OVERCOMING JURY BIAS

The purpose of this paper is to examine various approaches to coping with biases, beliefs and preloaded conceptions, particularly regarding the civil justice system, which citizens bring to the courthouse when called for jury duty. We overlay modern forensic psychological principles which have emerged from numerous studies of the decision-making processes of jurors onto persuasive techniques which have been used successfully for centuries. Finally, we examine twelve suggested methods to cope with jury bias. We also examine methods of creating, structuring and testing messages and themes as well as techniques for effective delivery of themes as a means of assisting jurors in setting aside bias. However, we begin where all persuasion begins: with Aristotle.

I. ARISTOTLE'S PRINCIPLES OF PERSUASION

2300 years ago, Aristotle, in his Discourse on Rhetoric reduced the principles of argument to four major points. Examination of these four points reveals that they serve those of us who labor in the vineyards of litigation as well today as they have served Aristotelian scholars for 23 centuries.

Aristotle's first principle: Well dispose your audience to you and ill dispose them to your enemy.

It is not sufficient to make your own case but it is also necessary to affirmatively attack your opponent's position, particularly on their most salient points. We often win the battle on the case in chief and lose the war through ignoring the opponent's case. Ideally, co-counsel in your office should be assigned the task of preparing fully the other side's case from their perspective. In doing so, they will peruse the strengths and weaknesses of the opponent's case while viewing your case from an adverse perspective. This will afford you the opportunity to analyze your opponent's viewpoint in exploiting your weaknesses and launching attacks on your strengths. This leads to Aristotle's second principle.

Aristotle's second principle: Maximize your salient points and minimize your weaknesses.

It is necessary to determine the thrust of your case early in the evaluation process and design your evidentiary presentation around a few well defined points, i.e., develop a theme. With respect to the weaknesses in your case, deal with them directly. Either dispel them, distinguish them or be the first to confront and minimize them prior to your opponent's positive use of them against you. Most importantly, don't ignore them.

The principle of inoculation applies here. By directly addressing your weaknesses before the opponent gets the opportunity to do so, you are able to weaken the attack and choose the language with which the weaknesses will be first discussed to the jury. This will convey the important and accurate impression that you are being straightforward and honest with the jury which enhances your own most important characteristic, i.e., credibility. By openly revealing weaknesses in your case and carefully couching your discussion of them, you may successfully inoculate the jury against the inevitable attacks by your opponent.

With respect to maximizing your salient points, this is simply done through the development of themes in your case which convey your well-defined messages in simple, easily understood and memorable language which embraces the facts and provides motivation for the desired verdict. Your theme should be based upon common sense which is the hallmark of the collective wisdom of the jury. Your themes should be delivered through the use of repetition throughout the trial, which brings us to Aristotle's third principle.

Aristotle's third principle: Refresh the memory of your audience frequently. Napoleon Bonaparte, who was a great orator as well as a military genius said that only one rhetorical device was needed to persuade: "repetition, repetition and repetition". Repetition as used in the context of litigation means developing themes, and the messages inherent in the themes, and embedding the themes and messages throughout the trial through thematic repetitions from various evidentiary directions.

Consistency and repetition are the hallmark of persuasive presentation of themes. Build thematic repetition by threads of consistency running throughout lay testimony, expert testimony, demonstrative evidence and documentary evidence, which are totally consistent with counsel's comments on voir dire, opening statement and summation. Proper thematic development through repetition achieves a coherent presentation which coalesces in the evidence and culminates in persuasive presentation of the thematic arguments during summation. Themes and messages should be introduced during voir dire and opening statement and developed fully in a combination logical and emotional appeal by counsel during summation. This brings us to Aristotle's fourth principle of persuasion.

Aristotle's fourth principle: Execute the required level of emotion. This is probably the area in which juries are most disappointed by trial attorneys. Forensic psychologists tell us that the one word which would be most often used by jurors to describe jury service is "boring".

Advocates fail to execute the required level of emotion by adequately involving jurors in the trial of the case. All too often, jurors sit as mere spectators to occurrences in the courtroom without being reminded that they are an integral part of the system. Counsel should strive to empower the jury with the early understanding that they are the sole judges of the factual disputes, the credibility of the witnesses and the amount of damages to be awarded in the case. Very early in the voir dire examination, make jurors understand the extremely important role which they are playing in the adversary system so that they do not view the trial as a spectator, but rather appreciate the importance of their position.

Jurors get less than they expect from advocates and when we disappoint jurors, they will return the favor in kind. There is a major place for emotion as a persuasive tool in the trial and that time is during summation. However, this is not emotion for the sake of emotion and must be distinguished from an appeal for sympathy. One of the purposes of this paper is to discuss how to get jurors to confront the plaintiff's physical pain and suffering and mental anguish and how to involve the jury viscerally in the trial.

II. MODERN FORENSIC PRINCIPLES

A. Jurors Decide Cases on Perceptions

Jurors do not decide cases based upon reality. Why? Because unless the juror was standing on the corner and witnessed the collision and color of the traffic signal, the juror does not know what reality is. Jurors base their decisions upon their perceptions of reality. Therefore, it is relevant for advocates to consider at least six broad based sources which affect jurors' perceptions upon which they base their decision. These include the beliefs which the jurors have before entering the courtroom, i.e., biases; everything that they observe during the course of the trial, in and out of the courtroom; the evidence presented and the credibility of the witnesses; persuasion by counsel; the court's charge; and persuasion by other jurors.

1. Jury Bias: Preloaded Perceptions

While theoretically, the perceptions of reality are created in the minds of the jurors through evidence elicited from the witness stand and through the documentary and demonstrative evidence which the court allows into evidence, we must never underestimate the importance of the biases and preloaded perceptions which the jurors have in their minds as they enter the courtroom for the first time and how important these biases and perceptions are to the decision-making process.

For example, many jurors who are called to be the decision-makers in a case involving medical negligence will begin the decision-making process simply upon learning that this is a "medical malpractice" case. According to Dr. Ellen Leggett of the Leggett Jury Research, their database reflects that one-third of jurors nationally believe that the people who file medical malpractice cases are looking for easy money; two-thirds believe that plaintiff lawyers pressured patients into filing malpractice suits; many believe that malpractice cases are driving up their medical insurance rates, and half of the jurors believe that malpractice cases are ruining the health care system in this country.1

The initial juror assumption upon hearing about a medical malpractice case is that it is a frivolous lawsuit and the health care provider who is the defendant is assumed to be the “victim” in the case.

Therefore, the skilled advocate will give careful consideration both to the biases, i.e., preloaded perceptions with which jurors enter the jury box in their particular case and to the advocate's role in coping with the biases and in creating new perceptions upon which the jury will decide the case at bar.

Perception is really each person's own vision or version of reality. Perceptions have effect on the conscious mind. When we communicate we take action based on what we perceive to be the facts or the truth. Perception is each individual's picture of reality. When we talk to people we communicate from the vantage point of the other person's perceptions of reality - his or her own model of the world. The skilled trial lawyer understands that each juror sees the world not as it is but as he or she is. Understanding the biases which each individual juror brings with them to the jury box is an important element in effectively framing the story which the attorney will tell through the evidence to influence the juror’s perceptions of the case.

Magicians understand the principle of clinging to perceptions. They use this principle to create miracles. They know that if they can fool our senses into perceiving that something is so, we will believe it. Once we believe that something is so, even though it is not, we accept it. In

fact, something else is really taking place. But that doesn't matter to our senses. We continue along with a certain belief. We believe the magician's assistant is in the box. This is not so. We are then faced with the surprise ending when we find the magician assistant is gone and is appearing from another point on the stage. Because our reality is based on perceptions, on what we perceive to be true, we have been fooled.

The importance of tenaciously clinging to perceptions is a principle that is very important to lawyers. He or she must understand that it is not only whether the adverse witness is telling the truth on the stand that counts. What counts is whether or not the jury is going to perceive that the witness is telling the truth. The witness may well be lying, but if he or she is perceived as truthful, they can still carry the day. On the other hand, our truthful witness, because of external cues, nervousness and fear, may well be telling the truth but may be perceived on the conscious or unconscious level as deceitful. In that case, we lose. What matters is that the witness is perceived as being untruthful, not what is really true. Perceptions of reality often prevail over reality. That is why it is important to understand that we have to deal with the jury's perceptions of reality and what affects those perceptions throughout the trial. All communication is based on perception. It is what is being perceived by the persons to whom we are communicating that counts.

The use of preconceived patterns of behavior generalizations, belief systems, stereotypes and biases alter perceptions and those perceptions become fixed rapidly. Jurors come into the courtroom, many for the first time, carrying with them their own biases and belief systems. They have accepted certain generalizations about life, sex, race, etc. They each have their own model of the world that they are living by. That model is filled with stereotypes, generalized beliefs and biases.

2. Multiple Roles of Bias in Decision- Making

These preconceived notions, ideas, generalizations, and stereotypes which make up the collective biases of the juror are a very important source of information which the juror uses in decision-making. They use their biases and beliefs to reduce anxiety and to make certain assumptions about their own reality. Jurors are in an unfamiliar setting. They are looking for information. They are picking up all kinds of cues. They are sponges absorbing new information and sifting it through preconceived ideas to reduce their situational anxiety.

They want to know what is going on. They watch the parties and speculate on the nature of his or her personality. They observe the lawyer. They observe the lawyer's relationship with court personnel. They are deciding whether to like the lawyer from the first moment they see him. They are sifting all of this information through using their own notions about lawyers, courtrooms, etc. They are in essence making judgments continuously about you and the client based on what they perceive to be true, both from the external cues that are being given them and from their own preconceived ideas and notions.

3. From Bias to Beliefs

From the moment jurors begin receiving new data verbally, visually and kinesthetically about the case, each individual juror begins to form their own paradigm of what the case is about and what their role in the case will be.

As jurors acquire new data about the parties and the issues in the case, this new data is filtered through a screen of the juror's belief system, long held and newly acquired beliefs, biases and stereotypes.

As the new data collides with the biases, the juror's model of the case emerges from the conflict and it is against this model that the evidence and events in the courtroom will be measured by the juror.

The juror's model of the case, which is generally formed during the primacy portion of the trial, will form the basis of the juror's perceptions of the case. As the perceptions are supported by evidence they slowly evolve into beliefs and the beliefs become the reality on which the jurors base their decisions, arguments and votes in the jury room.

4. Bias Fill the Gaps

As jurors receive information during the course of the trial, such information is tested against their model of the case and is either accepted, thereby enhancing the model, or rejected as being inconsistent with the model.

At the conclusion of all of the evidence, when the model has evolved into perceptions and then reality, bias plays its most important role: bias fills the gaps left by absence of evidence. It is incumbent on the skilled trial lawyer to be certain that there are no evidentiary gaps left in the evidence which will have to be filled by the bias of each individual juror.

This raises two major tasks for the trial lawyer in order to effectively cope with jury bias: 1) persuade the jury to accept your model of the case during the primacy portion of the trial, and 2) be certain to leave no gaps in your presentation of the evidence with will require that the jurors rely on their long held beliefs and biases to fill the gaps in the evidence.

5. Model Formation During Primacy

Since each juror forms their own model of the case during the primacy portion of the trial, learned counsel should focus on assisting the jurors to accept counsel's model of the case as their own.

Bias comes into play here because people use their own stereotypes, generalized beliefs, and biases to interpret ongoing external cues and form opinions very early in the trial proceedings. These opinions often become fixed rapidly. This is the psychological principle of primacy, which tells us that those facts which people first believe, they tend to continue to believe. We have a more difficult time reversing a fact in a juror's mind once primacy has taken effect.

The primacy portion of the trial is considered by most experts to be the period of initial acquisition of information, voir dire examination, opening statement and the first witness. By the end of the first witness, each juror will have formed their own model of the case against which they will measure the new data and evidence which they receive thereafter. In the ideal situation, counsel's themes for the trial will be accepted by the jurors during this vital primacy

portion of the trial. Careful attention must be paid to the initial impressions which jurors form of your parties and trial team as soon as they enter the courtroom and begin acquiring new data.

Voir dire examination should be devoted to delivery of your themes and acquisition of as much information as possible concerning the beliefs, values and biases of each individual juror. Supplemental juror questionnaires can be very helpful in identifying beliefs, values and biases, particularly in courts where time for voir dire is limited or the judge conducts the questioning of the jury panel.

Opening statement provides the opportunity to further embed your case themes as part of each juror's model of the case.

Finally, as part of the vital primacy portion of the trial, your first witness should be very carefully selected with the goal of helping the jurors to perceive, understand and adopt your model of the case as their own. Consider the following factors in selecting the first witness: a trustworthy, unimpeachable storyteller who can carry the theme and enhance the model. Obviously, this is an ideal scenario but it may be maintained as a goal.

For example, in a recent case in South Texas, involving a young man with a mild brain injury, the only issues were the existence, nature and extent of the brain injury. The first witness before this mostly Hispanic, catholic jury was the local priest who testified as to the extreme changes which he had witnessed in the young plaintiff after the head injury. He was a trustworthy, unimpeachable storyteller who carried plaintiff's theme and enhanced the model.

Another consideration is that generally the plaintiff will not be the best person to call as the first witness for several reasons. First, with respect to impeachability, the defense is generally better prepared to cross examine the plaintiff than any other witness in the case. It is not advised to close the primacy portion of the trial with an effective cross examination by the opponent. Secondly, the plaintiff, as a party to the litigation, is less trustworthy than a more neutral or authoritarian witness. Finally, delivery of the theme and enhancement of the model is difficult for a party who has an obvious interest in the outcome the litigation.

6. Coping with Long-Held Biases & Beliefs

Long-held beliefs and stereotypes are not changed by simply presenting contradictory information. People often have generalized belief systems about certain groups in the community. These stereotypes may apply to either a demographic fact or a group or class of people. For example, to many Caucasian Americans, all Vietnamese are viewed through a racial stereotype, some engendered by bad experiences from the Vietnam war and some by being inculcated with the prejudice of others. This is a racial stereotype. Or some may believe that all people from a certain housing project are thieves and totally untrustworthy. This is a demographic generalization. Such beliefs can apply to inanimate objects or a whole profession; i.e., corporations do not make unsafe products, doctors do not make mistakes, and lawyers are overpaid, greedy and bring frivolous lawsuits. In a product liability or a medical negligence case in which you are plaintiff's counsel, you must know how to recognize such beliefs and cope with them on voir dire examination through justification, linking and building a new belief system. These longevity generalized beliefs may be fixed conclusions either in a given juror's mind, or the group as

a whole.

Jurors tend to maintain such long existing stereotypes and general beliefs in one of the following ways:

1. By ignoring contradictory information (which they often do);

2. by interpreting the contradictory information so as to render it harmless to the original concept (they do this often), or

3. by recognizing the original information as being inconsistent with new information but insisting on maintaining the original belief anyway (this can also happen).

Generalized belief systems die hard. They cannot be changed by simply presenting contradictory information. They are going to believe that stereotype no matter what you prove. For example, proving that the doctor made a mistake or fell below the standard of medical practice in the community may not be sufficient in a malpractice case. Jurors go to doctors. Jurors trust doctors. Jurors do not want to believe that doctors make mistakes. Jurors do not want to believe that the doctor who gave them a clean bill of health in their annual physical can possibly be mistaken. Therefore, simply showing that the doctor made a mistake or that he was negligent will often be ignored. So what do you do about these belief systems and how do you change them? How do you know during the primacy phase of the proceeding that the jurors are leaning in your favor? What considerations are involved in changing a pattern of belief that the juror brings with him or her into the courtroom?

How does one change stereotypes and other belief systems that pre-existed in a particular juror and/or the community in general? Pre-existing belief systems can never be changed by directly presenting contradictory information. No matter how much evidence you present that "corporations make unsafe products" or that "doctors make mistakes", this will not change a preexisting belief system to the contrary. A very wise Alabama attorney, Greg Cusimano sums it up: “A man convinced against his will is of the same opinion still.”

III. TWELVE METHODS TO COPE WITH JURY BIAS

How then can you successfully cope with jurors long held beliefs and biases which may influence their in your case? The following are twelve suggested methods to assist the attorney in coping with jury bias: 1) ride the wild pony; 2) break the stallion; 3) the Spielberg method; 4)the conscious mind appeal; 5) the unconscious mind appeal; 6)seeking similarities; 7) modern forensic principles; 8) inspiring, influencing, instructing and empowering the jury; 9) filling gaps in the evidence; 10) creating, adapting and anchoring themes; 11) structuring power themes; and 12) communicating persuasive themes which are designed to overcome bias.

A. Ride the Wild Pony

Any experienced equestrian will verify that it is far easier to ride a wild pony in the direction that it is going than to try to alter its course. The same principal applies to a jury panel or an individual juror. There is simply not enough time or opportunity during the course of voir dire examination to identify or change the long held beliefs or biases of jurors.

One solution to the problem is to acknowledge rather than oppose their belief - ride the pony in the direction it is going. For example, jurors generally believe that the courts are clogged with frivolous lawsuits which waste taxpayers money and the time of courts and jurors. Rather than opposing this view and attempting to convince a roomful of strangers that their beliefs about frivolous lawsuits are wrong, simply agree with them and turn the belief to your advantage.

One way to accomplish this during voir dire is to ask everyone who is upset that frivolous lawsuits are clogging our courts to raise their hand. At the same time the attorney raises his or her hand and makes the following statement:

> I want you to notice that my hand is held higher than anyone in the courtroom because I raise my hand on behalf of both myself and my friend, John. You will learn that the tragedy that brings us here today occurred more than three years ago; three years during which John has waited patiently for this, his day in court. Why has John had to wait for more than three years? Because of the frivolous lawsuits that are clogging the courts in front of the serious and tragic cases, such as John's. So we understand why you are upset about frivolous lawsuit and we are sure you understand how upset John must be for this delay.

This technique puts both the attorney and the client on the same side of the frivolous lawsuit issue as the jury panel. Since seeking similarities with the jury members is one of the most productive endeavors an attorney can undertake, handling this problem area in this fashion has many potential advantages.

B. Break the Stallion

This technique is used by many fine attorneys and represents an attempt to change the direction of the jury panels thinking by providing additional facts on an issue such as the "outrageous jury verdict" in the infamous McDonald's coffee spill case.

Dr. Amy Singer of Ft. Lauderdale, one of the finest trial consultants in the business, suggest that this technique may be effectively used as a wake up call for jurors. The following is excerpted from Dr. Singer's excellent article entitled Dealing with Biased Jurors During Voir Dire:

"During voir dire, attorneys must "WAKE UP" jurors so they will be able to consider the issue of large damages awards more objectively. This can be achieved by a carefully planned and directed series of sharp questions to the jurors. Through this bracing query technique, the attorney can snap jurors out of their dull, "trance–like" states to get them to begin to question their own prejudicial attitudes regarding damages awards.

This interrogatory technique is similar to that used by cult exit counselors to help bring victims of mind- control groups back to reality. It is based on the concept of providing fresh perspectives so the individual can begin to view his or her beliefs in a new, more objective light. The following exchange illustrates what I mean. (*Note*: I will again use the issue of "jury

verdicts" since it seems to be such a big problem for many jurors today.)

Attorney: What are your feelings regarding jury verdicts?
Juror: Well, I know there are a lot of people out there who will sue, then get paid off royally, and all for the stupidest things.
Attorney: Could you give us an example?
Juror: I guess that McDonald's case would be the best one. Suing because you spilled some hot coffee on yourself in your car? Ridiculous!
Attorney: Do you think that's all there was to it?
Juror: As far as I recall, yes.
Attorney: Sir, did you know that prior to this case there had been hundreds of complaints against McDonald's because of its scalding hot coffee?
Juror: No, I didn't know that.
Attorney: Did you know that in this particular case, the woman was severely burned by the hot coffee?
Juror: No.
Attorney: Or that she was not driving her car when she was scalded but instead was sitting stationary in the McDonald's drive-through, simply trying to add some sugar to her coffee?
Juror: Uh, no, that's news to me, as well.
Attorney: Since McDonald's had already received so many complaints about scalding hot coffee, do you think they should have made some adjustment to the temperature of coffee served to people who would then have to balance it in their cars?
Juror: Yes, that would make sense.
Attorney: Where did you learn about the McDonald's case?
Juror: Newspapers, TV, that sort of thing.
Attorney: Do you suppose that because McDonald's is a major national advertiser, some of the details we have been discussing here might not have been fully reported?
Juror: That's possible, I'm sure.
Attorney: Do you still feel the way you did a few moments ago concerning the McDonald's case, and the subject of damages awards, in general?
Juror: No. I think I would prefer to look closer at the particulars of each case.
Attorney: Thank you, sir.

This type of brisk questioning prompts jurors to think, to examine their premises, to cut through all of the propaganda and malarkey they have been force–fed over the years concerning "excessive" jury awards, so they can begin to see the facts clearly for what they really are.

If the attorney is probing for information concerning attitudes about jury awards, but the judge does not permit the extended form of questioning as illustrated above, the "de-programming" can still be accomplished, albeit in a condensed fashion. After the juror references the McDonald's case (or one similar), the verdict of which he or she does not approve, the attorney might then handle it as follows:

Attorney: Considering the information that has been presented so far, is there anything that would lead you to believe this case will be like the McDonald's case?

Juror: No, it sounds pretty different.

Attorney: So this case should be judged on its own merits—that is, independent of any other cases and verdicts that you may have heard about?

Juror: Sure.

Attorney: Thank you, sir. I can't ask for anything more than that."

The attorney must realize that providing fresh perspectives to biased jurors during voir dire will not always result in changed attitudes. But, short of being able to get biased jurors off for cause, or of using up valuable peremptory challenges, this interrogatory process offers one approach for the attorney to balance the scales during voir dire with negatively opinionated jurors.

This technique is captioned "Breaking the Wild Stallion" because it is dangerous if not done properly. One objection to this method is that it places the attorney in a position of claiming superior knowledge to that of the jury panel. This can be interpreted as talking down to the jury if not carefully done. There is also an inherent risk in showing a juror that he or she is wrong in front of a group of strangers, particularly when the other panel members agree with the juror that McDonald's was an outrageous jury verdict.

C. The Spielberg Method

One of the most powerful and effective techniques for overcoming bias and long held beliefs is to use the same technique which Steven Spielberg uses in his brilliant movie making: suspension of belief.

In Jurassic Park, Spielberg was able to get the audience to suspend their belief that there are no dinosaurs, for a period of two hours, with the result that the movie was very enjoyable. As soon as the audience members left the theater, they reverted to their prior belief that there are no dinosaurs.

The important point here is that Spielberg did not try to change the public's belief that there are no dinosaurs but only asked them to suspend the belief for two hours.

The same approach can be a powerful tool in coping with jury bias. In prosecuting a medical negligence case, the plaintiff's attorney does not need to convince a jury that the medical field is replete with negligence or that the cause of the "malpractice crisis" is malpractice. The attorney needs to get the jurors to set aside their belief that "doctors don't make mistakes" solely for the course of this trial, solely for this doctor and solely for this patient in this surgery. The plaintiff's attorney must be careful not to take on any greater burden of proof than is necessary to win the case.

As soon as this medical negligence trial is over, it is fine for the jurors to revert to their previously held view that "doctors don't make mistakes."

The method for setting aside a belief and building a new belief system is a four step process:

1. Acknowledge the pre-existing belief and justify it.
2. Link yourself to the pre-existing belief.
3. Link the client to the pre-existing belief.
4. Use this link to the belief to build a temporary belief system which will last through the trial.

Information contradictory to the belief based on stereotype will be ignored if you attempt to attack the belief directly and disprove it. These are often very long held and deeply ingrained beliefs and we must be cautious not to make the juror feel that their beliefs are under attack. Their response will be to defend them and cling to them more tenaciously. Instead of directly presenting contradictory information, one needs to identify the stereotypes. Say that it is all right to have this belief; that most people share the belief; that your client previously held the same belief; if appropriate, that you previously held the same belief, but that you and your client have altered your belief based upon several factors which you would like to discuss with this jury. You have now predicated the building of a new belief system. You are not asking the jury to reject their belief but rather to consider the same alteration of their belief which you and your client have experienced based upon the facts of this case.

For example, if you are prosecuting a medical negligence case, you can assume that most jurors believe that doctors do not make mistakes. If you simply prove that the defendant made a mistake, they will still tend to believe the stereotypes. Instead you must say to the jury either in voir dire or opening statement the following:

1. Acknowledge and Justify Belief

"I know that most of you believe, as Mary and I once believed, that doctors generally do not make mistakes and that they are very careful. We all want to believe that highly paid physicians are very careful caring professionals who know what they are doing. In fact, most of us in this community still hold on to the concept, and if most Americans did not believe this firmly, it would seriously affect the delivery of health care. We have to believe in doctors. It is all right to believe that doctors generally do not make mistakes. If we did not believe that, we could not be treated by them."

What you have done is identified the problem and justified it. You have told them it is all right to believe that doctors do not make mistakes.

2. Link Yourself to the Belief

Next, you link yourself to the belief as we are constantly seeking similarities between ourselves, our clients, witnesses and the jurors. This can be done in this fashion:

“I recently had my annual physical by my doctor who is a close personal friend of mine. He told me that my health is fine and that I have no foreseeable health problems. I certainly want to believe that my doctor doesn’t make mistakes, just as you do.”

3. Link The Client to the Belief

"My friend Mary used to believe that too. When she went to Dr. Jones, the defendant in this case, she believed, as we would all like to believe, that Dr Jones would not make a mistake during delivery of her child. It was only when Mary learned after delivery that Dr. Jones had mishandled the forceps and crushed her child's brain that Mary realized what we will all realize if we think about it, that Dr. Jones also makes mistakes and that this mistake had dire consequences for Mary, John and their baby.

You have now linked the client to the generalized belief about doctors. You have shown that the client was correct in making the same assumption about doctors that most jurors would make. She had no reason to believe to the contrary. You have shown a strong similarity in thinking between Mary and the jurors. In doing so you have also shown the high price which Mary had to pay before she realized that the belief that doctors don't make mistakes is simply wrong.

4. Build a New Belief System

Now you are in a position to build a new belief system:

"While it is all right for you and Mary to have this belief and to feel comfortable relying on doctors, the truth is that doctors are human beings. Just as some of us make mistakes by running a red light in a car, on some occasions even good doctors run medical red lights. This happens for a number of reasons. Basically this happens because we are all human beings. In this case the evidence is going to show that Dr. Jones, a perfectly fine doctor on thousands of other occasions, ran a medical red light on this occasion. He made a mistake, a mistake which the law requires him to be responsible for."

In the medical negligence case, it is generally not sufficient to show that the doctor made a mistake because the juror's will often excuse a doctor's mistake. It is necessary to go further in voir dire examination and ask jurors how they feel about holding doctors "personally accountable" for their mistakes the same as other citizens are held accountable for their mistakes. Analogies such as "How do you feel about holding a doctor accountable for running a medical red light the same as you and I would be held accountable if we ran a red traffic light and injured someone?" are useful to open the discussion of doctors not being above the law.

Even if the belief or stereotype is derogatory to a class of people, the link to the client can still be effectively made in order to predicate a new belief system. Another example is if you are defending a poor person charged with a crime and are confronted with the stereotypical belief that poor men commit crime because they are uneducated, jobless and always need money, you might approach that problem as follows:

"Because poor people inherently have a need for money, most of us think that crime and poverty go together. Before I did this type of work I also believed that. My client grew up in the ghetto and he believed these same things about other men in his situation. What's amazing here is the evidence will show that my client has worked very hard to climb out of the ghetto. He is very different than others who live where he lives. He has actually read more classics than I

have. He is intelligent and working very hard to succeed in life. He is not your typical poor ghetto dweller who feels that the only way out is crime."

Thus, the preloaded perceptions are particularly important because of the psychological principal that people attempt to maintain their original perceptions regardless of contradictory information. Forensic psychologists tell us that jurors organize their perceptions and structure them within a very brief period of time and, more importantly, people use stereotypes to organize their perceptions. Thus, jurors will form their initial perceptions very early, based on stereotypes and preloads and will measure new data against their original perceptions. If evidence or impressions are brought to them which support their original perceptions, such data will reinforce and validate the original perceptions. However, if evidence which is contradictory to the original perceptions is introduced, the jurors will tend to restructure the evidence to make it fit their perceptions or reject it outright. Only if the new data is sufficiently compelling will jurors change their original perceptions. This is the why the above technique of acknowledgment and justification of the belief, linking yourself and the client to the belief and using the link to create a new belief system is crucial.

The organization of perceptions begins upon initial contact by each juror with anyone involved in the trial. It is very important for the advocate to understand that everyone in the courtroom is being constantly observed by jurors and that the decision-making process for each juror begins with this initial contact and proceeds until a final verdict is rendered. In this section we will discuss the various factors which influence jurors in creating the perceptions upon which they decide their cases.

One of the important psychological factors which makes the civil justice system work is that jurors seek to render a verdict which they perceive as fair and equitable. Jurors want to do a good job and sincerely want to render a verdict which they can look back upon with pride. It is essential for the advocate to stress to the jurors the importance of their role in the civil jury system, the permanence of their verdict and the reasons why equity and justice require the verdict which your client seeks. Use this principle on voir dire to suggest to the jurors who are unduly preloaded and prejudiced that they may be better qualified to serve, in all fairness to everyone, on a different type of case and try to obtain a challenge for cause.

The Unconscious Mind Appeal - Understanding the Conscious (Logic) vs. Unconscious (Emotion) Mind

Another powerful technique to overcome jury bias
is to communicate directly with the unconscious mind of the juror, which can effectively bypass the processing of information by the conscious mind where bias and long held beliefs often come into effect. In order to understand the communication technique with the unconscious mind the following is a comparison of the conscious and the unconscious minds and how they function in the process.

People make decisions with subjective experience (unconscious mind) and validate decisions with logic (conscious mind).

D. The Conscious Mind Appeal (Logic)

Understanding the function of the conscious mind is absolutely necessary. In order to understand the importance of this crucial principle, one has to understand how the conscious mind works and functions in opposition to and in conjunction with the unconscious mind. There are very important distinguishing features about the conscious mind, just as there are distinguishing features about the unconscious mind.

1. The Conscious Mind Can Abstract

First, the conscious mind can abstract. That is, it can think in terms of a universal or abstract idea. In the conscious mind, you can think of the concept of a chair as opposed to picturing a particular chair. In fact, it is this ability to abstract that most social scientists believe distinguishes the functions of the human brain from that of many or most animals. Physical evidence such as photos, medical bills, hard numbers on wage loss and the court's charge appeal to the conscious mind.

2. The Conscious Mind Distinguishes Reality From Non Reality

Secondly, the conscious mind distinguishes reality from dreams which are nonreality. The conscious mind knows when it is awake and when you are asleep.

