

## PERSUASION

### I. Communicating During the Trilogy of Persuasion: Voir Dire, Opening and Summation

#### A. Understanding and Utilizing the Dynamics of Decision Making

The purpose of this section is to examine the underlying principles of effective preparation and presentation of persuasive proof. Onto the ancient Aristotelian principles of persuasion, we will overlay modern forensic psychological principles which have emerged from numerous studies of the decision-making processes of jurors. From these principles and studies we deduce and examine four major goals of advocacy in persuading jurors: today's advocate must inspire, influence, instruct and empower jurors.

We will examine methods of creating, structuring and testing messages and themes as well as techniques for effective delivery of each message through the multiple levels on which we communicate with decision makers.

#### 1. 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 the thematic repetition by the 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.

## 2. 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., pre-loads; 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) 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 preloaded perceptions which the jurors have in their minds as they enter the courtroom for the first time and how important these 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 immediately upon learning that this is a "medical malpractice" case. Many jurors have been preloaded with perceptions which they have formed through the press, the news media and many other sources to believe that

medical malpractice cases are driving up their healthcare costs and are generally frivolous lawsuits. Therefore, the skilled advocate will give careful consideration both to the preloaded perceptions with which jurors will enter the jury box in their particular type of case and to the advocate's role in coping with the preloads and in creating the 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.

Magicians have understood this principle for years. They use it everyday to create miracles. They know that if they can fool our senses into perceiving 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 perception is a principle that is very important to lawyers. He or she must understand that it is not 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. It is the perceptions of reality that carry the day, not necessarily reality. That is why it is all 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 person to whom we are communicating that counts.

The use of preconceived patterns of behavior generalizations, belief systems, and stereotypes alter perceptions and those perceptions become fixed rapidly. Jurors come into the courtroom, many for the first time, carrying with them their own 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 and generalized beliefs.

### **(2) Preloads Role in Decision Making**

These preconceived notions, ideas, generalizations, and stereotypes are one source of information jurors use in decision making. They use this information 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 very first moment they set eyes on 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.

Therefore, one must take into account, what the general beliefs are, about your client, the type of case, and about you as an attorney. One must constantly ask oneself throughout the trial what beliefs jurors are bringing with them regarding this kind of case, this type of client, and the kind of lawyer that I am. Sometimes it is wise to have performed a community survey designed by a social scientist to discover the real attitudes of the community towards the client or the type of case and other factors involved.

For example, in a recent case in Cleveland, Ohio, involving a young man who was severely brain damaged when he fell off the back of a motorcycle despite wearing a protective helmet, plaintiff's evidence overwhelmingly showed that the helmet involved was defectively designed. In fact, the proof established that the helmet, instead of protecting the head, actually accentuated the injuries. A pretrial community survey showed that the one type of person the plaintiff did not want on the jury was someone who had experience with motorcycles or motorbikes. Instead of identifying with the plaintiff as counsel thought, these potential jurors assumed that the plaintiff knew how dangerous motorbikes were and should have stayed off of it.

### **(3) Preloads Role in Primacy**

One has to understand that primacy plays a role here also. People use their own stereotypes, generalized beliefs, and interpret ongoing external cues to 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 from voir dire through the first witness. Opening statement plays a critical role therefore in taking advantage of primacy. One should always work with voir dire questions and the opening statement to convince jurors of liability and serious injury. Additionally, the first witness always should be a strong one. By the time you finish the primacy portion of the trial, most jurors should have made up their minds that they want to decide in your favor. Once a decision is made, it is very difficult for the defense lawyer to change a juror's adopted point of view.

### **(4) Coping with Long-Held 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. Beliefs in stereotypes can be changed only in the following fashion:

#### **(5) Suspending Long-Held Beliefs**

1. Acknowledge the pre-existing belief and justify it.
2. Link the client and/or yourself to the pre-existing belief.
3. Use this link to the belief or stereotypes to build a new belief system.

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 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:

#### **(a) Acknowledge and Justify Belief**

"I know that most of you believe, as I once believed, that doctors generally do not make mistakes and that they are very careful. We all want to believe that physicians who are highly paid 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.

#### **(b) Link to the Belief**

Now you link the client to the belief:

"My client Mary used to believe that too. When she went to Dr. Jones, the defendant in this case, she certainly thought that he would not make a mistake, that he would not let the scalpel slip and cut her ureter during her hysterectomy. It is all right for Mary to have believed that."

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 and in doing so you have suggested that the exactly the same fate could have befallen the trusting jurors.

#### **(c) 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, 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."

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."

#### **(6) Organization of Perceptions**

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 acknowledgement 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.

#### **(7) Jurors Seek to Render a Verdict Which They Perceive as Equitable**

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.

#### **b. Understanding the Conscious (Logic) vs. Unconscious (Emotion) Mind**

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

##### **(1) The Conscious Mind (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.

##### **(a) 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.

##### **(b) 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.

##### **(c) 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.

**(d) 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.

**(e) 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."

**(2) The Unconscious Mind (Emotion)**

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

**(a) 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.

**(b) The Unconscious Mind and Reality**

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

**(c) 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.

**(d) 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.

**(e) 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.

**(f) 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.

**(3) 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.

**(4) 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.

**(5) Pneumonics** - Growing out of this understanding of how memory function, Harry Lorraine developed a system of pneumonics. Pneumonics 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 pneumonics 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 pneumonic 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	4 - gore	7 - heaven	10 - hen
2 - shoe	5 - dive	8 - bait	11 - football
3 - tree	6 - kicks	9 - dine	12 - hell

13 - thirsting	16 - sorting	19 - piling
14 - guarding	17 - leveling	20 - plenty
15 - sifting	18 - dating	

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.

**(6) 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.

**(7) 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.

### **c. 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.

### **d. Jurors Search For and Appreciate Similarities**

#### **(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.

#### **(e) Psychological Bonding with Jurors**

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.

#### **e. 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?".

#### **f. 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.

#### **g. 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.

#### **(1) 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.

#### **(2) Purpose of 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.

#### **3. Goals of the Advocate**

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.

##### **a. 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:

#### **(1) Creation of Perceptions**

A right brain emotional present tense appeal to the unconscious mind in order to create the vital early perceptions;

#### **(2) Validation of Perceptions**

Validation through logical presentation of hard evidence which supports the appeal to the conscious mind and reinforces the early perceptions; and

#### **(3) 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.

### **b. Influence the Jury**

#### **(1) 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.

#### **(2) 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.

#### **(3) Data Which Influences Jurors**

##### **(a) 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.

##### **(b) 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".

**(c) 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.

**(d) 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.

#### **(e) 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 match-up, 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.

#### **(4) 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.

#### **(5) 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.

##### **(a) 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).

##### **(b) 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.

##### **(i) 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 Malandro 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.

##### **(ii) 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.

### **(iii) Dynamism**

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.

## **(c) Influences on Perceptions of Credibility**

### **(i) 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.

### **(ii) 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.

### **(iii) 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.

### **(iv) 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.

### **(d) Attorney's Goals to Establish Credibility**

#### **(i) 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.

#### **(ii) 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.

#### **(iii) 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".

#### **(iv) 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.

#### **(v) 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.

#### **(6) 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.

#### **(a) 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.

#### **(b) 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, re-enforcement or rejection of perceptions and must be consciously considered by counsel as an important part of the trial.

#### **(c) 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.

#### **(d) 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.

#### **(7) 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.

##### **(a) Identifying Roles Jurors Play**

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

##### **(i) 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.

##### **(ii) 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 juror 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.

### **(iii) 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.

### **(iv) 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.

### **(v) 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.

### **(b) 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.

#### **(i) 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.

#### **(ii) 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.

#### **(iii) 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.

#### **(iv) 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.

#### **(v) 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.

**(c) 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.

**c. Instruct the Jury****(1) 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.

**(2) 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.

**(3) 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.

#### **(4) 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.

#### **d. Empower the Jury**

##### **(1) 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.

##### **(2) 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.

### (3) 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.

### B. Creating and Adapting Themes and Messages

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.

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 exist 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)*.

### C. Structuring Power Themes

#### 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. 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.

## **c. 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.

**d. Embedded Commands**

An embedded command is a technique for engaging the conscious mind while communicating 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 decision making 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 cueing.

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.

**e. 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.

#### f. 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 worshipped **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 speechmaking 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 understatement. 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 enthral".

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:

Know, respect and love the English language.

See and hear eloquent speakers in action and study the text of their speeches.

Endure your handicaps if they can't be cured and turn them to your advantage.

Read good books to broaden your mind and stimulate your thinking, since much of eloquent speaking depends on both knowledge and thought.

Be sincere and use rhetorical devices to help your audiences understand and remember what you say, and to stir their emotions.

Put forth your best efforts to prepare your speeches and seize every possible opportunity to practice them.

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 nonverbal 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 they describe as well as suggesting the sound associated with the action. These words 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 completely 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.**

**Discursing 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 out 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 foramina. 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 relieve 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 is 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 racehorse 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*.

#### **D. Persuasive Communication of Power Themes and Messages**

##### **1. Communicating on Multiple Levels**

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.

#### **a. Nonverbal 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.

#### **(1) 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:

- To arouse the anticipation of the listeners;
- To stress importance of each phrase;
- To accentuate humor;
- To allow the rhetorical question to be answered;
- To initially capture the attention of your audience;
- To emphasize the theme during repetition;
- 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.

### (2) 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.

### (3) 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.

**(4) 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."

**(5) 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.

**b. 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.

#### **(1) 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. These 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. Observe 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.

### **(2) 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.

### **(3) 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 courtroom 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:

- \* To illustrate a point;
- \* To make the listener feel some way or another;
- \* To make others experience certain sensations, feelings, or attitudes vicariously;
- \* To transfer some piece of information in our head into the head of the listener; and
- \* 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 impactful 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 impactful.

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 petrochemical 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.

## II. Models of Eloquent Speeches

### A. A Day of Infamy

by Franklin D. Roosevelt -

Delivered in 1941

Yesterday, December 7, 1941 - a date which will live in infamy - the United States of America was suddenly and deliberately attacked by naval and air forces of the empire of Japan.

The United States was at peace with that nation, and, at the solicitation of Japan, was still in conversation with its government and its Emperor looking toward the maintenance of peace in the Pacific.

Indeed, one hour after Japanese air squadrons had commenced bombing in the American island of Oahu the Japanese Ambassador to the United States and his colleague delivered to our Secretary of State a formal reply to a recent American message. And, while this reply stated that it seemed useless to continue the existing diplomatic negotiations, it contained no threat or hint of war or of armed attack.

It will be recorded that the distance of Hawaii from Japan makes it obvious that the attack was deliberately planned many days or even weeks ago. During the intervening time the Japanese Government has deliberately sought to deceive the United States by false statements and expressions of hope for continued peace.

The attack yesterday on the Hawaiian Islands has caused severe damage to American naval and military forces. I regret to tell you that very many American lives have been lost. In addition, American ships have been reported torpedoed on the high seas between San Francisco and Honolulu. Yesterday the Japanese Government also launched an attack against Malaya.

Last night Japanese forces attacked Hong Kong.

Last night Japanese forces attacked Guam.

Last night Japanese forces attacked the Philippine Islands.

Last night the Japanese attacked Wake Island.

And this morning the Japanese attacked Midway Island.

Japan has, therefore, undertaken a surprise offensive extending throughout the Pacific area. The facts of yesterday and today speak for themselves. The people of the United States have already formed their opinions and

well understand the implications to the very life and safety of our nation.

As Commander in Chief of the Army and Navy I have directed that all measures be taken for our defense. Always will we remember the character of the onslaught against us.

No matter how long it may take us to overcome this premeditated invasion, the American people in their righteous might will win through to absolute victory.

I believe I interpret the will of the Congress and of the people when I assert that we will not only defend ourselves to the uttermost but will make very certain that this form of treachery shall never endanger us again.

Hostilities exist. There is no blinking at the fact that our people, our territory and our interests are in grave danger.

With confidence in our armed forces-with the unbounding determination of our people-we will gain the inevitable triumph-so help us God.

I ask that the Congress declare that since the unprovoked and dastardly attack by Japan on Sunday, December 7, 1941, a state of war has existed between the United States and the Japanese Empire.

### B. Address of Martin Luther King, Jr.

I am happy to join with you today in what will go down in history as the greatest demonstration for freedom in the history of our nation. Five score years ago a great American, in whose symbolic shadow we stand today, signed the Emancipation Proclamation. This momentous decree came as a great beacon light of hope for millions of Negro slaves who had been seared in the flames of withering injustice. It came as a joyous daybreak to end the long night of their captivity. **But one hundred years later** the Negro still is not free. **One hundred years later** the life of the 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 languished in the corners of American society who finds himself in exile in his own land.

So we have come here today to dramatize a shameful condition. In a sense we have come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence they were signing a promissory note to which every American was to fall heir. This note was the promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty and the pursuit of

happiness. It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation America has given the Negro people a bad check, a check which has come back marked insufficient funds, but we refuse to believe that the Bank of Justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. So we have come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice.

We have also come to this hallowed spot to remind America of the fierce urgency of now. This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism. Those who had hoped that the Negro needed to blow off steam and will now be content will have a rude awakening if the nation returns to business as usual. There will be neither rest nor tranquillity in America until the Negro is granted his citizenship rights. The whirlwinds of revolt will continue to shake the foundations of our nation until the bright day of justice emerges. That is something that I must say to my people who stand on the warm threshold which leads into the palace of justice. In the process of gaining our rightful place we must not be guilty of wrongful deeds. Let us not seek to satisfy our thirst for freedom by drinking from the cup of bitterness and hatred.

