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"MAY IT PLEASE THE COURT" – CLOSING ARGUMENTS IN CIVIL CASES

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Throughout this Trial Academy, and in other similar programs, the presenters each address particular aspects of trial practice such as: discovery; *voir dire*; openings; direct and cross examination, and so on.

It is important to keep in mind that for effective representation each of the various steps and proceedings in litigation are an integral part of the whole, and each step should contribute to the presentment of the case according to a trial plan and theory of the case.

There must be a theme, a story that will be the framework upon which the case will be built. It is not always obvious or easy to find and may require a good deal of thought to formulate, but having a theme is crucial to a coherent presentation of the case.

The culmination of the case is the closing argument or summation, wherein the advocate ties all the pieces together in a coherent, logical presentation which should lead the jury to the one inescapable, logical and comfortable conclusion, a verdict in favor of our client. Psychologists have taught us that people often make decisions based on what they feel, and then justify it with logic. Do you not want juries starting off with the feeling that you are "right"?

When should we start thinking about summation? From the moment we first meet the client,

[1] These materials, and the accompanying presentation, are updated iterations of the earlier materials and presentations of the Honorable Mark D. Fox, U.S. Magistrate Judge (*ret.*), Southern District of New York, who previously presented this lecture at several past Trial Academies. With thanks and appreciation to him.

the process is ongoing. It continues through every stage of the case and is modified to deal with newly discovered information and tactical considerations as they arise during trial.

Who are the witnesses we need to prove our case? Are they likeable and credible, or is their demeanor going to create problems, particularly of credibility, with the jury? How will we deal with those issues in summation?

What discovery will we need to corroborate our witnesses, to prove various points important to our theory of the case and to impeach the other side's proof. AND what is out there that may hurt us, for which we must prepare a plan so as to deal with the problem?

We are thinking always about what proof, what facts, we will have at our disposal with which to argue our theory of the case on summation, and how to get them into evidence, or prevent our adversary from doing so.

AT THE SAME TIME, we are using the information we obtain to prepare for each step in the ongoing litigation because each step depends on all the others in the whole of the trial.

EXAMPLE: Plaintiff Stockard's case depends to a large degree upon the testimony of Trooper Chris Jensen. As plaintiff's counsel we must acknowledge that he has some credibility issues, including what some jurors might see as his inappropriate interest in then-16 year old Channing Stockard, his outright dishonesty to his superior officer in the subsequent disciplinary proceeding, and his emotional reaction to this case including his stated intention to "get" Mitch Murphy.

Defense counsel also has some problems, since the defense's case depends in great measure upon the testimony of the defendant Mitch Murphy, who hardly presents as a likeable and sympathetic young man. His attitude, his demeanor, his reaction to Channing's death, and his criminal history (if the jury is permitted to hear it), are very problematic. Remember we have been talking all week about the concept of a trial as a whole, as a single entity, so the issue of the admissibility of Murphy's criminal

history should be addressed in pre-trial motions *in limine*. See, e.g., *Federal Rules of Evidence* 403, 404, 609; Nibbs v. Goulart, 822 F.Supp.2d 339 (S.D.N.Y. 2011). If the defense is unsuccessful in precluding the evidence of the criminal history, defense counsel may wish to consider addressing the matter head-on in *voir dire*.

By raising a serious problem in *voir dire*, and then developing it further on direct examination, we hope to alleviate the problem, prepare the jury for it, and set-up the summation point, *i.e.* whatever mistakes he made in the past do not detract from the progress and career accomplishments he has since experienced, which make him a believable witness. This "takes the sting out" rather than allowing opposing counsel to raise and frame the issue first.

> EXAMPLE: Consider saying to the jury: "Mitch Murphy is not asking you to like him, Mitch Murphy is not asking to come to your home for dinner, Mitch Murphy is not asking you to be his friend. Mitch Murphy is only asking you to do what you already promised the Judge you would do when you were selected for this jury – and that is to be fair and impartial, and decide the case on the facts."

EXHIBITS: REMEMBER whatever exhibits you may wish to use on summation and whatever testimonial evidence you may want to quote or cite, *it must be admitted on the record*. If it is not, it cannot be referred to in closing. No exceptions.

During the testimonial proof at trial, facts come into the record from the witnesses, and much of it on particularly key points.

Summation is where we pull it all together, taking the theory and theme of the case that we set out in the Opening Statement, and utilizing the facts established and the exhibits introduced during trial to prove the points that support the theory. When we stand up, we have the attention of everyone in the courtroom, and the uninterrupted opportunity to demonstrate the compelling logic of our cause.

Note, I said uninterrupted. In some jurisdictions objections during your adversary's closing are not permitted. Objections during closing can be distracting. In order to deal with such objections Counsel should first ascertain during the pre-trial conference whether the Court permits objections during closing argument. If not, make certain that you preserve your objections by first making a quick note (so you do not forget your objection in all the stress of trial), and then be sure that you put the objection on the record after summations.

REMEMBER, UNLESS THE COURT REPORTER IS PRESENT AND TAKING DOWN WHAT IS BEING SAID, SIDE BAR CONFERENCES AND CONFERENCES IN CHAMBERS ARE NOT PART OF THE RECORD AND DO NOT PRESERVE ISSUES FOR APPEAL.