3. The Conscious Mind and the Rule of Three

Thirdly, the conscious mind can only deal with limited information at any one time. In fact, the conscious mind generally is better dealing with only three pieces of information. This is called the rule of three. We have learned that three is a magic number. We have always believed in three's. We are taught that God is composed of the Father, Son and Holy Ghost. The most powerful religious concept in our world comes in three people. There are such phrases in our society as "it is as easy as one, two, three." The rule of three is well-known by comics and others in the theater and entertainment industry. That is why comedians generally do only three jokes in a routine on a particular subject, never four. Good politicians make no more than three points during a speech. One evening, in the 1960's, Johnny Carson was telling jokes about President Lyndon Johnson and his dog. His fourth joke flopped and he immediately said to his writers off stage, "I told you never to give me more than three jokes on a subject." This is the rule of three. It is important to understand this because when you are organizing information to give to the conscious mind, you must know that it has a limited capacity to deal with that information, and you must organize it and simplify it so as to follow the rule of three and never exceed the rule of seven. Such organization appeals to the mind on both the conscious and unconscious levels.

4. The Conscious Mind is Detail-Oriented

Fourthly, the conscious mind sees details. It does not necessarily see the forest. It can look at the trees and count the leaves. It is oriented to organizing information and looking at detail. This function is peculiar to the conscious mind.

5. The Conscious Mind Deals with Negatives

Fifth, the conscious mind interprets language and understands it. It understands the concept of a negative thought or idea. It can understand and interpret the words "no", "don't," or "not."

E. The Unconscious Mind Appeal (Emotion)

Understanding the functions of the unconscious mind, on the other hand, is in many respect opposite to the conscious mind.

1. The Unconscious Mind Records a Total Experience

The unconscious mind cannot abstract. It does not deal with details. It absorbs and records a total experience. It does not function on a logical level, it functions on an emotional level.

2. The Unconscious Mind and Reality

Significantly, the unconscious mind cannot distinguish reality from dreams, or nonreality.

3. The Unconscious Mind Experiences in the Present Tense

The unconscious mind experiences everything only in the present tense. It experiences everything as though it is occurring now.

4 The Unconscious Mind Deals with Unlimited Information

The unconscious mind has the unlimited ability to deal with unlimited information. The truth is everything we experience is experienced in its entirety by the unconscious mind. Through a phenomenon, we still do not fully understand, our total life's experience is recorded and stored in the unconscious mind. Therefore, the unconscious mind has the ability to deal with unlimited information. But it fails to see details and rather deals with the whole experience.

5. The Unconscious Mind Cannot Interpret Negatives

It also does not understand and interpret language very well. The unconscious mind cannot interpret the words "no," "not," or "don't." If you tell someone don't think of pink elephants, the first thing he will think of is pink elephants. That is the way the unconscious mind works, it does not hear negatives. That is why when you say to the child, "Don't drop that glass," the unconscious mind hears only the message "Drop that glass," and the child will drop that glass anyway.

6. The Unconscious Mind Handles Information Emotionally

The unconscious mind does not organize anything and deals with information on the emotional level rather than on the logical level. In essence, the unconscious mind deals with all of the aspects of the total experience as it is occurring at the present time and then stores the information about that experience on the unconscious level.

7. Retention and Recall - Social scientists and psychologists still do not fully understand exactly how memory functions. Some researchers think that it is both a combination of electrical and chemical activity that stores the information somewhere on the surface of the brain. Certain experiments have shown that the hypothalamus gland plays a role with memory, and that therefore memories which are related to more than one sense are easier to recall. The important thing to understand about memory is that we really remember everything that we have experienced in life. That total experience of the unconscious mind is somehow recorded there on the brain surface. So it is not a question of remembering or storing information that is the

problem. The problem is recalling information from the unconscious mind to the conscious mind. It is a question of recall. When we say we remember something, we mean that we have created the ability to recall an event or an experience and to bring it from the unconscious mind back to the conscious mind. That is why memory can be more effective if we use some other sense to recall the experience.

8. The Role of the Five Senses - The sense of smell or the sense of sight can be used to bring back or recall an event. If we have something that helps us picture the event in our mind's eye, it is much easier to recall it. Those things that we can easily recall usually also have some emotional impact to them. It is very difficult to recall what you had for lunch a week ago on Wednesday. This particular experience eating that lunch had no particular emotional impact. But if you have ever been on the scene of a fatal accident, you will have not problem recalling that experience. The emotions connected with witnessing such an event even if after it happened many years ago it gives the event emotional significance sufficient to make it easier to recall the information from the unconscious mind back to the conscious mind. We know that sight, sound, smell, taste, and all of the senses play a role enabling us to recall from the unconscious mind to the conscious mind prior experiences.

9. Mnemonics - Growing out of this understanding of how memory function, Harry Lorraine developed a system of mnemonics. Mnemonics is a system whereby one is able to associate particular objects with a picture in the mind's eye, with the picture being associated with a particular number. Using this system, one can memorize twenty or more objects and instantaneously call back the word that was given. This is all done by using pictures created in the mind's eye as the object is called out which said picture is associated in your memory with the particular number. The more ridiculous or emotional or crazy you make the picture, the easier it is to recall. To set up the system of mnemonics Harry Lorraine created twenty words that go with numbers one through twenty. His system actually goes to 100, but 20 is enough to have a workable memory system. The person using the mnemonic system then creates a standard picture associated with the word. The word rhymes with the number to make it easy to remember the word and associate the word with the number. This makes it easy to call back the standard picture that goes with that number. You put the object into the picture in your mind's eye and it is very easy to recall. The list below are the twenty words that easily associate with the numbers one through twenty.

1 - one	11 - football
2 - shoe	12 - hell
3 - tree	13 - thirsting
4 - gore	14 - guarding
5 - dive	15 - sifting
6 - kicks	16 - sorting
7 - heaven	17 - leveling
8 - bait	18 - dating
9 - dine	19 - piling
10- hen	20 - plenty

Let me give you an example of how the system works. If someone calls out the number 4 and the word baseball, imagine a giant baseball in a bull ring being gored by the bull. When you

recall the number 4 and think of gore, the association makes it easier for you to recreate the picture of a baseball player being gored by a bull. Suppose someone gave the word "tongue" with the number 13. Thirteen is thirsting. You have the number 13. Can you imagine the ridiculousness of a tongue severed from the body, floating in a glass of water, and trying to lap the water up. The more crazy, the more ridiculous, the more emotional content, the picture in your mind's eye, the easier it is to recall called out objects. This gives you some idea how memory functions.

10. Negatives and the Unconscious Mind - The importance of these distinctions between the conscious and unconscious mind have certain clear ramifications to the trial lawyer. Since the unconscious mind cannot deal in negatives, all questions should be phrased so as to call for a positive or "yes" answer. If the question calls for a negative answer, the unconscious mind will hear and will interpret the opposite result. If one asks the question on voir dire, "Will you promise me that you can follow the law and not be unfair to my client?," the unconscious mind will hear only "be unfair to my client," Whereas, if you ask the question calling for a yes answer, "Do you promise me that you can be fair?", that question communicates to both the conscious and unconscious mind that the juror ought to be fair.

There are many other uses of the failure of the unconscious mind to register negatives. Consider the case where a plaintiff lost his leg at the knee from an infection because a company doctor failed to take an x-ray or follow-up on complaints of continuing pain for three months. By history the employee said a co-employee dropped a pumpliner on his foot. The pumpliner is huge and weighs 125 pounds. The plaintiff brought the pumpliner in the courtroom and had the co-employee who dropped it hold it exactly as he had before he dropped it. A big board was put on the courtroom floor under where the employee was standing to demonstrate how he was holding the pumpliner when he dropped it. The defense lawyer walked up and stood opposite the employee in an attempt to distract from the demonstration. The judge made the mistake of negatively communicating to the unconscious mind of the co-employee as he said "don't drop that". The employee's autonomic nervous system went into effect as he dropped the pumpliner which made a huge gash in the board and almost fell onto the defense lawyer's foot.

11. Present Tense Appeal - The unconscious mind sees everything in its mind's eye as though it is real and occurring in the present tense. That is, it cannot distinguish reality from nonreality and only experiences what is going on at the present moment. The fact the unconscious mind absorbs unlimited information and that the conscious mind is very limited in what it can handle greatly influences the manner in which we structure our proof and arguments. Structure logical evidence and argument in a well organized presentation of limited scope so that the conscious mind can effectively deal with it. Structure emotional evidence in argument so as to deal positively with the total experience in order to reach the unconscious mind. The rule is structure the logical appeal in a well organized fashion, narrow in scope and great in detail; structure the emotional appeal positive in nature, dealing with the big picture.

Everything you do in the courtroom, your position, your gestures, your emotions has an effect which, while it may not be read by the conscious mind, is being read and experienced by the unconscious mind.

Using movies and stills to communicate to the mind on both the conscious and unconscious

level when making an opening statement or closing argument is imperative. Most lawyers make the mistake of talking about what occurred to their client in the past tense. When the statement is made in this fashion, the information will not be nearly as effective on the unconscious level. When we create a situation where the unconscious mind feels as though the event is occurring immediately, a lasting emotional impact is created on the unconscious level. By using the technique developed by Dr. Malandro and Lawrence J. Smith, one can use movies and stills to create a situation where the event is simultaneously experienced by both the conscious and unconscious mind as though it is reoccurring at the moment it is being discussed.

By a movie we mean that one strings together in long sentences set in the present tense the events leading to the impact. One describes detail such as time of day, style of building, color of clothing, color of the victim's hair, etc. Deliberately use present tense or "ing" ending words. Use conjunctions to string sentences together so that the picture of the event becomes like a movie where the listener is pulled into the scene and begins to experience the scene as though it is occurring now in both the conscious and unconscious mind. If the technique is done correctly, the juror is actually there sitting in the car with the victim when a rear-end collision occurs. His or her mind sees the victim who's about to become a permanent neck cripple with subtle brain damage. They are actually experiencing what is occurring in the present tense and, therefore, it has great impact. Then one switches from movies to stills. For stills, we want to create dramatic effect. In essence, you switch to short, powerfully constructed sentences. This deliberate change in style is dramatic and underscores with impact the horrendous event that has just occurred.

In such an opening statement, describe Mary in detail, the clothes she was wearing, the weather conditions, her car and what she was seeing as she was driving through town. Slowly bring them to the scene (movies). It is the 4th of July weekend; Mary is thinking of the steaks that she has to buy which Phil is going to barbecue for the family this evening. She is in a good mood as she thinks of the joy which she always gets from the family outing each 4th of July and looks forward with anticipation to the afternoon; she thinks of the weather and is grateful that it is a beautiful, clear day, perfect for barbecuing outside and perfect for the games which the family loves to play out doors on this beautiful, cheerful holiday afternoon. (Change to stills). Suddenly there is a crash. The car is thrusting forward. Mary feels her head snap back. She feels the blow of her head against the headrest. There is sharp pain in her neck. She feels the muscles and fibers in her neck being ripped and torn. She feels the hemorrhaging and bleeding. She feels her car ram the car in front of her. Her body feels out of control. She is whipped forward by the second crash. Her head hits the steering wheel. Mary feels nothing else.

The culmination of the movie style to set the scene is achieved with long, flowing, descriptive sentences. The still shots to describe the tragic event offer an interesting counterpoint and change of pace to hold the jury's attention. This also graphically illustrates how Mary's life moved from one of a peaceful flowing existence to being emotional, unpredictable, and out of control in an instant.

12. Attorneys Must Create Perceptions of Reality

Since jurors base their verdicts on perceptions of reality, it is incumbent upon the skilled advocate to create those perceptions in the minds of the jurors. How are perceptions of reality created? The skilled advocate will learn to create word pictures in the minds of the jurors

through the use of demonstrative evidence, evocative language, storytelling techniques, very careful word selection and the use of rhetorical devices combined with the logical presentation of the validating documentary proof and oral testimony.

F. Using Similarities to Overcome Jury Bias

1. The Search for Similarities

There can be no doubt about it, we like people like ourselves. We want to be with others who are similar to us. The old adage is true, "birds of a feather flock together." We search for similarity. We look for it consciously in our friends. We associate with people from the same office, in the same profession, etc. We are comfortable with people who are like us and uncomfortable with people with whom we have no similarities.

Groups tend to dress alike. The corporate executives at IBM Corporation all wear the expensive pin-striped suits and wing-tipped shoes. They dress like executives. Defense lawyers have a certain style dress in most communities. Plaintiff's lawyers tend to be individuals and dress with more style and flair. Los Angeles gangs identify themselves by wearing certain colors. It is all part of the conscious search for similarity.

Clearly, an attorney who goes to a construction site to obtain information from prospective witnesses is not well advised to wear a three piece suit and wingtips. The dissimilarity between the construction workers and the attorney will automatically create a barrier which will adversely affect communication. The lack of similarities will make the attorney appear unapproachable, reflect an air of superiority and may slam shut the channels of communication. The attorney who wants the full cooperation of the construction worker will dress casually, arrange to meet the worker at his favorite lounge rather than on the construction site, drink a beer, shoot pool and talk about football, baseball and other matters of common interest and, after establishing rapport based largely on similar interests, talk about the case.

Attorneys are perceived by laymen as smarter, richer, socially elite, arrogant and unapproachable. Appearing at a construction site in a three piece suit and wingtips validates these perceptions. Appearing at a lounge, casually dressed, shooting pool, drinking beer and talking football replaces these adverse perceptions with a new belief system, at least as applied to this particular attorney. This effectively opens all channels of communication.

In court, similarity still counts, but the rules are different. You do not dress like jurors. You must dress like a lawyer and fit the role model. You certainly cannot come to court wearing that work suit because you suppose the jurors will be wearing the same. But on the other hand, if a lawyer tries a case in Florida where other lawyers dress more casual, then he too should dress more casual.

During voir dire ask jurors about their hobbies. If a juror has a hobby and you know something about the subject matter, let the juror know that you have the same hobby. It is all efforts to raise feelings of similarity on the conscious level. Feelings of similarity help create "liking" on a conscious and unconscious level.

2. The Effect of Similarities

In Trial Diplomacy Journal, Sanito and Arnold reported on a study of 600 jurors who were interviewed after they had reached a verdict in different cases. The interview was designed to find out why the jurors decided as they did. The one overwhelming piece of information that was developed was that in 600 cases out of 600, the jurors decided the case for the lawyer or the side they liked. Invariably "liking" was a key factor in the decision-making process. "Liking" is a function of the unconscious mind. How can we create "liking" in the unconscious mind? The unconscious mind searches for similarity and once the unconscious mind finds similarity, it has a significant effect on liking.

3. The Creation of Similarities

Social scientists, Dr. John Grinder and Dr. Richard Bandler have done extensive research regarding the subject matter of the effects of unconsciously perceived similarity.

a. Neurolinguistic Programming

This basic research has developed into a body of material which is known in the social sciences as "neurolinguistic programming." Dr. John Grinder defines neurolinguistic programming as follows:

"Neurolinguistic programming (NLP) is an exploratory activity - a pursuit of patterns of excellence." Charlotte Britto, in "A Framework For Excellence," (a resource manual for NLP) states:

> "Neurolinguistic programming is a discipline whose domain is the structure of subjective experience. It makes no commitment to theory, but rather has the status of a model - a set of procedures whose usefulness is to be the measure of its worth. NLP presents specific tools which can be applied effectively 'in any human interaction.'

b. Tap Into the Listener's Model

Each human being is his or her own model of the world they live in. They use this model to deal with life. In fact, we all have many models and the models overlap. If we really want to communicate with another human being, an adversary or juror or deponent effectively, we must learn his or her model of the world and tap into it.

c. Communicate With the Unconscious Mind

NLP gives us the tool with which to identify another person's model of the world so that one can create a subjective experience that elaborates a pipeline to the other person's mind. NLP was founded by Dr. John Grinder and Dr. Richard Bandler about fifteen years ago. It is a new, growing, and exciting science. According to one author in the field of NLP, Charlotte Britto:

> "The basic premise of NLP is that there is a redundancy between the observable macroscopic patterns of human behavior. (For example, linguistic and paralinguistic phenomena, eye movement, hand and body position, and other types of performance distinctions, and patterns of the underlying neuroactivity governing this behavior)."

In essence, NLP is a tool by which we can tap through the conscious minds into the unconscious mind of those with whom we are trying to communicate. With this tool we can significantly increase our chances of succeeding in achieving the desired outcome from that

other human being.

As attorneys we project our thoughts and feelings onto the decision-makers through non-verbal communication. Such communication flows equally in the other direction with the effect that observant counsel can discern the thoughts and feelings which jurors are projecting onto us. In order to achieve this it is absolutely essential to gain as much information as possible about each individual juror during voir dire examination or through the use of the very valuable juror questionnaires. Through utilizing personal information which we obtain from jurors, we can make the extremely important connection of perceived similarity between counsel, our clients and the juror.

d. Using Jurors Frame of Reference

For example, we should listen carefully to the language, i.e., specific word choices, which each individual juror utilizes during voir dire examination, particularly when they are talking about the case, the type of injury or other directly relevant matters. This gives us additional information with respect to the language of our case which we should utilize to persuade jurors. If a juror uses a particular metaphor, simile or analogy during the voir dire discussion, it may be helpful to work the same analogy, metaphor or simile into the trial and look directly at that particular juror when using their language.

The more we can learn about jurors' hobbies, work and activities which they enjoy, the more we have the opportunity to enhance the perceived similarity between us and the jurors. For example, if a juror enjoys bowling, we may at some point in addressing the jury utilize the metaphor about "rolling a strike" or refer to the Plaintiff's efforts to carry on daily activities as being as difficult as trying to "pick up a 7/10 split" each time you go to the line. At the point when such metaphors are used we should establish and hold eye contact with the particular juror or jurors who enjoy bowling. The eye contact and the use of a metaphor within their field of enjoyment connects with the juror's method of processing information and creates the perceived similarity which we are trying to achieve.

It is important to understand that we persuade jurors with greater ease, with greater effectiveness and with greater results when we operate within their framework of references rather than trying to force them to operating within ours.

G. Utilizing Forensic Principles to Cope with Bias

Creating a psychological connection with a juror begins with how we think of that juror in our own mind because our own thought processes are the seminal points for the impressions which we convey non-verbally and subliminally to the jurors. If we are to transmit behavioral cues to the jury which indicate warmth, respect, camaraderie and similarity we must think of each juror individually in that fashion in our own minds. This is because it is necessary for our thought processes to be congruent with our behavior. Most jurors, confronted with an attorney saying one thing verbally and reflecting an entirely different message non-verbally will be more likely to accept the non-verbal behavioral cues rather than the message which the attorney is conveying verbally.

It is suggested that we should think of jurors as individuals rather than as a collective body

and that we should know each juror by name rather than referring to them within our own discussions by number. At the end of each day of trial, take a few minutes to review all of the data which you have accumulated concerning each juror and consider how the perceptions of similarities between counsel, client, your witnesses and each juror can be worked into the next day's offer of evidence or argument. If we are to increase the juror's perception of us as approachable, likeable and similar to the jurors, the trial attorney must think of each individual juror as unique and cater to their individual likes, dislikes, personality quirks and other characteristics. Jurors perceive that they can more easily predict the behavior of your client when they feel a similarity between them. Take the time to stress that similarity throughout the trial.

1. The Principle of Reciprocity

The important principle of reciprocity comes into play in litigation because jurors feel a need to reciprocate when someone gives them a gift whether they like the gift or the giver. This is an ingrained principle which is automatic due to our societal standards. In a courtroom setting, the jury will apply the reciprocity principle to the parties if the attorney for the person seeking relief can convey the message that a debt has been created flowing from defendant to plaintiff.

In a personal injury case the argument can be made that when the defendant ran the red light and crashed into the plaintiff's car and crushed the plaintiff's body, both our laws and our societal standards recognize that the defendant became indebted at that point to make the plaintiff whole, i.e., repay the debt created by their own negligence.

Our free enterprise system which is built on multiple layers of credit and debt, has ingrained in the vast majority of our jurors a great respect for the need to repay debt. Virtually all of our jurors are debtors who pay their bills regularly and by raising the specter of a debt owed by defendant, the mental organizational package which is triggered in the juror is "I pay my debts, why shouldn't this defendant pay his?".

2. Jurors Use Trait Associations to Organize Perceptions

Asch's work on stimulus traits in 1946 eventually lead to the development of the trait association theory. He felt that when a person (the perceiver) identified "traits" in another person (the stimulus person), the perceiver would then, in response to his impression of the stimulus person, make further inferences about that person. According to Schneider, Hastorf and Ellsworth:

> Asch believed that it was the intervening impression that made it possible for the subject to generate new information. It was then a two-step process: stimulus traits--impression--response inferences.

Bruner and Tagiuri theorized that the intervening impression may not be formed at all. They believed that inferences about another person could be based solely on the perceived traits. Some traits just seem to be "right" with other traits. For example, in completing the following sentence, "John is bright, eager and (thin, fat)," "thin" seems to "go with" the other characteristics. We do not draw an intermediate impression before choosing "thin."

In their Handbook of Social Psychology, Bruner and Tagiuri state:

> . . .what kinds of naive, implicit `theories of personality' do people work with when they form an impression of others? We know from the Asch studies that such terms as `warm' and `cold,' when introduced into a description of personality, alter the apparent quality of certain other traits. In `everyday personality theory' we would ask, what kinds of inferences is a person led to by knowledge that another person is `-warm'? A study of inferential relations between attributes of personality is necessary if we are to understand common sense personality theory and the way in which certain forms of knowledge about another person come to influence drastically the total impression formed.

We all have an "implicit theory of personality," a sense of which characteristics go with which other traits, although we may not be able to articulate it. They "seem" right and logical to us, while others "seem" wrong and illogical. Bruner and Tagiuri argue that this perceived inter-relationship among traits represents a naive, common sense theory of personality.

To understand how jurors process information it is important to study the dimensions underlying these "perceived" trait relationships. What traits do jurors link together? How about "lean and mean," "fat and lazy." "blonde and dumb"? The system of rules which tells us which characteristics go with which other characteristics, such as "John is bright, eager and thin" constitute our own trait associations and our implicit theories of personality.

3. The Attribution Theory on Causation Issues

The Attribution Theory is useful to attorneys in helping us understand how jurors establish cause and effect links in the evidence. There is a distinction between what laymen perceive to be the cause of the behavior of other persons and the scientific causes of behavior. Jurors seem to simplify their understanding of behaviors by making assumptions of general causes, i.e., attribution is perceived as either reactive or purposive.

a. Reactive Attribution

Reactive attribution is when the jury feels that a party's behavior is relatively unconscious and therefore unintended. The impact here could be that if a juror perceives a defendant's actions as merely reactive, they may hesitate to find negligence or attribute fault to that party.

b. Purposive Attribution

The second type of attribution, purposive attribution, is when the juror decides that the behavior of the party was intended. The juror will then attempt to infer why the behavior occurred. Jurors use attribution processes in an attempt to understand why a person behaved as they did in a particular situation. Jurors make sense of behaviors by assuming that the behaviors were caused by the purposes and intentions of the party.

Of great significance to trial lawyers is the fact that the attribution theory tells us that jurors will establish cause and effect links if the attorneys do not. Therefore, if we fail to address the issue as to why a person acted as they did in a given situation, jurors will apply their own standards and techniques of attribution in order to fill in the cause and effect gap. This can be helpful under certain circumstances. If the attorney experiences difficulty establishing a cause

and effect relationship., careful consideration should be given to the order in which evidence is introduced so that jurors may establish in their own mind, through their own discovery processes, the cause and effect relationship.

H. Goals of the Advocate to Cope With Bias

It is incumbent upon the advocate to accomplish four major goals with respect to the jury: 1) inspire the jury, 2) influence the jury, 3) instruct the jury, and 4) empower the jury. In order to accomplish this, the skilled trial attorney should learn to engage the conscious mind of each juror while communicating to the unconscious mind.

1. Inspire the Jury

Forensic psychologists who have studied the subject in literally thousands of debriefings tell us that jurors make decisions by emotion and then sift through the evidence in order to validate their emotional responses with logic. In other words, jurors make a decision with their right brain and validate with their left brain. This is an important concept for advocates to understand because it demonstrates that an emotional appeal alone is not sufficient unless counsel provides the jury with validating documentation to satisfy their logical examination of evidence. In fact, if an attorney makes an emotional appeal which wins the jury's favor and then fails to offer validating evidence to support the emotional appeal, a juror may subliminally punish counsel and client alike for leading them astray emotionally. Obviously the most effective presentation will combine an emotional appeal to the juror's right brain with logical validation to satisfy the juror's left brain. Jurors make decisions by emotion through the use of their unconscious mind and validate them with logic through the use of the conscious mind. If we are to persuade jurors we must do so on an unconscious level, i.e., inspire the juror to seek to return a verdict for your client. Techniques for persuading the unconscious mind include embedded commands, anchoring, pacing, and right brain motivations.

Since jurors form their perceptions early and tend to cling to them tenaciously, it is important to inspire the jury early in the perception creating process if we are to achieve success in persuading the unconscious mind. The steps include:

a. Creation of Perceptions
   A right brain emotional present tense appeal to the unconscious mind in order to create the vital early perceptions;
b. Validation of Perceptions
   Validation through logical presentation of hard evidence which supports the appeal to the conscious mind and reinforces the early perceptions; and
c. Motivation of Perceptions

Motivation through a combination of logical and emotional persuasion during summation.

Inspiration can be achieved by effective storytelling, and persuasively presenting themes and messages which will allow each juror to identify with a client's cause and inspire them to a just result. This is particularly true during opening statement and direct examination of witnesses during which effective theme development can predicate the delivery of an inspirational

message during summation. Each of these topics is covered in more detail in this chapter.

2. Influence the Jury

a. Jurors Seek to Make Sense Out of Their Environment.

In order to effectively influence the jury it is necessary for the advocate to understand that jurors are constantly attempting to make sense out of this unusual courtroom environment, i.e., they are sifting through data and rejecting that which does not fit with their perceptions or is incongruent. The skilled advocate must assist jurors in this process. For example, a woman who claims to be the victim of a sexual assault must appear in court as a "victim". If the woman appears before the jury wearing tight clothing, ostentatious jewelry, overdone cosmetics and a wild hair style, this will create an incongruence in the minds of the juror of this woman as a "victim". The inconsistency must be resolved by either deciding that her appearance is consistent with that of a "victim" or by rejecting the idea that she is a "victim". This is an obvious example but it is important to illustrate that attorneys must be constantly aware of even the slightest inconsistent or incongruent messages which are being presented by counsel, clients and witnesses.

b. Consistency in Communications

Once again the important principle is that jurors are obtaining their information through non-verbal channels, such as clothing, eye contact and body motions; vocal channels such as voice characteristics and quality, and verbal channels such as the words used by the attorney, the client and the witnesses to tell the story. The non-verbal and vocal channels will outweigh the verbal channel in the decision-making process. Therefore, it is essential that there be a consistency between the verbal message presented by the attorney, client and witnesses, the vocal characteristics and quality, used all non-verbal communications.

c. Data Which Influences Jurors

(1) Jurors are Impressed with Hard Data

Once a juror has made the emotional, unconscious decision as to the outcome of the case which they desire, they begin searching for hard data in the evidence which will logically support their desired outcome. Thus, when organizing the evidence into its most persuasive format, organize hard data such as medical bills, photographs, x-rays, contracts and other such data which the jurors can see and touch. This is among the most persuasive evidence they will receive. The important use of this data is in conjunction with the rule of primacy and the role which hard evidence may play in the formation of early perceptions by jurors. Thus, don't hold back hard data which supports the early perceptions which you wish to create unless there is some other tactical trial reason for doing so.

(2) Jurors are Impressed with the Court's Instructions

Counsel must understand that jurors are impressed with the court's instructions and we should wrap ourselves in the court's instruction as often as possible throughout the trial. Ask questions of witnesses couched in the language of the court's instruction. Use signposts as you go through the questioning such as "the court is going to ask these ladies and gentlemen of the jury to decide upon the value to be placed upon the physical pain and suffering and mental anguish which you have endured, let's talk about that now Mr. Plaintiff".

(3) The Principle of the Value of Scarcity

The next principle regarding data which influences jurors is that people are more easily influenced when they believe the source to be scarce and valuable. Advertising agencies have understood this principle for decades, thus, we encounter the "limited offer" sales, "today only" deadlines for purchase, etc. Likewise evidence which is considered to be hard to get will be considered to be more valuable. When jurors are dealing with scarce information, two things occur; first, their attention is called to the information that is being presented and secondly, the information is anchored in their minds for retention and recall at the important time in the jury room.

Thus, the advocate should regard information which appears scarce as valuable. The effect of scarcity can be severe.

It does not take great deliberation to understand the principle of scarcity. A rare art work, something that is one of the kind, is always more valuable than any numbered print. It is the original Rembrandt that brings millions of dollars at a London auction, not a copy. Originals are one of the kind, rare items. It is the very unavailability or scarcity of an item that drives its value up.

Scarcity can have a severe effect on the value of an item. One needs to think back only to the early 1970's to realize the importance of this principle. Remember the oil crisis? The market price for oil was being manipulated by the Arab nations. We were made to believe we were going to run out of oil worldwide. There would be no gasoline. While there was not a real shortage, there was a perceived shortage of gasoline brought on by market manipulation. Fuel began to be hoarded and long lines formed at every gas station. All of this because of perceived scarcity, not real scarcity. Remember the first principle, all communication is based on perception. In other words, there never was a real scarcity of oil, just a perception of scarcity. Nevertheless because of perception, the price of gasoline soared to tremendous heights approaching almost $2.00 per gallon. This is a prime example of perceived scarcity having severe effect.

(4) Objections Increase Perceptions of Value

Scarcity also works in the courtroom. Broder did a study in the 1970's at the University of Chicago. He used actual jurors. It was a civil trial. The testimony was videotaped so that it could be totally controlled. There is only one variable used between each group of jurors who heard the case and decided.

That variable was insurance. It was an admitted liability rear-end collision case. The first set of jurors was not informed one way or the other as to whether the offending driver was insured. In the second situation, the jurors learned that the driver was in fact insured without objection. In the third situation, insurance was introduced by plaintiff's counsel and defense counsel objected strenuously, the objection was sustained, and the judge sternly instructed the jury to disregard the fact that there was insurance involved.

The results of the study showed that the verdicts increased significantly when the jury is

told to disregard the fact that there was insurance involved. In the instances where they did not know there was insurance involved or where they were simply told the fact that insurance was involved, the verdict had the same median value. But where the jurors were told to disregard the fact that there was insurance involved, there were significantly higher verdicts both on median and on average. The average verdict where the jurors did not know about the insurance was $33,000. Where jurors were told about the insurance it increased on average only slightly to $37,000. Where the jurors were instructed by the judge to disregard the information on insurance, the average verdict shot up to $46,000, a $13,000 increase over the case where the jurors did not know about insurance. The point is that knowing or not knowing about insurance had little effect. But where the same information was made scarce there was a significant increase in the verdict. It is obvious that the principle of scarcity plays a role. When jurors had information which they were told not to use, that information became scarce and therefore more valuable.