We must forever conduct our struggle on the high plain of dignity and discipline. We must not allow our creative protests to degenerate into physical violence. Again and again we must rise to the majestic heights of meeting physical force with soul force. The marvelous new militancy which has engulfed the Negro community must not lead us to a distrust of all white people for many of our white brothers as evidenced by their presence here today have come to realize that their destiny is tied up with our destiny. They have come to realize that their freedom is inextricably bound to our freedom. We cannot walk alone. As we walk we must make the pledge that we shall always march ahead. We cannot turn back. There are those who are asking the deputies of civil rights "**when will you be satisfied?**" **We can never be satisfied** as long as the Negro is the victim of the unspeakable horrors of police brutality. **We can never be satisfied** as long as our bodies, heavy with the fatigue of travel, cannot gain lodging in the motels of the highways and the hotels of the city. **We cannot be satisfied** as long as the Negro's basic mobility is from a smaller ghetto to a larger one. **We can never be satisfied** as long as our children are stripped of their selfhood and robbed of their dignity by signs stating "for whites only". **We cannot be satisfied** as long as the Negro in Mississippi cannot vote and a Negro in New York believes he has nothing for which to vote. **No, no we are not satisfied and we will not be satisfied until**

**justice rolls down like waters and righteousness like a mighty stream.**

So even though we face the difficulties of today and tomorrow **I still have a dream.** It is a dream deeply rooted in the American dream. **I have a dream** that one day this nation will rise up, live out the true meaning of its creed, "we hold these truths to be self evident, that all men are created equal". **I have a dream** that one day on the red heels of joy sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood. **I have a dream** that one day even the State of Mississippi, a State sweltering with the heat of injustice, sweltering with the heat of oppression, be transformed into an oasis of freedom and justice. **I have a dream** that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character. **I have a dream** today. **I have a dream** that one day down in Alabama with its vicious racists with its Governor having his lips dripping with the words of interposition and nullification. One day right there in Alabama little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers. **I have a dream today. I have a dream** that one day every valley shall be exalted. Every hill and mountain shall be made low, the rough places will be made plain and the crooked places will be made straight and the glory of the Lord shall be revealed that all flesh shall see it together. This is our hope. **This is the faith** that I go back to the South with. With this faith we will be able to hew out of the mountain of despair a stone of hope. **With this faith** we will be able to transform the jangling discords of our nation into a beautiful symphony of brotherhood. **With this faith** we will be able to work **together**, to pray **together**, to struggle **together**, to go to jail **together**, to stand up for freedom together knowing that we will be free one day.

This will be the day when all of God's children will be able to sing with new meaning my country tis of thee, sweet land of liberty of thee I sing. Land where my fathers died, land of the pilgrim's pride, from every mountainside, **let freedom ring.** And if America is to be a great nation this must become true. So let freedom ring from the prodigious hilltops of New Hampshire. **Let freedom ring** from the mighty mountains of New York. **Let freedom ring** from the heightening Alleghenys of Pennsylvania. **Let freedom ring** from the snow capped Rockies of Colorado. **Let freedom ring** from the curvaceous slopes of California. But not only that, let freedom ring from Stone Mountain of Georgia. **Let freedom ring** from Lookout Mountain of Tennessee. Let freedom ring from every hill and molehill of Mississippi, from every mountainside. When we **let freedom ring**, when we let it ring from every village and every hamlet, from every State and every city, we will be able to speed up that day when all of God's children, black men and

white men, Jews and Gentiles, Protestants and Catholics will be able to join hands and sing in the words of the old Negro spiritual "**Free at last, free at last, thank God Almighty we are free at last.**"

### C. Kennedy Inaugural Address

**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.** For I have sworn before you and Almighty God the same solemn oath our forbearers prescribed nearly a century and three-quarters ago. The world is very different now. For man holds in his mortal hands the power to abolish all forms of human poverty and all forms of human life. And yet the same revolutionary beliefs for which our forbearers fought are still at issue around the globe, the belief that the rights of man come not from the generosity of the state but from the hand of God. We dare not forget today that we are the heirs of that first revolution. Let the word go forth from this time and place to friend and foe alike that the torch has been passed to a new generation of Americans, born in this century, tempted by war, disciplined by a hard and bitter feat, proud of our ancient heritage and unwilling to witness or permit the slow undoing of those human rights to which this nation has always been committed and to which we are committed today at home and around the world.

Let every nation know, whether it wishes us well or ill, that we shall **pay any price, bear any burden, meet any hardship, support any friend, oppose any foe** to assure the survival and the success of liberty. United there is little we cannot do in a host of cooperative ventures. Divided there is little we can do to remember that **in the past those whose foolishly sought power by riding the back of the tiger, ended up inside.** To those people, in the huts and villages of half the globe, struggling to break the bonds of mass misery, we pledge our best efforts to help them help themselves. To those nations who would make themselves our adversary, we offer not a pledge but a request, that both sides begin anew the quest the peace, before the dark powers of destruction, unleashed by science, engulf all humanity in planned or accidental self destruction. So let us begin anew. Remembering on both sides that stability is not a sign of weakness and sincerity is always subject to proof. **Let us never negotiate out of fear but let us never fear to negotiate.**

In the long history of the world, only a few generations have been granted the role of defending freedom in its hour of maximum danger. I do not shrink from this responsibility, I welcome it. I do not believe that any of us would exchange places with any other people or any other generation. The energy, the faith, the devotion which we bring to this endeavor will light our country

and all who serve it and the glow from that fire can truly light the world.

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

My fellow citizens of the world, ask not what America will do for you, but what together we can do for the freedom of man.

Our greatest challenge is still the world that lies beyond the cold war. But the first great obstacle is still our relations with the Soviet Union and communist China. We must never be lead into believing that either power has yielded its ambitions for world domination. Ambitions which they forcefully restated only a short time ago. On the contrary, our task is to convince them that aggression and subversion will not be profitable routes to pursue these ends. Open and peaceful competition of prestige, for market, for scientific achievement, even for men's minds is something else again. For if freedom and communism were to compete for man's allegiance in a world at peace, I would look to the future with ever increasing confidence.

On the presidential coat of arms the American eagle holds in his right talon the olive branch. While in his left he holds a bundle of arrows, we intend to give equal attention to both. We must increase our support of the United Nations as an instrument to end the cold war instead of an arena in which to fight it. In recognition of its increasing importance and the doubling of its membership we are enlarging and strengthening our own mission to the UN. We shall help insure that it is properly financed. We shall work to see that the integrity of the office of the Secretary General is maintained.

Life in 1961 will not be easy. Wishing it, predicting it, even asking for it will not make it so. **There will be further setbacks before the tide is turned but turn it we must.** The hopes of all mankind rest upon us. Not simply upon those of us in this chamber, but upon the peasant in Laos, the fisherman in Nigeria, the exile from Cuba; the spirit that moves every man and nation who shares our hope for freedom and the future and in the final analysis they rest, most of all, upon the pride and perseverance of our fellow citizens of the Great Republic.

In the words of a great president whose birthday we honor today, posing his final State of the Union message 16 years ago we pray that we may be worthy of the unlimited opportunities that God has given us.

### D. General Douglas MacArthur's Speech to Congress

There are those who claim our strength is inadequate to protect on both fronts, that we cannot divide our efforts.

I can think of no greater expression of defeatism. If a potential enemy can divide his strength on two fronts it is for us to counter his effort. The communist threat is a global one. It's successful advance in one sector threatens the destruction of every other sector. You cannot appease or otherwise surrender to communism in Asia without simultaneously undermining our efforts to halt its advance in Europe.

Beyond pointing out these general truisms I shall confine my discussion to the general areas of Asia. Before one may objectively assess the situation now existing there he must comprehend something of Asia's past and the revolutionary changes which have marked her course up to the present long exploited by the so-called colonial powers with little opportunity to achieve any degree of social justice, individual dignity or a higher standard of life such as guided our own noble administration of the Philippines. The peoples of Asia pound their opportunity in the war just passed to throw off the shackles of colonialism and now see the dawn of new opportunity. A heretofore unfelt dignity and the self respect of political freedom. Mustering half of the earth's population and 60% of its natural resources these peoples are rapidly consolidating a new force both moral and material with which to raise the living standard and erect adaptations of the design of modern progress to their own distinct cultural environments. Whether one adheres to the concept of colonization or not this is the direction of Asian progress and it may not be stopped. It is a corollary to the shift of the world economic frontiers as the whole epicenter of world affairs rotates back toward the area whence it started. In this situation it becomes vital that our own country orient its policies in constance with this basic evolutionary condition rather than pursue a course blind to the reality that the colonial era is now past and the Asian peoples covet the right to shape their own free destiny. What they seek now is friendly guidance, understanding and support, not interesse direction.

The dignity of equality and not the shame of subjugation. Their pre-war standard of life pitifully low is infinitely lower now in the devastation left in wars wake. World ideologies play little part in Asian thinking and are little understood. What the people strive for is the opportunity for a little more food in their stomachs, a little better clothing on their backs, a little firmer roof over their heads, and the realization of the normal nationalist urge for political freedom. These political social conditions have but an indirect bearing upon our own national security but do form a backdrop to contemporary planning which must be thoughtfully considered if we are to avoid the pitfalls of unrealism.

Of more direct and immediate bearing upon our national security are the changes wrought in the strategic potential of the pacific ocean in the course of the past war. Prior

thereto the western strategic frontier of the United States lay on the literal line of the Americas with an exposed iron salient extended out through Hawaii, Midway and Guam to the Philippines. That salient proved not an outpost of strength but an avenue of weakness along which the enemy could and did attack. The Pacific was a potential area of advance for any predatory force intent upon striking at the bordering land areas. All this was changed by our Pacific victory. Our strategic frontier then shifted to embrace the entire Pacific Ocean, which became a vast moat to protect us as long as we held it. Indeed it acts a protective shield for all of the Americas and all free lands of the Pacific Ocean area. We control it to the shores of Asia by a chain of islands extending in an arc. From the Illusions to the Maryannas held by us and our free allies. From this island chain we can dominate with sea and air power every Asiatic port from Vadia Boscot to Singapore and prevent any hostile movement into the Pacific. Any predatory attack from Asia must be an amphibious effort. No amphibious force can be successful without control of the sea lanes and the air over those lanes in its avenue of advance. With naval and air supremacy and modest ground elements to defend bases any major attack from continental Asia toward us or our friends Pacific would be doomed to failure. Under such conditions the Pacific no longer represents menacing avenues of approach for a prospective invader. It assumes instead the friendly aspect of a peaceful lake. Our line of defense is a natural one and can be maintained with a minimum of military effort and expense. It envisions no attack against anyone nor does it provide the bastions essential for offensive operations but properly maintained would be an invincible defense against aggression. The holding of this literal defense line in the western Pacific is entirely dependent upon holding all segments thereof. For any major breach of that line but an unfriendly power would render vulnerable to determined attack every other major segment. This is a military estimate as to which I have yet to find a military leader who will take exception.

For that reason I have strongly recommended in the past as a matter of military urgency that under no circumstances must Formosa fall under communist control. Such an eventuality would at once threaten the freedom of the Philippines and the loss of Japan and might well force our Pacific frontier back to the coast of California, Oregon and Washington.

To understand the changes which now appear upon the Chinese mainland one must understand the changes in Chinese character and culture over the past fifty years. China, up to 50 years ago, was completely non-homogeneous. Being compartmented into groups divided against each other. The war making tendency was almost non-existent as they still followed the tenets of the Confucian ideal of pacifist culture. At the turn of the century under the regime of Chan So Ling efforts toward

greater homogeneity produced the start of a nationalist urge. This was further and more successfully developed under the leadership of Chank Sheck but has been brought to its greatest fruition under the present regime to the point that it has now taken on the character of a united nationalism of increasing dominant aggressive tendencies. Through these past fifty years the Chinese people have thus become militarized in their concepts and in their ideals. They now constitute excellent soldiers with competent staffs and commanders. This has produced a new and dominant power in Asia which for its own purposes is allied with Soviet Russia but which in its own concepts and methods has become aggressively imperialistic with a lust for expansion and increased power normal to this type of imperialism. There is little of the ideological concept either one way or another in the Chinese makeup. The standard of living is so low and the capital accumulation has been so thoroughly dissipated by war that the masses are desperate and avid to follow any leadership which seems to promise the alleviation of local stringencies. I have from the beginning believed that the Chinese communist support of the North Koreans was the dominant one. Their interests are present parallels of those of the Soviet. But I believe that the aggressiveness recently displayed not only in Korea but also in Indochina and Tibet and pointing potentially toward the South reflects predominantly the same lust for the expansion of power which has animated every would be conqueror since the beginning of time.

The Japanese people, since the war, have undergone the greatest reformation recorded in modern history. With a commendable will, eagerness to learn, and marked capacity to understand they have from the ashes left in war's wake, erected in Japan an edifice dedicated to the primacy of individual liberty and personal dignity and in the ensuing process there has been created a truly representative government committed to the advance of political morality, freedom of economic enterprise and social justice. Politically, economically, and socially Japan is now abreast of many free nations of the earth and will not again fail the universal trust. That it may be counted upon to wield a profoundly beneficial influence over the course of events in Asia is attested by the magnificent manner in which the Japanese people have met the recent challenge of war, unrest and confusion surrounding them from the outside and Czech communism within their own frontiers without the slightest slackening in their forward progress. I sent all four of our occupation divisions to the Korean battlefield without the slightest qualms as to the effect the resulting power vacuum upon Japan. The results fully justified my faith. I know of no nation more serene, orderly and industrious nor in which higher hopes can be entertained for future constructive service in the advance of the human race.

Of our former ward the Philippines we can look forward in confidence that the existing unrest will be corrected and a strong and healthy nation will grow in the longer aftermath of wars' terrible destructiveness. We must be patient and understanding and never failing as in our hour of need, they did not fail us.

A Christian nation, the Philippines stand as a mighty bulwark of Christianity in the far east and its capacity for high moral leadership in Asia is unlimited. On Formosa the government of the Republic of China has had the opportunity to refute by action much of the malicious gossip which so undermined the strength of its leadership on the Chinese mainland. The Formosan people are receiving a just and enlightened administration with majority representation on the organs of government and politically, economically and socially they appear to be advancing along sound and constructive lines.

With this brief insight into the surrounding areas I now turn to the Korean conflict. While I was not consulted prior to the President's decision to intervene and support the Republic of Korea that decision from a military standpoint proved a sound one. As we hurled back the invader and decimated his forces. Our victory was complete and our objectives within reach when Red China intervened with numerically superior ground forces. This created a new war and an entirely new situation. A situation not contemplated when our forces were committed against the North Korean invaders. A situation which called for new decisions in the diplomatic sphere to permit the realistic adjustment of military strategy. Such decisions have not been forthcoming. While no man in his right mind would advocate sending our ground forces into continental China and such was never given a thought, the new situation did urgently demand a drastic revision of strategic planning if our political aim was to defeat this new enemy as we had defeated the old.

Apart from the military need as I saw it to neutralize the sanctuary protection given the enemy north of the Allou, I felt that military necessity in the conduct of the war made necessary first, the intensification of our economic blockade against China, two, the imposition of a naval blockade against the China coast, three, removal of restrictions on air recognizance of China's coastal areas and at Manchola. Four, removal of restrictions on the forces of the Republic of China on Formosa with logistical support to contribute to their effective operation against the common enemy.

