew that they were required to do a 20-minute observation period. They knew that Jim could belch or burp and bring up fumes of alcohol from his stomach. They knew that their failure to watch him could give Jim a falsely high test result.

They knew, but they didn't look, they didn't watch, they didn't care.

**(c) Analogies and Storytelling**

Human beings learn by comparing the unknown to the known. "What does that taste like? It tastes like vanilla." "What is that book about? It is like Moby Dick. Instead of a whale, it has a shark in it." Analogies and comparisons help us take that which is unknown and put it into a context of that which is known. A breath test machine is easily compared to a computer wherein if the proper procedures are not followed, and the proper information inputted, the result obtained is not valid.

Storytelling captures interest because it conveys feeling. The story that encompasses a valid analogy can be very effective. For example: My Aunt Lilly had been feeling ill for a few weeks and had gone to the doctor. The doctor thought that she might require surgery and ordered tests to determine whether to proceed with the surgery or to treat her condition with medication.

The regular lab technician was on vacation and they had a fill-in doing the test. The fill-in who performed the test got a result indicating surgery, but the report reflected that the proper steps weren't followed in performing the test. The result, however, said that Aunt Lilly should have the surgery. Should Aunt Lilly accept the result of the tests and proceed with the surgery, or should she have the test redone?

In this case, they got a result of .14. There is no question that they didn't follow the steps that they were supposed to. The prosecution wants to tell you that it doesn't matter and that you should trust the result even though the manufacturer, the police department and the State of New York say that they are required to do that 20-minute

observation. It is too late for you to tell them to do the test properly. It is not too late for you to tell them that they should have.

## **10. Movement**

Dr. Paul Homoly is a great speaker and teacher. He is not a lawyer; he is a retired dentist who became interested in learning and teaching people how to speak effectively. He has lectured all over the country. He spoke for the New York State Bar Association on May 5, 2010, in New York City on "DWI on Trial-The Big Apple X" at the Affinia in Manhattan. His talk was entitled: "Just Because You Are an Attorney Doesn't Make You Interesting."

Dr. Homoly teaches trial lawyers how to be interesting and how to retain the jury's attention. One of his principle techniques is that utilized by stage actors which is planned movement.

Most speakers move unconsciously in accordance with how they feel. Some pace back and forth and some remain rooted in one place. Movement, however, can be used to obtain attention, retain that attention and to punctuate points that the speaker wants the jury to remember.

Dr. Homoly teaches that you should maintain eye contact with one person at a time in the group that you are addressing as opposed to randomly scanning the entire jury or audience. Since summation and/or a lecture is a series of points, you should remain in one place and distinguish your sub-points by switching eye contact from one person to another as you switch points. You should punctuate a change in subject by changing your

position. Once you have moved, you then address the jury from the new position obtaining and switching eye contact as you make the points associated with that subject.

Dr. Homoly agrees that people retain that which they feel and he suggests that argument be crafted so that it oscillates back and forth between logical and emotional appeals. He talks about earning the jury's attention and then re-earning it as you go through the summation.

## **11. Conclusion**

Closing argument is the most dramatic part of the trial. It is where you bring all the pieces of evidence together into a compelling argument to persuade and enlist the jury in your client's cause. It should be the very best that you can do.