Wolf and Montgomery replicated the study using a criminal trial setting. In that case the key factor was a police officer's testimony. There was little difference in the conviction rate where the police officer's testimony was given or where his testimony was not used. But where the testimony was given and then ruled inadmissible with the jury being instructed to disregard it, the conviction rate shot up substantially. Scarcity works in the courtroom.

The lesson one learns from the principle of scarcity is the effect of objections in the courtroom. All too often inexperienced counsel makes a number of technical objections in front of the jury. An experienced counsel knows that objections are like a red pencil, underlining the material you are trying to keep out. This is why experienced counsel, if they think objectionable material is going to come in, try to keep it out through a Motion in Limine. An experienced counsel will not object frequently and when it is necessary to object, the objection is executed in the mildest possible fashion so it is not to stress the importance or scarcity of the material objected to. Objecting at trial is performed best by a request to approach the bench so the objection is out of the hearing of the jury. The jury does not even hear the words, "I object," and the material whether admitted or not does not become scarce and valuable.

(5) Scarcity of the Expert

Scarcity also has an effect on the evidence. The scarcer you make your expert witness appear, the more valuable his testimony becomes. The further away he comes from, the rarer his credentials all increase his testimony's value. Let the jury know how hard it is to find that witness and the rarity of his credentials. There are very few of his kind in the world. He is the expert's expert. One can also underline a particular piece of evidence with scarcity. Show how rare it is. Show how difficult it was to obtain or how hard it was to come by or how scarce or new the technique used to find the evidence, a DNA matchup, for example. The more difficult you make it appear to obtain the more valuable your evidence becomes.

Combining scarcity with the need to be consistent with our commitments is shown by at least one group that understands the combined power of scarcity and the power of consistency, it is the toy manufacturers. They know the value of the lure of the unobtainable. Just look at the Cabbage Patch doll. Look at the imitations that came on the market when it was not available.

Have you ever wondered why toy manufacturers spend millions of dollars advertising toys

that are not adequately available in the market in October and November, right before Christmas? Why do they spend money on TV advertising GI Joe or the Cabbage Patch doll, and when mother goes to buy it at the toy store none are available? There is a simple reason. The toy manufacturers want to make double sales.

Here's how it works. The toy manufacturers know that they are going to have a big market for toys in November and December because of Christmas. They know that parents are not going to let Christmas go by without having something under the tree for little Johnny. Little Johnny wants GI Joe. They have advertised it to little Johnny on Saturday morning television. He just has to have it. Mother goes out to buy it for Christmas and it is not available anywhere. No store has it. How could the manufacturers be so stupid as not to anticipate the market? The answer is they did anticipate the market, but they needed a market for January and February when toy sales were going to drop radically. they know this toy is going to be valuable to you because it is scarce. You looked for it and you could not get it. Further, they are relying on people having overwhelming need to be consistent with their commitments. You have promised; i.e., made a commitment to little Johnny to get him GI Joe. When it is not available, the toy manufacturers know you are going to buy him another toy, i.e., a substitute to put under the Christmas tree. Come January and February little Johnny is sure to see it at the toy store and remind you of your commitment. They are sure you will be consistent with that commitment. Additionally, you will pay top dollar because GI Joe is hard to get and therefore valuable!

Scarcity and consistency can be combined in the courtroom. One way to do this is to make sure that you have only one red flag or key question to obtain a commitment on during voir dire. Do not dilute the importance of this question by trying to obtain commitments on three or four issues. Make it a rare issue and it increases in value. The commitment made during voir dire becomes more powerful psychologically if you make that commitment rare or scarce.

When commitment and consistency are combined, it also appeals to the jury's integrity. Discussion during summation should stress the importance of the role of the jury, i.e., the power of one vote out of 12 in the jury as opposed to one voter out of millions in an election. An appeal to the importance and integrity of a jury verdict effectively combines the psychological principles of scarcity with commitment and consistency. It makes the jurors feel their verdict to which they are committed is rare and therefore of great value. Important verdicts of value are generally not expressed in zero. Important verdicts generally reflect significantly adequate awards.

d. Jurors are Subject to the Anesthetizing Effect

The better part of wisdom dictates that when a severely injured Plaintiff is being presented to a jury, the less time the jury can actually observe the victim, the stronger effect the injuries will have on the jurors. Long term and constant exposure to a severely injured person causes an anesthetizing effect with individual jurors who become accustomed to the injuries and less empathetic with them as time progresses.

For example, a seriously burned individual who has horrendous scarring may cause jurors to look away upon first contact. However, if that person sits in the jury room in sight of the jurors six or more hours per day for several days of trial, by the time the jurors enter the jury room to deliberate on damages, they will be anesthetized to the damage and will not view it as

tragically as they would have upon initial contact.

From the Plaintiff's viewpoint, the wiser course is to bring the seriously injured victim in to introduce to the panel on voir dire examination. Then ask the court that the person be excused and not have them return until they are called to the witness stand to testify. After testifying, they should not be seen again by the jury until the jury deliberations begin and the jurors find the victim sitting with the victim's family in the courtroom anxiously awaiting the jury's verdict.

The absence of the Plaintiff during the trial can be explained by a medical witness or psychologist who will testify that it is in the best interest of the Plaintiff not to hear the testimony concerning the accident either from the viewpoint of reliving the horrors of the events or hearing testimony about the devastating long term effects. Therefore, the Plaintiff should be kept away from the trial on doctor's orders.

e. Attorney-Client-Witness Credibility

One of the major influences on the jury is credibility of the attorney, clients and the witnesses. Since jurors serve as the sole judges of credibility of the witnesses and the weight to be given to their testimony we must understand how credibility is gauged by jurors.

(1) Jurors Search For and Appreciate Credibility

Credibility exists solely in the mind of each individual or juror. To each juror credibility means that this is an individual whose message they can trust which results in the juror listening more closely, for a longer period of time and giving more weight to the message presented by the credible person, whether that person is an attorney or a witness.

> Jury consultants have identified credibility factors as being affected on several dimensions. One dimension is personal appearance. An advocate should gauge his or her personal appearance so as to appear both credible and approachable to jurors. A second factor which can effect credibility is behavioral patterns, i.e., the projecting of confidence, the projecting of a belief in one's own case and the projecting of a warm and trusting relationship between attorney and client. A third dimension which has been identified by Malandro and Smith is as follows: A third factor is the use of powerful speech and special language techniques such as repetition, metaphors, similes, analogies, and rhetorical questions. The perception of credibility of attorneys is closely related to expectations that counsel knows where he is headed, knows how to present information, is understandable, is quick and has a moderate to fast rate of speaking. All of these factors together help to add to the perception of credibility. Smith and Malandro, Courtroom Communication Strategies, p. 274 (Kluwer 1985).

(2) Achieving Credibility

People are more easily influenced when they perceive the source of information as credible. How is credibility developed? Perception of credibility is based on three factors, 1) competence or expertness, 2) trustworthiness, and 3) dynamism. Expertness and competence refer to the skill and/or knowledge of the individual. Trustworthiness refers to the fact that a person presents information without bias. He appears to be fair and just. The concept of dynamism is the measure of how forceful, bold, or active the person appears to be. Dynamism

means that the person is perceived as being forceful. It is the perception, not necessarily the reality, of all of these three concepts that creates credibility.

(a) Competence

With regards to the perception of competence or expertness, jurors use various judgments. They look at the attorney and decide whether he is experienced. Does he look older? Does he appear intelligent? If he has one or more of these factors going for him, they will probably rate him as being competent. Sometimes an attorney or a witness can have "floating competence." This means that if he appears very competent in one area, the jurors will assume that he is competent in all areas. Competence or the perception of competence is also a function of intelligence. By this we mean that if the attorney appears to respond to situations in a positive manner, and to be in control, he will be rated as competent. If he is quick to respond, he will be considered by most people as having some expertise.

Expertise is generally judged upon experience, floating competence and intelligence. Jurors generally assume that greater experience equates with a higher degree of expertise. Floating competence is a term used by Smith and Milandro to mean that if jurors see an individual as very competent in one area they tend to ascribe competence to that person in other areas regardless of whether the person has the skills or background in the second area. The fact that he's already perceived as being competent gives him a type of "floating competence" which results in a continued perception of credibility in other, often unrelated fields. The third factor, intelligence, simply means that we respond positively to those people who can control a situation, are quick to respond, and who display other characteristics of intelligence. These three factors also provide a composite picture of the criteria by which jurors judge an expert.

(b) Trustworthiness

The element of trustworthiness is a very important part of credibility. If an attorney appears untrustworthy, he or she becomes totally unable to persuade others. We cannot transfer a mood or in any way make the juror feel anything about injuries or what is right or what is wrong without having their trust. Any attempts at mood transference, if they do not feel the attorney is trustworthy, will be perceived as fake and insincere. Trustworthiness includes the perception of sincerity and honesty. If an advocate is to build the vital empathetic bridge between the client and the jury, trustworthiness of counsel must absolutely be established. It is not possible for counsel to achieve mood transference if the jury does not trust you as being authentic and sincere.

The first step in creating trustworthiness in the minds of the jurors is to be a trusting individual, i.e., trust the jurors to make fair and intelligent decision. This trustworthiness on your part will be communicated at both the conscious and unconscious levels to the jury who, hopefully, will reciprocate in kind. The second factor in order to achieve trustworthiness is to present the information in an ethical, fair and unbiased fashion. Evidence can and should be presented forcefully and enthusiastically without being biased. Bias in your own presentation of evidence simply detracts from its validity and your trustworthiness. Finally, sincerity and honesty are the by-words of trustworthiness.

(c) Dynamism as a Tool to Overcome Jury Bias

Finally, we turn to the element of dynamism. This refers to how forceful, empathetic, bold, and active the individual appears. In essence, it is a rating of the ability of a speaker to communicate actual emotional feelings. It relates to the attorney's direct overall sincerity regarding his feelings about the case. If an individual is dynamic, there is no question that he creates a mood transference among his receivers or listeners. Again, this cannot be created if you are perceived as untrustworthy, insincere, and dishonest. But if you are perceived as trustworthy, then through the proper use of vocal cues and other communication methods, one can become dynamic.

Credibility and dynamism are affected by the way a message is structured and delivered. With regard to the structure of a message, it is important that the message be kept simple. The salesman's rule of "kiss" applies. "Kiss" means "Keep It Short and Simple." It means that an advocate should not let his or her messages become too complex. If the message becomes too complex so that the jurors cannot understand it, they will not blame themselves. They will not say to themselves, "I cannot understand this message because of my own lack of intelligence." Instead they will blame the speaker. They will say that he or she is not smart enough, not dynamic enough, not competent enough to make the message understood. Therefore, if the message is too complex and not understood by jurors, the speaker will lose credibility.

Another important rule which applies to the structuring of a message is whether or not a message or argument should be presented anti-climax/climax or climax/anti-climax. By anti-climax/climax we mean that the weaker arguments are put first so that you build to a climax with the stronger arguments. By arguing climax/anti-climax, we mean that you put the strong arguments first.

Perceptions are organized very quickly and first impressions count. Remember the rule of primacy. This ought to answer the question of how one should structure a message or an argument. One should always, both in oral argument and in a brief, put the strongest argument first. Why do this? The answer is simple. Have you ever seen an attorney argue a motion in court on rule day? If he offers the judge an argument and the judge does not buy it, primacy works against him. When he makes the next argument, even if it is persuasive and on point, he may well lose the entire motion. Once the judge does not believe the first argument, it becomes much more difficult to persuade him with the second or third. We should always put our strongest argument first because our weaker arguments will tend to lessen our credibility. If we save our strongest argument for last, we will have so damaged our credibility that our argument will not be structured with any persuasion at all.

Word choice also affects credibility and dynamism to the extent that they affect simple communication of ideas. The message should always be in strong, positive terms. The message should be focused on the issues and the message should be repeated. In jury trials, legal jargon should be avoided. Try to talk in plain English. Terms like "heretofore" should be substituted for words like "before." The legal phrase "subsequent thereto" should be substituted by the words "after" or "following." "By reason of" should be substituted for "because." Also strong language should be used. The language should be positive and not weak. Nonfluencies in speech such as "ah" need to be avoided. One should always avoid unfilled pauses unless it is done for dramatic effect. Direct and positive answers are also helpful in establishing the

credibility of a witness. Witnesses should not weaken answers by being conditioned with language like "I think" the answer is "yes" or that the proposition put by the lawyer is "probably true."

These elements contribute to the dynamism which affects how forceful, empathetic, bold and actively aggressive each individual attorney appears to a jury to be. These characteristics are also established through vocal cues, the ability to communicate actual emotions or feelings, the sensitivity to issues that are being presented, direct association with overall feelings about the case and a belief in one's client and the client's cause. An individual who is truly dynamic will have absolutely no difficulty in mood transference from counsel to the jurors so long as the advocate is speaking from an actual feeling which he is experiencing at the moment.

Dynamism in transferring your feeling of empathy for your own client and your client's plight to the jury is achieved not by acting but by a high level of association with your client's true feelings. In order for an advocate to convey dynamically an empathetic feeling there can be no separation between the advocate and the feeling he is conveying at that moment.

(3) Influences on Perceptions of Credibility

(a) Personal Attributes

Significantly, the personal attributes of an advocate which influence the jurors include such elements as physical appearance, the speaker's delivery style, likability and approachability and the effective use of humor. The use of humor by an advocate is not for the purpose of entertaining but for the purpose of demonstrating a sense of humor. The personal attributes and reputation of the attorney also have effect on his or her credibility.

(b) Self Monitoring Characteristics

Social scientists have developed a test to evaluate a person's so-called self-monitoring characteristics. The test is a series of questions which can determine whether a person is a so-called "low self-monitor" or a "high self-monitor." (See "Courtroom Communication Strategies," by Smith and Malandro, pp. 259-260.) Low self-monitors are very concerned with objective truth and are rigid in their thinking. They do not worry about what other people think. They are the accountants, scientists, and bookkeepers. They are very objective and want hard facts. They are very believable, but do not make good impressions. High self-monitors, on the other hand, are very concerned about what other people think. They are constantly changing their position to be popular. High self-monitors are movie stars, politicians, and trial lawyers. They are very good at impressing people, but are not very believable. They are very dynamic, but lack credibility. On the other hand, low self-monitor is very believable, but not very dynamic.

The point is that you have to have the attributes of both in order to appear credible. You must be both dynamic and trustworthy. If you are a low self-monitor, you have to work on dynamism. If you are a high self-monitor, you have to work on credibility. You should know what personality type you are and work to obtain some of the attributes of the other. Good trial lawyers are well-balanced. They give off the attributes from both the low self-monitor and the high self-monitor. They are dynamic and credible at the same time.

(c) Reputation

Reputation also plays a role in establishing credibility with the jurors. Some attorneys have built up a significant reputation and have instant credibility. Gerry Spence of Jackson Hole, Wyoming, is credible because, although flamboyant in both dress and style, his general reputation precedes him. He is known as a great trial lawyer. Scotty Baldwin in Marshall, Texas, has instant credibility in East Texas. He is a great lawyer and everyone knows it.

Jurors in your hometown, if it is small, know something about you. You would want them to know that you are a specialist in a particular area of the law. This gives you expertise and therefore adds credibility to your reputation. Once jurors believe something, they tend to retain that information even if contradictory information is presented. Once they believe you are credible, you have a much better chance of influencing them.

(d) Fairness

One should always be fair, and appear fair in front of the jury. Never show the jury an exhibit without showing it first to the judge and the other side. Always create the appearance of fairness. Never appear to be hiding something or holding something back from the jury. Make sure that you never do anything that the judge has to admonish particularly when it is going to be apparent that you were doing something that was wrong. Such an evaluation can drastically affect your credibility with the jury and you may not be able to repair the damage.

When jurors examine attorneys from the viewpoint of credibility, they look for the knowledge and skill of the advocate, i.e., expertise; whether the advocate presents information without bias, fairly, justly and ethically, i.e., in a trustworthy fashion; and the forcefulness, boldness and charisma which the advocate brings to the presentation of proof, i.e., dynamism.

(4) Attorney's Goals to Establish Credibility

(a) Establish Rapport

It should be the goal of the skilled advocate to establish rapport with the jury; to humanize both attorney and client, primarily through the demonstration of a sense of humor; and establish approachability, which primarily is accomplished by the jury observing counsel's interaction with witnesses, laymen, court personnel and others with whom counsel comes in contact during the trial.

(b) Importance of Integrity

In order to establish credibility it is also necessary for the skilled advocate to convey a very high level of integrity. This is accomplished through the manner in which the attorney demonstrates honesty and sincerity throughout the trial, both in dealing with people and dealing with the admissibility of evidence. It is also necessary that counsel demonstrates a sincere belief in the client, the client's case and the message which the attorney is delivering to the jury.

(c) Attorney-Client Relationship

One of the most important areas for achieving congruence between the verbal, vocal and non-verbal messages conveyed to the jury is in the relationship of attorney and client. If the attorney refers to the client as "my friend, John" and then throughout the trial ignores the client

during the breaks, lunch hours and the beginning of each day of trial, the jurors will get the clear non-verbal message that "my friend, John" is merely another fee. They will then punish the attorney because of the obvious misleading information delivered in the verbal communication regarding "my friend, John".

(d) Display Professional Demeanor

Be an exemplar of professional conduct. Forensic psychologists also advise us that one area in which we consistently disappoint jurors is in the level of professionalism which attorneys exhibit in trial compared with what jurors anticipate prior to trial. Jurors expect lawyers to act in a professional manner in dealing with the court, the jury, the witnesses and opposing counsel. The failure of counsel to conduct themselves with professional demeanor during the course of a trial can reduce the attorney's credibility quotient so thoroughly that by the time counsel rises to argue, the persuasion has become an uphill battle.

The closing argument may be the most interesting and challenging phase of trial as it offers a critical opportunity to bring coherence and clarity to those issues favorable to the client. Summation is an opportunity for counsel to exercise long-practiced skills and techniques of advocacy. However, in order to achieve the highest level of persuasive potential, counsel's own integrity and credibility must be solidly established with the jury when counsel begins to argue. One of the means of accomplishing this is by conducting the trial with professional demeanor which includes a proper attitude towards the court, the court's staff, the jury and all counsel and witnesses.

(e) Communicate Simply

Finally, in order to effectively influence jurors it is necessary to learn to communicate simply. Legalese is counterproductive. Legalese builds a barrier between counsel and jurors, reduces the advocates approachability and detracts from the ability to successfully to meet the first requirement of a great trial lawyer: simple communication.

f. Arenas of Influence

It is incumbent upon the skilled advocate to understand that the data which influences jurors is conveyed in many arenas and is communicated in an ongoing process from the time the first juror sees the first person involved in the case until the final verdict is signed and delivered to the court. The arenas of influence include the witness stand, courtroom, courthouse, and any place where a juror can witness anyone associated with your side of the case. There are also extrajudicial considerations which must be taken into account to make sure that you are not victimized by "evidence" offered outside the courtroom.

(1) Witness Stand

While theoretically the influences on the jury should take place from the testimony delivered from the witness stand by sworn witnesses, each person testifying in a case must be aware that they are observed at all times anywhere near the courthouse. Jurors' impressions of each witness are being formed from the first instant that the juror and the witness establish either visual, auditory or physical contact. The first moment the witness enters the courtroom, observation begins and continues through the testimony, in the hallways, elevators, coffee shop and cafeteria, and perceptions are still being formed through the observation of non-verbal

behavioral cues emanating from the witness. Perceptions are also being formed through the observation of the relationship which exists between the witness and the parties and the attorneys. This is also true outside the courtroom as well as inside. As in the case of attorneys, the vast majority of the communication done by witnesses is done on the non-verbal and vocal levels rather than on the verbal level. Be sure that witnesses are fully aware of this.

Witnesses should be trained in vocal cues such as eye contact, body language, use of hands and body posture to communicate a message. They should also be aware of the importance of their vocal delivery of the message such as speaking with authority, confidence and sincerity while maintaining eye contact with the jurors.

(2) Courtroom

If you want to appreciate the role of the juror, walk into any courtroom in which a trial is taking place. Take a seat on the front row and then sit quietly for one hour, acting out the role of a juror. Listen to the testimony of the witness and consciously attempt to serve a juror's role. See how long it takes for your mind to begin to wander and for your attention to move from the witness stand to watching the non-verbal communication which is taking place in the courtroom. After a short period of time you will begin observing such things as the posture of the attorneys and the witnesses; the attitude and attention of the court; the non-verbal responses by all counsel to testimony being proffered by the witnesses; the actions and reactions of everyone else in the courtroom, and the role which the words coming from the mouth of the witness plays in this overall courtroom communication scene. You can begin to gain an appreciation of the effects of non-verbal communication when you observe what the jurors are watching as evidence is being offered. The simple rule is that everything that occurs in the courtroom during every moment that a jury is present, can influence the creation, reenforcement or rejection of perceptions and must be consciously considered by counsel as an important part of the trial.

(3) Courthouse

Many war stories are told about statements made in front of jurors on elevators, in bathrooms, cafeterias or hallways. However, there is a greater dynamic at play than statements made within hearing range of jurors. That dynamic is the observation of non-verbal communication by jurors of the trial's participants in parts of the courthouse other than the courtroom. The Plaintiff's doctor who is observed by jurors laughing and chatting chummily with the Plaintiff's attorney is much more subject to an attack on credibility by defense counsel as being the Plaintiff attorneys' hand-picked doctor than one who is seen only by the jurors on the witness stand.

The witness who is seen huddling with the attorney in the hall may be perceived by jurors as being coached by the lawyer on how to testify and what to say. The simple rule is to advise all clients, all witnesses, all members of the litigation team and everyone who is identified by jurors as being a member of the advocate's entourage to be constantly aware that they are being observed by jurors and that perceptions are being formed by those jurors based upon the non-verbal communication which they witness.

(4) Extrajudicial Considerations

Be constantly aware that jurors are gathering "evidence" at all times. Many cases have been won and lost in the hallways without the court or counsel being aware of the influences.

For example, in a case involving medical negligence on the part of a doctor for failure to timely diagnose lung cancer in a patient, the Plaintiff's expert witness testified not only as to the negligence of the defendant doctor but also testified extensively as to the cancer being caused by a forty year smoking history of the Plaintiff which should have put the defendant doctor on notice to look closer for the possibility of lung cancer. The doctor testified at length as to the horrors of cancer arising out of smoking. He was an impressive witness. However, the jury rejected his testimony completely. Why? Because during a coffee break in the middle of his testimony, the doctor was observed by jurors smoking in the hallway outside the courtroom. The doctor's non-verbal message that smoking is acceptable to him was totally inconsistent with the verbal message which he had gone to some lengths to deliver from the witness stand. As will generally occur, the jurors accepted the non-verbal message which they "discovered" for themselves and rejected the verbal message which the attorney and doctor had attempted to convey.

In a more simple case involving child custody, the child was adjudged by the court to be too young to testify. The case involved the efforts to take the child away from her father, a paraplegic in a wheelchair. Five days of testimony inside the courtroom, pages and pages of documents, numerous items of demonstrative evidence, expert testimony and lay testimony were all proffered to the jury from the witness stand. All of which was ultimately meaningless in the decision-making process. Why? Because every time a break occurred and the jurors entered the hallway outside the courtroom, the father would roll his wheelchair out the courtroom door and the child, who was not allowed inside the courtroom during the trial, would run to her father, climb up in his lap, put her arms around his neck and kiss him. Each time he had to return to the courtroom, she would hug his neck and say "I love you daddy, I'll be waiting." There is absolutely nothing which could have occurred inside that courtroom which would have overcome the extrajudicial evidence which the child, who was too young to testify, conveyed to the jury every time they went into the hall.

Counsel must constantly be aware of and guard against such outside influences on the jury.

g. The Real Final Argument

In order to maintain the proper perspective on the influence of jury leaders, we must understand that the final argument in a lawsuit is not given by the attorneys but rather is given by the individual jury members during the deliberative process. The final arguments which count most and which influence the outcome of the case are those given by the jury leaders who effectively sway the other jurors to their viewpoint. Thus, it is incumbent upon the skilled advocate to identify the various roles that jurors play in the deliberative process. During the trial, identify the persons who fill those roles. By understanding the process by which the jury selects leaders and the influence which the leaders exert over other jurors, we can more effectively arm the juror advocates who are espousing our side of the case with the arguments which will allow them to prevail in the jury room.

(1) Identifying Roles Jurors Play

For our purposes it is convenient to categorize jurors into five roles which they play: juror advocates, followers, benchwarmers, negotiators, and hangers.

(a) Juror Advocates

The juror advocate is a juror who will proactively argue their position with such skill and

force as to effectively sway the minds of other jurors to their position. The juror advocate is the most important category of jurors due to the ability to lead the bench- warmers, trade with negotiators and persuade followers. The foreperson of the jury will generally, but not necessarily, be a juror advocate for the reason that the type of traits used to select a foreperson are included in the same traits of a juror advocate. Those jurors who emerge as leaders in jury deliberation generally demonstrate the following leadership qualities: 1) high status and authority; (2) high intellectual abilities as exemplified by strong, articulate answers to difficult questions; (3) decisiveness and strong will, exemplified by self-confidence and strength of conviction, and (4) past leadership training or experience.

(b) Followers

A follower is a juror who knows how he or she intends to vote but either has no desire or does not have the skill to persuade others to follow their lead. The follower will immediately support the jury advocate who best espouses their position. Another type of follower is one that will attach to a position presented by a leader with whom the follower chooses to align. Followers are generally less assertive and aggressive, have lower social status and are somewhat more intimidated by the courtroom setting.

(c) Bench Warmer

A bench warmer is a juror who, for whatever reason, is indecisive. A bench warmer will generally go along with the majority during jury deliberations and if the majority shifts, so will the bench warmer. The bench warmer may be identified by uncertainty in responding to voir dire questions, lack of self confidence, and difficulty in grasping the concepts involved in the trial, as discussed on voir dire.

(d) Negotiator

Negotiators are those jurors who seek the middle ground and try to bring the warring factions and polarized jurors together. The negotiators are generally left brain dominant individuals who negotiate the middle ground by use of logical arguments. On voir dire examination, a negotiator will stress his ability to be "even-tempered" and his ability to be totally open minded, understand both sides of an issue and give fair consideration to everyone in the case.

(e) Hangers

Hangers are jurors who will maintain their own position without regard to the view of the majority. These are individuals who are not bothered by differences of opinions, tensions, pressures from other jurors or their identity as a "spoiler". Jurors who appear on voir dire to be non-conformist, stubborn and unintimidated by authority figures are the most likely holdouts.

(2) Selection and Influence of Jury Leaders

The reviews of numerous juries by jury consultants have developed a pattern which help us predict the emergence of the jury foreperson. Group leadership is linked to the status of the participants.

(a) Ascribed or Achieved Status

As a general proposition, the higher the status of the individual, the more likely he or she is to emerge as the leader or to be chosen by the members as the group's leader. Status comes in

two forms: 1) ascribed status or 2) achieved status. Ascribed status is considered to be the prestige that goes to a person by virtue of such characteristics as family, wealth, good looks or age. Achieved status is status that an individual has earned based on merit of his or her own accomplishments.

Studies demonstrate that the foreperson is more likely to be a person of higher socioeconomic status and also reflect that high socioeconomic status members tend to participate more in jury deliberations. Individuals of higher status have more communication acts directed towards them and those communication statements tend to be more positive than statements directed to lower status members. Thus, high status persons have an inordinate ability to control the flow of the juror's interaction. Forepersons of juries tend to be from certain higher status occupations such as professional or proprietor positions.

(b) Leaders Are Confident and Communicative

The most common trait of the juror usually elected foreperson was that he or she was exceptionally talkative. Forepersons were also seen as confident individuals as well as warm persons who communicated well with others. Those who speak first when jury deliberations begin are chosen as foreperson 36% of the time.

(c) White Males Prevail

The foreperson will most likely be a male (70% of the time) and white (95% of the time). Women are much less likely to be chosen as foreperson in civil trials. For example, women were chosen foreperson 3% of the time when women comprised 36% of the civil juries. During jury deliberations, male jurors tended to proact, i.e., initiate conversations, suggestions and solutions to solve the problem. Women tended to react to the contributions of others, agreeing, understanding and supporting. One study reveals that 67% of the jurors studied were men but they accounted for 80% of the conversation during deliberation.

(d) Leaders Use Communication Skills

The most vocal members of the group are more likely to be chosen as leaders. Significantly, this applies to both verbal contributions and non-verbal contributions. Those who are perceived as leaders and chosen as forepersons tend to verbalize their opinions more and to use more gestures and other non-verbal movements during the deliberative process.

(e) Identifying Juror Advocates

It is essential for the skilled advocate to attempt, during the course of the trial, to identify potential leaders in the jury room, particularly juror advocates who will be in the role of persuading the other jurors.

While we all have a tendency to watch the jurors during witness testimony, it is submitted that more information may be gained by observing jurors during the coffee breaks and lunch periods. Through such observation we can see how jurors break up into groups; who is the dominant talker in the group; who is the first person to speak, who is quiet and strictly in a listening role, and who is most effective in the use of non-verbal communication. Through the understanding of non-verbal communication, we can perceive by observing juror groups in hallways those to whom deference is paid by the jurors and those who exude confidence and

leadership qualities.

(3) Arming Juror Advocates

The skilled advocate will identify, persuade and arm the juror advocate during the course of the trial. Since we know that the juror advocates are the jurors who will persuade the other decision-makers towards the final verdict, it is incumbent upon us to identify them through careful questioning on voir dire examination, and careful observation at all times throughout the trial. The juror advocate then may be persuaded by personalizing analogies, metaphors and arguments that should appeal to that leader; by utilizing the language and argument which he or she used during voir dire examination and by maintaining eye contact during the crucial portions of the summation while arming them with the thematic arguments you wish them to make in the jury room.

Since the juror advocate will be leading the final argument in the jury room, we can be of great assistance in insuring that the advocate's argument is persuasive, predicated on the right theme and utilizes the right tools. During summation, we should, through careful eye contact at crucial points, arm the juror advocates with the precise arguments which embody our themes which we want them to make in the jury room to the other jurors. We may also arm them with demonstrative or documentary evidence which we want them to utilize during such arguments. This is accomplished during summation by holding a piece of demonstrative evidence, establishing eye contact and moving back and forth between two juror advocates as we advise them that "when you come to the question of the defective design of the product, remember Plaintiff's Exhibit 6 and remember that..." This is followed by the simple straightforward logical, common sense argument which you want the juror to make in the jury room tied to this piece of demonstrative evidence.