For entertaining these views all professionally designed to support our forces committed to Korea and bring hostilities to an end with the least possible delay and at its saving of American and allied lives I have been severely criticized in lay circles, principally abroad, despite my understanding that from a military standpoint



the above views have been fully shared and passed by practically every military leader concerned with the Korean campaign including our own joint chiefs of staff.

I am closing my fifty two years of military service. When I joined the Army even before the turn of the century it was the fulfillment of all my boyish hopes and dreams. The world has turned over many times since I took the oath on the plane at West Point and the hopes and dreams have long since vanished. But I still remember the refrain of one of the most popular barrack ballads of that day which proclaimed most proudly that old soldiers never die, they just fade away. And like the old soldier of that battle I now close my military career and just fade away, an old soldier who tried to do his duty as God gave him the light to see that duty. Goodbye.

### III. Sample Summations

#### A. Marvin Lewis:

Ladies and gentlemen of the jury, the hour is getting late and you've been very patient. You've been an audience that has been a captive audience, and I think you recognize by now that you are not an audience in any sense of the word, but you are judges. Judges of the fact, just as much a judge as his Honor who sits there on the bench, although you do not wear the black robe.

And we've been discussing a question of liability here, if you can call this a question of liability. We've heard of this complete, wanton misconduct which no one could possibly classify as negligence of the defendant. And, of course, his Honor will give you the instruction of law, and when there is that type of wantonness, there can be no defense of contributory negligence. So contributory negligence, in my opinion, is not even in this case. But even if it was, as we have discussed in our question of liability, it wouldn't be negligence, because again, as you will hear from his Honor, conduct that may cause injury -- yes, conduct that may proximately cause injury -- is not negligence necessarily. Before we can reach the stage of negligence, we have to take this piece of paper and tear 30% off of it because the person who gets 70% in his tests passes, and that's you and I, the average person, who because we are human, err, and all of us at times are at fault. But as we've said here in the liability, if you could possibly even conceive that there was this type of negligence as distinguished from conduct that brought about this accident on the part of Jenny O'Neal, is at most could only be 10%, and we're going to discuss that when we get into the question of the debt -- of the debt, I say to you -- that is owed this woman be reason of the wantonness of this driver.

Now where shall we start? Jenny O'Neal is a woman that you probably will never read about, at least now, in the newspapers. She hasn't reached the stage of a Helen Hayes or other people who are prominent in Broadway today, and why? Because Jenny was just starting out on

her career. She had all of life ahead of her, and living, of course, is not just survival. And she loved life to the full. And I think all people, probably, who want to be actors and actresses have that type of the love of life because they love people. They feed on applause, they want to come over and portray to amuse -- to entertain, and to become part of other characters and people that we know in the world, and in order to do that, they have to completely forget themselves and put themselves into the part. And this was the life that she had planned for herself, and at the age of 21 she went into acting school. We've had her teachers here who told us the fine grades she had, the promising career. And she was just starting out at \$100 a week, playing stock, doing very well, received good notices as the evidence showed; but her teachers felt that she should also do some dancing so she could be on the stage and learn to live with the stage, and all different phases of it, like the moving picture actress, Ginger Rogers, who is now in her 50s, still playing in pictures -- started out as a member of the chorus. And how many of our actresses -- they start that way at the beginning of the road.

She was a tennis player. She loved people. She didn't only have one young man, but she went out with many different young men and enjoyed life to the full. And here she is on that day, driving along in a car, minding her own business, and as life would have it -- we have enough problems just from growing old, let alone have someone else bring something upon us to our bodies that is not necessary -- out of nowhere, she crashes into this truck ahead. And when she crashes, what happens? There is a sudden flexion and extension of the body, as the doctors told us, and there is a fracture of the humerus -- that's the long bone of the left arm. But it's the fracture that isn't so important -- of course, it was uncomfortable to wear that cast for eight months; it itches, you'd like to take it off, it's uncomfortable, it was unsightly to her. She had the worry of the two swollen eyes, not knowing whether her face was going to be disfigured. That, of course, healed, but there was that mental suffering during that period of time. But when you have a fracture, as the doctors explained, it's not just the breaking of the bones. There's a soft tissue destruction that goes on there of the muscles and the ligaments and the tendons and the hemorrhaging of the blood into that area, and then when you see, as the doctor's say, when it heals, it heals with scar tissue that bears down on those nerves causing constant, nagging pain, and sometimes a type of electric type of shock pain. And she had that, and still has it, as the doctors said, at the present time. And then there was the jerking of her head and she went to the emergency hospital. She went to her general doctor for a period of time, and it was only after a period of some year when things weren't healing that he thought because her shoulder was still bothering and her neck was still bothering, he sent her for a specialist, an orthopedist, in bones and joints. And that doctor gave her what is called

physiotherapy. And it's interesting if you would look at the bills that's been submitted to you, you will see that she wasn't just trying to build up bills here; she didn't go to the physiotherapist unless she had to. If you will note, there are months where she may have only gone once or twice, but toward the end, she was going three and four times a month. She wasn't doing that for fun. She was doing that to be relieved from pain. And we've put in the medicine bills, the prescriptions. And what does that mean? For each prescription there, those pills were used up and those pills were for what? So she could sleep at night.

You know, God in his wisdom has made a wonderful machine of man that nobody's been able to duplicate. Doctors try, but doctors are not scientists in the sense that medicine is a science, it is only an art, and they attempt to fix the body, they attempt to patch things up, but you know, there's no such thing as just a broken bone. There's no such thing as just a torn ligament or torn muscle or the torn fibers of that tendon which held that shoulder to the remainder of her body. Every time we have any type of an injury, there is a mental shock as well, and something has been done to the person, to the person as we knew them.

Now there's one little remark that appears in the first hospital record that says nervous shock. And she never got over that nervous shock. Now that may sound -- you can say it quickly, nervous shock, but what does it mean? You know, it means instead of that happy-go-lucky girl that her friends knew and told you about, what did you see on the witness stand? You saw a girl that while she testified her voice quivered, there were tears that came to her eyes and she tried to hold them back. When I asked her, do you feel that you're the same girl that you were today? When I said, do you still play tennis like you used to? Did you enjoy tennis?, and she said I loved the game. Can you do it now? She said, I've tried, I've tried, but I just can't make it. Of course she had to go off the stage, and again when I asked her that, that was that painful question and she didn't want to show emotion. She knew that you would be judging her as maybe an actress. She thought, well maybe that jury's going to say, oh this is a really good actress. She's really putting it on. There's nothing wrong with her professional ability. And I asked you about that in voir dire. I said, are you going to consider that because this girl is an actress and that's what she wanted to do in a career, that you were going to look at all her present problems as if she were acting, and you promised me, as judges, you promised me under your oath that this is something that you wouldn't do.

You know, there's a famous line from Hamlet written by the great Bard, William Shakespeare, and I'm reminded when he was trying to goad his mother into admitting her complicity in the killing of Hamlet's father, the great Dane King, and he brought out two pictures, and he

showed his father and his stepfather, and he said, mother, look you upon this picture, and now look you upon this. And I say to you, ladies and gentlemen of the jury, look you upon this picture. How this girl, starting out in life, full of fun, vibrant, looking forward to the applause of her fellowman, wanting to entertain, looking forward to a life where she had a great opportunity to do what she wanted to do, and look you upon this picture, where you may not even like this girl today because of the way she sat on that witness stand and seemed morose, somebody who you wouldn't want to invite into your living room. Don't hold that against her. That's the very injury -- one of the very injuries that we are seeking damages here for today, because that mental disturbance can be so far greater, so far greater than even the injury to the body. And that's what's happened to her. And now, on top of everything else -- she's had that bruise on her breast and the worry, and she's told you that she's heard so much about cancer -- that possibly there is that lingering feeling, maybe I face that. But worse than all else, the x-rays now show that there's starting to be a narrowing of the vertebrae. And you know what the doctors said that means. That means that the disks which is like a cushion that goes between those vertebrae of the bone and protects those one bone from rubbing against the other, there's been an injured vertebrae -- injured disk here. And that means that they are wedging down there and that's wedging on nerves, and as the doctors said, in reasonable medical probability that's going to continue. And you know, he made a rather inconsistent statement. He said, she may be able to go back to work in three years as an actress, but, but, if this continues, as we see here now, and at her early age she shouldn't have arthritis in her body -- this is a progressive thing and we're going to probably have to have a fusion. You know what that means? That means that that girl, whether she has it or not, faces the future, the fear of being taken into a hospital and then being asked to sign a consent that whatever happens to her where they are operating on that delicate spinal column with all of those nerves going off of it that can control the entire body, and where a slip of the knife can cause complete paralysis, she consents to have this type of operation in order to relieve this pain where already the tingling is going down the arm and it's going into the fingers and into the hand.

Now the defense counsel will remind you, the judge will tell you, that you cannot speculate. That's not speculation. You're going to be given in instructions tomorrow morning by his Honor life expectancy tables. That's the gamble of the insurance industry as to how long a person's going to live. Nobody knows how long they're going to live. Nobody has a crystal ball. But that doctor will not guarantee that she won't have to have that operation. Who should bear that risk? It's like a baseball game. You get a fine batter comes up to the plate and you've got two on and there's no outs. Everything's going for him. But now he swings twice and there's one more

strike left and the people start leaving the ballpark. You can't overlook the two strikes, can you?

Now I know you'd rather think that Jenny is going to be all right, and so would we all. We don't like to look at pain. They say that looking at heaven is looking into health, and looking into illness is looking into the window of hell; because you can send a man to jail for life, you can even -- you used to be able to execute him, but you could never give him pain. And it doesn't have to be tremendous pain, it can just be annoying, aching pain.

Do you know what you look forward to at night, at the end of the day, where you've been sitting here even, listening to this trial and you're tired tonight, and what happens? You get into your bed and you pull that switch and that room becomes nice and dark. And you pull those nice clean sheets over you and those comforters and you snuggle down on that nice, soft pillow for that wonderful, comfortable sleep which you just take for granted, don't you? And this girl can't do that any more. When she starts lying on that shoulder she's getting pain that wakes her up. When she moves her head, any movement, she's getting a nagging ache in that neck. You know, we don't recognize how heavy our head is. How it sits on this little bone, until we have headaches or something wrong with our head. Isn't it a wonderful feeling when we don't have to be conscious of our body. Even the little toothache -- what it can do to us. What about a backache? The gnawing ache that just lingers there so that you can't enjoy the day's work.

You know, they say that there's three inalienable rights. Life, liberty, and the pursuit of happiness. Life isn't survival. Liberty is the liberty to be free and happy and enjoy these things that we just take for granted. When she wants to put her arm around that boyfriend when dancing, she doesn't want to think that it's aching. When she just goes to reach up on the shelf to get the pitcher of milk it's going to hurt. And when she goes to zip or unzip that dress or her bra, it's agony. This isn't living, and they can't tell her when this is going to terminate.

Now let's just consider a minute some damages here that we're talking about. This is her loss of wages to date. Now, she was as a dancer, she lost \$90 in that show for 104 weeks. The judge said you can write this down. You all were told you can have pencil and paper here to write down these figures, and I know his Honor won't mind if you bring these to the jury room. Then she earned \$90 a week as a cashier. Imagine. This was prison for a girl who wanted to be on the stage as an actress. And now -- she wasn't made to be a cashier any more than I'm made to be a cashier. You take me away from the courtroom, you take me away from pleading for my fellowman, and you've destroyed me. Because each of us has our own niche in life and so did she. And then she went to work finally as a receptionist for \$70 and again, this is what

she's doing at the present time. And there you can see the figure that I've reached. This is just a small figure, but we've tried to be realistic. And even if you want to take off the 10%, which I say you shouldn't do at all because there wasn't even contributory negligence, but it couldn't possibly be more than the 10%, you're left with that figure. That's just the out of pocket up to the present time. And now we come into what is loss of earning ability.

What do we mean by loss of earning ability? His Honor will advise you that a person -- that's general damages -- that's now out of pocket, and it isn't speculation. You can figure that this girl has been deprived of earning her living in the way that she wanted to. Just assume she can't return to work as a dancer. I haven't even taken the \$100 a week as an actress. I've only taken the \$90 a week in the line, and of course she wouldn't stay there for very long. And we come out there again to this figure, and this again is the actual loss of her earning capacity from the date of trial added onto the other -- \$20 at 39 weeks, \$780, where I have deducted what she would be receiving as a receptionist. But here's the realities. The realities that the chances are she's never going to go back to work as an actress.

Now I have assumed here that if she goes back to work as an actress she's only going to be making the starting salary of \$100 a week. That's ridiculous. That's absolutely ridiculous because we know that with her talent what she's going to earn in the future. But just on that basis, and on the basis of only the \$90 as a dancer and not the \$100 as an actress, we would come out on her life expectancy to \$35,568.00 and if we took the \$100, we'd be over \$50,000.00.

I made a mistake here, ladies and gentlemen of the jury, and I want to confess it. My prayer was too low. I have only asked for a total of \$50,000.00 and you're bound by it. I usually say to a jury, I leave it up to you. But don't think because I'm asking for \$50,000 cut it in half or take one penny off of it, because if you do, you'll only have half justice, you won't have full justice for this girl.

You know sometimes you can look from a hill and you see a city of lights and you just see the little dots and all they are lights. But each light is a family and a human being's lives, and you've been compelled to look into the window of Jenny and you have to make that decision. She can't come back in a year or two years or five years and say this wasn't sufficient. This is your day and she depends on me, and I pray that I've had the wisdom and the ability to convey to you that this -- in order to do justice -- must be the verdict of the prayer in this case.

I'm not going to shift this responsibility from my shoulders to yours. I know that not only on behalf but on behalf of counsel for the defense and his Honor, the

judge, we thank you for the wonderful attention that you have paid here today. We don't ask your sympathy, we ask for your empathy. Empathy, which as Webster says, is understanding another's pain and suffering by the use of the mind. And there by the grace of God go you.

It's been a pleasure to be with you and I know it has been a real honor and responsibility for you to have served in our great jury system. Thank you so much.