Jury studies show that one of the methods used by jurors during deliberations in order to gain the attention of their fellow jurors is to utilize demonstrative evidence. Therefore, remind the juror advocates whom you perceive as being on your side as to the precise piece of demonstrative evidence which they should use in the jury room to discuss the outcome determinative issue. Then arm them with the precise argument that they should make to the other jurors tied to this piece of demonstrative evidence. In addition, remind them of the metaphors, analogies, similes and other rhetorical devices which they may use in the jury room to persuade their fellow jurors. These rhetorical devices should be carefully chosen in order to conform to the activities and attitudes of the jurors as you have determined them on careful voir dire examination.

3. Instruct the Jury

a. Jurors Look to Attorneys for Guidance

Attorneys spend seven years in college and law school obtaining the education which we need before we can enter the courtroom as an advocate. We then spend countless hours preparing our witnesses and ourselves in order to fulfill our role in a specific trial. The judge was often a skilled trial lawyer before taking the bench and has experience from both sides of the bench to aid him or her in performing their duties. However, those who serve in the extremely important role as the sole judges of the facts, the credibility of the witnesses and the arbiters of the amount of damages to be awarded in the case enter the jury panel completely naive as to their

role, their power, their rights, their duties, their obligations or the procedure for accomplishing their extremely crucial role in the dispensing of justice. Even worse, they enter with pre-loaded misconceptions about the irresponsibility of jurors, run-away jury verdicts and the recent, much publicized failure of the civil justice system.

b. Lead Jurors Through Suggestions

Skilled counsel will utilize the trilogy of persuasion as an opportunity to instruct the jury as to their role in the civil justice system and offer suggestions as to how that role may be most effectively fulfilled in this particular case. Suggest to the jurors the order in which they may wish to consider the evidence when they enter the jury room; suggest the evidence which they should consider on each question which they are called upon to resolve; suggest a method of calculating damages, and suggest the minimum amount of damages which should be awarded with respect to each element.

c. Advise Jurors of Duties and Responsibilities

Most importantly, if we are to recover adequate compensation in a personal injury or wrongful death case we must make the jurors understand and feel their duties and responsibilities with respect to the consideration of damages.

We are advised by forensic psychologists that Jurors do not deliberate on the issue of evidence of damages for the reason that jurors do not like to confront physical pain and suffering, mental anguish, physical disability and physical disfigurement. They do not like to see it, hear testimony about it or sit down in a room with eleven strangers and discuss it and attempt to put a monetary value on it.

It is our duty as advocates to instruct the jurors as to their duties. We must make jurors understand that they have the duty to confront the injuries and their sequelae, i.e., the physical pain and suffering, mental anguish, physical disability and physical disfigurement which has been suffered by the plaintiff in the past and will be suffered by the plaintiff in the future.

Jurors must also be informed that they have the duty to raise and fully discuss the evidence of damages in the jury room; that they have the duty to award full compensation; that they have the duty to follow the law, particularly with respect to the award of damages; and that they have the duty to render full and complete justice.

d. Sample Argument Regarding Duties

The following is a sample argument with respect to advising the jury as to the necessity of confronting the general damages:

> The quality of the first 14 years of Annette's life was the responsibility of her parents. The quality of Annette's life for the two years since this tragedy is the direct responsibility of these defendants. But the quality of the next 60 years, the rest of Annette's life, is directly in your hands.
>
> On voir dire examination we advised that the 12 of you who were chosen would have the difficult task of confronting, carefully considering and calculating the dollar value to compensate for 60 years of Annette's lifetime companions of physical pain

> and suffering, mental anguish, physical disability and physical disfigurement.
>
> Such a grizzly audit is difficult, but indispensable. If the injustice which has been done to Annette by this defendant is to be overcome by your verdict, you must do your full duty, follow the court's instructions and fully evaluate Annette's physical pain and suffering, mental anguish, physical disability and physical disfigurement. But as you sit in that jury room and discuss the evidence of these devastating damages, remember that you and I only have to discuss Annette's physical pain and suffering, mental anguish, physical disability and physical disfigurement. Annette has to live it every second of every minute of every waking hour of every day of her life forever.
>
> The hardest part of any trial for the lawyer and for the parties is waiting for the jury verdict after deliberations begin. But your decision is so crucial to how Annette spends the next 60 years of her life that we will wait as long as it takes you to fully evaluate each and every piece of evidence on each and every element of damage concerning Annette's physical pain and suffering, mental anguish, physical disability and physical disfigurement. Remember that Annette has waited two years for this, her last day in court. If we have to wait two days or ten days for you to arrive at a verdict which you can look back upon with pride for the rest of your life, we'll gladly wait. We understand that reviewing all of the evidence and carefully considering all of the damages is your duty. Take the full time it requires. We will wait.

This is the type of argument which is designed to aid the jury in understanding their duty to return full compensation.

The jury needs assistance in making decisions. Lead them in a concise and pertinent fashion to the damage award. Give them the foundation to justify the large sums of money that will be required to compensate for the duration of plaintiff's damages. Do not make the mistake of telling the jury what to do. Show them - explain to them - lead them to their necessary decision. If plaintiff's counsel has properly prepared the closing argument, all the pieces of the case should coalesce and provide the motivation that each juror needs to decide on a proper verdict for the plaintiff.

4. Empower the Jury

a. Jurors Do Not Understand Their Power

In a recent survey, two out of three jurors who were serving in civil lawsuits felt that their award of damages was strictly advisory to the court. If they gave too much the court would reduce the amount appropriately and if they awarded too little the court would increase the damages to the proper amount. It is incumbent upon the skilled attorney to make the jurors understand their power. They must understand that they are the Supreme Court with respect to the facts; that they are the Supreme Court with respect to the damages; that they are the Supreme Court with respect to the credibility of the witnesses and the weight to be given to their testimony. Jurors must also be made to understand that they are the last bastion of hope; that these are the parties' last days in court; that their verdict is written in indelible ink, not in pencil; that they not only can but must award full compensation; that they have the power to right a wrong, correct an injustice or pay a debt. In a product liability case they have the power to

influence corporate conduct and make this community and America a safer place to live. In a medical negligence case they have the power to send a message to the health care community and to act as the conscience of the community in establishing the standard of medical care which will be acceptable to the community. By making the jury understand the power which they possess we can make them more conscientious in fulfilling their role as jurors.

b. Use of Rhetorical Questions

One of the most useful techniques for empowering the jury is through the use of the rhetorical question. Throughout the opening statement and summation the skilled advocate may ask the rhetorical questions, the answers to which help the jurors understand their power. For example, in a case involving the wrongful death of a child, the rhetorical question, "what is this child's life worth in our community?" was asked a total of 20 times by the plaintiff's attorney, followed by various versions of "that is your determination in this case". This drives home the point to the jury that they have the duty as well as the power to determine the value of a child's life in the local community.

c. Imbue Jurors with a Sense of Power

Jury service is not a spectator sport. It is one of the most important roles of counsel to make the jury clearly understand that they are sitting as judges in your case; that their decision is the only one which your client will ever obtain and that they are the only ones who can render full and complete justice in this case. There are numerous messages which can be utilized during summation which convey to the jury the importance of their role and the extreme importance of the exercise of their power in this particular case. If counsel can successfully imbue the jury with the appropriate sense of their power during voir dire examination and opening statement, jurors will pay more attention to what transpires during presentation of evidence which, in turn, makes counsel's summation far more meaningful to the empowered jury.

I. Fill the Gaps in the Evidence

The major role which bias plays in the formation of each individual juror's model of the case is to fill the gaps left in the evidence. It follows that one of the most effective means of overcoming jury bias is for the attorney to carefully evaluate your evidentiary position and be certain that all of the potential evidentiary gaps have been filled before closing your case. As trial attorneys, we often assume that certain matters require no proof because they are "obvious to everyone." Such reasoning is often the source of the gaps which must be filled by the beliefs, values and biases of the jurors. When we leave jurors to their own devices in reasoning out important aspects of a case, we must understand that, in the absence of evidence to consider, their reasoning will
be built on a foundation of their predispositions, beliefs, values and other biases. Either fill the gaps with evidence or the jurors will fill them with conclusions based on bias.

J. Creating, Adapting, and Anchoring Themes

It is axiomatic that counsel should develop a theme during voir dire examination, carry it through opening statement, expound upon it in the evidence and use the fully developed theme as a cornerstone of summation. There are numerous ways to develop a theme but two of the most useful are through client involvement and assimilation of the standard themes to your case.

Proper development and use of themes can be a powerful tool in confronting jury bias. Jurors form their own model of the case by the end of the primacy portion of the trial and measure evidence and new data against that model through the remainder of the trial. Each individual juror's biases play an important role in molding their model of the case. When all of the new data and evidence is concluded, jurors analyze the information in order to answer the questions submitted by the court. Gaps in the evidence and information at the end of the trial are filled by the juror with what they have learned from their own life experiences, i.e., their values, predispositions and biases.

The important role which effective theming can play in overcoming bias is to assist the jurors to adopt your model of the case as their own, leave no gaps in the model and reduce the need for the jurors to revert to bias.

The utilization of one or more themes is an effective method of organizing and presenting the closing argument. Themes should be selected at the initial stages of case preparation. They can then be implemented throughout the trial--including voir dire, the opening statement, the trial of the case itself, and the closing argument. The theme gives the jury a title, a goal and a purpose within a vital framework for deliberations.

Thus, when structuring the summation, plaintiff's counsel should focus on those issues which will have maximum impact on the jury. Time is very precious during the closing argument and should not be spent on superficial or frivolous issues. Counsel can choose either a climax or an anti-climax order for the presentation of strongest points. The climax argument begins with points of lesser impact, then builds and culminates with those of maximum impact. The anti-climax argument is obviously just reversed. Counsel, however, should NEVER allow issues of main impact to be diluted by blanketing them in the middle of the argument.

1. Developing Case Specific Themes

If your client is catastrophically injured, such as paralytic, brain damaged or otherwise severely impaired, one means of effectively developing a theme is to spend the day with your client. It is your job as counsel for the injured plaintiff to convey to the jury a clear understanding of the physical pain and suffering, mental anguish, physical disability and other elements of damage which your client has suffered in the past and will suffer in the future. In order to accomplish this, counsel must acquire empathy with the client on these issues. We cannot effectively and persuasively convey to the jury that which we do not fully understand.

A second technique of client involvement is to have the client write their own thoughts with respect to the physical pain and suffering, mental anguish, physical disability and impairment to earning capacity which they are experiencing. In addition to gaining a valuable basis for proof and argument of damages, you may gain a considerable insight into your client's reasoning process and level of suffering and endurance.

Finally, conduct an in-depth general damages interview with your client, preferably with a medically trained person present. Ideally, we conduct these interviews on videotape with the video equipment being set up as unobtrusively as possible. By encouraging your clients to talk, as soon after the accident as possible, about the physical pain and suffering and mental anguish

which they are experiencing, you acquire a new understanding of the depth and scope of their problems which will help you in developing, understanding and conveying your theme regarding damages to the jury.

2. Adapting Standard Themes

There are numerous standard themes which have been developed over the past few decades of litigation. There is no need to reinvent the wheel when we can stand on the shoulders of giants such as Harry Philo, Bill Colson and Scott Baldwin the people who have developed and successfully used these standard themes for decades. The standard themes include, for example, corporate greed vs. consumer safety, child safety, product safety, workplace safety or whatever category your client fits into in the case. The corporate greed theme is that:

> A corporation has no heart, it has no soul, it has no nerve center, it has only bank accounts. Corporations exists solely to produce profits and converse only in the language of accounting. But this corporation must receive the message that the citizens of Texas will not tolerate corporate greed over consumer safety. As jurors in this case, you have the opportunity to send that crucial message to the corporation in this case.

That is a standard theme which can easily be assimilated to fit your case. Standard themes are located in several books that have been written on the subject of summation.

1. Case Themes - The importance of case themes is so vital that every case should have a case theme. It may be a simple theme in a rear-end collision case revolving around damages and the value of human life. In a malpractice case you may use a series of impact words and phrases that describe why the plaintiff ought to win and the defendant ought to lose. A case theme which explains both the plaintiff's position and reverses the defendant's theme is the perfect case theme. The case theme should be short and perhaps use alliteration or other literary techniques to make it more memorable.

Here are some examples of case themes. In a rear-end collision a young man was struck so hard that his head broke the rear window of the truck and he sustained brain damage. The case occurred because a laundry truck driver was changing lanes quickly in heavy traffic and did not see the plaintiff bring his vehicle to a stop in front of him. The theme for that case was "an erratic lane change led to a catastrophic life change." That theme obviously said everything about the case. It said it was a serious case and that the injuries had substantial effect on the plaintiff's life. It states that the injuries occurred because the defendant was negligent in changing lanes. In an oil refinery explosion, the defendant contractor had installed 120 valves backwards and had valves which allowed volatile hydrocarbons to bleed into the atmosphere. In that case, the theme was, "Ladies and Gentlemen, they contracted to build an extension to the oil refinery, instead they built a bomb!" Throughout the case that plant became a bomb in the jury's eyes. Ultimately the reinsurance company, who sent someone over from London to observe the trial, decided they had enough of hearing about the bomb. They settled for substantial money on the third day of trial.

In an anesthesiology medical negligence case a child became anoxic due to a laryngospasm

(a spasm of the larynx blocking off breathing). Instead of acting rationally and giving the drug Anectine to reverse the spasm, the anesthesiologist tried to force a laryngoscope (a tool used to insert a breathing tube) into the child's mouth. When he could not force it in, he flung it across the room. The theme in that case was, "A professional panicked. Professionals must not panic." This theme like the others said all there is to say about the case. It showed why the plaintiff ought to win and the defendant ought to lose. He panicked and he should not have.

These are just some ideas of what we mean by a case theme. You have to design your case theme with each individual case and each individual set of facts. With a little experience we find ourselves thinking of each case as "this is the case of (blank)". Eventually we learn to develop great case themes and our presentation will become more effective. The case theme is repetitive. The key words are used in voir dire, driven home in opening statement, logically supported by evidence from witnesses, documents and demonstrative evidence, and driven home forcefully in closing argument. By repeating a case theme, we tie the case together in the jury's mind. We will now consider a technique which will encourage the jury to adopt your case theme.

3. Thematic Anchoring - Anchor the case theme so that the message contained is remembered and used. *See infra at C2 (b).*

a. Thematic Anchoring

(1) Anchoring Through Repetition

Anchoring is a well accepted psychological technique. Anchoring is a technique whereby a word, a phrase or a theme is repeated. It is repeated from the same spot, with the same gestures, with the same facial expressions, the same tone of voice, and with the same mannerisms. One use for anchoring that everyone can remember was done by the late great Jack Benny, who had a certain way of folding his arms, putting his hand under his chin, and saying the word, "Well...." Pretty soon he was getting laughs without saying the word and then he did not even need to put his hand under his chin. He just used part of the gimmick and the anchor worked. Anchoring causes an association of the subject matter anchored with an emotional response that is initiated by the repeated use of the anchoring technique. In essence, it communicates our theme impactfully on an emotional level. Because of the pipeline, the theme is easily recalled and therefore is more likely used. The key is that information which is anchored will be likely remembered and used. The most important information you want a jury to remember and use is your case theme. It explains why your client should prevail.

The techniques that we have described here are excellent communication techniques. They are well documented in the social science literature. They can be used very effectively at trial, in personal relationships, in negotiations, and many other areas of life. They are techniques which have been scientifically studied. They are tools available to trial lawyers whose job it is to communicate effectively.

While understanding and using these techniques is no guarantee of success, they give the advocate who knows and understands them a persuasive edge. And in this age of high powered litigation in both large and small cases, any edge that an advocate can achieve is one he or she should have. It is our job to present our client's case in the best light. We can achieve this most effectively by increasing our understanding of how to communicate simply with jurors on all of

the levels through which they receive information.

Anchoring is a technique of establishing a pattern of behavior to communicate with the listener's unconscious mind. It is an organized means of verbally communicating with a conscious mind while non-verbally communicating with the unconscious mind. Anchoring is used during voir dire examination to introduce the case theme followed by repetition and the use of a more precise statement supporting the case theme during opening statement. At some point in the beginning of the summation again anchor the case theme. That is, return to the language which sets out the case theme, say it in the same manner with the same gestures and from exactly the same position in the courtroom utilizing the same graphics and impact words and phrases which are the heart of the case theme. For example, when trying a case in which the theme is that defendant placed "corporate profit ahead of child safety", this impact phrase should be anchored in several ways: 1) verbally by repeating precisely the same words; 2) vocally by using the same tone of voice; 3) non-verbally by using the same gestures and movements each time the phrase is delivered; 4) physically by standing in exactly the same location in the courtroom when discussing that theme and at no other time; and 5) visually by referring to precisely the same piece of demonstrative evidence while delivering the phrase. Anchors ideally are used throughout every phase of the trial. In order to establish and maintain their effectiveness, they must be used consistently and precisely.

Anchors may be used effectively by plaintiff's attorneys and prosecutors in conjunction with the primacy concept. However, they may also be used effectively by defense attorneys, both in civil and criminal cases. The goal of plaintiff's counsel is to anchor a case theme through a highly emotional state while the goal of defense counsel is to anchor the defendant's theme through use of a logical, objective, factual state.

Anchoring is a technique that could be most closely likened to classical conditioning when an identified stimulus will elicit a particular response, e.g., Pavlov's Dog. Anchoring frequently occurs in the courtroom by attorneys who are using the device unconsciously.

(2) Anchoring Technique

For example, when an attorney punctuates the air with his eyeglasses in order to make a particular point, it is a form of anchoring. However, if the same attorney punctuates the air with his glasses on a different issue, the anchoring process is lost. To be effective, anchoring must be consistent, repetitious and use identical methods for eliciting a particular response pattern.

(3) Collapsing an Anchor

It is also important for the skilled advocate to understand how to collapse an anchor. If you see your opposing counsel successfully anchoring his or her message or case theme in the minds of the jurors, you need to identify whether counsel is accomplishing this through verbal message, voice tone, non-verbal communication, spatial manipulation, use of exhibits or more likely, a combination of these. You can successfully collapse the anchor by standing in the same location, using a different voice tone, different non-verbal communication and a different graphic to talk about exactly the same subject matter. It is just as important to understand how to recognize and collapse anchors as how to create them.

(4) Anchor Recalls Entire Experience

Anchoring is a technique for locking in a particular experience, event, theme or evidentiary points in the minds of jurors for the crucial retention and recall during the deliberative process. The neuropsychological principle underlying anchoring states that any element of an experience, when repeated, replays all elements of the experience. Any associational method which triggers events in the mind, triggers recall of the entire experience surrounding the events.

K. Structuring Power Themes to Cope with Bias

1. Psychological Principle of Structuring

Jurors are influenced by the way the message is structured and delivered. Jurors are constantly trying to make sense out of their environment and/or attempting to resolve inconsistencies. Therefore, it is an important consideration to jurors as to how the information being conveyed by counsel is structured and delivered. Is the theme or message consistent, easily remembered and well delivered? Jurors are more likely to perceive the source as credible when the way in which the message is presented allows jurors to feel both competent and intelligent. If counsel presents data which is too confusing or too multifaceted, jurors will discredit the information rather than discredit their own capability to understand the information. Therefore, the skilled advocate will present information which is simplified which jurors can easily perceive and which make them feel competent in carrying out their duties as jurors. An attorney delivering a complex message does not convey the perception to the jurors that the attorney is intelligent. More likely, jurors will perceive the attorney as less intelligent and incapable of communicating a clear and simple message. Jurors look at the attorney as the source to find out what is wrong with the information presented.

2. Psychological Tools of Structure

Certain principles are now axiomatic in the field of psychology which can be applied with great effectiveness by the skilled trial attorney to a jury trial. These include, among many others, primacy, thematic anchoring, embedded commands, the Zeigarnik effect and the principle of recency.

a. Primacy

Jurors tend to place the greatest emphasis on information which they receive first concerning a person or an occurrence. Combine this with the communication principle that perceptions are organized and structured by jurors within a brief period of time and we learn that impressions, particularly concerning people, are formed based on very scanty information. The bottom line for trial lawyers with respect to the principle of primacy is that the information presented first is most decisive.

The skilled advocate will utilize the principle of primacy repeatedly throughout the trial. For example, the first witness in the morning, the first questions asked of that witness, the first questions asked after a coffee break when a witness is recalled, the first questions asked after the lunch break, the first questions on cross examination and, of course, the important use of primacy during the trilogy of persuasion. The first four minutes of voir direct examination, opening statement and each section of the summation are the most crucial to perception, formation, and persuasion. The demonstrative evidence introduced during the earliest moments of testimony of

a witness, during the earliest part of the day and the earliest part of the trial, will be received, retained and recalled better by jurors than other demonstrative evidence.

In crucial debriefing of thousands of jurors, they invariably had a much better recall of the beginning and the ending of trials than of the evidence offered during the middle of the trials. This raises the next issue as to which has the most impact, the beginning or the ending, i.e., primacy or recency. The skilled advocate utilizes both primacy and recency as part of the persuasive process.

One of the important uses of primacy by the plaintiff's attorney is the opportunity to establish the issues in the case and the language which will be used to discuss those issues. Plaintiff's counsel should advise the jury from the inception, on voir dire examination, and opening statement, that the issues to be resolved by them are simple, state what those issues are in very simple, common sense terms, and warn the jurors not to be misled by attempts to confuse and complicate this very simple lawsuit, which will be the tactic of the defense.

Combining the principle of primacy with the communication principle that perceptions are organized and structured within a brief period of time, the Plaintiff's attorney must effectively utilize the first impression stage of the trial which includes voir dire, opening statement and the first witness. These three areas form the basis of the jury's first impression of the case. The goals of the Plaintiff's attorney during this crucial time frame should be to educate as to the issues in the case, disclosures of the weaknesses in the case, inoculation against the defendant's attack and clear simple repetition of plaintiff's themes.

The principles of primacy and recency can be interwoven into the closing argument structure. The principle of primacy maintains that listeners will tend to believe most deeply what they hear first.

b. Neurolinguistic Programming - Pacing

(1) Pacing to Create Similarities

Interactional pacing or neurolinguistic programming is used as a tool of persuasion. The jurors, in order to be comfortable, are looking for similarity. Pacing or neurolinguistic programming is a process where one takes advantage of this search for similarity in the jury's mind by creating similarities not only on the conscious level, but on the unconscious level. If jurors perceive us as similar, particularly on the unconscious level, we greatly increase the chance of jurors "liking us". We know since the Sanito and Arnold's study, that if they like us, we have a better chance of winning the case. This also ties in with the seminal principle: "All communication is based on perception." What we are trying to create is perceived similarity. This perception takes place on the unconscious level and the jurors or opponent are not aware of it. Anything we can do to increase or intensify the feeling of similarity helps.

Pacing can be the most effective technique that a trial lawyer can use. It is something which occurs naturally with people who like each other. It is not fake and not false. But being aware of the technique will help you to focus on the person with whom you are communicating and will help you create a bond or a feeling of liking between you and that person. Pacing jurors can help because whether they like us on the conscious or unconscious level, it is still easier to

influence them if there is "liking" on either level.

(2) Matching and Mismatching

Basically, we are talking about interactional pacing which includes two basic types of pacing, matching and mismatching. In a relationship between you and another person or you and a group of people, you can pace them to create a feeling of similarity and a feeling unconsciously that they like you. Interactional pacing occurs naturally. When a couple is in love and the romance is blooming, the couple matches one another. It is natural and occurs on the unconscious level. In an interactional situation we want to create this. That is, if we want the other party or parties to like us, we match them.

On the other hand, there are some situations where we want to create dissonance. We want the party or parties to feel they do not like someone. For example, in cross-examination, you may want the witness to feel uncomfortable. You may want the witness to be perceived to be squirming and out of step with everybody else. This is done by mismatching and thereby creating dissonance. The jurors, because the witness mismatches the lawyer, may on an unconscious level dislike him and not even know why.

(3) Pacing at all Levels

Interactional pacing takes place on all levels of communication. To pace a witness or a juror or a number of jurors, you must verbally match the juror's language. One listens to their language pattern and uses a similar language pattern. We pick up on their words and use them. We listen for their key phrases and echo them. In essence, we adopt their vernacular.

Besides matching verbal cues, one should match vocal cues. That is, we should attempt to match their rate of speech, their pitch of voice, and even their pauses. This does not mean we mimic their speech pattern, but only match it in one or two aspects.

In addition to matching vocal and verbal cues, one needs to match the nonverbal cues. In doing this we match their gestures, not deliberately or obviously, but comfortably. We also match their facial expressions, their eye movements, their blink rates, and even their breathing patterns. All of these things form part of interactional pacing.

(4) Pacing in the Primary Representational System

Another key method to matching a person through interactional pacing is by matching the primary representational system the person is using at the time. That is, we match the way in which they are processing information. If they are processing visually, we deliberately use phraseology which signals the unconscious mind of the visual person. If they are using the visual channel, we want them to "see it our way." If they are using the auditory channel to process information, we want them to "hear what we have to say." If we have determined that the person we are trying to influence is processing his or her information kinesthetically, then we tell them "how we fell" about the situation and try and match their feelings with both words and gestures.

c. Embedded Commands

An embedded command is a technique for engaging the conscious mind while commu-

nicating to the unconscious mind. The skilled trial attorney will understand how to use the embedded command to identify a specific action message which he wants delivered to the unconscious mind. The unconscious mind is analogous to a computer in that it acts on commands. The commands upon which the unconscious mind acts are those which the conscious mind allow to come through to the unconscious mind requesting specific action. The purpose of the embedded command is to bypass the conscious mind penetrating the logical and rational process and communicate a command directly to the unconscious mind of the juror.

The unconscious mind is not selective in that when a command reaches the unconscious mind it responds impartially. There is no analysis process in the unconscious mind.

(1) Communicate a Command to the Unconscious Mind

The embedded command reaches the unconscious mind and commands the person to perform, think or feel in a particular way.

(2) Preface, Pause, Voice Change and Command

In order to accomplish this, two steps are required, first, there must be a "preface" which causes the conscious mind to drop its guard. Secondly, the embedded command must come after a pause, a voice change and a command beginning with the word "you". The preface is delivered as a casual inquiry such as "I know you are wondering if". The command part of the statement is delivered, after a distinct pause, in a stronger and lower voice tone, as customarily utilized in giving a command. The shifts in voice tone and the pause pattern serve to cue the unconscious mind that the following information is for it. The role of the unconscious mind is to discern nuances and behavioral changes which are the keys to this form of behavioral cuing.

The embedded command to the unconscious mind then follows the pause, such as "I was wondering if ... you can feel the mental anguish involved in being a paraplegic?" This command, if delivered effectively to the unconscious mind, will cause the unconscious mind to perform by feeling the emotions which have been described by various witnesses during the trial that are inherent in being a paraplegic. This is a subtle but highly effective technique which can be used most effectively during summation in order to trigger emotional responses within the subconscious minds of the jurors.

Another type of embedded command deals with the establishment of evidence. This is accomplished using the phraseology, "I knew then what you know now". The use of this particularly effective command works to reconfirm the evidence in the jurors' minds.

d. The Zeigarnik Effect

When applied to litigation, the Zeigarnik effect is the psychological principle that jurors are more impressed with data which they discover for themselves over an extended period of time than with information which is spoon fed to them in bulk. The use of this principle in a personal injury case may be most effective with respect to proof of damages. Plaintiff's counsel may consider that instead of disclosing the full nature and extent of the plaintiff's injuries during voir dire examination and opening statement, it may be more effective to concentrate on proof of liability in the early portion of the trial and unpack the damages proof more slowly. In this manner, the nature and extent of the injury is continually increasing as more evidence is

presented. Let each juror wonder as to the nature and extent of the injuries and they will watch carefully for additional evidence which answers the questions which are properly raised in their mind about "just how badly hurt is this plaintiff?". As the information develops slowly over a longer period of time it will have a greater impact on the jury than if they are told everything in the inception and pay little attention to the details of the injury as they are discussed during the evidence. In some cases the extent of the injury is obvious immediately, however, the Zeigarnik Effect can be used to relate to the jury the effects of the injury on the injured party and on the spouse, children, occupation, recreation, etc.

e. Recency

The psychological principle of recency is to the effect that people remember longest that which they hear last. Thus, recency relates to ease of recall as distinguished from primacy which relates to formation of a belief. Clearly, both primacy and recency have been reflected in jury studies since jurors can recall with specificity the opening and closing portions of trial but have only vague, if any, recall of the events that occurred in the middle of the trial.

The skilled attorney will utilize the principle of recency by finishing big at every portion of the trial. In witness examination, whether direct or cross, always finish on a high note. Close every portion of the proof, whether on break for coffee, lunch, or at the end of the day with a significant piece of evidence. Wrap up every portion of the trilogy of persuasion, voir dire, opening statement or summation with a compelling point.

The principle of recency maintains that listeners will tend to remember longest what they *hear last*. It is imperative that closing arguments begin and end on issues of strength. The plaintiff's counsel can effectively use knowledge of primacy and recency to insert specific issues into the argument in the most effective manner.

3. Rhetorical Tools of Structure

A review of the great speeches from Cicero and Demosthenes through Abraham Lincoln, Winston Churchill, John F. Kennedy and Martin Luther King reveals that there are common threads which pervade the great oratorical works. The prevalent thread is the effective utilization of rhetorical devices as a predicate to persuasive oratory. Rhetorical devices are language techniques which are used to arrange words in distinctive and persuasive phrases, sentences and paragraphs in order to forge greater force and fluency. Through the use of rhetorical devices, attorneys can couch themes more clearly and persuasively. There is no technique more useful to lift language from the abyss of lackluster speech to the peaks of eloquence.

The effective closing argument is an art as well as a science. As with all art and science, certain devices, techniques and tools can enhance the finished product. The plaintiff's counsel must be able to use effectively the various rhetorical devices available to activate, stimulate and motivate the jurors. Although many rhetorical devices technically bring argument outside of the record, the facts of a case may be related to history, fiction, personal experience, anecdotes, Bible stories or humor. See *Sheffield v. Lewis*, 287 S.W.2d 531, 539 (Tex. Civ. App. -Texarkana 1956, no writ).

In *Beaumont Traction* the Court said:

> If the conclusion of fact he wishes to bring the jury to by his argument is such as the law makes applicable to the case, and there is any evidence from which such conclusion can be deduced, he may use all the strength of mind and powers of utterance he can command to bring the jury to such conclusion. He may illustrate principles upon which he builds his argument by drawing on history, fiction, personal experience, adjudicated cases, and may even appeal to the logic of the poets....

Beaumont Traction Co. v. Dilworth, 94 S.W. 352, 355 (Tex. Civ. App. 1906, no writ.)