\* \* \*

Now let's look at a different treatment of the same case. This time the lawyer is Moe Levine. I never knew Moe and I wish I had. If you ask members of the general public to name the ten greatest trial lawyers of this century, I suspect that few would mention Moe Levine. But if you ask lawyers, he would be among the first named. He's one of us. The argument that he makes is creative, sincere and real. Ask yourself, did Moe Levine care about Jenny O'Neal? Did he understand her? Did he convey to the jury the essence of her loss? The loss of her dream and, of course, the answer is a resounding yes. I suggest that you watch this closing twice. First, just listen. Then play the tape again and analyze his technique; his use of pauses, his appeal to common sense, the word pictures, his sheer presence. These are all part of a unified whole that is persuasion at it's finest. Here is the great Moe Levine.

#### **B. Moe Levine:**

Members of the jury. I think you all know my name is Moe Levine, and my function is to make final argument to you in the case of Jenny O'Neal. And it's not easy, and because of the unique quality of this jury, it is my intention to lead you into unique fields of consideration. This is not an easy case for you to consider. If all we were concerned with are the special damages, we would not need lawyers. Liability has been concluded and has been resolved in favor of the plaintiff and so I shall not touch upon it. I have no wish to arouse your animosity against the defendant who I am sure had no intention to cause injury to Jenny O'Neal. You may not forgive him by your verdict since forgiveness is the Lord's and your function is judgment and not forgiveness. And so what you must do is appraise what has happened to Jenny O'Neal and to compensate under the law and in accordance with your conscience, adequately. And this, I said at the outset, is not easy.

Two thousand dollars represents the out-of-pocket losses. Anything else would be speculative, and so I will not speak of anything else. I will speak, however, of what has happened in the light of the meaning of life to all of us and to Jenny O'Neal. There is no way for you to determine from what you have heard whether Jenny O'Neal would ever have been a great actress. She might never have been successful. We know that thousands of girls go to acting school and then try to become actresses

and fail. We know that those who succeed are in the great minority. We know that this is a very difficult field indeed in which many strive and very few succeed. And so it would be speculative to determine for you how successful she would have been. Would she have been a star? Would she have become a model? Would she have been a dancer? Would she have entered night club routines? We don't know.

It is true she was not given the opportunity to prove herself, but we have no way of judging what would have happened had she been given that opportunity. What do we have? We have the knowledge that a girl, 25 years of age, had spent some part of her life in establishing for herself a goal and a lifestyle. At that early age, what more could she have done than to have said, this is what I wish to do. I shall try. She knew the heartaches and heartbreaks of acting. She knew the difficulties. She knew the thousands of girls that traveled to New York and to California and seek to share the limelight and the spotlight and failed, and go home brokenhearted and disappointed, to marry the boy who has waited for them and settled back into domesticity. She knew these things. She was one of the girls who said, let me try, let me see. I said to you, we will wander into strange fields together and we must in order to explore this problem. What has happened here and what I will talk about almost sounds like science fiction.

There is no Jenny O'Neal any more, because the Jenny O'Neal who existed one moment before this accident happened was a Jenny O'Neal with a future which she had planned, which might never have happened, but which she had embarked upon, and that Jenny O'Neal is gone. And she has been replaced with a different, completely different, other, Jenny O'Neal. Now I do not say to you that this is an inferior Jenny O'Neal, it may not be. Indeed, it may be a superior Jenny O'Neal. It may be better for this girl to have been saved the heartbreak of attempting to compete in a field for which she might never have been qualified. But she never had a chance to find out.

And what is life, is the question that we started with. Is it survival? We have heard a definition of life, liberty, and life -- is life survival? If life is survival, who needs it? Some of you are so young and there is so much ahead for you. And I say to you that in this world of tensions and struggle and hatred and horrors and enmity and fears, if all we have is survival, who needs it? There must be hope and dreams and faith and belief and desire and wishfulness, and here was a girl who wanted to be Tinkerbell or Wendy -- she wanted to fly, and now she's become earthborn through no fault of her own, and she's not Jenny O'Neal at all. Mischa Elman with one finger cut off is no longer Mischa Elman is he. Same name, same face, same man. You could cut off both my legs and arms. You could blind me and deafen me. Leave me

my voice and put me on the jury table in a basket and I will double my verdict. The jury will weep at the sight of me. Take my voice and leave me all my other faculties and I am nothing. Take from Jenny her dream, and what is Jenny? Not an inferior person, but she's not Jenny.

What damages do you arrive at for this transfiguration of a human being, for this robbing her, albeit not willfully, but negligently, robbing her of her identity. You see what I'm talking about. I'm talking about her right to choose her lifestyle has been altered and taken from her; against her will and without her concurrence, it's been taken from her. She cannot act. She cannot dance. I'm not talking about her pain, she could live with that pain. She's young, she will heal. If she cannot heal herself, others will heal her; it will cost money, so what? She will have pain, she will learn to grow with pain, life is pain. Part of living is stress. Without stress there is no life. It's the meaning of life. Stress would not bother her. But her lifestyle has been altered and she has been altered and she has been stopped from doing what she wanted to do, and she is not the same girl, and she has been changed, whether for better or for worse is irrelevant. She is not what she was and she has not chosen to be changed and there must be compensation for it.

I anticipate that this intelligent jury, and I mean I do not mean to pay you vague, idle compliments, this is not my style. But if you were not what I deem to be an intelligent jury, this would not be the tenor of my final argument. I anticipate that someone on this jury will say, what good will money do her. Will it change her back into Jenny O'Neal, the dancer and the actress. The answer is no. No, money cannot help her to become what she was. And so some of you may say, then why give money? Why punish when it will not help? And here we come to what really becomes almost a religious problem. This is not a matter of reward, then punishment. The defendant, indeed, is blessed by the fact that this occurrence did not take place in the old days when for injury inflicted negligently the penalty was that the tortfeasor has inflicted upon him like injury; an eye for an eye, a hand for a hand, injury for injury. Today, only money need to be given in compensation for injury, and the rule of Hamerabi is no longer in existence. But what good will the money do? Well, for one thing, there is no alternative. You cannot restore her. I said that only God can forgive and only God can heal. What has happened to her cannot be undone. What can you do?

You sensed as she testified that this girl feels that she has been rejected. Life has not been good to her. Her plans have not matured. They have been aborted at the beginning. She wasn't given the chance that she sought and felt she deserved. She's been rejected. Will you reject her? Do you feel she should be rejected? Has she done anything to deserve it?

An award by you of damages will take into consideration her dignity, her sense of pride. It will be an acknowledgement that you understand what she has lost. What she might have had. What life she could have achieved. It will be a little light cast upon what has become a gloomy world. You can give no more. You can do no more. I feel that you can do no less. She deserves no less. She has done nothing for which she should be punished. She has been the victim, and she was innocent.

And so reflect deeply within yourselves and you will come to a conclusion which is consonant with your sense of conscience and which will reflect your ideal of justice, and I have no doubt that whatever decision you come to, born as it will be by your sense of your responsibility and of her need for pride and dignity, it will be a verdict that will be acceptable.

Thank you.

**C. Howard L. Nations:**

**THE COURT:** All right. Mr. Nations.

**MR. NATIONS:** May it please the Court; Mr. Simpson; Mr. Weinstein; ladies and gentlemen of the jury: Your presence in this jury box breathes life into the Constitution and the Bill of Rights. You are the embodiment of the Seventh Amendment, every American citizen's right to trial by jury. As you enter that jury room to decide the quality of Cesar Gonzalez' future life, you will be carrying on a vital role of citizenship that began 2500 years ago in Athens, Greece, when the Athenian leader, Solon, first summoned citizens of Athens to court to resolve the disputes of their fellow citizens. It is the highest calling of citizenship and the finest method ever devised by man for resolving our disputes. However, the role of juror carries with it great power and great responsibilities. You have the power in this case to right a wrong, to speak for all of our citizens to demand safer amusement parks throughout America, and most importantly to the Gonzalez family, to determine whether Cesar is to receive a full measure of justice which will fully compensate him for the disabilities which he will endure for the next forty seven years.

When we talked three weeks ago on voir dire examination, I told you that the 12 of you who would be selected to answer the questions in this case were going to have an extremely important and difficult job; That your role would be, first, to resolve all of the factual disputes between the parties; secondly, to weigh the credibility, the believability, of the witnesses; and third, to determine what amount of money will be necessary to fully and justly compensate Cesar Gonzalez for the wrongs done to him by Astroworld and to help restore his life to the highest degree of quality still available to him, considering his permanent physical disabilities.

We have considered a lot of evidence in the last three weeks. Let's now consider how that evidence applies to the questions which you are called upon to answer. The first issue:

"Was this injury traumatic in origin or was it spontaneous?" The answer is clearly that the injury was traumatic in nature. You heard the doctors discuss the medical investigative technique that was used to determine whether the injury was traumatic or spontaneous, a technique called differential diagnosis. Let's review differential diagnosis in this case as the treating physicians did and we will see that it leads clearly and convincingly to an injury traumatic in nature.

The first element of differential diagnosis is Cesar's family history. The fact: There is absolutely no Gonzalez family history of any nature that would indicate a spontaneous event.

The second element is Cesar's individual patient history. There is absolutely nothing in Cesar Gonzalez' personal history that would indicate that he was predisposed to a spontaneous clot. You recall the various tests, what the Defendant's hired witness, Dr. Michael Weintraub said needed to be there, the underlying disease processes that would cause a spontaneous event. We considered Cesar's history with respect to every one of them: diabetes, smoking, diet pills, birth control pills, heart condition, sickle cell anemia, and, of course, the ever famous won ton soup syndrome. None of these indicators of a spontaneous event, not one of them applies to Cesar Gonzalez. So, the second element of differential diagnosis, patient history, supports an event traumatic in origin.

The third medical consideration in differential diagnosis is the mechanism of injury. What physiologically occurred to Cesar's body to cause the injury, is it consistent with the subsequent findings, and does it support a traumatic event or a spontaneous occurrence? The mechanism of Cesar's injury is undisputed. There are two biomechanical engineers who have testified in this case: Dr. Chandran, who came in from Iowa, one of the leading biochemists in the country, and Dr. Alexander, whose NASA credentials you heard. They are outstanding bioengineers. Let's look again at the video graphic re-enactment of the stretching of the right vertebral artery over the atlas disc, the tearing of the artery, formation of the clot, movement of the clot through the right vertebral artery to the basilar tip and blockage of the basilar artery cutting off the blood supply to the brain. You watched the medical graphic and heard each doctor and biomechanical engineer testify that "yes, you whip the head around in this fashion, it can clearly result in a tear of the right vertebral artery." Defendant's expert, Dr. Alexander admitted it. There is no question about it.

Four doctors testified in this case: Fields, Weibel, Handel -- and even Defendant's witness, Dr. Michael Weintraub -- admitted the mechanism of Cesar's injury.

Consider the mechanism of injury as described by Defendant's biomechanical expert, Dr. Alexander in reporting to Astroworld before the medical reports were drafted: "the acceleration forces involved in the violent movement of the head result in high tension forces which can tear or separate the vascular bed leading to the bleeding within the vessels themselves;" which is exactly what happened to Cesar.

So, all four doctors and both biomechanical engineers agree on the mechanism of this injury, that this could occur in precisely the fashion we have demonstrated to you on the medical video re-enactment all the way through the trial.

The next consideration in the differential diagnostic investigation is the onset of neurological symptoms. What occurred, and when did it occur? It is significant that the onset of neurological symptoms came immediately after Cesar turned to his cousin and said, "That turn popped my neck." Then what happened? The first neurological symptom. Cesar is rendered unconscious for a brief period of time. When he gets off the Cyclone, he vomits. The third very important symptom he experiences is blurred vision. You remember how important that is? Because we have this question about whether this is a basilar tip syndrome or whether it is mid-basilar. Remember what Dr. Fields said about the importance of this symptom of blurred vision? The blurred vision indicates the involvement of the Circle of Willis, which is located above the tip of the basilar artery. The blurred vision medically indicates that there was an occipital problem, which indicates that the blockage is in the basilar tip, not emanating in the mid-brain. This clearly supports traumatic origin of injury rather than spontaneous. Considering all of the neurological symptoms, they medically spell brain stem infarction, a traumatic event.

The next thing in differential diagnosis is the clinical examination. Significantly, who did the clinical examination? Cesar's treating physician, Dr. Weibel did the clinical examination. What is the advantage of that? Defendant's hired witness who never examined Cesar Gonzalez, Dr. Weintraub, admits that there is a substantial advantage in differential diagnosis to Dr. Weibel as Cesar's treating physician, rather than someone in Dr. Weintraub's position who is paid to read a cold medical record years later. Consider this carefully when deciding whether to accept Dr. Weintraub's diagnosis of a spontaneous event or all of the treating physicians' agreed diagnosis of the episode being traumatic in nature.

Dr. Weibel then followed the next step in differential diagnosis: He brought in consultants in the relevant specialties. Significantly, consider the quality of the consultants Dr. Weibel engaged. One of the world's leading neurologists, Dr. William Fields. There is no question about that. One of the world leading neuroradiologists, Dr. Nick Bryan, who is now head of neuroradiology at Johns Hopkins. Dr. George Campos, the head of T.I.R.R., a renowned radiophysicist. Cesar had a tremendous advantage of being treated in the Texas Medical Center, which allowed Dr. Weibel to bring in some of the world's finest medical experts to assist in saving Cesar's life.

One of your vital roles as jurors is to weigh the credibility of the witnesses, especially the medical experts in this case. We have reviewed the thorough differential diagnostic techniques utilized by Dr. Weibel, Dr. Fields and Dr. Bryan, the treating physicians whose expertise saved Cesar Gonzalez' life. Now let's compare the methods used by Defendant's hired witness, Dr. Michael Weintraub of New York: What clinical examination of the Plaintiff did he perform, what test did he conduct, with whom did he consult, what test results did he review? Answer: None.

What did Dr. Weintraub, Defendant's hired testifier do? Did Dr. Weintraub call Dr. Weibel and ask him for a first hand account of the clinical examination? No. Did he call Dr. Fields and ask to discuss his entries in the medical records? No. Did he call Dr. Nick Bryan and inquire "Is this an underlying congenital stenosis or is this a stenosis arising from the thrombosis?" No, he did no consultations. None. He did exactly what he was paid by the Defendant to do. He sat in his office in New York, read the medical records and arrived at a pre-ordained opinion precisely in conflict with the opinion of the world renowned medical experts who actively treated Cesar Gonzalez and whose expertise saved Cesar's life. We brought you those experts to give you a first hand account from the witness stand as to the depth of their knowledge of Cesar's condition and each of them agreed that his life threatening injury was traumatic in nature.