The following is a partial list of rhetorical weapons that have proved effective in the closing argument arsenal.

a. Triad

One of the most frequently used techniques throughout the history of eloquence is the rule of three, sometimes referred to as the triad. As a means of communicating rhythmically, memorably, and persuasively, the rule of three is one of the most valuable tools available to trial lawyers. This is true because the conscious mind is able to best deal with three items in terms of reception, retention and recall.

The idea is to communicate in threes in any unit of language: words, phrases, clauses, sentences, paragraphs, or the development of the entire argument. A rule for advocates is to try to convey three major messages to your jury in such manner that the messages can be remembered. Instead of trying to cover every minor point and persuade on every minor issue, we develop themes which are repeated throughout the trial. You may wish to develop three themes which you will try and convey to the jury or one theme with three messages within the theme. From the viewpoint of trial lawyers the rule of three can be used for everything from effective use of three words through effective persuasion on three themes.

Consider the following well-known examples in which the triad achieves rhythmic eloquence:

> We hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.
>
> ***
>
> We mutually pledge to each other our lives, our fortunes, and our sacred honor. (Thomas Jefferson).
>
> Never in the field of human conflict was so much owed by so many to so few. (Winston Churchill)
>
> With malice toward none, with charity for all; with firmness in the right.
> We cannot dedicate - we cannot consecrate - we cannot hallow this ground.
> And that government of the people, by the people, for the people shall not perish from the earth. (Abraham Lincoln)
>
> Duty - Honor - Country. Those three hallowed words reverently dictate what you

ought to be, what you can be, and what you will be. (Gen. Douglas MacArthur)

The Greek philosopher and mathematician, Pythagoras, referred to three as a perfect number. This was predicated on the ancient Greek belief that the world was ruled by three Gods and the Greeks revered love, laughter and beauty. The ancient Chinese worshiped gentleness, frugality, and humility. In Scandinavian mythology the Mysterious Three sat on three thrones above the rainbow. The Hindu trimurti consists of three Gods: Creator, Preserver and Destroyer. Christians believe in the trinity by which God exists in three persons: Father, Son, and Holy Ghost; Faith, Hope and Charity are the three Christian graces. Three wisemen paid homage to the newborn Jesus and brought three gifts: Gold, Frankincense and Myrrh.

The structure of man has three dimensions: Body, Mind and Spirit. Nature is divided into three: Mineral, Vegetable and Animal. Time has three aspects: Past, Present and Future. Government is divided into three levels: National, State and Local. Within each level of government there are three divisions: Executive, Legislative and Judicial. Psychoanalysts divide the human personality into three functional parts: Id; Ego; and Superego.

As we attempt to compose a summation or a persuasive theme the principles of composition are unity, coherence, and emphasis. Each summation or speech, according to Aristotle, should have a beginning, middle and end which are also termed as introduction, body and conclusion. Greek dramatists originated the concept of three divisions of drama: tragedy, comedy and satire. The three classical principles of dramatic construction are unity of time, unity of place and unity of action.

Thus, the rule of three is a basic tool for those who write prose, poetry, drama, humor, political speeches and persuasive messages. It should also be a powerful tool in the arsenal of the skilled trial attorney. As advocates, we can effectively use the triad during the trilogy of persuasion, the three times that we directly address the jury: voir dire, opening statement and summation.

Forensic psychologists tell us that grouping items in threes makes them easier to remember. The Rule of Three has been used by great orators throughout history to enhance the persuasive power of their oratory. The classic example is the following segment from a radio speech delivered by Prime Minister Winston Churchill to the citizens of England as the Battle of Britain was underway:

> We shall fight them on the beaches,
> we shall fight them in the streets,
> we shall fight them in our homes,
> we shall never, never, never surrender.

The use of the term "we shall fight them" to begin three consecutive sentences is the device of refrain. The phrases "on the beaches", "in the streets", "in our homes" illustrate the use of three word phrases at the end of three sentences. The term "never, never, never" illustrates the use of the Rule of Three in the middle of a sentence.

b. Parallel Structure

Parallel structure is an extremely effective technique for use during either opening statement or summation. It is particularly useful in a catastrophic injury case. As an example of this type of structure, consider the following excerpt from a speech by Senator William Fulbright:

There are two Americas.
One is the America of Lincoln and Adlai Stevenson,
The other is the America of Teddy Roosevelt and General MacArthur.
One is generous and humane,--the other narrowly egotistical;
One is modest and self critical--the other arrogant and self-righteous;
One is sensible--the other romantic.

Applying this technique to a summation can give the following results:
We have seen two Thomas Miller's in this case.
One an energetic and active father--the other a bedridden paralytic.
One a helpful and loving husband--the other a helpless patient.
One a hard working provider--the other a financial burden.
One a healthy happy Thomas Miller before this defendant's tragic mistake;
the other, Thomas Miller for the next forty years.

c. Antithesis

The rhetorical device of antithesis is used to balance contrasted ideas so as to highlight both ideas through the parallel arrangement of key phrases. Antithesis is used in conjunction with parallel structure to effectively counterpoise and contrast the past and the future, life and death, healthy and crippled, words and deeds, one and many, light and dark, mortal and immortal, age and youth, male and female, choice and determination and any number of other counterpoising principles. The effect of combining antithesis and parallel structure can create compelling and memorable summations.

For example, consider that President John F. Kennedy's speeches were replete with antithesis. The classic example of the use of antithesis was contained in John F. Kennedy's inaugural address wherein he entreated the American citizenry with the following challenge:

We observe today not a victory of party, but a celebration of freedom, symbolizing an end as well as a beginning, signifying renewal as well as change.

Let us never negotiate out of fear, but let us never fear to negotiate.

And so my fellow Americans, ask not what your country can do for you, ask what you can do for your country.

If a free society cannot help the many who are poor, it cannot save the few who are rich.

This technique, applied to the death of a child, may be used as follows:
In determining the damages in this case, don't look at the death of this child, but look at the life which never will be.

The technique of antithesis is also extremely useful during summation in order to assist the

jury in assessing the damages for an extended period of time in the future. As Winston Churchill said, "The further backward we look, the farther forward we see."

Assume that you represent a twelve year old quadriplegic who has a sixty-four year life expectancy. One technique for making the jury appreciate how long sixty-four years of future mental anguish will be is to ask them to look back sixty-four years. The technique is to enumerate well known events which occurred from 1927 chronologically through 1991 such as Babe Ruth hitting 60 home runs, the stock market crash, the depression, Pearl Harbor, World War II, Korea, the Kennedy Camelot years, Watergate, etc. up to the present. See, for example, the use of this technique in an actual summation on page 81.

In order to make the jury understand the mental anguish which is to be suffered by this child for the next sixty-four years, as you catalog each of the occurrences from history since 1927 you use the refrain that

> If this accident had occurred 64 years ago this plaintiff would have witnessed this significant event of 1929 from his wheelchair as he endured mental anguish everyday of his life.

Another effective technique to demonstrate future economic cost is to compare the cost of a Ford automobile, a gallon of gasoline, a loaf of bread and other items from a Sears Roebuck catalog from those years in order to demonstrate the extreme increase in prices which the plaintiff will be required to cope with over the next sixty-four years.

d. Repetition

Aristotle's third principle: Refresh the memory of your audience frequently.

(1) Repetition At The Beginning

Eloquent and rhythmic effects can be achieved by repeating a word or phrase at the beginning of consecutive clauses or sentences in order to form a rhythmic pattern which will capture the juror's attention, stir their emotions, and persuasively deliver the message. Consider the following phrases of Martin Luther King in his Lincoln Memorial speech in 1963 wherein he uses the repetitive phrase "one hundred years later" in referring back to the signing of the Emancipation Proclamation:

> But one hundred years later, we must face the tragic fact that the Negro is still not free.
>
> One hundred years later, the life of a Negro is still sadly crippled by the manacles of segregation and the chains of discrimination.
>
> One hundred years later, the Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity.
>
> One hundred years later the Negro is still languishing in the corners of American society and finds himself in exile in his own land.

This repetition at the beginning of the sentence creates a refrain.

(2) Refrain

A review of Martin Luther King's "I Have A Dream" speech shows the brilliant use of refrain as he moves from the repetition of "one hundred years later" to repeating "I have a dream" which sequels into the refrain of "let freedom ring" which culminates in the climax of "free at last! free at last! thank God Almighty, we are free at last!"

Applying the triad/refrain technique to a summation may be illustrated as follows:
They gambled with our public safety.
They gambled with our judicial system.
They gambled with young David's life.
We know that David lost their gamble.
We know that his parents lost their gamble.
We know that they must never, never, never be allowed to win their treacherous gamble.

Abraham Lincoln, in the Gettysburg Address, utilized the Rule of Three "of the people, by the people and for the people" as well as refrain "We shall not desecrate, we shall not consecrate, we shall not hallow this ground."

(3) Echo Effect

The echo effect of repetition is achieved through the repetition at the beginning of successive sentences of one word or phrase which repeats the speaker's theme. This may be a declarative statement such as the "I have a dream" which was used eight times consecutively by Martin Luther King or it may be in the form of a rhetorical question which reminds the jurors of their power, such as "what is this child's life worth in our community?"

Politicians have understood the effectiveness of refrain in the echo effect by repeating phrases at the beginning of sentences for centuries. Consider the following example of repetition by Franklin D. Roosevelt:

> Whoever seeks to set one nationality against another, seeks to degrade all nationalities. Whoever seeks to set one race against another, seeks to enslave all races. Whoever seeks to set one religion against another, seeks to destroy all religion.

(4) Augmentative Repetition

Daniel Webster coined the phrase "augmentative repetition" in order to identify and encourage the use of either the same word or a form of the same word for cumulative effect in conveying a message.

It has been the practice of English teachers to encourage the use of synonyms rather than repeating the same word. In fact, the standard rule in English has been promulgated to "never use the same word in a sentence - or within twenty lines". H.W. Fowler in Modern English Usage refers to this as a fatal influence. Consider the use of augmentative repetition by John F.

Kennedy: "We will neglect our cities to our peril for in neglecting them we neglect the nation."

As was so often true with respect to the effective use of rhetorical devices it was accomplished brilliantly by Winston Churchill in his first speech as Prime Minister before Parliament in 1940. Note the use of sequel from war to victory to survival:

> You ask, what is our policy? I say it is to wage war by land, sea and air. War with all our might and with all the strength God has given us, and to wage war against a monstrous tyranny never surpassed in the dark and lamentable catalog of human crime. That is our policy.
> You ask, what is our aim? I can answer in one word. Victory. Victory at all cost, victory in spite of all terrors, victory, however long and hard the road may be, for without victory there is no survival. Let that be realized. No survival for the British Empire, no survival for all that the British Empire has stood for, no survival for the urge, the impulse of the ages, that mankind shall move forward towards its goal.

Napoleon, who was a great orator as well as a military genius, said "In speech making you need only one technique, and that is repetition, repetition and repetition".

(5) Repetition of the Central Theme

In addition to the repetition of a word or phrase, the most effective means for conveying a message to the jury is through the repetition of a central theme throughout the case. After voir dire is complete, your theme should be clear to the jury. Certainly by the time you've completed opening statement, your theme should be crystal clear to the jury. Repeat the theme effectively by approaching the same basic theme from several different positions in your proof. By the time the evidence is complete, summation should simply be a review of what each juror has heard and seen several times during the course of the trial. Every member of the jury should know precisely what your theme is before you rise for summation.

e. Thematic Reversal

In keeping with Aristotle's first principle of persuasion, i.e., to well dispose your audience to you and ill dispose them to your enemy, we use careful theme development in order to simply, forcefully and persuasively well dispose the jury to our case. However, the second half of the rule is equally important, i.e. to ill dispose them to your enemy. One of the most effective methods for accomplishing this is through the use of thematic reversal. This is accomplished by reviewing very carefully your opponent's theme and in addition to simple rebuttal of their theme, reverse it and use their own theme against them. One of the most eloquent example of thematic reversal emerges from the colloquy between Brutus and Mark Antony in Shakespeare's Julius Caesar.

Brutus, in his summation before the people of Rome immediately following Caesar's death, brilliantly stated the theme of the slayers that Caesar had to be slain for the good of Rome because he was ambitious. Mark Antony rebutting Brutus without either criticizing or directly disputing him accomplishes this in a brilliant display of thematic reversal by examining carefully the slayers theme that Caesar was ambitious. While constantly praising the slayers as "honorable men" and without directly attacking their motives or their actions, Mark Antony reverses the

theme of ambition, demonstrating Caesar's lack of ambition, while speaking in positive terms about Caesar's slayers throughout the summation. As Mark Antony reverses the theme, he reverses the minds of his jurors also. In analyzing the comparative speeches of Brutus and Mark Antony, consider Shakespeare's use of the rhetorical devices which we are discussing herein. There is a reason why we are still watching, reading and enjoying his plays four hundred years after they were written. Consider the following "Summations":

> Brutus: Be patient till the last.
> Romans, countrymen, and lovers! Hear me for my cause, and be silent, that you may hear. Believe me for mine honor, and have respect to mine honor, that you may believe. Censure me in your wisdom, and awake your senses, that you may the better judge. If there be any in this assembly, any dear friend of Caesar's, to him I say that Brutus' love to Caesar was no less than his. If then that friend demand why Brutus rose against Caesar, this is my answer: Not that I loved Caesar less, but that I loved Rome more. Had you rather Caesar were living and die all slaves, than that Caesar were dead to live all freemen? As Caesar loved me, I weep for him; as he was fortunate, I rejoice at it; as he was valiant, I honor him; but as he was ambitious, I slew him. There is tears for his love, joy for his fortune, honor for his valor, and death for his ambition. Who is here so base that would be a bondman? If any, speak, for him have I offended. Who is here so rude that would not be a Roman? If any, speak, for him have I offended. Who is here so vile that will not love his country? If any, speak, for him have I offended. I pause for a reply.
>
> All: None, Brutus, none.
>
> Brutus: Then none have I offended. I have done no more to Caesar than you shall do to Brutus. The question of his death is enrolled in the Capitol, his glory not extenuated, wherein he was worthy, nor his offenses enforced, for which he suffered death.

* * *

> Brutus: Good countrymen, let me depart alone, And for my sake, stay here with Antony. Do grace to Caesar's course, and grace his speech tending to Caesar's glories, which Mark Antony, by our permission, is allowed to make. I do entreat you, not a man depart, save I alone, till Antony have spoke.

* * *

> Antony: Friends, Romans, countrymen, lend me your ears! I come to bury Caesar, not to praise him. The evil that men do lives after them, the good is oft interred with their bones; so let it be with Caesar. The noble Brutus hath told you Caesar was ambitious; if it were so, it was a grievous fault, and grievously hath Caesar answered it. Here, under leave of Brutus and the rest--for Brutus is an honorable man; so are they all, all honorable men--come I to speak in Caesar's funeral. He was my friend, faithful and just to me; but Brutus says he was ambitious, and Brutus is an honorable man. He hath brought many captives home to Rome, whose ransoms did the general coffers fill. Did this in Caesar seem ambitious? When that the poor have cried, Caesar hath wept; ambition should be made of sterner stuff: yet Brutus says he was ambitious, and Brutus is an honorable man. You all did see that on the Lupercal I thrice presented him a kingly crown, which he did thrice refuse. Was this ambition? Yet Brutus says he was ambitious, and sure he is an honorable man. I speak not to disprove what Brutus spoke, but here I am to speak what I do know.

You all did love him once, not without cause; what cause withholds you then to mourn for him? O judgement, thou art fled to brutish beasts, and men have lost their reason. Bear with me; my heart is in the coffin there with Caesar, and I must pause till it come back to me.

First Citizen: Methinks there is much reason in his sayings.

Second Citizen: If thou consider rightly of the matter, Caesar has had great wrong.

* * *

Fourth Citizen: Marked ye his words? He would not take the crown; therefore 'tis certain he was not ambitious.

* * *

Antony: But yesterday the word of Caesar might have stood against the world. Now lies he there, and none so poor to do him reverence. O masters! If I were disposed to stir your hearts and minds to mutiny and rage, I should do Brutus wrong and Cassius wrong, who, you all know, are honorable men. I will not do them wrong; I rather choose to wrong the dead, to wrong myself and you, than I will wrong such honorable men. But here's a parchment with the seal of Caesar; I found it in his closet, 'tis his will. Let but the commons hear this testament--which, pardon me, I do not mean to read--and they would go and kiss dead Caesar's wounds and dip their napkins in his sacred blood, yea, beg a hair of him for memory, and, dying, mention it within their wills, bequeathing it as a rich legacy unto their issue.

* * *

Antony: Good friends, sweet friends, let me not stir you up to such a sudden flood of mutiny. They that have done this deed are honorable. What private griefs they have, alas, I know not, that made them do it. They are wise and honorable, and will, no doubt, with reasons answer you. I come not, friends, to steal away your hearts. I am no orator, as Brutus is; but, as you know me all, a plain blunt man, that love my friend, and that they know full well that gave me public leave to speak of him. For I have neither wit, nor words, nor worth, action, nor utterance, nor the power of speech, to stir men's blood. I only speak right on; I tell you that which you yourselves do know; show you sweet Caesar's wounds, poor poor, dumb mouths, and bid them speak for me. But were I Brutus, and Brutus Antony, there were an Antony would ruffle up your spirits and put a tongue in every wound of Caesar that should move the stones of Rome to rise and mutiny.

* * *

Antony: Now let it work. Mischief, thou art afoot, take thou what course thou wilt.

f. Rhetorical Question

A rhetorical question is that device which a speaker can use to prompt the listener to ponder the answer of a question where both speaker and listener realize an answer is not expected. Rhetorical questions are frequently used in summation to empower jurors by having them answer a question in their own minds which makes them better understand that they have the power to resolve the issue raised in the question. For example, one of the most effective uses of the rhetorical question in a summation was the following wherein three rhetorical questions were used to close the plaintiff's rebuttal portion of the summation:

> Who will render full justice for this brave young man with a courageous heart beating in his useless body? If not you, who? If not now, when?

Rhetorical questions can be as simple as "what is this child's life worth in our community?", followed by the reminder that "this is your determination."

William Shakespeare, the absolute master of rhetoric, made a complete argument and conveyed a distinctive threat by asking six rhetorical questions designed to make the point that Jews and Christians are no different as human beings. In Shylock's speech from the Merchant of Venice, Shylock asked rhetorically:

> Hath not a Jew eyes?
> Hath not a Jew hands, organs, dimensions, senses, affections, passions?
> If you prick us, do we not bleed, if you tickle us, do we not laugh?
> If you poison us, do we not die?
> And if you wrong us, shall we not revenge?

Shakespeare, in conjunction with the use of six rhetorical questions, also demonstrates the effective use of short, powerful words. Of the 48 words in this message, 40 (83%) are one syllable.

g. Alliteration

The rhetorical device of alliteration is used to establish the flow and rhythm of your summation. It can be effectively combined with refrain, the Rule of Three and repetition in order to obtain an effective flow. Consider for example the following sentence:

> We would witness this fine family emerge from the depths of despair into the heights of happiness.

h. Understatement

Another verbal technique which is used in summation which is similar in nature to the rhetorical question technique is the application of understatements. The principle of understatement simply means that it is far better, in terms of impact of testimony, that the obvious not be belabored. A piece of dramatic evidence of disability or injury should speak for itself. Do not harp on that evidence or belabor it because it surely will lose its impact.

A few years ago two young and inexperienced lawyers began trying a quadriplegic case. The client was brought into the courtroom and remained on her stretcher during voir dire and opening statement. Her counsel, discussing the case with an experienced trial lawyer later that day said that he anticipated a big verdict because the jury would be overwhelmed by the sight of this quadriplegic client. The experienced lawyer correctly predicted that there would be a verdict for the defendants. Ten days later, the jury wasted little time in returning a defense verdict. The young lawyer went back to the more experienced lawyers and asked how he knew it would be a defense verdict. The explanation was simple. The inexperienced trial counsel had failed to apply the technique of understatement to the case. The most dramatic piece of evidence was the quadriplegic client. They were hoping that the severity of the injury would overcome the

liability problems of the case. Sometimes it does, but by overexposing the jury to the horrors of the plaintiff's injury day after day, the jury became accustomed to the sight rather than being persuaded by the horror. A more successful approach could have been understating the evidence. Viewing the quadriplegic plaintiff briefly, combined with a viewing of a day-in-the-life film, will cause the jurors to retain the shock of seeing your client.

Properly applied understatement lets the jury use its imagination, and often the horrors that can be unleashed by the imagination are worse than what the actual evidence could show. This is illustrated by the emergence of modern television, which allows the graphic depiction of violence. The horror movies today do not have nearly the impact of the horror movies of twenty or thirty years ago. What we imagine in our minds is far more horrible and devastating than reality. The most significant example of this is Orson Welles' 1938 radio show about an invasion from Mars, which caused the imaginations of millions of Americans to run wild while the whole nation panicked.

Another startling example of the application of understatement in summation can be illustrated by the effective application of that principle by the late Moe Levine of New York. He was trying a case for a man who had lost both arms. The defendants, the judge, and everyone connected with the case expected a long summation from Mr. Levine about a life with no arms. In fact, his summation was short, simple, and to the point. It was a masterpiece of understatement and resulted in one of the largest verdicts in the history of the State of New York at the time it was given. That brief summation, as paraphrased by Moe Levine himself, is:

> Your Honor, eminent counsel for defense, ladies and gentlemen of the jury: as you know, about an hour ago we broke for lunch. And I saw the bailiff came and took you all as a group to have lunch in the juryroom. And then I saw the defense attorney, Mr. Horowitz and his client decided to go to lunch together. And the judge and the court clerk went to lunch. So, I turned to my client, Harold, and said why don't you and I go to lunch together, and we went across the street to that little restaurant and had lunch. [Significant pause.]
>
> Ladies and gentlemen, I just had lunch with my client. He has no arms. He eats like a dog! Thank you very much.

Sweet, short, simple and to the point. It described the horrible injuries in that admitted liability case and emphasized them far greater by the application of understatement than if Mr. Levine had engaged in a long dialogue about what it is like to have no arms. A point can always be made more effectively and with greater impact when the principle of understatement is applied.

i. Grammatical Inversion

Many of the more persuasive speakers, particularly in our political history, have understood the effective use of grammatical inversion, i.e., displaying words more prominently by inverting the normal quarter of a sentence. In Lincoln's Second Inaugural, instead of the standard we fondly hope and fervently pray, Lincoln inverted the grammar so as to place more emphasis on the adverbs: "fondly do we hope, fervently do we pray." We should not only be

careful in our selection of the precisely proper and powerful word to use but also discerning in the manner in which we structure the sentences and emphasize the key words.

j. Rhythm

The distinguishing characteristic between an ordinary summation and an eloquent, persuasive summation is that the eloquent speech is replete with rhythm. Rhythm in speech refers to the flow or movement of the language through patterns. The patterns that are used to create the rhythm in speech are rhetorical devices.

From the cradle to the grave, humans respond to rhythm. The rhythm of our breathing, pulse and heartbeat instill patterns into our most essential existence. The psychological effect of rhythm on humans has been understood for centuries as warriors, both ancient and modern, have used the rhythmic beat of the drum to excite the troops and imbue them with the spirit of battle. Rhythmic speech can be used just as effectively as rhythmic music to move an audience emotionally and to capture and hold their attention. We have all sat through the seemingly endless classes of professors who spoke in a monotone, i.e., without rhythm to their speech. Compare the pacing, rhythm and delivery of John F. Kennedy, Martin Luther King or a multitude of other great speakers who understood and brilliantly practiced the art of eloquent speech. Examine closely their speech materials, such as Martin Luther King's "I Have A Dream" speech or John Kennedy's "Inaugural Address" and you will see that the starting point of eloquent speech delivery is the material with which the great speakers worked. These two great speeches are included in the appendix to this paper. After reading the section on rhetorical devices, review carefully these two outstanding speeches and notice the manner in which the devices are used brilliantly in order to create a rhythmic speech.

4. Verbal Tools of Structure

In structuring a persuasive presentation of any type, the skilled advocate will do well to study carefully the master orators and persuaders from the past: Pericles, Cicero, Demosthenes and from the present: John F. Kennedy, Martin Luther King, Teddy Roosevelt and the master of them all, Winston Churchill.

For American lawyers, studying Churchill's effectiveness as a speaker, brings us full circle to Churchill's early training as an orator. Churchill acknowledges that his role model as an orator was a New York attorney and congressman, Bourke Cockran, whom he met when he visited New York in 1895. Churchill states that "it was an American statesman who inspired me and taught me how to use every note of the human voice like an organ. He was my model. I learned from him how to hold thousands enthrall".

One of the most important lesson which Cockran taught to Churchill is equally important as a lesson for all attorneys today. Cockran stated "Only a speaker who is sincere can be eloquent, because sincerity is the name of eloquence. What people really want to hear is the truth - it is the exciting thing. Speak the truth."

The preparation technique which Cockran explained to Churchill is equally applicable to advocates today, i.e., to study in great detail everything he could learn about his subject; to carefully store and order in his mind the materials; to simplify the most difficult issues with carefully selected examples and illustrations; to concentrate on the strongest points, and in

delivery, to build the material up to an irrefutable conclusion. After a career during which he received innumerable distinctions, Winston Churchill, the only person ever to receive a Nobel Prize with a citation for oratory, was kind enough to list the seven rules that he had followed in order to achieve his level of almost unparalleled eloquence. These rules are certainly useful for those of us who seek to achieve our most persuasive level before juries. Churchill's rules include the following:

1) Know, respect and love the English language.
2) See and hear eloquent speakers in action and study the text of their speeches.
3) Endure your handicaps if they can't be cured and turn them to your advantage.
4) Read good books to broaden your mind and stimulate your thinking, since much of eloquent speaking depends on both knowledge and thought.
5) Be sincere and use rhetorical devices to help your audiences understand and remember what you say, and to stir their emotions.
6) Put forth your best efforts to prepare your speeches and seize every possible opportunity to practice them.
7) Let your feelings or personality show in your speeches.

Remember that the goals which we seek to achieve in structuring our messages include simple communication which aid jurors to understand, empathize, retain and act upon the information which we convey to them.

a. Power Word Choices

Words are the tools of the trade of the trial lawyer. Just as the plumber must choose precisely the right sized wrench, the trial attorney must choose precisely the right word from many with similar meanings. We are well advised to remember the advice of Mark Twain:

> Use the right word, not its second cousin. The difference between the almost-right word and the right word is really a large matter - it's the difference between the lightning bug and lightning. A powerful agent is the right word.

The great orators in our history have unanimously extolled the virtues of precise word selection. Franklin D. Roosevelt, in his famous radio address announcing Japan's sneak attack on Pearl Harbor, originally wrote the opening line: "December 7, 1941, a day that will live in world history." Upon reflection, he changed the broad term "world history" to the more precise word, "infamy", which connotes not only the historical event but the contemptuous attitude which the American public held towards the Japanese sneak attack.

> Words are the most powerful drug used by mankind. Not only do words infect, egotize, narcotize and paralyze, but they enter into and color the minutest cells of the brain" according to master wordsmith, Rudyard Kipling.

In order to maximize the effectiveness of the presentation to the jury, the skilled advocate must carefully consider the selection of the language of the case before each trial. There are impact words which are generic and can be used in every case but the development of catch phrases, or lay synonyms for technical language and medical terminology must be considered. There are several word choices to make, including impact words, catch phrases, logical or emotional words, short, long, old and new words, technical or lay language and significantly, the

specific language of the case. In making these selections the attorney must also consider the particular make-up of the jury to whom the words are being addressed. Another consideration is the comfort level of the attorney in using the words "chosen". It is more persuasive to speak with rhythm and fluidity than to stumble over words with which the speaker is unfamiliar or has difficulty pronouncing. Counsel should also be cognizant of the possible synonymous meanings of a word since twelve jurors will be selecting their own definition and applying their own understanding to a word with numerous synonymous meanings. Remember, clarity is the goal, to convey to the judge and all twelve jurors precisely the message, since, as the German poet Goethe stated "everyone hears only what he understands".

In word selection, consider both denotative meaning and connotative meaning of each power word. The denotative meaning is the precise meaning as defined in the dictionary. The connotative meaning consists of the ramifications which can be associated with the word. For example, "home" denotes the residence where a person lives but connotes far more, the comforts, privacy, warmth and intimacy of a person's "castle". Be specific and concrete in word selection.

The precise selection of words, metaphors, analogies and other rhetorical devices should be assimilated during trial to the specific type of jury before whom you are trying the case. In advance of trial, in establishing the language of the case and the rhetorical devices to be used, create alternatives which fit different types of juries. For example, if you draw a jury, the leadership of which is white collar business, you may choose not to use the same language of the case, metaphors and analogies which you would use if the jury leadership is blue collar, labor union members. Thus, it is necessary to review your word selections, analogies, metaphors and other rhetorical devices after voir dire examination and after you have learned as much as possible about the members of your jury so as to utilize language which will be most readily accepted, understood, retained and recalled by these particular jurors.

We use focus groups to establish the language of the case and to test arguments and rhetorical devices. While the use of focus groups in litigation is a recent innovation, the same concept has been in use by great advocates and orators for centuries. Consider the test which Abraham Lincoln used in his selection of language:

> I was not satisfied until I had put it in language plain enough, as I thought, for any boy I knew to comprehend. This was a kind of passion with me, and it has stuck by me; for I am never easy now, when I am handling a thought, until I have bounded it north and bounded it south, and bounded it east and bounded it west.

As advocates, we should replace Lincoln's "Any Boy I Know" test with choice of language of the case designed to persuade our particular jurors in each individual case, taking into account all that we know about each of the jurors which we have learned on voir dire examination and through careful observation of their non verbal communication in and out of the courtroom, throughout the trial.

In careful word selection we must distinguish between general versus specific; abstract versus concrete; short versus long; emotive versus logical; technical versus lay; old versus new; familiar versus jargon; and give additional thought to such matters as to whether to use slang or

vernacular.

(1) Abstract vs. Concrete

In word selection, we have to choose specific words as well as specific terms. A word choice may be the difference between an "accident" or a "crash". Careful consideration of phrases leads a plaintiff's lawyer to totally avoid the use of "medical malpractice case".

In the choice of words with impact, a good starting point is to consider concrete words rather than abstract terms. Concrete words are those which refer to the use of our five senses, i.e., what we see, hear, touch, taste and smell, for example: scarring, screams, singeing, acrid or pungent. Abstract words create no tangible image and include such vague terms as justice, equity, liberty, and democracy. The problem with the attorney's use of abstract words is that if you ask twelve jurors to give a definition of justice, you would get twelve completely different answers because each juror would interpret justice in terms of their own background, experience, education, ethnicity and intelligence.

Therefore, concrete words are more persuasive by their nature than abstract terms, particularly in group persuasion, and should be carefully selected by counsel to convey the proper concrete message.

(a) Simulative Concrete Words

The most effective use of concrete words is to use those which simulate the action generally rely upon the opening consonants to compel the lips to move forcefully to suggest the sounds. Examples for use by attorneys include crash, crunch, crush, blast, blare, flicker, flame, or flare; shimmer, shiver, or shutter; fizzle, sputter, splash, roar, whistle, hush, whoosh or gurgle. These are words that create vivid mental images in the minds of the listener and have the added advantage of being very familiar, simple and easy to recall. Words such as crash, crunch and crush are very specific and lead to very little controversy with respect to their precise meanings.

(b) Deliberative Abstract Terms

Not only should we carefully choose concrete words, but the better part of discretion dictates that we should avoid the use of abstract words. Abstract words such as justice are left brain, contemplative words which lead to philosophical debates and discussions, precisely the opposite of the goal which we as attorneys have in persuading jurors. Our goal is to mold the minds of the jurors into a cohesive mind-set, culminating in complete accord on our side of the issue. Our purpose is not served by using words which stimulate debate. Once again Abraham Lincoln, demonstrating his brilliant understanding of the persuasive techniques that carried him to the White House and into the world's history books, explains the problem with abstract terms:

> We declare for liberty; but in using the same word, we do not all mean the same thing. With some, the word liberty may mean for each man to do as he pleases with himself and the product of his labor, while with others, the same words may mean for some men to do as they please with other men and the product of other men's labor. Hereto, not only different, but incompatible things, called by the same name - liberty. And it follows that each of the things is, by the respective parties, called by

two different and incompatible names - liberty and tyranny.

In choosing the language of the case, choose carefully concrete words which most specifically describe the idea which you are trying to convey and avoid abstract terms which will merely move your jury to unwanted debate and philosophical discussion.

(c) Preloaded Word Selection and Avoidance

As a result of the extensive preload which has been imposed upon jury panel members before they walk into the courtroom through the mass media efforts of the insurance industry, the manufacturers of defective products, chemical companies and the health care professionals, there are numerous impact words which must be avoided by the plaintiff and which should be frequently utilized by the defense in particular types of cases. For example, the term "medical malpractice" will conjure up in the minds of many prospective jurors that, 1) this is the type of case that is driving up my health care costs, 2) this is why doctors are leaving medical practice, 3) this is why the elderly can no longer afford insurance, and 4) most of these cases are frivolous. Obviously a medical negligence defense lawyer should utilize the term as often as possible. However, the plaintiff's attorney must speak in terms of "this is an ordinary negligence case that involves the failure by the doctor to meet the standard of medical care in this community. It is a simple medical negligence case. Nothing more, nothing less." In the automobile collision case, the plaintiff should never use the term accident. An accident connotes an occurrence which was not the fault of anyone. For the plaintiff the event was a high impact collision, a crash that resulted in the crunching of metal on metal and the crushing of the life from the driver.

There are other circumstances where the industry language may be unfortunately misleading and must be avoided. For example, in the entire area of closed head injuries, the language used by psychologists and neurologists to describe the nature and extent of the closed head injury are mild, moderate and severe. A plaintiff's attorney describing to a jury a moderate closed head injury will not "execute the required level of emotion" as Aristotle recommended 2300 years ago. The plaintiff's attorney should advise the neuropsychologist, psychologist or neurologist who is testifying with respect to the injury of the plaintiff to use terms other than mild, moderate or severe and to avoid the use of the term "closed head injury". Instead, more accurately descriptive terms such as permanent, irreversible brain damage go further to describe to the jury the true situation with respect to the plaintiff's plight.

In describing our own work we should give thought to our role as we stand before a jury. Would you prefer to portray yourself as an asbestos lawyer or an environmental lawyer; a product liability lawyer or a product safety lawyer; a criminal defense lawyer or a constitutional rights lawyer. The idea is to identify the adverse words which may be used during the trial and soften those which support perceptions adverse to your position and strengthen those which aid you in explaining your client's position to the jury.

(2) Catch Phrases

A catch phrase is an innocuous term which has been reworded so as to turn it into a thorn in the side of your opponent.

An example of a meaningful catch phrase is found in a case in which a customer in a grocery store bent down to pick up a package of candy off of the bottom shelf of a multi-tiered

candy counter which was complete with shelf extenders with bags of candy attached. As she bent down she impaled her eye on one of the metal shelf extenders which was completed concealed by the cellophane packages. In preparation for trial it was realized that the term shelf extender was an innocuous meaningless term which would not "execute the required level of emotion". During the course of deposing the company employee who loaded the candy onto the display counters, he was asked what the company called the shelf extenders. He replied "we call those profit pegs". Profit pegs became the perfect catch phrase in the trial for the reason that those two words "profit pegs" perfectly embody the theme of the case, which is corporate greed over consumer safety.

The skilled attorney will give careful consideration to locating and utilizing catch phrases. Catch phrases may often be found by searching the literature of the defendant. For example, Clark Equipment Company, the manufacturer of forklifts which have a tendency to tip over and either severely injure or kill the driver when the top of the forklift crushes the skull or various parts of the body, refers to that crushing phenomenon as "the fly swatter effect". This is found in their literature and demonstrates a rather cavalier attitude towards a problem which has rendered a number of their users paraplegic, quadriplegic, severely crippled or dead. Additionally, the fact that they have bothered to create a term for the phenomenon and include it in their literature, demonstrates clearly that they are familiar with the problem but chose to take no action to correct it.

Before each trial, search through the language of the case to determine if there is an innocuous term which you can develop into a thorn in the side of the opposition. Catch phrases are easy to create, easy to remember and easy to argue.

(3) Emotive Words

Emotive words are those words whose interpretation may be clouded by preloads; which invoke attitudes of hostility or which incite feelings which are rooted in such adverse emotions as prejudice or fear. Such words as demagogue, shyster, hick, wetback, dictator or quack have implicit messages which are derived from temperament, prejudice, background or experience of the jurors who hear such words.

Such emotive words are dangerous to use in the courtroom because they barricade the simple communication which we attempting to achieve with jurors. We encounter the additional problem that such words are generally chosen for the purpose of appealing to prejudice and have little to do with factual persuasion. Since we are proscribed to make prejudicial appeals, the avoidance of emotive words is recommended.

(4) Logical vs. Emotional Words

There are right brain emotional impact words and left brain, contemplative, philosophical words to describe the same event. For example, justice versus injustice. Justice is a left brain logical word which invites contemplation and philosophical discussion. It implies no call for action and seeks no remedy for a wrong. However, injustice is a right brain, emotional word which causes offense. It stirs people to action and inspires people to right a wrong.

If Martin Luther King had stood in his pulpit in Atlanta and called for "justice for the

blacks in America", he would probably still be doing it. However, Dr. King chose to go into the streets, be attacked by police dogs, knocked down by fire hoses, placed in handcuffs, thrown in jail and subjected to numerous other indignities, all for the purpose of demonstrating injustice. His demonstration of injustice stirred people to action and has caused many of the wrongs which he confronted to be corrected.

The skilled attorney should give careful thought to whether you choose to make a left brain appeal by utilizing logical words or whether you wish to make a right brain call to action by utilizing emotional words. Obviously, both appeals should be prepared and a combination of logical and emotional words should be part of the language of your case.

(5) Short, Long, Old & New Words

In deciding whether to use short words or long words, once again the best advice comes from Aristotle: "what we need is a mixed diction". Through the careful mixing of short and long words, we gain the advantages of impact provided by the short words and rhythmic flow provided by long words. A review of some of the world's greatest literature indicates that the use of short words, preferably one syllable, is replete in the works of many of the greatest writers. Shakespeare understood the use of rhetorical devices as demonstrated in Shylock's powerful speech in the Merchant of Venice in which fifty-seven of the sixty-six words are one syllable. Page 33, supra.

Abraham Lincoln understood very well the power and effectiveness of one-syllable words. Consider the Gettysburg address, one of the most powerful and beautifully structured speeches in history, in which Lincoln conveys his message in 270 words, 203 of which (75%) are one syllable.
(Address delivered at the dedication of the Cemetery at Gettysburg)

> Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battlefield of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that nation might live. It is altogether fitting and proper that we should do this.

> But, in a larger sense, we can not dedicate--we can not consecrate--we can not hallow--this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us--that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion--that we here highly resolve that these dead shall not have died in vain--that this nation, under God shall have a new birth of freedom--and that government of the people, by the people, for the people, shall not perish from the earth. November 19, 1863

An interesting historical footnote concerning this address is that Abraham Lincoln did not deliver the Gettysburg address. The principal speaker at Gettysburg was Dr. Edward Everett, the President of Harvard College, who spoke for more than two hours while Lincoln delivered his "Remarks by the President of the United States" in 10 sentences, comprised of 270 very carefully selected words.

Winston Churchill recognized the power of short words but also suggested that "old words are best". The reason Churchill was devoted to the use of old words was their value in serving as an effective means of communication. Older words have the ring of familiarity and lead to clarity of understanding.

(6) Bilingual: Technical & Lay

It is necessary for the skilled attorney to be conversant with both the technical language to be used in the case and the layman's translation which the jury will need. However, the attorney must overcome the desire to show off his or her technical knowledge and remember the maxim to "communicate simply" with jurors.

While we often encounter technical language in product liability, toxic tort and many other types of cases, the place where technical language occurs most frequently for the personal injury lawyer is in the medical field. In Marshall Hout's excellent treatise, Lawyers Guide to Medical Proof, he gives two wonderful examples of medical jargon at its worst:

> In a wrongful death case the plaintiff's lawyer had to call the doctor who signed the death certificate. After the preliminaries, the exchange on the substantive question of death went:

Q. Now, Doctor, can you, in popular language, tell us what the cause of this man's death was?

A. (Uncertain) You mean, I presume, the causa mortis?

Q. (Pleading) Well, Sir, it was my hope that you could put it in common down-to-earth, everyday, lay language that we could all understand. Can you please tell us what caused this man to die?

A. (Supercilious and condescending) Well, it will be difficult but, I can try. The cause of death was cerebral edema, caused by thrombosis, or perhaps embolism, secondary to generalized arteriosclerotic brain disease moderate to severe, secondary to a subphrenic

abscess, following a cholecystectomy.

A JUROR:

Well, I will be damned!

THE COURT:

Sir, I will not tolerate the use of such language in my courtroom and must caution you against any further outburst. Normally, I would find you in contempt and levy a fine. However, since you have done nothing more than give audible expression to a thought which wells up in the court's own mind, I cannot find it in my heart to punish you.

While this was an actual example from a trial, the poet, as is so often true, captures the essence of the problem in the following doggerel:

With an erudite profundity

And subtle cogitabundity,

The medical expert testifies in Court;

Explains with ponderosity

And keen profound verbosity,

The intricate nature of the plaintiff's tort.

Discoursing on pathology,

Anatomy, biology,

Opines with patient's orbit suffered thus:

Contusions of integuments

With ecchymosed embellishments,

And bloody extravasation forming pus.

A state of tumerosity

Producing lacrimosity,

Abrasion of the cuticle severe;
All diagnosed externally,

Although, he feared internally

Sclerotic inflammation might appear.

The jury sits confused, amazed,

By all this pleonasm dazed,

Unable to conceive a single word;

All awed, they think with bated breaths

The plaintiff dies a thousand deaths.

What agony, what pain he has endured!

Said then the counsel for defense,

Devoid of garrulous eloquence,

Would I be correctly quoting you

To say his eye was black and blue?

To this, the doctor meekly answered,

"Yes".

(7) Use of Jargon

In litigation we encounter the necessity to explain to jurors the nuances of numerous professions, occupations, product designs, medical procedures and innumerable other areas in which jargon has been developed by members of the group to communicate with each other. As a general proposition, it is best to avoid the jargon of a particular field in communicating with a jury simply because such jargon requires additional explanations. It is more efficient in terms of communication to identify lay terms which are synonymous with the jargon and use those lay terms in communicating with the jury.

(8) Slang

As a general proposition it is better to avoid slang in courtroom communications. Some slang is offensive, has double entendre meanings and creates images which may not be consistent with the goals of the speaker. It is generally better to use simple language which will more clearly convey to your listeners precisely your message without running the risk of offending your listeners.

(9) Vernacular or Colloquialism

Using the vernacular which is peculiar to a region may be helpful in communicating to the jurors from that region, however, the attorney should attempt to use vernacular only when it can be done so comfortably and with a clear understanding of all the possible ramifications of the vernacular. A native, hometown advocate can communicate effectively with native, hometown jurors by using the vernacular of the village. However, an outsider attempting to ingratiate

himself to jurors through the use of local vernacular runs the risk of being spotted as a manipulator, and not having a clear understanding of all of the possible ramifications of the vernacular term. The simple suggestion is to avoid the vernacular unless it is clearly understood and comfortably used by the attorney.

(10) Language of the Case

If we are to communicate simply and successfully with jurors, the most effective way is to speak to them in their own language. Each case has its own peculiarities with respect to the language describing the events and the resulting damages.

As you discuss the case with the jury on voir dire examination, listen very carefully to the specific language which the jurors use in talking about the events, this type of injury or any other relevant parts of your theme.

One of the many valued services which focus groups can perform is to educate the attorney with respect to the language of the case. The technique is to give the focus group a simple, bland description of the events of the case and encourage them to talk about the case in terms of the questions which arise in their minds; their opinions about this type of litigation generally and this case specifically, and whatever other focuses you are attempting to achieve from the group. However, listen very carefully to the phrases and terminology which the focus group members use in talking about your case. This will give you the language which laymen use, understand and accept in discussing this case. You then adapt that language into your voir dire examination, opening statement, witness examination and summation as a vital part of presenting your messages and themes to the jury in simple, communicable, lay language.

b. Analogies

Analogies are an extension of the two other comparative tools, metaphors and similes. The analogy, while being used to communicate a point clearly by comparison, stretches further than the metaphor or simile. Analogies often require more lengthy storytelling than a simple metaphor or simile but the end result is that the analogy most often will be the most effective means of clearly communicating a point to the jury.

It is suggested that analogies from everyday life and from the national press make excellent realms of comparison to the value of human life or the experiencing of physical pain and suffering and mental anguish. Analogies should be assimilated to the particular jury to which they are being argued. There are very effective sports analogies, art analogies and other types of analogies which can be used for comparative purposes. Consider the following analogy that was used in arguing damages for the death of a child:

> What is this child's life worth in our community? Counsel says 4 million dollars is too much money. However, ladies and gentlemen, we live in a society in which 82.5 million dollars was recently paid for paint on canvas. Why? Because it was the work of a master, Van Gogh. Ladies and gentlemen, if paint on canvas is worth 82.5 million dollars in our society because it is a masterpiece, is the greatest creation of the greatest master of them all, God's creation of a child, worth at least 4 million dollars in our community?

Sports analogies are particularly effective today because of the extremely inflated salaries which sports stars are receiving for playing children's games. Consider the following which was used in an argument shortly after the Spinks-Tyson fight:

> Ladies and Gentlemen, what is the reasonable sum of money to compensate this young man for the mental anguish which he will endure every day of his life for the next forty-five years as he sits confined as a prisoner in his wheelchair as result of the negligence of this defendant. Is 10 million dollars enough? We ask you to judge this by the standards of our society. We live in a society in which 23 million dollars was recently split by two men, Spinks and Tyson for 91 second in a boxing ring. If 91 seconds of dancing and punching each other is worth 23 million dollars can 10 million dollars even begin to compensate this plaintiff for 45 years of mental anguish?

Johnny Carson said that he had the world's easiest job. He simply read the paper each day and his monologue leapt out at him. The same is true with the use of analogies in summation. It is suggested that counsel should maintain a summation notebook that is filled with anecdotes and matters of common public knowledge. Use these as a basis of establishing societal standards from which to argue the reasonable value to compensate for catastrophic injury or death.

Analogies may be used to explain a point of law. For example, in an effort to explain the law of non-delegable duties in order to make the jury understand why a department store owner could not abrogate its responsibility to maintain its elevator in safe working condition by simply signing a contract with an elevator maintenance company, the following analogy was used:

> Simpson's department store owes a direct duty to its customers to maintain the elevators in safe working condition. They would have you believe that they met their obligation by simply signing a contract with an elevator maintenance company. However, the law says differently. The law says that Simpson's cannot delegate their responsibility to the elevator company. Many of you may remember the sign that President Harry S. Truman had on his desk "The Buck Stops Here". The law places that same sign on the desk of Simpson Department Store and tells them that "the buck stops here" when it comes to providing safe elevators for their customers.

> The analogy is also a helpful tool in arguing the 5% disability case:
> Counsel says that the plaintiff is suffering only a 5% disability. However, the 5% figure is meaningless because the defendant did not inflict an injury solely on the plaintiff's low back. The 5% figure is meaningless when an injury occurs which afflicts physical pain and suffering and mental anguish on a worker to such an extent that it incapacitates him from performing the usual tasks of his job. The 5% figure is meaningless when we consider the effect of the back injury on the whole man. The 5% figure is meaningless when we consider where the 5% is located in the body. Mr. Jones is injured at L4-L5, the work horse part of the back; the portion of the body that is used for bending, lifting, stooping, and the many other tasks that Mr. Jones had to perform on a daily basis.

What is a 5% disability? The 5% figure is meaningful only when we consider the effect of the 5% on Mr. Jones' overall performance. For example, look at the clock on the courthouse wall. If that clock malfunctioned to the extent of 5% beginning now, by the time we return to this courtroom tomorrow at this same time, the clock would be 72 minutes behind; two days from now would be 144 minutes behind; three days 216 minutes, and then four days, the clock would be almost 5 hours behind. Mr. Jones experiences the same type of difficulty as he attempts to return to work and perform his usual tasks and finds that he gets further and further behind every day. The 5% figure is meaningless.

The same type of analogy can be used while demonstrating a sense of humor by good-naturedly poking a bit of fun at the defense counsel, in this fashion:

Counsel ridicules the plaintiff's claim of a 5% disability to the body as a whole. However, if counsel takes his wife and two children on a boat in Galveston Bay this weekend and his wife spots a hole in the bottom of the boat with water pouring in, I have to wonder if counsel would tell his wife, "Don't worry, dear. That hole only represents a 5% disability to the boat as a whole."

Just like the water rushing in to sink the boat, the physical pain and mental anguish which Mr. Jones is experiencing on a daily basis is sinking him financially, is sinking him physically and is sinking him emotionally. Only you as a jury can throw him the life buoy before he drowns in the disabilities which have resulted to him from his injury.

A variation on this theme is the small leak in a chemical plant; a chip in the heel of a mighty race horse; a small tear in a priceless da Vinci painting; a small cigarette burn in the new dress; a thorn in the paw of the mighty lion which incapacitates it; the small leak on the nuclear plant which represents only a 5% malfunction of the structure as a whole; a rotator cuff injury to Nolan Ryan's pitching arm, only 5% disability to the body as a whole, or, one which is easy for our jurors to identify with, a pebble in the shoe which annoys and distracts you throughout every minute of every day when you're on your feet, whether working or playing.

In a case involving the cut tendon and ligament, the analogy is to a puppet which breaks the string that controls the use of its arm. Analogy is drawn to the manner in which tendons, ligaments and muscles work like the string of a puppet. However, with the puppet you simply have to replace the string, but the tendon or ligament which limits motion cannot be repaired but will develop scar tissue which will render the disability permanent.

In death cases, the effective analogies are to the incredible amounts of money which we spend in our society to protect or save the life of one person. We could have flown to the moon long before Neil Armstrong landed, and at much less expense, if we had been willing to sacrifice the lives of two astronauts by leaving them there. Landing on the moon was the simple task compared to the Herculean problems involved in taking off from the moon and docking with an orbiting spacecraft for the return trip. However, the billions of dollars involved to return men safely from the moon were never questioned, and the thought of leaving them there was never

considered. Why, because of the huge value which we place on human life in our society.

One of the best sources for analogies in a death case is the daily newspaper. Analogies of this type should be constantly updated since, to the credit of our society, we frequently spend large sums of money in life-saving measures.

c. Metaphors

The metaphor has been defined as "the application of a word or phrase to an object or concept it does not literally denote, in order to suggest comparison with another object or concept." An example of a common metaphor is "a mighty fortress is our God." Counsel effectively using a metaphor can rely on a familiar story or anecdote. Biblical stories make excellent metaphors. The effective metaphor is easy for the jury to understand. The jury is not threatened when listening to a metaphoric story.

d. Similes

The use of simile is a comparison of one thing to another. Martin Luther King used similes in the following powerful phrase from his "I Have a Dream" speech: "No, we are not satisfied and we will not be satisfied until justice rolls down like water and righteous like a mighty stream."

For example, in the trial of a case involving 15 defibrillation of a nine month old infant, the term defibrillation is a totally meaningless, innocuous and non-inspiring term which conveys absolutely no message with respect to the agony which the child endured. However, when an expert witness described defibrillation as being "just like electrocution", this predicated an emotional right brain appeal during summation based upon sending an electric shock through the body of a 38 pound infant with sufficient force to stop the heart from beating. Thus, electrocution became a highly electrifying catch phrase replacing the innocuous term, defibrillation.

Another example of use of simile in a product liability case is the following: "This defendant is like the criminal who killed his parents and pled for mercy because he was an orphan."

e. Establish Sense of Humor

One of the complaints about attorneys is that we appear unapproachable and are basically stuffed shirts. One of the best techniques for establishing approachability, credibility and common ground with the jury is through the use of humor. Neither the purpose nor the technique is to tell a joke or to attempt to entertain. The purpose is to simply establish in the minds of jurors that we have a good sense of humor.

Of the eight categories of humor: surprise, exaggeration, understatement, pun, irony, sarcasm, climax and anti-climax, the best techniques for demonstrating a sense of humor would be to utilize surprise, understatement or irony. Obviously avoid exaggeration, puns or sarcasm, which, if taken wrong in the context of a trial, could reflect very badly on the attorney's credibility. The techniques of climax and anti-climax may also detract from the seriousness of

the proceedings.

The most appropriate time to use humor is during voir dire examination while initial impressions are still being formed and before the serious matters at issue are undertaken in the trial in chief. Humor may also be used in trial during particularly long, boring testimony offered by the opposition in order to demonstrate to the jury that you share their boredom and offer the humor as a brief respite. Demonstrating a sense of humor in colloquy with the court may also be helpful to demonstrate your good relationship with the court as well as your sense of humor.

You may purposely choose to inject humor into direct examination as a means of humanizing your witness or under cross examination as a weapon against the adverse witness. In direct examination of an expert witness, counsel made a mistake, which was promptly pointed out by the opposing counsel. As direct examination resumed, counsel apologized to his witness for the mistake and then inquired "Doctor, is that the first time you've seen an attorney make a mistake?" to which the doctor responded, "no, but it's the first time I've seen one admit it." The judge, jury, witness and counsel all laughed at the witness' remark. This served the valuable purpose of humanizing the witness, demonstrating his sense of humor and demonstrating that the attorney had a sense of humor and could take a joke of which he was the butt.

Some attorneys use sarcasm successfully as a weapon on cross examination. However, this is tricky and should only be used if it fits your particular style and you appear to be comfortable with it.

One of America's greatest advocates, Tom Alexander of Houston, wields the weapon of sarcasm with grace and style. For example, in cross examining a doctor in which Alexander's theme was that the doctor had performed unnecessary surgery, he began with the question "Doctor, are you aware that you are known as the fastest knife in the West?"

In cross examining a doctor who had been established to be a very frequent testifier for the plaintiff's bar, defense counsel stated: "I'll be brief, Doctor. I know you are needed in several other courtrooms."

However, the rule remains that the purpose is to demonstrate a sense of humor, to humanize the attorney, or to humanize the witness rather than to entertain the jury.

f. Anecdotes

Personal anecdotes are a great storytelling device. We all use them in telling a story to make a point in a conversation with friends. They are just as effective in conveying a message to a jury and have the added advantage of enhancing the approachability and the humanity of the attorney. For example, a lawyer arguing the wrongful death case of a father who had left a widow and a six year old son. Using classic storytelling techniques, he related the following occurrence:

> We see the young child as he stands on the platform at the train depot looking up at his father and thinking how big and strong he looks in his army uniform; we see the pride in his eyes as he looks around at all of the other soldiers waiting for the train

and realizes that his dad is the best soldier of them all; we see him as the conductor calls "all aboard" and dad hugs and kisses mom and lifts the youngster in his arms as he thinks how lucky he is to have the best dad in the world; we see him as dad, with tears in his eyes, makes him promise to take care of his mother and mind her until he gets back from the war; we see him as he waves goodbye, his dad climbs aboard the train and rushes to the nearest window; we see him as mom raises him up to the glass so he can put his lips against the glass and give his dad one last kiss goodbye; we see him standing hand in hand with his mom and waving and waving and waving until the caboose is out of sight and only the trail of smoke remains; we see him bravely trying to hold back the tears, without success, as he realizes that he is the man in the family now and must not cry in front of mom; we see him 22 months later enter the living room as the man delivers the telegram to mom, the telegram that says that dad will never be home again.

I can describe that occurrence to you with such vivid detail because the soldier was my father and I was the young man on the train platform. It was 50 years ago but I remember it as if it were yesterday. So when I tell you that I know what this young man has lost in losing a father, I speak to you from my heart and my experience.

g. Quotes

Quotations, when skillfully but sparingly placed in the argument, can also be an effective tool for conveying a complex situation to the jury. The quotation should come from a source that the jury automatically accepts as gospel on the point that counsel is attempting to make. Common sources for quotations are: 1) The United States Constitution, 2) The Bible, and 3) Notable heroic figures, such as Abraham Lincoln and Winston Churchill, 4) Poetry, 5) Prose and 6) Song Lyrics.

(1) Prose - By carefully selecting well known prose or poetry, we have the advantage of choosing language which already has the rhythm and the rhetorical devices built in. The idea is to pick and choose phrases from prose or poetry which create a link of commonality between counsel, client and the jury. The more familiar the prose or poetry that is used, the stronger the bridge of commonality that will be built.

Consider, for example, the wonderful prose "What is a Boy?" Obviously we would not choose to quote this in its entirety. The idea is to pick and choose useful phrases which apply to your particular case.

WHAT IS A BOY?

Between the innocence of babyhood and the dignity of manhood we find a delightful creature called a boy. Boys come in assorted sizes, but all boys have the same creed: to enjoy every second of every minute of every hour of every day and to protest with noise (their only weapon) when their last minute is finished and the adult males pack them off to bed at night.

Boys are found everywhere--on top of, underneath, inside of, climbing on, swinging from, running around, or jumping to. Mothers love them, little girls hate them, older sisters and brothers tolerate them, adults ignore them, and Heaven protects them. A boy is Truth with dirt on its face, Beauty with a cut on the finger. Wisdom with bubble gum in its hair, and the Hope of the future with a frog in its pocket.

When you are busy, a boy is an inconsiderate, bothersome, intruding jangle of noise. When you want him to make a good impression, his brain turns to jelly or else he becomes a savage, sadistic, jungle creature bent on destroying the world and himself with it.

A boy is a composite--he has the appetite of a horse, the digestion of a sword swallower, the energy of a pocket-size atomic bomb, the curiosity of a cat, the lungs of a dictator, the imagination of a Paul Bunyan, the shyness of a violet, the audacity of a steel trap, the enthusiasm of a firecracker, and when he makes something, he has five thumbs on each hand.

He likes ice cream, knives, saws, Christmas, comic books, the boy across the street, woods, water (in its natural habitat), large animals, Dad, trains, Saturday mornings, and fire engines. He is not much for Sunday School, company, schools, books without pictures, music lessons, neckties, barbers, girls, overcoats, adults, or bedtime.

Nobody else is so early to rise, or so late to supper. Nobody else gets so much fun out of trees, dogs, and bruises. Nobody else can cram into one pocket a rusty knife, a half-eaten apple, 3 feet of string, an empty Bull Durham sack, 2 gumdrops, 6 cents, a slingshot, a chunk of unknown substance, and a genuine supersonic code ring with a secret compartment.

A boy is a magical creature--you can lock him out of your workshop, but you can't lock him our of your heart. You can get him out of your study, but you can't get him out of your mind. Might as well give up--he is your captor, your jailer, your boss, and your maker--a freckled-face, pint-size, cat-chasing, bundle of noise. But when you come home at night with only the shattered pieces of your hopes and dreams, he can mend them like new with the two magic words--"Hi, Dad!" See p.23, *infra.*

(2) Poetry - Poetry, if carefully selected, can be a very useful tool in conveying a message to the jury. If you can find poetry which coincides with and conveys your theme, the jury can be persuaded that your theme has a commonality which has been adopted by the poets and should also be adopted by the jury. We must be cautious in the selection of abstruse poetry which must be studied to be understood. Remember that the jury is receiving the poetry only through the auditory channel and does not have the opportunity to read the poem and study its meaning. By making a careful vocal presentation of the poem, counsel may also reach the kinesthetic channel by invoking the feelings of the listeners. Jim Perdue, in his excellent book, Who Will Speak For The Victim, has suggested the following lines of poetry from "The Broken Wheel" by Edgar Guest. Consider the effective use of this wonderful poetry in a case in which a defective product has been placed on the market by the manufacturer:

We found the car beneath the tree.

The steering knuckle broke, said he;

The driver is dead; they say his wife

Will be an invalid for life.

I wonder how the man must feel

Who made that faulty steering wheel.

Perhaps the workman never saw

An indication of the flaw;

Or seeing it, he fancied it

Would not affect his work a bit,

And said; It's good enough to go -

I'll pass it on. They'll never know.

It's not exactly to my best

But it may pass the final test;

And should it break no man can know

It was my hands that made it so

The thing is faulty, but perhaps

We'll never hear it when it snaps.

Note the effective use of short words by Edgar Guest in order create impact, combined with the use of longer words to achieve rhythmic flow. Of the 121 words in the poem, 99 (82%) are one syllable.

(3) Biblical Quotes & Parables

The Bible is an excellent source of quotations. However, a caveat is to be very careful in using biblical quotes or parables which are subject to multiple interpretations. Remember how many different denominations there are that interpret the same basic scriptures in very different ways. Particularly in the interpretation of the Bible, it could be disastrous for counsel to offer an example to make a point with which a juror disagreed on the interpretation or which opposing

counsel could interpret to their benefit. Examples of Biblical quotations which may be helpful include:

> if he rise again, and walk abroad upon his staff, then shall he that smote him be clear; only he shall pay for the loss of his time, and shall cause him to be thoroughly healed. Exodus 21:18,19

> Rachel weeping for her children refused to be comforted: because they were not. Jeremiah 31:15

(4) Song Lyrics

Quotes from song lyrics can be particularly compelling when properly incorporated into an argument. For example, in the case of a 22-year-old college coed who was a paraplegic and who testified as to her mental anguish when she helped the other young ladies prepare for dates for the big game on Saturday night, counsel effectively used the lyrics from *"They're Writing Songs of Love, But Not For Me."*

(5) Literature

Familiar quotes from literature are very useful tools. Once again, the more familiar the quote, the more useful in establishing commonality with the jury. Consider, for example, Shakespeare's quote concerning the value of a person's reputation, which may be useful in a defamation case.