Let's consider further the objective tests conducted by Dr. Weibel, the CAT scan and the angiogram. The first test, the CAT scan shows no bleeding in the brain. That's an extremely important diagnostic tool in this case, because it eliminates subdural hematoma, A.V.M., aneurysms, and numerous types of disease processes that potentially could have been the cause of Cesar's injuries if they had been precipitated by a spontaneous event. Therefore, the CAT scan is a very important differential diagnostic tool in ruling out spontaneous event.

Next consider the differential diagnostic surgical procedure, the angiogram. Now let's recapture the situation here with respect to Dr. Weibel. Dr. Weibel, the

father of subclavian arteriography, who has performed literally thousands of them is confronted with a young man who is about to die. There is no doubt about that in the record. Dr. Weibel conducts the extremely important angiogram and makes four very significant discoveries.

Number one, he tries to go up the right vertebral artery, and cannot. It is occluded. He backs out and goes up the left vertebral artery.

The second important discovery: when Dr. Weibel gets the dye into the basilar artery he sees the thrombosis. Knowing that there is a 95 percent fatality rate in basilar artery thrombosis, Dr. Weibel recognizes that this young man is about to die if he doesn't take the proper immediate action. The third event happens: Dr. Weibel sees reflux into the right artery, which hesitates for three or four seconds. The dye flowing downhill hesitates. Why is that significant? Dr. Weibel explained "because there is blockage there. There is a problem here in this area." Then the dye goes through and the fourth event occurs: Dr. Weibel sees the tear in the right vertebral artery.

Now Defendant raises three issues as to Dr. Weibel's actions at this point. One, why did he not take a picture of the tear? Two, why did he not record the tear in the medical record? And, three, why didn't he do surgery to repair the tear?

The answer to the first two inquiries is Dr. Weibel was not acting as a neuroradiologist in this case, consulting with someone else and reporting to a treating physician. Dr. Weibel was the treating physician. He was the one that needed to know that the tear was there and, as he explained, the tear was not clinically important, because Dr. Weibel could see that the tear needed no surgery. It needed no repair because it self heals."

As Defendant's medical witness, Dr. Handel explained on cross-examination, "Yes, we get tears in arteries when we are doing arteriography. But you get the tear in this fashion, and then you go through adhesion and aggregation. Platelets immediately start filling in here. They adhere to this area. Then they aggregate to each other. Then they build up. They keep the aggregation going until they move into the bloodstream. The bloodstream breaks the clot loose. But when it breaks the clot loose, you have gone through a self-healing process of the artery right here. That's why there is no need for surgery, because it self-heals."

Additionally, there is no surgery that can be done in that area. You don't do surgery in the lower area, because you can't get access through the bony area because of the transverse processes. You will recall that I asked Dr. Handel on cross examination: "What corrective surgery

can you perform when you tear an artery doing an arteriogram?" Dr. Handel replied "None."

To answer Defendant's inquiry as to why Dr. Weibel did not do surgery to repair the tear, first, there is no surgery needed. Second, there is no surgery that can be done.

One additional factor which I suggest that you take into account in weighing Dr. Weibel and Dr. Fields' testimony against the contrary testimony of Dr. Weintraub is that not only did Dr. Weintraub not consult with anyone, not have the advantage of a clinical examination, and not conduct any test. It is extremely important that you take into account that Dr. Weintraub did not even bother to look at the angiograms or the CAT scans before rendering his decision that this event, which crippled Cesar Gonzalez for life, was spontaneous in nature.

The evidence preponderates heavily that the event was traumatic in nature. Look at the medical records made at the time of the event. Dr. Fields and Dr. Weibel wrote: "Final diagnosis: Thrombosis of basilar artery, traumatic in origin."

Significantly when this medical record was made there weren't any lawyers involved then. There wasn't any lawsuit. There wasn't any jury to try to impress. The treating physicians simply wrote that because that was their diagnosis. I think it is also very important that the jury consider that when Dr. Fields and Dr. Weibel acted on that diagnosis, the results were immediate and Cesar's life was saved. Thus, Dr. Fields and Dr. Weibel were 100% correct in their diagnosis and in their treatment and the evidence is clear that they are also 100% correct that this was a traumatic event.

Most significantly, remember the admissions by defense witness, Dr. Weintraub on cross-examination: "Doctor, if you had been presented with all this evidence that Dr. Weibel saw on differential diagnosis, you wouldn't fault his decision that it was traumatic in origin, would you?"

"No, I wouldn't."

"And, Doctor, you would have made the same decision, confronted with those same diagnostic results, wouldn't you?"

"Yes."

So the vascular event is clearly traumatic in nature and the trauma was the G-forces applied to Cesar's neck on the roller coaster ride.

Now let's look at what Dr. Weintraub says happened and let's see what evidence there is of it. What is Dr. Weintraub's theory? You will recall that I asked him on

cross-examination: "Doctor, as I understand what you are saying, you contend there is a congenital narrowing of the artery rather than a traumatic narrowing. Doctor, what happened to that congenital narrowing of the artery? There is no clot. There was no event. Nothing happened. Is it your testimony, Doctor, that nothing happened?"

Dr. Weintraub replied, "That's right, nothing happened."

Just like that. Out of nowhere, it all blocked up. No clot; no event; no nothing.

Thus, as jurors you must decide whether to accept the medical theory of Dr. Weibel, who actually conducted the arteriogram, who personally saw the thrombosis in the basilar tip and who personally saw the tear in the right vertebral artery or you must accept Dr. Weintraub's theory that nothing happened. The two medical theories are mutually exclusive. In order to accept Dr. Weintraub's theory that nothing happened, it is necessary that you totally reject the medical testimony of all three treating physicians. Medical testimony aside, common sense dictates that something happened during the roller coaster ride which caused Cesar Gonzalez to begin experiencing neurological symptoms of unconsciousness, vomiting, blurred vision, dizziness and slurred speech. The medical theory of the treating physicians, which has been demonstrated to you graphically, testified to under oath and is contained in the medical records which were written at the time of treatment, all confirm that the event which has led to Cesar Gonzalez' lifetime of disabling injuries was traumatic in origin and that the trauma was the violence created by the application of excessive G-forces to Cesar's unrestrained neck during the roller coaster ride.

Now let's address the inquiry raised by the Defendant. Defendants ask: "Why did you give an anticoagulant if you had a tear in the artery?" There is a very simple answer to that. You have a blockage in the basilar artery that's killing this young man by cutting off the blood supply to his brain. The way to eliminate that blockage is to give an anticoagulant that breaks it down and allows the blood to flow again. That's what happened. It saved the young man's life.

The next thing we come to is the hiring of Dr. Carter Alexander. Now, make no mistake about it, as a result of this suit being filed, Dr. Carter Alexander was hired to aid in the defense. Dr. Carter Alexander told Astroworld: "You have got a problem with the seat design on this roller coaster. You had better replace them." They replaced them. Injuries dropped drastically. So, if nothing else good comes from this lawsuit, at least it forced Astroworld into replacing the seats on this roller coaster, thereby rendering it safer for all of our children.



Let's look at the situation which Dr. Alexander confronted. In his first visit at Astroworld they told him about the accidents that occurred during the first 23 days: 55 accidents; 16 major injuries; 39 minor injuries. Then they talked about Cesar Gonzalez' case. Think how easy it was to solve this problem. After that, Dr. Carter Alexander did not say, "Let me go ride the roller coaster. Let me observe the ride in action. Let me walk the track." Dr. Carter Alexander said the obvious thing: "Let me look at the seats."

After 45 minutes of looking at the seat design, Dr. Alexander said: "Monty, you have got a problem. These seats are not adequate for handling the lateral loads." The ones he refers to in this letter: "You need to add padding to the lap bar. You need to add padding to the seat. You need to add padding to the back. You need to incline the seat. You need to protect and restrain the rider all the way around. Restraints on the side, restraints along the back." You saw the pictures of what he did to the cars. But one thing that you will want to consider: What happened after he made the changes? This is our evidence in the case. The year before he altered the seats, 1985, 143 total injuries recorded, of which 59 were head and neck injuries. The year after he made the modifications: 22 total injuries, of which only seven were head and neck injuries.

Now, we went over these 22 injuries with you -- remember all the knee injuries. It was a whole different problem. So, the neck problem was solved by changing the seats on the roller coaster, which they did as a result of us filing this lawsuit and proving the design defect on discovery.

Now, remember the next thing that we talked to Dr. Alexander about? "Doctor, if you had been hired in 1976 would that first 23-day report, with 55 accidents in it, indicate to you that a problem existed?"

He said, "Yes, it would. I would want to do accelerometer testing to see what the forces are, and so forth." And he recommended accelerometer testing for the purpose of protecting passengers.

Mr. Jasper said, "We didn't do accelerometer readings to protect passengers. We did accelerometer readings for maintenance problems."

And let's talk about notice of the injuries as constituting a pattern. What notice did they have, and what they could have done in 1976.

In terms of accident history pertaining to the Texas Cyclone, it is a fact that the incidents of injury involving the head and neck are quite high. This is to be expected, in light of the almost total encapsulation of the lower body and by the physical characteristics of the seat and

associated restraint straps and lap bar. That's exactly what I questioned him about: "If you lock the lower body in, and let the upper body whip about, you are going to get this type of injury," as Dr. Alexander agreed. This leaves the upper one-third of the body subject to the acceleration forces. Dr. Carter Alexander told Astroworld, "Your problem is lateral forces, not having the head restrained. He solved that problem by changing the seat design, and the injuries dropped off appreciably.

The Court is asking you if the Cyclone was defectively manufactured. Now, what is meant by the term "manufactured?" You understand that there is no problem with the superstructure. When Astroworld's roller coaster generated excessive G-forces, they had the obligation to their customers to restrain them in such a way as to effectively deal with the forces. There is no problem with normal G-forces. The forces are fine, so long as riders are adequately restrained, in order to cope with them. When the Court asks you concerning the roller coaster: "Was it defectively designed?" look closely at the definition given to you by the Court of "defective design." Is it unreasonably dangerous, taking into account the utility of the product weighed against the risk involved in its use?

Now, what is the utility of the product? A thrilling ride. What is the risk involved in its use? The risk is head and neck injuries, and injuries of other types. Can you eliminate the risk without affecting the utility? Answer: Yes. It was done. As a result of this lawsuit being filed, Astroworld made changes that greatly reduced the risk while keeping the utility. It is still a thrilling ride out there today. They still fill it with riders every time they run it, as Mr. Glennan told us. So, by the definition of "unreasonably dangerous," this was a very high risk of injury to passengers that was unnecessary, which could be very easily eliminated without affecting the utility of the ride. If they had done this before Cesar Gonzalez rode the roller coaster he would be healthy and happy today and we wouldn't be here.

And remember what they did to eliminate the risk? In their own maintenance shop they used a naugahyde padding and wood for framing. They spent \$5,000 to correct this problem in 1986 that they should have corrected in 1976.

Ladies and gentlemen, they have spent more money hiring expert witnesses to come to this court and deny their responsibility than they spent curing the problem. And I submit to you that it could have been done -- as Carter Alexander said, "If I had been hired in '76, I would have done the same thing then."

There have been three seat experts testify in this case. Our expert, Dr. Ray Bradley, in charge of seat design at NASA for every space vehicle from Mercury through the

Sky Lab that is circling the earth today. Our expert, Ron Hellmann, worked on the same NASA programs. Including Defendant's expert Carter Alexander, all three of those gentlemen agreed this was a defectively designed seat that needed to be corrected. How many seat design experts came into this courtroom and said there was nothing wrong with those seats and nothing needed to be done to restrain these customers and to protect our children from those violent forces? None. Not a single one.

Thus, you will have no difficulty with the question as to whether the seat was defectively designed. All of the seat experts, plaintiff's and defendant's, agree that it was. Next, when you consider the issues on whether Astroworld was negligent, consider: Were they negligent in light of the knowledge that they had of prior accidents? The pattern that was there? Look at the nature of the injuries arising out of those accidents. Look at the compression fracture. Look at all the head and neck injuries. Look at the pattern contained in these accident reports. There was a pattern of injuries occurring in the same location: at the upper south curve, first drop; upper south curve, first drop; upper south curve, first drop; over and over and over. My neck was popped. My neck was popped, my neck was popped. My head; my shoulder. All upper body; case after case. Those establish a pattern. As Dr. Alexander refers to it, the history of injuries showed a definite pattern.

But they had no one looking for patterns. They did not have anyone who sat down with those accident reports and said, "Let's compare to see what patterns are occurring here? Do we have one area of the roller coaster where more injuries are happening? Do we have a pattern of similar types of injuries that we need to address?"

They absolutely ignored it. And I submit to you that ignoring the patterns, created the problem. Ignoring the patterns ignored the problem. Ignoring the patterns failed to eliminate the problem. Ignoring the patterns constitutes negligence on the part of Astroworld.

And when you consider negligence, when you measure their conduct to decide if they were negligent, read carefully the test that the Court asks you to apply to their conduct: Is this something which a very cautious, very competent and very prudent person would have done under the same or similar circumstances? I submit to you that a very cautious, very competent and very prudent person would have recognized the pattern of injuries; would have recognized the problem, and would have achieved the very, very simple solution many years earlier. If they had done so before Cesar Gonzalez' disastrous ride, we wouldn't be here today, ladies and gentlemen.

Even when they did a major overhaul on the Cyclone in 1981, they had accident records. Astroworld doesn't have the accident records now from '77, '78, '79, and '80. So, we don't know what those accidents statistics were. We extrapolated the figures. We do know this: there were enough of them that they caused a storage problem. Mr. Glennan said, "No, we had to move those injury reports out because they were causing a storage problem. So, we disposed of them." It is clear that in '81, when they did a major overhaul, they did not address this problem of a pattern of similar injuries.

Now, Mr. Simpson is going to tell you that this is one isolated event out of 8,000,000 passengers who have ridden this roller coaster. That this is a stroke. That Cesar Gonzalez is the only person that has ever had a stroke on this or any other roller coaster.

First of all, the number 8,000,000 was an estimate by Mr. Glennan as to how many people have ridden the roller coaster. I submit to you that that's not the best evidence. The best evidence would have been the turnstile count which they said they did not have. But that's not in the record. So, let's deal with the 8,000,000 estimate.

First of all, if you say 8,000,000 people rode the Cyclone, that's simply not true, because there were not 8,000,000 different people. You have the same people riding the Cyclone over and over and over. You heard Dr. Ray Bradley and Dr. Fields say that the people who would ride the Cyclone over and over would be the ones who are not experiencing the problems. The people who ride it once and never ride it again are the people who have those physiological effects. The people who ride it over and over are the ones that get the thrill of it without having any physiological effects. So, we don't know how many different people have ridden the Cyclone.

But it doesn't matter, because we are not dealing with one clot. We are not dealing with one stroke. We are dealing with years and years and years of head injuries and neck injuries that should have put them on notice of the nature of the seat design problem. We are dealing with a failure to recognize a pattern of injuries, a failure to determine the cause of the injuries and a failure to correct the problem that caused the injuries, namely, defectively designed seats.

Let's talk for a moment about the damages in the case. On Issue No. 5 there are two types of damages. First we have what we call the special damages, which would be, in this case, the medical expenses and the damage to wage earning capacity.

The medical expense proof in this case is really undisputed. Past medical in this case is \$182,648. The future medical is \$74,000, based upon the rehabilitative care that Dr. Pollock testified that Mr. Gonzalez needs:

cognitive rehabilitation, job coaching, and psychological counseling, that total \$74,000. And again, that figure is undisputed.

But let me remind you of what Dr. Pollock said: We are not in a position to effect a cure or a total rehabilitation for Mr. Gonzalez. He has been rehabilitated to the extent that he can. He is as good as he is going to get. Why? Because he has brain damage. That portion of the brain that was denied oxygen by the cut-off of the blood flow is dead. He is not going to regain use of his left arm, or his left leg regardless of how much therapy he has. His disabilities are permanent.

The purpose of therapy is twofold: first, to help him cope with living as a handicapped person in our society. To train him psychologically to meet job requirements, so that he can compete in our job market. Secondly, to help Cesar cope with his mental anguish. We are going to talk about mental anguish more in just a moment.

Now let's talk about the other element of special damage, which is wage earning capacity. In the past we are claiming nothing for the last five years. We claim no damage to his wage earning capacity. Why? Because during that time frame he would have still been in school. He wouldn't have been earning wages. He would have been a student in high school and college. So, the answer to that is zero.

The evidence of future damage to wage earning capacity comes from two sources. First of all, Dr. Cloninger testified that the average starting salary in the accounting market, if he had been allowed to complete his Bachelor's work, is \$25,000 per year. You understand from Dr. Pollock that Cesar is unemployable. However, we are saying that, because of the tenacity and personal integrity of this young man, if he gets the rehabilitation, we are giving him the benefit of the doubt that he will be able to compete for a minimum wage job or \$7,000.00 a year. That makes the damage to wage earning capacity \$18,000.00 per year. You heard the statistics from Dr. Cloninger and his chart is in evidence. If you look at 18,000 per year, you project it over the rest of his life, and discount it to present value -- which is exactly what Dr. Cloninger did -- that arrives at Cesar's future damage to wage earning capacity in the amount of \$666,648.

Defendant's annuitist, Mr. Bass testified that he is familiar with the Big 8 accounting firms. In addition to the salary, they have benefit packages that total 7.8 per cent of annual salary. We have to take the loss of salary and add that to it. That totals \$51,000 bringing Cesar's total damage to wage earning capacity to \$718,646.

Now let's discuss Cesar's general damages of mental anguish, physical pain and suffering, physical impairment and disfigurement. The pain and suffering is

obvious. Mr. Gonzalez still has pain down the left side of his body. He has to wear a TENS unit, a device that sends electrical stimulations in response to muscle spasticity to relieve the pain. Cesar wears a TENS unit today; he has worn a TENS unit since he got out of rehabilitation, and he will wear a TENS unit the rest of his life, to help him cope with the obvious pain. Pain has been appropriately described as a window into hell. People who are in pain often beg for death. No one begs for pain. But as a result of Astroworld's negligence, Cesar Gonzalez has endured five years of physical pain and suffering and is confronting 47 more years for which the law says he is entitled to be fully and justly compensated. Further, as jurors you are the guardians of that law and it is part of your duty as citizens to decide the amount of the full and just compensation to which Cesar is entitled.

The next element of damage is mental anguish. Listen to what Dr. Pollock said about Cesar's mental anguish: "This young man is in the first percentile for severe depression in the world." What does that mean? That means that 99 per cent of the people in the world are less depressed than Cesar Gonzalez.

Can we possibly identify with that level of mental anguish? That, however, is a very important part of your task as jurors. While none of us like to confront physical pain and suffering or mental anguish of others, it is absolutely crucial to the rendering of full justice in this case that you, as jurors, confront and carefully consider the value required to compensate for the mental anguish and physical pain and suffering which Cesar Gonzalez must confront on a daily basis for the remainder of his life. Only through your willingness to discuss and evaluate Cesar's physical pain and suffering and mental anguish can an adequate award be achieved or full justice rendered to this fine young man.

The next element of damage is Cesar's physical impairment. This refers to Cesar's inability to do all of those activities that he could do before the injury, which do not bear on wage earning capacity. Cesar doesn't participate in the church's social and athletic activities as he did before his injury. He goes to church but he doesn't interact with the other youngsters. He doesn't go fishing anymore with his dad. He doesn't go swimming at the beach anymore. He doesn't go to the social functions. He doesn't go dancing. All the long list of things that he used to do before. He doesn't walk 25 miles anymore to raise funds for crippled children as he did before the injury. Now, what does that tell you about this young man? He can't do these things anymore. That's physical impairment.

The next element of damage is disfigurement. Disfigurement is how Cesar is perceived when we look at him; How his body is physically disfigured, and the

mental anguish he suffers as a result of such disfigurement. The disfigurement in his case is that he has to hold his left arm in this fashion. And when he moves, as he testified, he has to turn his left hip, so he can walk, but not in a normal fashion. He has to walk in this fashion. And that is disfigurement. And that's something that he will have to deal with for the next 47 years.

Now we come to the evaluation of these elements of damage. While that is clearly your job, let me suggest a segmental approach, that is, Cesar's history since the injury divides easily into segments. The first segment begins the day Cesar regained consciousness in T.I.R.R. and lasts until he was released from rehabilitation and sent home. As you see from the chart, that was a period of 248 days. What was his condition during this 248 days? Did he experience physical pain and suffering, mental anguish, physical disability, and disfigurement? Let's review the evidence. When he awakened he was paralyzed from the neck down. He had a trach tube in. He was being fed by IVs. He could not speak. He could communicate with his family only by blinking his eyelashes. He would blink once for yes; twice for no. That's the condition he found himself in when he awoke from the coma. When you consider physical impairment, consider that this is as total as physical impairment can be - 100 per cent.

Mental anguish. It is your job to evaluate Cesar's mental anguish. You must consider the fear, frustration and constant mental agony that would inevitably accompany awakening from a coma to find that you have the total inability to move any portion of your body from the neck down; that you are totally unable to speak or cry out for help and you are completely overcome with the fear that this is a permanent condition. Cesar's fear was overwhelming, his mental agony was constant and all of his dreams for the future were completely destroyed.

Ladies and gentlemen you need to consider the incredible strength, courage and personal integrity of this young man, Cesar Gonzalez. Confronted with total disability, did he give up? No. This brave young man started as a newborn child. He had to learn all over again how to say "Daddy" and "Mama." He slowly and painstakingly learned to speak, to read, to write, to learn to communicate. He had to learn to hold a knife and fork and work his way through infancy and childhood once again. Cesar endured one of the longest rehabilitative programs in the history of Texas Institute Rehabilitation and Research (T.I.R.R.). But because of his personal tenacity, personal integrity, and his willingness to fight, this very admirable young man came back. Thank God, he made a remarkable recovery. And he is not through. He is going to do better. But when you look at that 248 days in T.I.R.R.; in the hospital, when he was going through that painful and frustrating rehabilitation on a

day by day, hour by hour, minute by minute basis; you have to confront, measure and evaluate Cesar's mental anguish.

And you have to measure, physical pain and suffering, physical impairment and disfigurement which Cesar also endured during this period.

I'm going to suggest to you that the figure that will compensate for that is no less than a thousand dollars a day. That's where this figure on our damage board comes from. \$248,000 for the period in T.I.R.R.

A second segment of time for your evaluation is the 1,478 days as indicated on the chart. This is the time from Cesar's release from the rehabilitation unit through today.

1478 days after he was released from the hospital Cesar is still suffering physical pain, physical impairment, mental anguish, and the pangs of disfigurement 16 waking hours of every day.

There is not one waking moment of one hour of one day that Cesar is free from physical disability, mental anguish and disfigurement, which he suffers as a result of Astroworld's negligence. Since Cesar suffers minute by minute, and hour by hour, let me suggest that you evaluate his suffering in the same manner, hour by hour. Determine what will fairly and reasonably compensate Cesar Gonzalez for one hour of mental anguish that he must endure. I submit to you that for this time segment, from Cesar's rehabilitation release to the time of trial, a period of 1478 days, that at least \$10.00 per hour represents a minimum figure for fair and just compensation for the mental anguish which Cesar endured during that time frame.

How do we measure the mental anguish monetarily? One thing to consider is what do we pay to avoid physical pain and mental anguish. We pay \$30.00 for a shot of Novocain to avoid 30 minutes of pain and suffering in the dentist chair, and think nothing about it. How many of us have gone to the dentist and said, "No, just get out your drill. Forget the novocain shot. I'll take the pain. I want to save my \$30." That's a dollar a minute we gladly pay to avoid pain and mental anguish. If we pay one dollar per minute to avoid physical pain and mental anguish, does \$10 per hour begin to reasonably compensate for the enduring of the constant mental anguish which Cesar Gonzalez has lived with, minute by minute, hour by hour and day by day for the last 1478 days. That is your determination.

In this second time segment which is delineated as phase two on our damages chart, Cesar has suffered sixteen hours of mental anguish per day for 1478 days for a total of 23,648 hours. If you determine that \$10.00 per hour

is enough to compensate for Cesar's mental anguish during this time frame, then you should award \$236,480.00 for the phase two mental anguish.

The next element of damage is Cesar's physical impairment during the phase two time frame. We respectfully suggest that his physical impairment was so overwhelming, so frustrating and so devastating to him during the time from the release from the rehab through the present date, that the same figure of \$10.00 per hour would be a fair and reasonable compensation. Therefore we suggest \$236,480.00 for the phase two physical impairment which Cesar has suffered through today.

With respect to pain and suffering and disfigurement during phase two we suggest that two dollars per hour is a reasonable compensation for physical pain and two dollars per hour is a reasonable compensation for physical disfigurement. When you consider the litany of disabilities which Astroworld has thrust upon Cesar Gonzales, remember that, as Americans, we have a Constitutional right to be free from pain and mental anguish. The government of the United States and the various states can inflict death but, in our society, physical pain and suffering is viewed with such horror and disdain, that we have a constitutional right to be free from it. That right has been taken away from Cesar Gonzalez by Astroworld.

We are going to talk more about the future damages, which are delineated on our damages chart as phase three. However, since Cesar has the burden of proof, I have the right to open and close the argument. I have the privilege of addressing you now, and Mr. Simpson will argue and then I will have the final opportunity to speak to you. We will talk more about Cesar's damages at that point.

As we sit here today, this young man has a 47-year life expectancy. He is looking into the year 2,036. And you have got to remember that on voir dire examination I asked you: "Is there any member of this panel who, if you are chosen as one of the 12 jurors in this case, who will not be able to project damages and award damages for 47 years in the future?" Because the fact is, with irreversible brain damage, this young man is going to be physically impaired in the year 2,030. He is going to have mental anguish in the year 2,020. He is going to always have the disfigurement. So, it is your job to project 47 years into the future and award damages accordingly.

You will also recall that I asked you on voir dire examination, is there any member of this jury panel who, if the evidence in this case supports it, cannot bring back a verdict in excess of \$5 million? Ladies and gentlemen, the evidence in this case clearly supports damages in excess of \$5 million.

You say, but \$5 million is so much money. True, 52 years of having a large portion of your life destroyed and living with the remains is a lot of mental anguish. It is a lot of disfigurement. It is a lot of physical impairment. It is a lot of physical pain and suffering.

Is \$5 million nearly enough money to fairly compensate Cesar for a lifetime of disabilities? How much is \$5 million to compensate for 47 years of physical pain and suffering, mental anguish, physical disability, disfigurement, damage to wage earning capacity and medical expenses? Ladies and gentlemen, we live in a society in which \$53.9 million was recently paid for what? Paint on canvas. *Irises*, by Van Gogh. Why? Because it was the work of a master. Is \$5 million, less than ten percent of the cost of that painting, nearly enough compensation for waking up every morning of your life for 47 years confronting Cesar's physical disabilities, his mental anguish, his physical pain and his disfigurement? Is 10 per cent of the price of a painting enough compensation for a lifetime -- a lifetime -- of waking up every morning of your life with this physical disability? And with this mental anguish? Is \$5 million nearly enough for 52 years of pain and suffering, mental anguish and physical disfigurement? I submit to you it is not. Not at all.

We talked about evaluating one hour of mental anguish at \$10.00 per hour. Counsel says \$10.00 per hour is just too much money to reasonably compensate for a devastating level of mental anguish which places Cesar, according to Dr. Pollock, in the highest one percent of the world's misery index. But your job, among others, is to apply our societal standards to reasonable compensation. Ladies and gentlemen, we live in a society in which two men by the names of Spinks & Tyson recently split \$23 million for 93 seconds in a boxing ring. Can \$10.00 per hour even begin to reasonably compensate Cesar Gonzalez for what he is destined to endure for the remainder of his life. That ladies and gentlemen is your determination.

Ladies and gentlemen, my last plea to you before I sit down is going to be that you meet your obligation as jurors and render full, complete justice for Cesar Gonzalez. Full, complete justice means awarding absolutely full, total compensation for the disabilities which this young man is forced to endure. Anything less than full justice is injustice. Permit me, if you will, to give you one last example of what I mean by full justice.

Assume that instead of injuring Cesar Gonzalez on a roller coaster, an Astroworld truck in the Astrodome parking lot had run into a horse trailer and killed Seattle Slew, the great ten million dollar racehorse. If we were in Court today seeking damages for the destruction of that great horse and we offered as evidence proof that checks had been written in the amount of \$10 million for

the purchase of Seattle Slew, then that would be the actual value of the horse and that would be the amount of loss caused by Astroworld's negligence. If the jurors retired to the jury room and said yes, they were negligent. Yes, the horse cost \$10 million dollars. But that's just too much money for a horse. Why don't we award them \$5 million?

Well, ladies and gentlemen, \$5 million, in that case, would be half justice. And half justice is injustice. In fact, anything less than total justice is injustice.