> Good name in man and woman, dear my Lord, is the immediate jewel of their souls. Who steals my purse steals trash; but he that filches from me my good name robs me of that which not enriches him and makes me poor indeed. OTHELLO, ACT III, SCENE III

> The purest treasure mortal times afford is spotless reputation. RICHARD II, ACT I, SCENE I

Shakespeare may also be useful if the defendant or defense counsel has shown a cavalier attitude towards the plaintiff's pain and suffering: he jests at scars that never felt a wound. ROMEO & JULIET, ACT II, SCENE II

(6) Witnesses/Parties

Of course, often the most persuasive quotes in the case will come from the witnesses and the parties, either during the trial or in previous correspondence, publications, depositions or other writings. Once these have been introduced into evidence, a particularly relevant or poignant quote should be enlarged, mounted on fiber board and shown to the jury during summation.

In order to obtain these quotes, search carefully the literature of the opposing party and their experts; trial and deposition transcripts from other cases and, of course, quotes from the case at bar. Also search through all records, reports or other writings by your opposition, their experts and witnesses, with a particular eye to pulling out quotes which may be enlarged and

used in the persuasive process during summation.

(7) Medical Quotations - The following quotations are from an accumulation in a sample notebook by Thomas J. Murray. Once again, the full quote may not be necessary in order to support your position, but they are offered as useful sources from which you may choose the relevant portions.

Quote 1

"In severe sprain, the ligaments are torn, the synovial membranes are contused, or bruised. Cartilage may be loosened from bone. There may be hemorrhage into and about the joint. The muscles are stretched or torn. Tendons are stretched, torn or displaced. Blood vessels are contused. Nerves are damaged. The skin is contused." [p. 368, Sec. 25, 27; Gray's Attorneys Textbook of Medicine, Vol. 1]

Quote 2

"In addition to torn ligaments, frequently small blood vessels also are injured. Blood escaping from these vessels may form a hematoma; this is composed more of tissue fluid than actual blood." [p. 858; Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 3

"From the clinical standpoint, there are multiple organic pathological factors involved in radiculitis that follows a whiplash injury. It is reasonable to assume that there is trauma of the spinal ligaments because of the characteristic symptoms of a sprain of the neck, and, in some severe ligamentous injuries, an actual subluxation can be demonstrated by roentgenographic examination. It is likely that there is some hemorrhage and edema in the region of the damaged ligaments that may be a source of nerve irritation. Later on, fibrosis and cicatricial changes may be a chronic source of irritation of the nerve roots. At the instant of the whiplash, direct trauma of the nerve roots from stretching, compression, or even trauma of the spinothalamic pathways in the lateral columns of the spinal cord may conceivably occur.

In the acute case, swelling and vascular congestion of the nerve root and narrowing of the foramen due to protrusion of the intervertebral disc or swelling of adjacent ligaments may be important factors producing symptoms. In chronic cases, fibrosis, which is the late counterpart of hemorrhage and edema, may involve the nerve root directly, produce adhesions between the spinal ligaments and the nerve root, or cause a relative narrowing of the vertebral foramens. An additional factor may be the abnormal mobility of the vertebral joints because of damage of the ligaments." [p. 1703; Journal of the American Medical Assn., Vol. 152, No. 18, Aug. 29, 1953, Common Whiplash Injuries of the Neck, by Gay and Abbott]

Quote 4

"Such simple activities as stooping, shaving, brushing the teeth, hanging curtains, painting or papering ceilings, making a bed, driving a car, working under a car, etc., may aggravate the symptoms because these activities usually produce hyperextension of the neck." [p. 77; The Cervical Syndrome, by Jackson]

Quote 5

"At any rate, the result of neck-lashing injury is sprain or stretching or tearing, or avulsion of the ligamentous and capsular structures, with or without immediate compression or

irritation of the cervical nerve roots. Sudden compression of nerve roots give immediate symptoms. If the symptoms are delayed a few hours, irritation of the nerve roots probably occurs because of hemorrhage or swelling in the surrounding structures. The symptoms may be so mild at first that they are ignored, but as time goes on further stretching and relaxation of the ligamentous and capsular structures may occur and permit more mechanical derangements." [p. 73; The Cervical Syndrome, by Jackson]

Quote 6

"Degenerative changes initiated in a disc by a severe sprain may occur long after the injury and give rise to delayed symptoms." [p. 74; The Cervical Syndrome, by Jackson]

Quote 7

" There is considerable evidence for the belief that in many cases the lesion may be a tear of the posterior longitudinal ligament (which keeps the intervertebral disc from protruding), a tear of the annulus fibrosus (the outer part of the intervertebral disc), or traumatic changes within the disc substance." [p. 399; Handbook of Orthopedic Surgery, 4th Edition, by Shands]

Quote 8

"Usually, the roentgenogram are found to be negative immediately following and or some time after the rupture due to the fact that the degenerative changes take place slowly. Usually, by the end of a year, narrowing of the affected interspace will begin to take place, and after several years, condensation and proliferative changes of bone characteristic of traumatic arthritis will develop." [p. 109; Lewis' Practice of Surgery, Vol. II]

Quote 9

"Many of these cases of low back strain present a variable degree of the hypertrophic type. When confronted with a case of this type, a surgeon who has had much experience usually gives a guarded prognosis, especially in regard to time and completeness of relief of symptoms, because it is quite well known that these cases tend to hang on and become chronic even when properly treated for the acute strain, and that once they become chronic, they are frequently more difficult to relieve than are similar cases in which there is no evidence of arthritis." [p. 393; Fractures, Dislocations and Sprains, 5th Edition, by Key and Conwell]

Quote 10

" More than one-third of all spines roentgenrayed for any purpose have shown congenital abnormalities. Most of these do not cause symptoms, but congenital defects are probably an important factor in producing weakness of the architecture of the spine, leading to points of lowered resistance to strain. In these patients, the spine is probably more vulnerable to injury than in normal persons." [p. 1032; Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 11

"Roentgenographic evidence of degenerative changes in the spine is found almost universally in patients past the age of fifty years. Such changes vary considerably in severity, however, and significant symptoms are produced in only a small percentage of cases." [p. 583] "Only about five percent of individuals past fifty have clinical symptoms." [p. 531, Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 12

"Since the roentgenographic findings described above frequently are asymptomatic and may appear as a physiological manifestation of aging, one must not accept these findings

without careful appraisal of the symptoms and signs. In the absence of actual mechanical impingement or compression of nerve fibers by narrowed intervertebral discs, one must proceed cautiously before attributing symptoms to degenerative joint disease. Even when these changes are present, each case must be evaluated by the composite picture of all factors." [p. 540; Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 13

" The period between the injury and the production of traumatic joint disease may vary from days to several months. Pain and limitation of motion may persist for years following a single strain or contusion even without obvious anatomic change." [p. 855; Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 14

"It must be kept in mind that trauma may precipitate other forms of arthritis (rheumatoid, tuberculous, syphilitic, pyogenic, gouty, etc.), the traumatized joint often being only the first joint involved. Also, any form of joint disease (but especially degenerative joint disease) may be aggravated following trauma." (Degenerative joint disease, hypertrophic arthritis and osteoarthritis are all one and the same disease. They are merely different terms used to describe the same condition.) [p. 853; Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 15

" Injury produces a two-fold effect on joints: (1) mechanical damage such as a capsular tear, detachment or laceration of cartilage, articular fractures, compression, splitting or detachment of articular cartilage, etc., and (2) joint reaction of such trauma." [p. 855, Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 16

"The primary pathologic reaction is a synovitis. The synovia, however, rarely is affected alone. When articular structures other than the synovial membrane are injured, pathological changes resembling those of degenerative joint disease result almost invariably. Such changes are hastened by overweight (in weight-bearing joints), overuse or the continued presence of loose bodies." [p. 855; Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 17

" Roentgenogram are often of little help toward making a positive diagnosis. They are of great assistance, however, in ruling out conditions such as neoplasms or tuberculosis." (Also fractures, and troublesome abnormalities and arthritic changes.) [p. 403; Handbook of Orthopaedic Surgery, 4th Edition, by Shands]

Quote 18

"From a pathological standpoint it must be realized that this disease is chronic and cannot be cured. Since worn or damaged cartilage regenerates poorly, at best, and since osteophytes cannot be reabsorbed, such changes, once manifest, are irreversible and permanent. Nevertheless, much can be done to relive symptoms and to prevent, or at least retard, progression of the pathological conditions." [p. 550; Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 19

"That this disease (degenerative or hypertrophic arthritis) does exist in the spine is undisputed, but it is necessary to review carefully the history, physical examination, laboratory tests and roentgenogram (x-rays) before such a diagnosis is made. Often

marginal lipping is the result, rather than the cause, of disease in the spine. Thus, lipping often has been demonstrated following degeneration of the intervertebral discs." [p. 537; Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 20

"For many years I have been increasingly annoyed by the tendency of my conferees to stigmatize as 'psychoneurotic' any symptom complex for which an organic cause could not be easily demonstrated. I cannot accept as true that authors' (Gay & Abbott, J.A.M.A. 152:18, Aug. 29, 1953) statement that 'a persistent psychoneurotic reaction' is responsible for prolonged disability in victims of whiplash injuries. The authors' own statements make this improbable. They mention the probability of various degrees of rupture of intervertebral ligaments and admit that herniated cervical intervertebral disc was clinically diagnosed in 26% of their series.

I have personally observed innumerable automobile collisions ranging from trivial to the severest. For some years I was one of the autopsy surgeons (full time) to the coroner, Los Angeles County, California. I have performed autopsies of quite a number of persons who were killed by the worst of whiplash injuries -- 'broken neck'. I have performed autopsies on at least a dozen persons in whom the skull was completely dislocated from the spine by such injuries. In hospitals I have seen quite a number of very serious but non-fatal fractures of the cervical spine by whiplash injury. Drs. Gray and Abbott describe the less serious, non-fatal whiplash injuries. Even in the less serious whiplash injuries, who can say how much intervertebral ligamentous tearing exists? Who can say how much hemorrhage occurs at the site of the injury and how much subsequent fibrosis and adhesions develop around nerve roots or into or between cervical muscles? Certainly such things may be expected to result in some degree of prolonged or permanent impairment. Even worse, who can say how much or how little trauma of the cervical cord in incurred? Certainly the x-ray cannot give the answers to these questions. By the same token early treatment and physiotherapy may be expected to minimize sequelae, and delayed treatment can be difficult or futile. Prolonged immobilization--necessary or unnecessary--could be expected to similarly result in prolonged or permanent difficulty not detectable by x-ray.

The neck being a highly mobile structure, it seems reasonable to expect that any post-traumatic fibrosis around nerve roots or into or between muscles, even though rather slight, could be expected to give more prolonged symptoms than elsewhere along the spine. It seems to me that one should be very reluctant to categorically state that 'More than half the patients in this series...were seriously handicapped in this way, i.e., by 'persistent psychoneurotic reactions'. Many symptoms are due to real factors that cannot be objectively demonstrated. Not a few persons die of causes that cannot be demonstrated by the most thorough autopsy. Such persons do not die of psychoneuroses." (underscoring supplied [p. 974; Journal of the American Medical Assn., Vol. 153, No. 10, Nov. 7, 1953 - Letter to the editor from John H. Schaeffer, M.D., Los Angeles]

h. Adapting Standard Arguments

There are numerous standard arguments which have been developed over the decades which can be readily assimilated by counsel to your individual case. The following are simply a few of the more useful:

(1) Pain and Suffering:

(a) Measuring Physical Pain and Suffering. How do you measure the reasonable value to be placed upon the physical pain and suffering of the plaintiff. One way is to determine what we will pay to avoid physical pain. In our society, we think nothing of paying $30.00 for a novocaine shot in order to avoid thirty minutes of physical pain in the dentist chair. If we will pay one dollar per minute to avoid physical pain, is $5.00 per hour enough to compensate for the constant enduring of physical pain?

(b) Constitutional right to be free from pain. Even the state which can, under our constitution, inflict death, cannot inflict physical pain.

(c) Pain is life's window into hell. People in anguish and pain pray for death. No one prays for pain.

(d) Job ad - catastrophic injury:
Ladies and gentlemen assume that tomorrow we run an ad in the Houston Post that reads as follows: 'Job available, no experience necessary. No education necessary. Pay: $100.00 per day. Only two conditions: first, you must suffer pain every waking moment of your life, and secondly, you can never resign.' Ladies and gentlemen, how many applicants do you think would apply for that job?

(e) Minimum wage:
Ladies and gentlemen, we pay $4.20 per hour for the most menial tasks in our society. Shouldn't this be at least the very minimum compensation for the constant suffering of physical pain?

(2) Value of Human Life:

In maintaining a summation notebook, keep current examples of the value placed on human life within our society. For example:

When Jessica McClure was trapped in the well in West Texas, the entire country was breathless for 56 hours while Herculean efforts were made to save the child's life. The country breathed a collective sigh of relief when the young child was saved. At no point did anyone stop to inquire as to the cost of these efforts and whether the life of the child was worth the cost.

(3) Full Justice:
Ladies and gentlemen if this lawsuit concerned the death of that magnificent race-horse Seattle Slew in an automobile accident instead of the death of this husband and father, the owners of Seattle Slew would be in this court as plaintiffs seeking 10 million dollars and that would be what full justice would demand. Why, because 10 million dollars was paid to purchase the horse. If the jury decided, after hearing the evidence, that despite the fact that 10 million dollars was actually paid for the horse, that 10 million dollars was just too much money and awarded only 5 million dollars, that would not be justice. That 5 million dollars would represent half justice and anything less than full justice is injustice. We have proven that full justice demands 5 million dollars in compensation to the widow and children of this fine man and anything less than that amount will not represent full justice. Therefore, when you deliberate on damages in this case, please remember that you agreed on voir dire examination to render full justice in this case; that full justice demands at least 5 million dollars to compensate this plaintiff, and that anything less than full justice is injustice. For the use of this argument in a summation, see page 78, *infra*.

L. Persuasive Communication of Power Themes

Individuals send messages out on three levels. Lawyers are basically wordsmiths. For years we have been concerned about what impact words and phrases we should use or what analogies we could make to drive a point home. In essence, our focus as lawyers was on what "we said." Unfortunately, words alone are the component of communications which contribute the least to the overall impact or persuasiveness of a message. When social science researchers talk about words alone, they use the term "linguistics". When they talk about how a person says the words, voice modulation, intonation, pauses, etc., they use the term "paralinguistics." Nonverbal communication is everything else that goes along with the message such as facial expressions, eye movements, body movements, etc. For our purpose we shall break a message down into three components, but for ease of understanding, we shall use lay terms. Those three components are 1) verbal-words alone, 2) voice - how you say it, and 3) nonverbal - body movements, facial expressions, etc.

When social science studied the impact of a message as relating to those three channels of delivery, the results were quite surprising in terms of the impact of a message. Words alone account for only 8% of the impact! How we say it or voice alone counts for another 37%. But the majority of the impact persuasiveness or believability of a message, 55% relates to the nonverbal content. Therefore, the majority of a message's impact comes from its nonverbal content. This is not to say that all three parts of a message are not important. Of course you have to have the right words. Of course you have to use impact words and phrases. Of course you have to drive home points home with analogy. But even when you do that effectively, you cannot ignore the fact that how you say it, how you move, where you stand, and how you use eye contact in giving the message plays a primary role in determining whether or not that message is going to be believable and persuasive.

Messages are received and processed through one of three primary channels or representational systems. Even when we are focusing on what we are saying, how we are saying it, and making sure that our messages are sent effectively on all three levels; we may still not communicate effectively. To communicate effectively we must understand that human communication is a two-way process. A message must not only be considered as to how it is sent out, but we must look at how the messages are going to be received. In essence, we must be aware of the person or group of persons to whom we are sending the message. This is often referred to as having a "they focus". That is, most lawyers have an "I" or "we" focus. They focus on themselves, the judge, the law, the facts, etc. Many lawyers do not realize that they should be focusing on only one group in the courtroom and that is the jury. To be really persuasive one has to be constantly aware of the jury's changing moods, attitudes and reaction. It is part of having a "they focus."

Messages are received not only through preconceived notions, ideas, and beliefs, but they are processed through what social science calls a primary channel or representational system. There are three recognized channels by which people process information with. Those channels are 1) visual, 2) auditory, and 3) kinesthetic.

The person who is using a visual channel sees the message in his minds eye. He visualizes

the information in order to understand it. On the other hand, if the person is using an auditory channel to process the information, he has to hear it in order to understand it. In essence, in his mind he hears the information, repeats it, or says it to himself in order to process it, remember it, and store it. This person is said to be using the auditory channel or representational system. Some people use the kinesthetic channel to process information. That is they process information through their guts or with their feelings. People using this kinesthetic channel have to touch an object to assess it and understand it. Most people are using either the auditory or visual representational systems to process information most of the time.

An important point to remember here is that the person with whom we are communicating uses all three representational systems to process information at one time or another. What we are concerned with is what is the primary channel being used when we are trying to communicate with that person. Most people tend to favor one channel over another. Some people use the visual channel most of the time. On the other hand, some people use the auditory channel most of the time. But do not forget that people switch channels from time to time. Still identifying a person's primary method by which he or she processes information can be a critical asset if we want to communicate effectively.

The reason it is critical to know the channel which a person generally processes information is that if we use that channel to send that information, it makes it easy for the person hearing the message to understand and retain the information contained therein. Therefore, whether we are communicating with the opposing counsel during negotiations, or a judge drawing a pretrial conference, or the jurors during the trial we should try and ascertain the primary representational system that person is using at that time. If we do this, we can send a message out which communicates easily with that representational system and therefore the person is much more likely to understand the information, accept it, and believe it.

We should consider two methods by which we can identify a person's primary representational system or channel for processing information. The first is to listen to the words a person uses when they are sending out a message. Words and phrases people use can reveal that person's primary channel for processing information. Secondly, when we give that person information to process, we can watch their eye movement pattern. Neuropsychologically, the eye patterns differ when information is processed differently.

First we will start with a chart taken from "Courtroom Communication Strategies" which list verbal predicates a person uses depending upon the channel from which they are sending the message. Notice that the verbal person uses words and phrases like "see what I mean." Whereas the auditory person will say often things like "do you hear what I am saying." A kinesthetic person will use phrases like "I want you to feel right about this." Practice identifying the channel by which a person with whom you are communicating is processing a message. If you use the same verbal predicates back, you will then be matching that person's channel for processing information or representational system and the other person will feel very comfortable with you. You increase the probability that they will accept your message and that it will have greater impact.

Further, one can assess a person's representational system by watching the eye movement

patterns of that person. Before checking the eye pattern movements of a person, however, you have to give them information which you ask them to think about or process. Be sure that they are processing information when you check their eye movement patterns. A person's eye movements, if they are not processing information, can be insignificant. If one is processing information visually, the eyes move up to the right or left. Therefore any time the eyes move up, either right or left, one can assume that the person is processing the information visually--he is seeing it in his mind. If on the other hand while the person is processing information the eyes stay even and move from side to side, one can assume that person is processing information auditorially - he is listening to the information in his head. On the other hand, if a person's eye movements are down, it generally means the person is trying to get in touch with his emotions. He or she is processing the information kinesthetically getting in touch with his or her feelings about the information.

Remember it's a two-way process, therefore, it is crucial to always have a "they focus." One can be sending out a message beautifully, communicating with impact on all three levels. But if one does not have a "they focus", the great elocution may fall on deaf ears. The message cannot be sent with impact until we are sure of a person's attitude, beliefs, and representational system to whom we are sending the message. This is why we should always think of the jurors or anyone else with whom we are trying to communicate as a loving, caring, fellow human beings. Jurors should not be just a number. We should know by memory each jurors first and last names. In your mind, think of them by their first names. We should have positive feelings toward them so they can have positive feelings toward us. This type of "they focus" is necessary when we want to communicate with another human being whether that be our opposing counsel, the judge, the juror, or anyone else.

1. Non Verbal Communication

Aristotle taught that orators could "heighten" the effect of their words with suitable gestures, tones, dress and dramatic action. Cicero, Rome's greater orator said "delivery is a sort of language of the body-the management, with grace, of voice, countenance and gestures. Demosthenes, Greece's greatest orator taught that delivery is the greatest pathway to success and successful oratory. He listed the three most important ingredients of oratory as action, action, action. Shakespeare's advice to actors was "suit the action to the word."

You can often tell the experienced from the inexperienced lawyer by the way they handle objections. When an objection is made against evidence being offered by an inexperienced lawyer and the judge rules against him, the inexperienced lawyer hunches his shoulders forward, and looks nonverbally whipped. He is visibly shaken. The experienced lawyer understands that the jury has a difficult time distinguishing between the plaintiff and the defendant. Jurors have no idea of the significance of legal objections and particularly do not understand the difference between "sustained" or "overruled". The experienced lawyer knows he should always look like the winner no matter what happens. Whatever the judge says after the other counsel has objected, whether it is sustained or overruled, it should not matter nonverbally. Counsel should deliberately hold his head high, look at His Honor and say "thank you" no matter what the ruling. The jury will think you have won even if you have lost. Never lose face in front of the jury. Always remain confident and in control.

a. The Importance of the Pause

Often, the most important thing an attorney can say is nothing. The pause for dramatic effect has been used by great orators over a number of millennia. The pause serves two major purposes for the orator:

First, the pause allows the statement immediately preceding it to soak in thoroughly; and secondly, the pause will recapture the minds of those who have strayed and cause those who have been listening to pay more close attention to the statement that follows the pause.

Often, inaction is the most effective means of non-verbal communication, i.e., the use of the emphatic pause.

The major uses of the pause during oratory include the following:

1. To arouse the anticipation of the listeners;

2. To stress importance of each phrase;

3. To accentuate humor;

4. To allow the rhetorical question to be answered;

5. To initially capture the attention of your audience;

6. To emphasize the theme during repetition;

7. To dramatize a climactic ending.

Consider the following brilliant use of pause in the delivery by Winston Churchill of two of his most famous sentences (slant lines \ indicate pauses)

> Never \ in the field of human conflict \ was so much owed \ by so many \ to so few.
>
> Let us, therefore, \ brace ourselves to our duties, \ and so bear ourselves \ that, if the British Empire and its commonwealth \ lasts for 1000 years, \ men will still say, \ 'this \ was their finest hour.'

In structuring the use of the pause, a simple guideline is to use the pause as punctuation in the sentence. Without punctuation we would have a stream of consciousness run on sentences which run the risk of failing to convey to the reader the message which the author wished to convey. Similarly, speeches without pauses fail to utilize all of the tools available to the speaker in order to most effectively convey the message.

b. Pacing the Jury

In addition to using verbal, vocal and nonverbal cues to create the appropriate mood for your case, it is necessary to pace the jury during summation. The attorney has paced the individual juror during voir dire and he has watched the jurors closely during trial. The attorney knows which jurors relate to one another, which jurors like humor, and what cues elicit desired responses, and what phraseology and verbiage to use. He also has some information regarding their background. Pacing in summation is based on weaving that information into the phraseology and nature of the summation. The nature of the summation is based on the intensity of the emotional impact to be conveyed to the particular jury type that you are facing. A conservative upper class jury will not be persuaded by a summation loaded with emotional impact. On the other hand, a blue-collar-type jury is more likely to react favorably toward an emotional summation containing a strong theme, pictures and impact words and phrases. All of these factors should be considered when pacing the jury in summation.

c. Movements and Gestures

Movements or gestures form part of the style of summation. The more flamboyant the attorney's style of delivery, the more movements and gestures are used. Some movements and gestures are essential. An effective summation cannot be given by standing in one spot, rigid and stiff. On the other hand, too much uncontrolled movement is distracting. The speaker who paces back and forth in an uncontrolled fashion, like a caged lion, actually distracts the jurors with his movements and gestures.

No attorney should use gestures or movements with which he is totally uncomfortable. A background in some type of public speaking is helpful in developing appropriate movements and gestures. Most communities have toastmaster clubs or other such clubs where the neophyte attorney can develop important speaking skills. He will find that the practiced gestures become more natural as he learns to use his movements to correctly emphasize important points.

As effective means of developing gesturing skills is by the use of videotaped practice sessions. This allows an individual to learn about his own style and gestures and how to use them most effectively. If we attempt to communicate through the nonverbal channel with inappropriate and improperly timed gestures, jurors will perceive a lack of authenticity, at least on the subconscious level. Generally, most of the attorney's movements during summation ought to be restricted to the upper torso. He can move from side to side, but generally should be stationary for many moments at a time, never appearing to be nervously pacing. Movements of the upper torso appear more like gestures of nervousness if made too close to the body. Arm and hand movements need to be full and robust, and certainly at no time should the attorney stand with his hands in his pockets. Nor should his hands be clasped tightly behind his back as such movements are distracting and definitely affect credibility. The only object which should be held during summation is one you intend to use, i.e., a piece of evidence to be shown to the jury or a pointer of some type used as an extension of your arm. A collapsible-type pointer is recommended because it looks more professional and projects an air of authority and competence.

d. Touching the Client

The jury searches for and is impressed by an apparent relationship between the attorney and the client. This is particularly true where the attorney is representing an individual rather than a corporation or some other nonpersonal entity. If the attorney is representing an individual

in a personal injury claim, some physical touching of the client is essential during the course of the trial and during summation because touching is interpreted as a sign of affection. Although it is nonverbal, it will surely be picked up by the "Sherlock Holmes" of the jury. It is a nonverbal cue that can only be narrowly interpreted. It projects the attorney's belief in the client and the warm relationship that exists between them. Touching projects that the attorney, like the juror, has feelings about and empathy for human beings and their suffering.

The caveat regarding touching the client is that it must always be appropriate and almost incidental. The sex and age of the client and the attorney must be considered to avoid all sexual connotations potentially associated with the touching. The young male attorney should never touch a young female personal injury client, nor should a young male client be touched by a young female attorney. An older fatherly-type attorney may appropriately put his arm around or touch the client of either sex. An older female attorney can be seen as mothering younger client by her touch. The touching of older clients by younger attorneys, regardless of the sex, is usually permissible as long as the touch can be interpreted as indicating that "I believe in this client," or "I have feelings for this client."

e. Dressing for Summation

As the trial progresses, the attorney's dress should become progressively more conservative. An attorney representing a seriously injured client in a civil case will be making a somber summation emphasizing the serious injuries and damages suffered by the client. Appropriate dress for the delivery of such a somber message approximates the visual image of the minister who has come to the house to tell the widow that her husband died in an accident. The attorney wants to be identified with the archconservative banker-type, dressing in dark blue or gray. As discussed previously, the attorney's dress obviously varies according to the sex and personality of the attorney.

2. Mood Transference

Well trained actors and orators create moods by the use of verbal, vocal, and non-verbal cues. The words they choose to use and how those words are used, combined with eye movement and gestures, can be an effective means of mood transference. Great actors repeatedly create a mood every night, sometimes for years, while doing a Broadway show. The great actors do not go through the emotional turmoil of feeling that mood night after night, rather, they create the mood by pure acting.

However, this is where the actor and the advocate part company. For example, in order for a plaintiff's attorney to fully and completely generate empathy in the hearts and minds of jurors with the plight of the paralytic plaintiff, it is necessary for the attorney to understand, appreciate and feel that plight at a gut level. Merely verbalizing the words, describing the horrors of paralysis is not sufficient because it is absolutely essential that the verbal content of the summation be consistent with the vocal and non-verbal behavioral cues which the attorney conveys to the jury.

In order to maximize the consistency between the verbal, vocal and non-verbal communication on the issue, the attorney must fully empathize with the client's plight, i.e., feel the loss. This is because, whether we realize it or not, whether we attempt to control it or not, the attorney,

during summation, will transfer his mood to the jury through behavioral cues, voice inflection and verbal content of the persuasive speech. One of the reasons that the jury system in America works so magnificently is that the collective wisdom of the jury far outweighs the persuasive talents of counsel. The lawyer who attempts to mislead the jury through the power of oratory, without substantive evidence, will most often be spotted by the jury because the non-verbal behavioral cues are inconsistent with the message which the attorney is attempting to convey.

There is a definite role for a more profound understanding of the channels of communication with juries. For example, the plaintiff's attorney who is attempting to persuade the jury as to the seriousness of a client's injury, at the crucial point of conveying sadness, should lower his eyes towards the left side while gesturing downward with the left hand, in such a manner as to cause the jurors to lower their eyes towards the lower right hand corner. This eye position of jurors allows greater accessibility to kinesthetic communication and opens the jurors up for experiencing the emotional feelings which counsel has attempted to convey.

Making emotional statements also affects the breathing patterns of the attorney. The more depressing the news, the more slowly the rate of breathing. Therefore, conveying a sad mood requires the attorney slowing the breathing rate while breathing more deeply. On the other hand, indignation or rage about a person's conduct is best conveyed by more rapid shallow breathing. These behavioral cues are communicated to the jury more effectively than the verbal content of the message, particularly when the verbal and non-verbal messages are inconsistent.

Pacing and Leading to Create a Mood Transference

Transferring a mood in the courtroom is the process of leading jurors to experience a particular emotional state. This state might be a state of anger, empathy, or pity. Or, the attorney may want the jurors to view everything in a very logical, detached type of perspective. In almost every instance, the attorney is probably trying to counter the emotional state that opposing counsel is attempting to create.

It is very important that you understand how to create a mood or emotional state that jurors experience in the courtroom. Your opening statement and closing argument, as well as everything that has transpired in the courtroom, has to support the way you are trying to lead the jurors. Keep in mind that these are not individual strategies to be used by themselves, but to be used collectively. The following sections discuss how to transfer feelings, factual information, and visual information.

a. Transferring a Feeling

Before we can understand how to transfer a feeling, it is important to understand what behavioral cues tend to go along with a person experiencing a particular feeling. When you want jurors to experience the state of extreme empathy, the trauma of a tragedy that has taken place, the deep emotional feeling and concern for a family that lost a loved one, then you must not only display certain behavioral cues, but you must lead the jurors to use these cues themselves. If you have already established rapport with the jurors, when you use these behaviors they will begin to pace you. Of course, this is the true test of your being able to lead the jurors. If you want jurors to experience a particular state as you are presenting your opening or closing statement, for example, you need to use those behaviors (vocal, verbal, and nonverbal cues) that correspond with the particular drama that you are trying to create. Too often trial attorneys will deliver a very emotional argument in terms of the verbal content and not use the correct vocal and nonverbal behaviors. If the verbal content is in itself emotional, but the vocal and nonverbal behaviors are not, the attorney will not be able to transfer an emotional state to the jurors. Given a contradiction between vocal and nonverbal behaviors and verbal content, jurors will believe the behaviors. Therefore, your behaviors will nullify the effect of the emotional story or picture that you are trying to paint.