And I submit to you that the evidence in this case supports an award in the total amount of at least five million dollars in order to achieve full justice.

Now let's consider the issues which you are called upon to answer:

No 1: Were they negligent? Yes. Clearly.

Issue No. 2: Did they defectively design it? Yes. Clearly.

Issue No. 3: Were they negligent by an ordinary care standard? Yes. Clearly.

Did the roller coaster or the defective design cause the injury? Absolutely.

Issue No. 5, damages: Past damages, pain and suffering, mental anguish, 550,000.

Nothing on loss of earnings. Disfigurement, 55,000. Physical impairment, 550,000. Medical, 182,648. Future damages, pain and suffering, mental anguish, 2,500,000. Damage to wage earning capacity, 718,646. Disfigurement, 550,000. Physical impairment, 550,000. Medical expenses, 74,000.

That, ladies and gentlemen, is what the evidence supports in this case, that is what minimum standards of justice require and that's how we ask you to answer the Issues in this case.

Now I'm going to sit down now and listen, along with you, to the hardest part of the trial for me, which is listening to Mr. Simpson talk about the case. But let me say this: If Astroworld feels that the \$5,000,000 figure on this board is too much money for 52 years of physical impairment, 52 years of mental anguish, 52 years of physical pain and suffering, 52 years of disfigurement, Cesar's damaged wage earning capacity and his medical expenses then let Mr. Simpson come to the board, I will leave a blank here, and fill in the amount of money which Astroworld says would fairly and reasonably compensate Cesar Gonzalez for his 52 years of misery. Thank you very much.

**THE COURT:** All right. Thank you, sir.

(Whereupon, the defense counsel made his summation to the jury, which is not transcribed here.)

**THE COURT:** All right. Thank you, sir. Mr. Nations.

**MR. NATIONS:** May it please the Court; Mr. Simpson; Mr. Weinstein. We are not asking that Astroworld or the Texas Cyclone be judged by NASA standards. We are asking that Astroworld be judged, as it must, by the standard given to you by Judge Cartwright in the Charge.

And you recall on voir dire examination I said: Will each of you promise to follow the Court's Charge in the case, whether you agree with the law or not?

The Court gives you the law. The standard is right here. It is not a NASA standard. The Court defines to you, in Issue No. 1, negligence. My friend, Mr. Simpson, kind of skipped over a couple of words in the definition, so I thought I would bring them to your attention. Negligence, when used with respect to the conduct of Astroworld Inc., means failure to use a high degree of care. This is not the NASA standard. This is the legal standard. This is the standard that the law imposes upon companies who have rides on which they carry the public for hire. Failure to use a high degree of care. What does that mean? That is failing to do that which a very cautious, very competent and very prudent person would have done under the same or similar circumstances. That's the standard in this case.

There is a standard on the fourth Issue, also. It is the ordinary care standard. They are also held to the standard of ordinary care, that which an ordinarily prudent man would have done under the same or similar circumstances. But make no mistake about the standard. So, let's examine what they did in light of that standard. There is talk about Dr. Alexander versus Dr. Bradley. Let's talk about Dr. Bradley for a moment. When NASA decided to get into the space shuttle business the first man that occupied an office at NASA to start the whole shuttle program was Ray Bradley. He was the project manager. He is the first man who sat at a desk and put pencil to paper and started designing the Space Orbiter. And just so there is no question about it, what he designed was the Space Orbiter, the spacecraft that flies in orbit around the earth and returns to land. Ray had nothing to do with the booster system, which is the part that caused the tragedy.

Defendant displayed a rather high degree of temerity in disputing Dr. Ray Bradley on the subject of G forces. Why not debate Bear Bryant on football? But if Ray Bradley, the man who designed the shuttle, the man who received an award from NASA for his brilliant work in modifying the wings of the shuttle after it was first used; if the man who modified the wings on the shuttle that

flew, left this earth, went out into orbit and landed back on this earth while this trial was going on, if that man doesn't understand the calculation of G-forces, then NASA is awfully lucky that their plane got back in with a re-entry speed of 16,500 miles per hour without the forces tearing it apart. Ray must know something about G-forces.

One last thing on Dr. Bradley. I mean, I'm belaboring the obvious, and I know that. But when we sent men to the moon, we were orbiting the moon. And we needed to get them from the orbiting spaceship down to the moon and back again. Who did NASA choose to design the lunar lander? Dr. Ray Bradley. He designed the whole system for getting man from the spaceship to the moon and back again. And it worked beautifully. So, if you believe Ray Bradley knows nothing about how to calculate G-forces or how to do amplitudes on G-forces, how to transfer them from the seat of its roller coaster up to Cesar's neck, where it really matters, there is nothing else I can tell you.

What I can tell you is this: The statement that 20 Gs will rip wings off planes, that's beyond human tolerance, that's not the testimony in the case. You remember what we discussed about human tolerance? That 20 Gs is the low end of human tolerance. That's where you begin to see physiological affects in human beings. That's where some people will start to get dizziness; blurred vision. But that's what they deal with in jet fighter pilots. They are flying multi-million dollar aircraft, blurred vision to a fighter pilot can be the end of it. That can be death, because they can lose control of the aircraft.

Now, is Dr. Alexander really in conflict with Dr. Bradley? No. The problem on the Cyclone is not the G-forces. The G-forces haven't changed. When Mr. Cobb testified I said, "you understand, sir, we have no problem with the way you designed that structure. That structure is still the same. Those G-forces are still the same." But what did Mr. Cobb say when I asked: "Mr. Cobb, when you finished designing that structure, who was supposed to take care of the cars?" He replied: "That's Astroworld's job to pick the cars." Astroworld claims "well, these are the cars they use all over the United States." How could those be bad. Very simply, there had never been a roller coaster with the dynamics of the Texas Cyclone. It is the most thrilling, the most exciting, and it has different curves and banks than the rest of the roller coasters. So, cars that work on one roller coaster will not work on another roller coaster. And you have to make adjustments in passenger restraint to compensate for the added G forces.

Where they failed miserably in this case was, after 23 days with 55 injuries, they failed to recognize that they had a problem that they needed to address. The pattern of injuries to necks and heads of their passengers put

them on notice of the problem but they chose to ignore the pattern. That's where they failed.

Dr. Alexander said; "They are asking us these days if the airplanes we are flying are too hot. And the answer is a resounding "No," so long as we properly restrain our pilots." The answer is exactly the same on the Texas Cyclone. You heard me ask him: "Doctor, isn't it true that the G-forces on the Cyclone don't really matter, so long as you restrain and protect the passengers?" He agreed. So, there is no great conflict here about G forces; or about human tolerance, the conflict is about failure to properly restrain passengers.

Let's talk about a couple of other disputes that exist in the case. Dr. Cloninger versus Mr. Bass. I'll agree with one thing that Mr. Simpson said about his hired gun annuitist. He said, "Mr. Bass puts his money where his mouth is." And he certainly does. Mr. Bass told us on cross-examination that he makes \$200,000 a year testifying as a witness in cases like this. That is definitely putting your money where your mouth is.

But the fact is, in this case, Dr. Cloninger has given us the calculations that have projected Cesar's future earnings, and discounted them back to present value.

Now, recall what I asked Mr. Bass about his starting salary when he entered accounting with Peat Marwick, one of the big eight.

"What did you make as a starting salary?"

"Seven thousand a year, 22 years ago."

We don't know what he makes today, as a salary. But what we do know is this: If we took the one quarter per cent per year -- that's what he said, one-fourth of one percent a year -- that he would attribute to Cesar Gonzalez for his own growth potential in earnings, applied it to that \$7,000 a year for Mr. Bass, he would have the ability to earn \$30,000 a year. That's the standard he wants to apply to Gonzalez.

But what do we know about Mr. Bass? We know that Mr. Bass makes \$240 an hour. \$240.00 an hour, on a standard forty-hour week, is \$500,000 a year. So, he completely failed to take into account the ability, the tenacity, the personal spirit, the ability to fight back that this young man, Cesar Gonzalez, has demonstrated.

He took nothing into account except Cesar's junior high grades. I would sure hate to be evaluated based on my junior high school grades. And I don't think that's the basis for your evaluation, either, ladies and gentlemen.

I think the basis for your evaluation is to look at the condition this young man was in on July 8, 1984 and

look at the condition he is in today, and see how he got there. He got there by a willingness to fight back; a willingness to overcome handicaps; and a willingness -- an absolute drive -- to improve his life. This young man is brain damaged, and he is out there right now competing at the college level. And he is not in handicapped courses. He is taking regular, college-level courses. And he is doing everything he can to get through them. And he is going to make it. He is definitely going to make it.

We are not concerned about that. We know this young man, this courageous, persistent, hard working young man. He will make it.

Now, Mr. Simpson appropriately said, as the Court tells you, "Do not let sympathy or bias play any part." We don't want sympathy. Cesar Gonzalez doesn't need sympathy. He got enough sympathy in Methodist Hospital. He got enough sympathy at T.I.R.R. for 248 days. He got enough sympathy from his friends when they saw the condition he was in when he attempted to return to school. He has had enough sympathy to last him three lifetimes. We are not here about sympathy. We are here about justice.

So, let's talk about justice. Now, we talk of money. We talk of money because there is no magic. Magic exists only in the world of children. We have to deal with reality. If this jury could wave a magic wand and return that young man in his former, healthy, happy condition to those two people sitting right there, Mr. And Mrs. Gonzalez, and say, "Here is your son back, healthy," there is no one who can possibly believe that they wouldn't leave here in the 99 percentile of happiness in the world rather than where Cesar is -- the bottom one per cent -- of severe depression. But we are not dealing with magic. We are dealing with reality. We are dealing with severe realities.

It is reality that Cesar Gonzalez has reached his maximum level of rehabilitation. That's undisputed.

It is reality that Cesar Gonzalez experienced 248 days of horror. Quadriplegia. Vegetative state. Communicating with his eyelashes.

It is a reality that he endured 23,648 hours of adjustment to reality from the time he got out of rehabilitation until today. The life expectancy table is in evidence. It is a reality that his damages are based upon 47 additional years from today of future damages. At 16 waking hours a day, it is a reality that this young man will endure 274,000 hours of mental anguish in the future, because he will never be free of physical pain and suffering and mental anguish.

It is a reality that he will endure 274,000 hours of physical impairment in the future, because he is never free of it.

It is a reality that he will endure 274,000 hours of physical pain and suffering in the future, because he is never free of it.

It is a reality that he will endure 274,000 hours of disfigurement in the future, because he is never free of it.

Another reality is that he has to compete in a job market at the toughest entry level there is.

And those are the realities, ladies and gentlemen, that you have to deal with. Because that's your role in the judicial system, to tell these folks what amount of damages equate to justice for Cesar Gonzalez.

Now, 47 years of future damages -- it is easy to stand here and say "47 years in the future." But that's a hard, hard concept to grasp, that we are talking about damages that exist to the year 2036. We are talking about in the year 2,025 this young man will still get out of the bed in the morning and he will still have a crippled left arm and a crippled left leg. That he will still be suffering mental anguish. That he will still have the physical impairments. And they will never go away.

One way that we suggest that you might want to consider in trying to get a perspective on what 47 years in the future is, is to look back 47 years. If we did that, the end of 1941, Pearl Harbor, all the way through World War II. If this had happened then, and they had been projecting 47 years, this young man would have awakened on the morning of December 7, 1941 with his physical handicap, his mental anguish, his pain and suffering, his physical disfigurement and he would have gone through all the ensuing years enduring every waking moment with those physical impairments. All through the Truman years; the Korean War; all the way through the Eisenhower years. Every day of his life, awaking to the physical pain and suffering, mental anguish, physical disability and disfigurement that will plague him for the remainder of this life. Cesar would not have danced to the music of Elvis or the Beatles since he would have been sentenced by his physical disabilities to the role of spectator in many of life's most enjoyable experiences. Bringing it through the Kennedy era, he would not have been able to appreciate and enjoy the Camelot days of the Kennedys, as other youngsters would, because of the problems that he has in dealing with society, primarily due to his physical disfigurement.

The great accomplishments of going to the moon and back. When Ray Bradley was over there designing the lunar lander, this young man would have still been, every



day, fighting to cope with basic problems of life arising from his physical disabilities.

When the Astrodome was built, when the Summit was built, when the Houston Rockets moved here, and the Houston Aeros, this young man wouldn't go to those games because he couldn't cope with being jostled by the crowds.

If you look back at it that way, you can get some idea of what 47 years in the future is, which is what he is looking at today.

If we also look back 47 years and a jury in 1941 was awarding damages to Cesar to compensate him through the remainder of his 47 year life expectancy, those jurors never would have believed the cost of living in America in the 1960's, the 1970's and the 1980's. The verdict they would have returned for Cesar in 1941, which would have been designed to last him through the next 47 years to 1988 would have been woefully inadequate because the purchasing power of the dollar has depreciated so substantially since that time. They would have failed to look into the future and give an actual evaluation of 47 years of future damages. We are asking this jury sincerely not to experience that same failure. None of us are economists and we can probably all agree that if we laid all the economists in the world end to end we would never reach a valid conclusion. However, we all have common sense and as we look back over the depression, recessions, booms, valleys and peaks, we know that the cost of living in America since 1776 has gone one way and one way only: straight up!! We can also reasonably conclude, based upon our common sense and experiences in life, that the cost of living over the next 47 years will continue to rise. Your verdict to Cesar Gonzalez must predict, project, and fully compensate him through the year 2035 and for all the intervening years and the verdict which you return in this case is going to determine the destiny of this young man for the next 47 years. We cannot come back if your projection is wrong and the compensation is inadequate. Your verdict is not written in pencil, it is written in indelible ink and cannot be changed if it is inadequate. Therefore, despite the fact that waiting for the jury to conclude deliberations is always the most difficult part of the trial for all of the clients and the lawyers; we are going to ask you to take all of the time you need during your deliberation to carefully consider your verdict so that the collective wisdom which goes into the verdict which you return will produce full and complete justice.

The quality of the first sixteen years of Cesar's life was the responsibility of his parents, the quality of the five years since this tragedy was dictated by Astroworld's actions, the quality of the rest of his life is in your hands. As we discussed, three weeks ago on voir dire examination, the 12 of you will have the difficult and

unpleasant task of confronting, carefully considering and calculating a dollar value to compensate Cesar for 52 years of physical pain and suffering, mental anguish, physical disability and disfigurement. Such a grizzly audit is difficult, but indispensable. You and I only have to discuss the physical pain and suffering, mental anguish, disability and disfigurement. Cesar has to live with it every waking moment of his life.

After this trial is over I move on to my next trial, the judge calls a new case, the defendants return to their jobs at the amusement park, hopefully wiser and more safety conscious, but Cesar will continue to live with the results of Astroworld's conduct for the next 47 years, minute by minute, hour by hour, day by day. There will not be one day during the year 2000, 2010, 2020, or 2030 when Cesar does not have to cope directly with his inability to use his left arm. When he can walk without dragging his left leg or when he can speak clearly. Since Cesar has to confront his pain and suffering, mental anguish and physical disability for 274,000 waking hours in his future, justice demands that in your role as jurors, you directly confront Cesar's pain and suffering, mental anguish, physical disability and physical disfigurement for a few hours in the jury room. None of us like to confront pain, to talk about it, to listen to others talk about it or to try to put a dollar amount on enduring pain. But if full and complete justice is to be rendered, you must meet your full and complete duty as jurors and directly and thoroughly confront, discuss, consider and evaluate Cesar's lifetime companions, physical pain and suffering, mental anguish, physical disability and physical disfigurement.

What will it take to compensate Cesar for 47 years of future pain and suffering, mental anguish, physical disability. We have projected the damages, on a per diem basis. Consider 47 years, break it down into the number of days; the number of waking hours, we conclude that Cesar will endure 274,000 waking hours of future disability as a result of the injuries inflicted on him by the actions of Astroworld. How do we apply the per diem calculation to the future damages which Cesar will endure? Follow me on the damages board as we review each of the elements of damage which Cesar will suffer in the future.

Consider the mental anguish. What amount of damages would fairly and reasonably compensate this young man for one hour of the severe depression; of the mental anguish that he faces every hour of his life? We suggest to you that \$8.00 per hour for the mental anguish and \$2.00 per hour for the physical pain and suffering, for a total of \$10.00 per hour for future physical pain and suffering and mental anguish. As you can see on the damages board that would generate \$2,740,000.00.

In computing disfigurement, at \$2 an hour for the remainder of this young man's waking hours, it totals \$550,000.

We suggest the same calculation for physical impairment, which he clearly will have for the rest of his life, at \$2 an hour, that totals \$550,000.

The medical, Mr. Simpson has told you, there is no real issue about that.

Then we ask that you answer the Issues Yes, Yes, Yes, Yes. And return the damages issues in the manner in which we have indicated them on the board.

Ladies and gentlemen, that totals \$5,700,000.

As we discussed three weeks ago on voir dire, we have seen two Cesar Gonzalez' in this case: one an energetic, active, fun loving extrovert; the other a depressed, withdrawn, inactive introvert. One a bright, optimistic, hard working student; the other a brain damaged, pessimistic, struggling student. One a physically fit, athletic youth; the other a physically handicapped hemiplegic. One a happy, healthy Cesar Gonzalez before Astroworld's tragic mistake; the other Cesar Gonzalez for the next forty-seven years.

Ladies and gentlemen, the numbers which we have suggested to you for use in the calculation of Cesar's future damages total \$256.00 per day. If we placed an ad in the Houston Post tomorrow which said: "Job available. No education necessary. No experience necessary. Pay: \$256.00 per day. Only two requirements - one, you must suffer mental anguish, physical disability, physical pain and suffering and physical disfigurement every waking moment for the next 47 years and two, you can never resign." Ladies and gentlemen, how many people do you think we would have applying for that job? Unfortunately, that is the job which Cesar Gonzalez holds, not by his own choosing, but as a result of the actions of Astroworld. The only remaining question is what will be his compensation for holding that job. That is your determination.

So on behalf of the Gonzalez family we sincerely pray that in serving in this vital role as jurors that God gives you the individual and collective strength and wisdom to render full and complete justice in this case. This is Cesar Gonzalez' last day in Court. The lawyers have now finished our work, the Judge has completed his role and the clients await justice. Ladies and gentlemen, who is to render full and complete justice for this courageous young man who has had a lifetime of disabilities inflicted upon him? If not you, who? If not now, when? Thank you very much.

**D. Howard L. Nations:**

This is a rebuttal argument on damages in a products liability case involving a product that the manufacturer failed to recall despite their knowledge of the defect and the product resulted in the death of a seven year old child.

**COURT:** Mr. Nations you may proceed.

**MR. NATIONS:** Thank you, your Honor. Counsel, members of the jury.

Now we talk of money. We talk of money because there is no magic. Is there anyone in this courtroom who is so callous as to believe that if this jury had the power to work the magic of throwing open that courtroom door and having young David run down that aisle-way into the hands and into the arms of his parents, is there anyone here so callous as to believe that this young couple and their young son wouldn't get up and walk out of this courtroom the happy, full family unit that they were before this disaster and turn around and smile and wave goodbye to all of us and never give a thought to money. But we talk of money because there is no magic. Magic exists only in the world of children. For young David, seven years of age, he faced the magic of every new day, the magic of new challenges, dreams, the magic of hitting a ball further than the other kids, the young athlete like his father had been. The magic of running faster than the other kids, the magic after a hard day on the playing field of Mom's chocolate chip cookies and ice cream. That magic of Saturday afternoon when he got to get out there and play baseball with Dad. The magic of David's life vanished on November 3, 1982. It vanished when a time bomb exploded and ended his life violently. A time bomb that crushed the life from his body, crushed his future and crushed the happiness of this family. A time bomb because this corporation knew of this defect, this corporation knew of this danger and this corporation knew that this had to happen eventually. We talk of money today because they talked of money earlier when, remember the evidence, at a Board of Directors meeting they considered that it would cost them \$4,000,000.00 to recall this product. They talked of money and they decided , "no", we won't recall the product", because that's not \$4,000,000.00 that they're spending, that's \$4,000,000.00 out of net profit. And we all know that corporations exist solely for the purpose of making a profit. So we talked of money today because they talked of money then. When they talked they made a decision. And in that decision they gambled. They gambled with public safety, they gambled with young David's life and they gambled with you, the jury system. They gambled that their lawyers and their hired experts would be able to come into this courtroom when the inevitable occurred and that time bomb exploded that their lawyers and their experts, and you heard them, would be able to come into this courtroom and walk out

of here owing less than \$4,000,000.00. We know that David lost this gamble. The question is, "Did this corporation lose this gamble or did they win?" And, that, ladies and gentlemen, is what we're here about. And that's what you're here about. Did they win the gamble with David's life. We talk of money now because they talked of money then. I told you on voir dire examination that the jury in this case, the twelve of you who are finally chosen, would have a tremendous burden. That burden being to place the value on a human life. A life that no longer exists. The court has told you, as we talked about on voir dire examination, that the law says that the parents are entitled to recover for loss of society, loss of companionship of young David and their own mental anguish which they have suffered as a result of that loss. We're not here for sympathy, ladies and gentlemen, they're not here for sympathy. This young couple had enough sympathy on the day of this funeral to last them three lifetimes. We're not talking about sympathy. We're talking about the law. Let suggest this to you. Don't look at David's death. That's not what we're here about, when we start talking about damages. Look at the loss. The court instructs you, loss of society, loss of companionship. Don't try to measure death. Measure loss. What has this young couple lost? The loss is in the life that never will be. What is the loss to the family, to the parents of a young 7-year old boy? Where they just had a mere preview, less than 10% of his life expectancy. He lived seven years out of what should have been seventy-three. The loss, is all of those wonderful things in life that will never occur now that would have occurred but for this explosion. This young couple will never again share the daily joys, years, hopes and tears of young David. David, Sr. will never know whether young David would follow in his father's footsteps. Would he have been the high school halfback as his Dad was? Would he have gone on to college? Would he have gotten an academic scholarship and got his MBA degree? Would he have followed in his father's footsteps into the business, and taken over with David Moore & Son, eventually to be David, Jr. running it? They'll never know those things. That's their loss. They also lost all those special moments that occur as parents watch a child grow up. They'll never know the experience of graduation from grammar school, Jr. High School, graduation from High School. They'll never know the thrill of watching young David graduate from college. They'll never know that special moment when young David walks in, with this lovely young lady and says, "Mom, Dad, I want you to meet my future wife." David, Sr. will never experience the thrill of that moment when the phone rings and he picks it up and he hears, "Congratulations, Granddad, it's a boy." And most of all Ann will never, ever, ever, again hear the most magic words in the English language, "I love you, Mommy." Days of celebration. Birthday, Christmas, Mother's Day, Father's Day, at the Moore household are now days of mourning. What is emptier than a home on Christmas

morning, without the child there. So when we think of the loss in this case we could discuss and endless litany of loss from the life that never will be. Loss that was thrust upon this family by these defendants. The question is, "What is that life worth?" But ladies and gentlemen, we close now the book on David's life. You, when you go into that jury room, are writing the last chapter of David's life. They'll never know what his life was worth. But these parents will know from your jury verdict what this community thought their young man's life would have been worth. That's the only indication they'll have. But before we close the books on David's life, let's look at another set of books. Let's look at the books of this corporation. Because as we speak here today, David's death is carried as an asset, a \$4,000,000.00 asset in the corporate books of this corporation. Because \$4,000,000.00 is what it would have cost them to recall this product. So as we close the book on his life, let's examine closely the corporate books of this defendant. When this Board of Directors gambled with the jury system, they gambled that you would bring in a verdict when the inevitable occurred of less than \$4,000,000.00. And ladies and gentlemen, if you bring a verdict of \$3,000,000.00 in this case, they'll sit here with long faces and they'll look like they've been stung, but when they get back to the corporate offices they'll laugh. Because they'll say, "Hey, we still won because we came out \$1,000,000.00 ahead. It was a good business decision. It's a million dollar profit and that's why we exist, to make a profit." So, if you bring in \$3,000,000.00, they win. If you bring in \$4,000,000.00 they still didn't lose anything. That's what it would have cost them to recall the product. So they haven't lost a thing, they haven't learned any lessons. Remember the cost, remember the purpose that we discussed of punitive damages? They have no motivation if your verdict is \$4,000,000.00 or less, they have no motivation to keep this from happening to someone else. And neither does any other manufacturer in the industry. You, ladies and gentlemen, are acting as the conscience of this community. You have an opportunity that I don't have. You have an opportunity that the Judge doesn't have. You have an opportunity that their own attorney doesn't have, and that is, to talk directly to the Board of Directors. They don't listen to me, they don't listen to the Judge, but you can believe that the Board of Directors of this corporation will listen to you. Because when the verdict in this case is brought in it will be reported directly back to this Board of Directors of this corporation. And I'm going to ask you, ladies and gentlemen, if justice, full justice is to be served in this case, if this family is to be compensated, and this corporation is to be told, don't do this again, and other corporations who are similarly inclined are to be told, "Look what's going to happen to you if you follow this same course of conduct, if you gamble with public safety, if you gamble with the lives of our children and if you gamble with our jury system, here's what you're going to get." We have a simple system under the law for

this. We call it "treble damages". Whatever verdict you return, that's compensation. Bring that in under compensatory damages. But over here where the Court asks you about punitive damages take that number, multiply it times three and make that the punitive damages in this case. Let your verdict in this case serve as a beacon in the sea of product manufacturers that says we, the jury, the conscience of this community and the guardians of public safety demand three things from you. We demand safety, safety, and more safety. We demand the protection of our children. Bring in your verdict that is large enough, that it goes beyond this company. Let your verdict reach out to the whole industry. Can you do that, ladies and gentlemen, by returning a compensatory verdict of \$4,000,000.00 and a punitive damage verdict of \$12,000,000.00? Full justice demands nothing less. Ladies and gentlemen, I now lift from my shoulder the mantle of responsibility that I've carried in this case for the last three years since this fine young family walked in my office and I place this mantle of responsibility very delicately in your hands and all I ask, on behalf of this young family, is that when you go home, after this case is over, when you walk into your house and talk to your spouse, or your children or your parents, and they say, "What did you do in Court?" You can look them straight in the eye and say: "We did a lot. We improved consumer safety in this country, we told a family what their young son's life meant to this community and we rendered full justice." Thank you very much.

#### IV. Sample Opening Statement

Howard L. Nations:

Ladies and Gentlemen, in order to understand why we are here today, let me take you back to where this tragedy began that has brought us together this week. It is a Saturday afternoon in September, 1991. Dave Winston is doing what many of us were doing on that fine Texas football afternoon: sitting in his den watching the Texas TCU game on television. We see Ann come in and tell Dave that there is no hot water coming from the tap in the kitchen sink. We see Dave do what most of us would do. He says, "I'll take care of it during half time darling." We see Dave go to the utility room and kneel to read the instructions on the water heater. Dave smells the faint odor of gas and finds that the pilot light has gone out. The instructions say, "when the pilot light goes out, wait a few minutes and then light it again." Dave follows the instructions carefully thinking, as we all would, that the gas shut off valve on the hot water heater will work the way the manufacturer says it will.

We see almost two hours pass as Dave goes back to the den to watch the second half of the Texas-TCU game. At the end of the game, Dave being the faithful Longhorn that he is, happily tells Ann that now he will take care of the hot water problem.

We see Dave go back to the utility room where he no longer smells the gas odor. He strikes a long wooden match on the concrete floor and we see him as he reaches out to put the flame by the pilot light. We see an instant look of panic on Dave's face as he hears the whooshing sound; he sees the flicker and the flash then the flame and feels the searing heat. Dave doesn't realize that the pungent odor rushing up to his nostrils is from the singing and charring of his own flesh.

We see Ann rush through the garage to the utility room as she hears Dave's screams; Dave's clothes are entirely engulfed in flames and all she sees is an orange ball of fire as she hears his tormented screams emerging from that fiery ball.

Like a lobster thrown into a boiling pot, this gentle man is cooked from his ankles to the top of his head. Not an inch of skin is spared from that awful blaze, not his thighs, not his stomach, not his chest, not his eyes, not his ears, which are burned off.

We see more than four weeks, thirty-two long days and nights drag by in the hospital burn unit. Days and nights measured minute by minute by minute of misery, pain, anguish, despair and hopelessness until Dave finally finds the only peace left available to him, the peace of death. Sometimes in the quiet and lonely hours of the night, Ann still hears the echoes of her husband's screams and awakens in the middle of her own nights to the sound of her own screams and the vision of Dave captured in that fiery ball of flame.

That, ladies and gentlemen is why we are here, because Dave Wilson trusted this manufacturer and followed the instructions on the side of the water heater with the shut off valve that didn't really shut off the gas the way this manufacturer said it would.