For example, to convey a feeling of empathy for a tragic emotional experience of your client you will want to utilize the following behaviors:

- A slower voice tone
- A lower voice tone
- Extremes in vocal patterns from soft to loud
- Dropping the eyes to lower right
- Using left-handed gestures and hand movements that pull the eyes of the jurors down to their lower right
- Using a slower movement pattern
- Using a slower breathing pattern
- Using dramatic pauses

Beginning with the first item on the list, it must be recognized that a slower voice tone correlates with a depressed emotional state. When a person is experiencing a feeling, his voice pattern tends to become slower and his vocal tone tends to drop lower. This is the way we express concern.

By using extreme vocal tones of going from soft to loud, you will be able to create the drama that is associated with feeling. This means being able to develop the voice so that it will go through all ranges and all types of pitch patterns. An individual can best process kinesthetic information when the eyes are dropped down to the lower right. It increases the jurors ability to experience what you are describing. You must remember that if you are not genuinely feeling the effect that you want to create, it will be impossible for jurors to feel that same state. You need to bring about the particular behavioral state by feeling the emotion you wish to transfer. Drop your eyes down to the lower right, collapse the upper chest cavity as though you have sighed, and let out your air. Theses are the appropriate nonverbal cues to use to create a feeling of tragedy.

The next step is to make sure the jurors start to process the information on a kinesthetic or feeling level. To do this, use left-handed gestures. Keep the gestures low enough so as to pull the juror's eye contact down into their lower right hand corner. When done properly, they are in the mood to process kinesthetic information. Therefore, you want to deliver your most important and dramatic lines when their eyes are in this position. Save this type of motion and gesture for the key points.

Slower movement patterns are also indicative of conveying an emotional state to jurors. To convey the tragedy, therefore, you do not want to be fast or flip. Rather, you want to be slow and draw it out when describing it.

A very critical consideration with the kinesthetic transference of mood is the use of slower breathing pattern. When a person is feeling emotional, he usually breathes from his abdominal cavity, there are more pause patterns, and he tends to sigh. In order to convey and transfer this feeling, you will need to use the same behaviors.

The other feeling that counsel may want transferred in certain very limited situations is when counsel is trying to instill anger on the part of the jurors. In other words, arousing their feelings so that they are angry at an injustice that has taken place. Anger has several other behavioral characteristics that go with it. In order to transfer or display the characteristics of anger, the following behavioral patterns must occur:

- A fast vocal tone
- Usually a higher vocal tone
- Louder vocal tone
- Eyes moving straight across
- Direct eye contact
- Gestures that are mid-waist to upper level
- Gestures that are firm and definite
- Quicker movement patterns
- Decisive movement patterns
- Dramatic pauses

The sense of conveying anger has an altogether quicker movement pattern. When a person is angry, he tends to breath in his upper chest area, so his breathing pattern is very different. He moves at a different rate. In order to motivate people to become angry, both the attorney's speech patterns and movement patterns must be quicker. To convey anger, you have to come forward and be aggressive in your behaviors. Do not be afraid to point, as long as you are pointing at opposing counsel or his client. Never use the pointed finger at your own people.

The best way to practice the transference of a kinesthetic feeling is to first take the feeling that you are trying to convey and put yourself in the same body position and state of mind. Before going into the courtroom, you should experience whatever state you are trying to convey on a personal level. For example, to convey the feeling of anger, practice being angry. Practice feeling the emotional state yourself and try to perceive behaviors that you have in that state. Ob-

serve yourself. When you are unhappy, notice what you do. When you are happy or carefree, notice your behaviors. Also become a watcher of people and study basic human nature. You will notice the behaviors that people use in displaying anger or passion or empathy are very similar. All you have to do is understand those behaviors, use them, feel the state, and then transfer the mood to the jurors.

b. Transferring Factual Information

There are times when you want to convey to jurors that the information being presented is just factual. The last thing the attorney wants to do is lead jurors into an emotional state. In order to do this, you need to follow several behavioral cues. These cues include the following:

- Keeping the eyes level
- Keeping the breathing pattern even
- Using a moderate rate of speaking
- Avoiding extremes in vocal tones
- Keeping all behaviors in moderation

If you want jurors to treat information as a matter of fact, you must treat it as a matter of fact. The behaviors you use for transferring factual information to jurors are very nondescriptive and moderate. The eyes stay at an even level, neither moving up or down, just appropriate eye contact. Breathing tends to be even so jurors will not see an extreme in the breathing patterns. The one risk that is run in transferring factual information is that it can become boring. Thus, when you do transfer information that is factual, you will want to break it up by emphasizing key points or making something more exciting simply to maintain the attention of the jurors.

c. Transferring Visual Information

In many types of cases, there is a need to describe a picture, scene, or event for the jurors. This definitely involves the transfer of visual information. Some jurors will pick up these visual pictures very quickly because they will be visually oriented. Other jurors who are kinesthetically or auditory-oriented will need the attorney's help in obtaining the transfer of information. Behavior cues used to transfer visual information include the following:

- Using quick vocal tones
- Breathing in the upper chest
- Keeping the eyes moving up to upper right or left
- Using gestures that are above the waist and expansive
- Pointing up to a chart
- Maintaining a fast pace

Using these behavioral cues is most appropriate when the attorney is telling a story. If the attorney asks the jurors to picture or focus on some object, he should pick up his rate of speech, pull his hands up and get the juror's eyes moving to the upper right and left. Remember, what you are trying to do with the eye movement pattern behaviors of the jurors is to keep their eyes in the quadrant corresponding to the state you want them to experience. When you want them to have an emotional feeling, you want their eyes going down to the lower right. When you want them to have an auditory or more factual type of feeling, you want the eyes level. To visualize

or picture a particular event, you want the eyes moving to the upper left or right. To do this, you need to point up.

One way of getting jurors to visualize information is through the use of charts or graphic displays. With the proper use of a chart, the attorney can induce the proper eye movements. If you want the jurors to be assisted in visualizing or seeing what you are saying, make sure that you are using hand motions to pull their eyes up. Point to the uppermost part of the chart, or to the top of the screen. This will pull their eye contact up. Try to keep the chart high enough so that when you point to it you are pointing in an upward direction. If you want the jurors to visualize an event, you should never pass out material to them. When they are looking at such material, their eyes are looking down.

2. Voir Dire - Goals of Jury Selection

On voir dire examination we have several purposes which it is necessary to prioritize; these include:

a. Obtain Information

There are six standard areas of inquiry which we should pursue from each panel member, either through oral examination if time and judicial propensity permits or through the use of juror questionnaires. These include:

- _ Background and experiences;
- _ Technical training background;
- _ Experience with this particular type of injury;
- _ Attitudes about just compensation;
- _ Attitudes concerning the jury process; and
- _ Case specific information based upon this particular litigation

b. Create Rapport

It is necessary to create rapport with the jury before we can effectively educate, persuade or inoculate. One of the better techniques for establishing rapport is to be the educator, i.e., be the first person who sheds light on the jury process and what their role in it will be if they are selected as a juror. Jurors receive a summons to appear in court. As a general proposition they are not informed as to the role they will play and their curiosity is at a peak level when they arrive at the courthouse. Jurors don't know if they are going to be asked to put a criminal in jail, divide property between warring spouses, punish a negligent manufacturer or decide who ran a red light. On voir dire examination, we have the opportunity to be the educator. Be the person who explains to them exactly what this case is about and what their role will be in the case if they are chosen as a juror. We should explain their duties, responsibilities and powers. Our goal in education should be to instruct the jury, influence the jury, empower the jury, and inspire the jury. One of the most effective starting points to accomplish this is to establish credibility with them by being the first one who intelligently informs them as to why they are there, what is expected of them, how long it will probably take and other burning questions which no one has addressed.

While educating, we should also seek to establish rapport in such a manner as to cause the jurors to open up and give information about themselves. A very good ice breaker is self disclosure by the attorney. If you approach voir dire examination by sharing some information about yourself, personal data such as marital status, family information, etc. you are effectively

conveying to the jury that you won't ask them to do anything which you won't do yourself. This allows the jurors to reciprocate by opening up personally to you.

In order to establish rapport with the recalcitrants or those obviously adverse to you, it is important to sincerely thank them for asking a question or making a revelation which appears to be adverse to your position. By showing sincere appreciation for their honesty and their disclosure, you effectively encourage others to make the same type of disclosure. The worst response and the death of rapport occurs, if, when you get an adverse response or an adverse revelation from a juror, you argue with them or try to persuade them to change their position. Other jurors holding a similar position will sit quietly from that point forward. Rapport is crucial both with your friends and your potential enemies on the jury.

c. Begin the Persuasive Process.

The persuasive process is undertaken subtly on voir dire examination. It can be accomplished by using a storytelling technique to relate the facts of the case. Storytelling is done in the present tense, using simple language designed to create visual imagery in the minds of the jurors with respect to your themes and messages. The idea of storytelling is to tap into the memory organization packages of the jurors, i.e., to tell a story which will trigger personal experiences which the jurors may have had in their lifetime which will cause them to empathize with your client's viewpoint.

d. Inoculate Against Weaknesses.

One of our major goals on voir dire examination is to inoculate the jury against adverse information which will be a major part of the opponent's case. One of Aristotle's four principles of persuasion is to minimize your weaknesses. It is far better to treat the weaknesses in your case directly by raising them on voir dire examination at a time when you have the opportunity to identify those panel members who will not forgive your weaknesses and hopefully eliminate those jurors either through challenge for cause or a peremptory strike. By discussing our weaknesses directly, we are establishing our own credibility with the jury by being open and honest about our case. We also have the opportunity to couch the weakness in our own language. For example, it is far better for the jury to hear from the plaintiff's attorney on voir dire that "John did what several of us do, he drank two beers at the Oiler's game before this accident occurred on his way home", than to have their first knowledge of this fact be couched by the defense lawyer as "the plaintiff in this case is a drunk driver".

How do we determine the weaknesses in our case which must be dealt with on voir dire before the jury. A simple test is that if a fact bothers us, it probably also bothers someone on the jury panel. Our goal on voir dire examination with respect to those jurors which we cannot remove from the panel is not to retrain them with respect to the weakness in our case but rather to have them refrain from punishing our client because of the weakness. For example, if you represent a plaintiff who is injured as a passenger in a vehicle and the evidence will show that the plaintiff was intoxicated at the time of the accident, the intoxication clearly has no bearing on the negligence in the case. However, if you have panel members who, for religious purposes, are unalterably opposed to drinking alcohol, it is necessary to deal with their anti-alcohol beliefs directly on voir dire examination. We cannot be successful in retraining an anti-alcohol juror to set aside a lifetime of thought, belief and religious training concerning alcohol, however, our

goal is to make them refrain from applying their anti-alcohol beliefs in this case since the intoxicated condition of a passenger had no bearing on the negligence of the adverse driver which caused the accident. The simple rule is try to get the jurors to refrain rather than retrain.

e. Introduce Case Themes

Voir dire examination is the point at which we begin the persuasive process with the jury by introducing them to our case themes. Your theme can be most effectively promulgated on voir dire by identifying jury panel members who agree with your theme, have them discuss it and let the other panel members be persuaded by one of their own members as to the propriety of your theme. For example, if your theme is corporate greed over consumer safety and you discover a juror who has encountered such a problem in the past, have that juror discuss the problems of trying to maintain a safe society when corporate America is interested only in the bottom line. Clearly the juror will not survive the strike by the other side, however, they can serve the extremely valuable purpose of creating an early perception in the minds of other jurors that your theme is something which touches real citizens other than your plaintiff.

f. Empower Jurors

Jurors do not understand their power. It is essential that we begin on voir dire to make them understand that they are the sole judges of the facts in the case; that they are the sole judges of the amount of money to be awarded to compensate for the wrong which has been done; that they are the last bastion of hope in our society for correcting the injustice which has been visited upon the plaintiff by this defendant; that this is the party's last day in court; that full and complete justice is required at this time; and that they are serving as the conscience of the community to correct a grievous wrong which has been done in this case.

g. Create Visual Images

It is essential in order to influence early perception creation in the minds of the jurors to create visual images which support our themes and messages. This is accomplished by the use of simple, carefully chosen language, storytelling techniques, and demonstrative evidence to the extent that it can be cleared with the Court that it is admissible as evidence and is needed to qualify the jury on voir dire examination.

h. Listen to the Jury

A simple rule of thumb is that the attorney should not talk more than one-third of the time on voir dire examination. We are attempting to obtain information from panel members, let them create perceptions in each other's minds and open up the process so as to encourage free flow of information. In order to get jurors to talk, we must demonstrate true concern with what they are saying and with the questions they are asking. Never leave a question unanswered even if it is necessary to take the panel member in front of the bench and have the question answered privately in front of the judge.

i. There is No Such Thing As a Stupid Question

Jurors approach open discussion on voir dire with trepidation due to the fear of embarrassment or the fear of saying something stupid. We must make them understand that the only stupid questions on voir dire examination are occasionally those which are asked by lawyers. The classic example is the lawyer who, after explaining that the jury would have to sit through a three

week trial, asked a rather obese female juror when her baby was due to which the juror replied "I'm not pregnant".

j. Avoid Legalese

Word selection on voir dire examination is crucial. We should choose our impact words carefully, utilize words which support our theme and introduce the language of the case. By using legal language we build a barricade between ourselves and jurors which initiates resentment.

k. Do Not Ignore Anyone On the Panel

Focus Group research has taught us that one of the major mistakes made by attorneys is to ignore jury panelists whom they feel are on their side because of the fear of the person sounding too favorable and eliciting an effective challenge from the opponent. As enigmatic as it may seem, despite the fact that jurors have a great fear of being called on to speak, they have an even greater resentment when they perceive that everyone else has been called on except them. The simple rule is to talk to and involve every member of the panel.

l. Ask Open-Ended Questions

Explain to the jury panel at the inception that there are no right or wrong answers to the questions which you will be asking; that this is simply an information gathering process and that they should feel free to speak openly and fully on your areas of inquiry. Asking leading questions to a jury panel is not only a waste of precious time but is also totally ineffective in achieving the goals which we have discussed herein.

m. Use Juror Questionnaire

The most effective means of being certain to obtain all of the information that you want from every jury panel member is to get permission from the court to use a jury questionnaire. There are two problems inherent in this, both dealing with time. You must convince the Court to give you the time to get the juror questionnaire filled out by each panel member and then, allow the additional time for you to review the questionnaires before having to exercise your peremptory challenges. The creation of juror questionnaires is also a superb exercise in aiding the attorney to focus on the precise issues which should be covered on voir dire.

3. Effective Storytelling Throughout Trial

Children love stories. Adults love stories. We remember, understand and create through storytelling and listening. Jurors decide on the basis of stories heard, related, and understood.

Gerry Spence explained the role of storytelling in an article appearing in the American Bar Association Journal 605 April 1986:

> Of course it is all storytelling--nothing more. It is the experience of the tribe around the fire, the primordial genes excited, listening, the shivers racing up your back to the place where the scalp is made, and then the breathless climax, and the sadness and the tears with the dying of the embers, and the silence...The problem is that we, as lawyers, have forgotten how to speak to ordinary folks...lawyers long ago abandoned ordinary English. Worse, their minds have been smashed and serialized, and their brain cells restacked so that they no longer can explode in every direction--with joy, love and rage. They cannot see in the many colors of feeling. The passion is gone,

> replaced with the deadly droning of the intellect. And the sounds we make are all alike, like machines mumbling and grinding away, because what was once free--the stuff of storytelling--has become rigid flanges and gears that convey nothing...

The importance of the story in human remembering and understanding is easier to grasp if we picture the individual in today's high intensity world of communication. Today the English language contains roughly 500,000 usable words, five times more than during the time of Shakespeare. The number of books in top libraries doubles every 14 years, giving new meaning to the words "keep up with your reading." Peter Large, in The Micro Revolution Revisited, advises that more information has been produced in the last 30 years than in the previous 5,000 years. About 1,000 books are published internationally everyday, and the total of all printed knowledge doubles every eight years.

Good communication skills are among the most valuable assets. An effective communicator must not only be able to speak eloquently and express his or her thoughts clearly, but also be able to register what others tell them. We remember a mere 15% of what we hear, thus, good listeners are at a premium.

Social scientists have studied the impact of messages relating to the three primary channels of delivery, verbal (words), vocal (how the message is delivered), and nonverbal (facial expressions, eye movements, body positions, etc.), and the results are devastating to today's hyper-correct language enamored lawyer. What we say counts for only eight percents of the impact. Our vocal message (inflection, resonance, etc.) accounts for 37% of the impact. By far the most important aspect of the message is nonverbal, which delivers 55% of the impact. All three of these components play major roles in the storytelling process.

We survivors in the modern world are inundated with information, as the quoted statistics demonstrate. Information is not knowledge. Raw data can be mass produced in incredible quantities of facts and figures. Knowledge cannot be mass produced. Theodore Roszak in The Cult of Information, tells us knowledge is created by individual minds, drawing on individual experience, separating the significant from the irrelevant, making value judgments. Data are facts. Information is the meaning that human beings assign to these facts. Individual elements of data, by themselves, have little meaning; it is only when these facts are in some way put together or processed that the meaning begins to become clear. William S. Davis and Allison McCormack, The Information Age.

When people receive random, unstructured data, they become anxious. Information anxiety is produced by the ever-widening gap between what we understand and what we think we should understand. Richard Saul Wurman in Information Anxiety tells us, "information anxiety is the black hole between data and knowledge. It happens when information doesn't tell us what we want or need to know."

There are several general situations likely to induce information anxiety. When an individual does not understand the information, feels overwhelmed by the amount of information, does not know where to find information, is not certain information exists or knows where to find the information, but does not have the key to access it, anxiety sets in. In a court-

room setting it is the trial lawyers' job to lower the anxiety level, create understanding, which is the bridge between data and knowledge, and enhance understanding by creating a situation wherein the listener becomes comfortable and opens his or her mind for understanding.

Henry David Thoreau told us it takes two to speak the truth--one to speak and another to hear. We should try to listen with the same intensity we have when we are talking. Paula Bern, author of How to Work for a Woman Boss (Even if You'd Rather Not, advised in an article from New Woman, May 1988, there are basic tenets of mastering the art of listening:

(1) You have two ears and one mouth. Remember to use them more or less in that proportion. (2) Don't plan your reply while the other person is speaking. (3) Be aware of your personal prejudices (everyone has them), and make a conscious effort to maintain your objectivity. (4) Show that you are listening by keeping eye contact, even if you must take notes during the conversation. (5) Don't interrupt or try to finish the speaker's sentences for him or her. (6) Allow a pause after the person has finished speaking before leaping with your response. Do not be afraid of silence; people often reveal the essence of what they are trying to say after a pause. (7) Use your intuition to read between the lines and pick up body language. Consider what is not being said.

Remember, Americans have micro-second attention spans. We, as trial lawyers, must design methods to overcome our listeners' reluctance to accept and understand new information. The concept of storytelling is the methodology that allows us to effectively communicate. Human beings are collections of stories. They accumulate stories over a lifetime and when they are given the opportunity, they select an appropriate story and tell it. They determine appropriateness by a variety of measures, primarily familiarity, emotion, the potential for shared viewpoint, and seeking approval. Finding a relevant past experience that will help make sense of a new experience is at the core of intelligent behavior.

A simplistic view envisions an individual as a person who walks around with a myriad of stories stored in his or her unconscious mind. When information is offered, a scanning process takes place to retrieve relevant stories that match the information being input. These stored stories or scripts constitute a set of expectations about what will happen next in a well-understood situation. In a sense, many situations in life have the people who participate in them seemingly reading their roles in a kind of play. In his book, Tell Me a Story, Roger Schank tells us life experience means quite often knowing how to act and how others will act in given stereotypical situations. That knowledge is called a script. Taken as a strong hypothesis about the nature of human thought, scripts obviate the need to think; no matter what the situation, people may do no more in thinking than to apply a script. Schank's hypothesis holds that everything is a script and very little thought is spontaneous. Scripts are also a memory structure in that they serve to tell us how to act without our being aware that we are using them. They serve to store knowledge that we have about certain situations. They serve as a kind of storehouse of old experiences of a certain type in terms of which new experiences of the same type are encoded.

When something new happens to us, we must have someplace to put that new information so we will be wiser next time. Scripts change over time, therefore, and embody what we have learned. Obviously, we can understand some novel experiences even if no script seems to apply.

We do this by seeing new experiences in terms of old experiences.

The storytelling trial lawyer must fathom the stories stored in each juror's mind, so, as an effective communicator, he or she can activate the scripts that will lead to an understanding by the listener. It is a concept of reaching into the jurors' minds and pulling out those stories that match our clients' favorable story. If we do not carefully structure our stories, unfavorable scripts will be scanned by the listener and applied to the situation at hand.

A good teacher is not one who explains things correctly, but one who couches explanations in memorable formats. When we tell stories intended for other people, our goals tend to fall within five categories:

1. To illustrate a point;
2. To make the listener feel some way or another;
3. To make others experience certain sensations, feelings, or attitudes vicariously;
4. To transfer some piece of information in our head into the head of the listener; and
5. To summarize significant events.

In a trial setting we tell stories for all of these reasons. Our primary concern is to map our stories on to the listener's stories. Different people understand the same story differently precisely because the stories they already know are different.

As a listener, once we have found our own story, we basically stop processing. The reason for stopping is partially based upon our intentions in the first place. Since most of the time we were really just looking for something to say back in response, having found something, we have little reason to process further. This is a frightening concept for someone who wishes to communicate effectively. If the listener stops listening once a relevant story or stories is located, persuasion might not occur. This tells us in our storytelling at trial we must condense information, deliver it quickly with impact, and hope the main theme is etched into the mind of each individual juror in a manner favorable to our client. It also means we must include in our story a motivational factor, which will overcome the listener's natural tendency to stop processing once he or she has found their own story.

Certain communication concepts apply to effective storytelling. We know there are only three meanings of description available to us--words, pictures, and numbers. The palette is limited. Generally, the best instructions rely on all three. We also know people process information through visual, auditory, and kinesthetic channels. A person using a visual channel creates a "mind's eye view" and might be inclined to say, "I see what you mean." The auditory processor has to hear the message in order to understand it. That person might tend to say, "Do you hear what I am saying?" A kinesthetic individual processes information by living the experience. Such a person might say, "I want to feel right about this."

We, of course, use all three channels of processing information, but most people tend to favor one channel over the other. To communicate effectively, we must learn which channel our listeners favor.

Frances Bacon advised us, "It is a peculiar and perpetual error of the human understanding to be more moved and excited by affirmatives than negatives." Social scientists explain Bacon's

observation by viewing the unconscious mind (as opposed to the conscious mind) as being the storehouse of unlimited information relating to the total experience. It is the sponge of our being.

Social scientists tell us information is best understood, when presented to jurors in groups of three's. This, the "Rule of Three's," has been recognized in America for centuries. "Faith, hope and charity," "life, liberty and the pursuit of happiness," "it is as simple as one, two, three," All of these are examples of the "Rule of Three's." Individuals are more capable of understanding concepts if the data is input in the form of three pieces of information.

We are all familiar with the theory of primacy. That which enter the mind first will be remembered best. This concept, coupled with the mind's first-impression approach to evaluation, results in the "four-minute drill." Social scientists tell us most people in a social setting develop a first impression within four minutes of the initial encounter. Translating this into juror communication techniques, we know we must tell our main story to the jurors as early as possible and within four minutes of their first encounter with the facts of the case. Once implanted, an effective and persuasive story will remain the focus of the jurors' minds throughout the trial.

Telling a story in the present tense, using active verbs, creates a greater impact on the listener. The story is happening now, and the listener is there. "Joan was stopped at the light, when she was struck violently from the rear," is less effective than "Joan is sitting in her car at the stop light, thinking of the joy she experiences when the children come racing in from school, when suddenly her body is thrown forward as the defendant strikes her motionless vehicle from behind."

Finally, a concept of storytelling we often tend to overlook or misinterpret plays a strong role in effective persuasion. We communicate by exchanging stories in condensed form. Vignettes are a way of life. "We killed them," is an unmistakable way of describing a lopsided football victory. Our younger generation uses terms such as "radical" to provide a full explanation of an enjoyable experience. "Mañana" explains the task will be accomplished sometime in the future. We are a culture of condensed communications. This concept at least partially explains the need for a theme or themes in every case.

Keeping these communication concepts in mind, it is easily recognized that storytelling must be an overriding aspect of every case. It is easy to recognize the need to tell an effective and persuasive story during opening statement and closing argument. A lawyer who can capture his or her audience in these two aspects of trial by telling an impactive story is to be admired, but that lawyer has not conquered the art of communication. Storytelling must be employed in every aspect of trial from voir dire to final argument.

Voir dire, where permitted, provides a unique opportunity to use storytelling concept in two ways. Most experts agree the three primary goals in voir dire are: (1) information gathering; (2) indoctrination; and (3) creation of rapport. To effectively gather information the lawyer must create an atmosphere where it is comfortable for the jurors to tell stories about themselves. This is where we learn whether the individual juror tends to channel information through visual, auditory, or kinesthetic means.

Within conversations are a myriad of self-adjusting systems. In voir dire, as we speak with a juror, we constantly readjust our language based on the cues we receive from that person. Do they look baffled or excited, bored or angry? We must engage in a constant conversation tuning process during voir dire. We make adjustments, simplify, repeat, and move between various levels of complexity based on continuous feedback--a slight nod, a gaze up, down or to the side, blinks, shrugs, turns of the head, or loss of eye contact. The symphony of signals occurs during even the briefest of conversations.

To indoctrinate, we can tell short stories to the jurors by adopting their stories and reframing them in terms of the stories we want to tell on behalf of our client. For instance, if a juror discloses she is a nurse, who becomes distressed when working in the emergency room, we can in a medical negligence case, sympathize with her situation and respond by having her agree there are certain protocols medical care providers must follow, regardless of the urgency of the situation. By sharing our own stories, often in a self-deprecating manner, the jurors will understand, sympathize and relate to us. In this manner we build rapport.

Opening statement provides us the first opportunity to tell the jury our story in complete form. The theme is introduced or reintroduced if an opportunity has arisen to convey the theme during voir dire, and the stage is set. Our story must be told in a manner that each juror can index to his or her own favorable scripts, appealing to visual, auditory and kinesthetic channels of understanding. The story must be told at the outset of our remarks to satisfy the concepts of primacy and "four-minute drill." Major points should be presented in story form to the jury in three's. The story should be told in the present tense as if the jurors were there, living the events with the victim. Impact words and phrases, devoid of legalese, should be used to convey the messages. At this point in the trial themes for liability, damages and motivation to act should be established. If the case story is told in a persuasive fashion with a beginning, middle and end, the jurors will have extreme difficulty focusing on anything else during the trial.

Direct examination is the epitome of storytelling. Your client's story is told with you acting as the moderator. Tell a group of children a story like "The Little Mermaid." Listen carefully to the questions at the completion of the story. These are the types of questions jurors will be contemplating during the direct examination story told by your client. As a good storyteller, you must anticipate those questions and explain them through your client during the storytelling process. In essence you must become one of the jurors listening to the case story. The story must be compact, simple, direct and impactive.

An example of effective storytelling in direct examination is the manner in which your expert's qualifications are established. Many lawyers tend to present qualifications in a droning, quick hitting, "let's get this out of the way," manner. The story that must be conveyed to the jury is, "Ladies and Gentlemen, we have a very special commodity here in the form of this expert." Condensed stories relating to that expert's views, education and experience will be interesting to the jurors. What prompted the expert to spend three years in Saudi Arabia researching petr-ochemical issues is more persuasive than the mere fact he was in the desert. An expert is someone who has a great many stories to tell in one particular area of knowledge and who has those stories indexed well enough to find the right one at the right time. Thus, the expert

becomes a storyteller in the process of testifying.

Cross-examination is also a time for storytelling. You may utterly crucify an opposing witness, but at the end the jury may have no clue as to what story has been told. The "rule of affirmatives" plays a role in cross-examination. Remember, the unconscious mind, which is going to activate to scan relevant stories cannot understand a negative. In cross-examining a witness, "yes" responses will elicit the most favorable reaction from the jurors. In his book, How We Know What Isn't So, Thomas Gilovich tells us:

> When trying to assess whether a belief is valid, people tend to seek out information that would potentially confirm the belief, over information that might disconfirm it. In other words, people ask questions or seek information for which the equivalent of a 'yes' response would lend credence to their own hypothesis.

In Tell Me A Story, Roger Schank points out memory is composed of Memory Organization Packages or "MOP's." An MOP covers a context-dependent aspect of memory, such as taking a trip or going on a date. Any MOP is composed of a set of scenes, each of which covers visually-defined boundaries that might occur in a variety of MOP's, such as an appearance at the emergency room and the confrontation with the desk attendant over insurance. We have all experienced embarrassment at having our fly unzipped or our dress unbuttoned in public, and such an experience may constitute an MOP. Everyone conjures up an immediate visual and auditory MOP, when a dentist's drill is mentioned. In our storytelling process to the jury, we look for MOP's that, when properly scanned by the listener, will give rise to a response consistent with our persuasive efforts.

Thus, in cross-examining witnesses, we attempt to elicit affirmative responses to descriptions that will produce MOP's in the jurors' minds, consistent with our story of the case. For example, a badly fractured leg may be described as snapping at a reverse angle. Such a description may give rise to the indexing of the MOP created in much of America's mind, when the breaking of Joe Theisman's leg was repeatedly and sickeningly shown on television.

Final argument is once again storytelling time. The same concepts apply. The four-minute drill is repeated. The case story is told again and this time the moral or motivation is emphasized. Visual, auditory and kinesthetic channels are utilized. Present tense, themes, and the rule of three are employed. You have now completed your story. It is a good story. Unlike nursery rhymes, fairy tales, novels, and nonfiction, your story does not leave the audience merely contemplating and reflecting. Your story must excite the listeners to action.

Storytelling is a natural, almost inherited, capability we all possess. Effective use of this talent in all aspects of trial will lend to more persuasive efforts.

IV. CONCLUSION

The subject of jury bias, beliefs and values is one of critical importance to the trial attorney. In this era of media, political, tort reform and public attacks on the justice system in general and lawyers in particular, jurors enter the panel with more types of bias and more deeply entrenched biases than ever before in the history of our Republic.

At the same time, judges are limiting time for voir dire examination of prospective jurors despite the fact that the need for juror information is greater than ever.

It is hoped that the information in this paper will help to open new avenues for coping with the multitude of biases which confront trial lawyers and their clients today and will assist in achieving a higher level of justice.

1 Medical Malpractice: Law and Strategy, Volume 11, number 10, August 1992.