For a summation to be effective, DO NOT tell the fact finders that they should believe your theory, your version of the facts. Instead, tell them WHY they should believe it.

JURY INSTRUCTIONS: Try to mirror the wording of the Court's charge in your closing argument. Why do you want to do that? Remember the rule of primacy and recency. We tend to remember best what we heard first and what we heard last. The last thing the jury hears before retiring to deliberate is the Court's charge on the law. The jury instructions. It has been my experience that jurors tend to relate to, respect and defer to the Court . Most judges make an effort to empower the jury and to impress upon them the importance of their role as judges of the facts. Judges do that consciously, so that the jurors will look to the trial judge for guidance and try to follow the Court's instructions. So when the jury finally hears the Court's instructions, and those words resonate because they heard those same words and phrases just a little while earlier in your summation, your arguments may appear more credible.

But, again, be sure to ascertain the Court's rules concerning references to the charge language and the law, as some courts/judges do not permit attorneys to reference same in the closing arguments.

EXAMPLE: "The burden of proof on each issue in a civil case is on the party asserting that claim or defense (on plaintiff in the case-in-chief, on defendant if counter-claims are pled, and on any affirmative defenses)."

In a civil trial, the standard of proof is generally by a fair preponderance of the evidence. What is a fair preponderance of the evidence? That upon the credible evidence presented (evidence that the jury believes) the fact in issue is more likely true than not true. If you can find a way to use those or similar words in summation, the jurors will hear them again from the Court, and hopefully will connect with your asserted position. As one of my former law partners would explain to clients and jurors alike, a fair preponderance of the evidence means just more than what is needed to meet the burden of proof – for example, if the New York Yankees defeat the Boston Red Sox by a score of 10 to 9, that is a fair preponderance of the evidence that the Yankees won (he is, like I am, a Yankees fan). Compare that to a score of 10 to 5, which would be more akin to the clear and convincing evidence standard; or to a score of 10 to 1, which would compare to the beyond a reasonable doubt standard in a criminal case.

How do we find out what words and phrases the Court will use in the instructions? Under the Federal Rules of Civil Procedure the Court is required to advise counsel, prior to summations, of its proposed instructions to the jury and of its rulings on any charge requests submitted. See Fed. R. Civ. P. 51. For the fact-specific charges in your case you may need to wait for the charge conference. But for the standard instructions such as the burden of proof, and the factors to consider in weighing the credibility of witnesses, go to standard jury texts such as *New York Pattern Jury Instructions* and the late-Judge Leonard Sand's treatise *Modern Federal Jury Instructions*.

In the standard jury charge, the Court will instruct the jury in substance as follows: "What the lawyers may say to you, about a fact issue, is not evidence. The evidence upon which you will decide the disputed factual issues in the case is the testimony of the witnesses and the exhibits which are admitted into evidence."

When you begin to argue the facts in your summation many excellent lawyers believe that you should not mention that instruction because to do so tends to belittle your argument. They believe that it should only come from the Court later-on. I respectfully disagree. I think it enhances your credibility to tell the jurors: "What I may say to you in these remarks, about the facts, is not evidence. You are to determine the facts from the evidence in the case, the testimony of the witnesses and the exhibits. But you may consider what I say in these remarks, as they bear on the facts as you find them to be, and you may consider the reasons I suggest to you as to why these facts matter in deciding the issues before you."

When the jury hears substantially the same thing from the Court in the instructions they will hopefully conclude that that you are being forthright and not trying to mislead them.

Everything that you do throughout the trial should enhance your personal credibility. If you are successful, if the jurors have found you to be a source of trustworthy and reliable information, they will likely be receptive to your summation, and that is the most any advocate can hope for. *Please remember, credibility and trust are everything in a trial.*

WHAT TO ARGUE: Some lawyers sum-up by restating the testimony of each and every witness in the order in which they testified. I submit to you that that is boring and a waste of the wonderful opportunity that summation provides to advocate for your client.

Back to primacy and recency: The first specifics the jury heard about the issues in the case were discussed during opening statements, where we outlined what we were going to prove and how we were going to prove it. Now in planning the closing argument, go back to the opening, remind the jurors of what we promised to prove as to each of the elements of our theory of the case. Then show how you kept your word (you should have also ordered a copy of the transcript of your adversary's opening so that you can see if he or she did, or failed to do, the same). Again, treat each step in the trial

as related to the others, as integral parts of a single comprehensive plan to prove your theory of the case.

USE EXHIBITS: Keep in mind that exhibits must be received *IN EVIDENCE* to be part of the record – proof – and therefore available for use in closing. This seems obvious but is not always as easy as it seems, particularly if an exhibit was marked for identification only, as part of laying the foundation, or if it was used only for a limited purpose or used subject to connection. ALWAYS maintain an exhibit list to keep track of the exhibits, and ask the deputy court clerk or the court reporter to clarify any questions. *REMEMBER:* Once an exhibit is received in evidence, either side can use it from that point forward at any time during the trial. Therefore, if your exhibit list alerts you that an item was marked for identification, and/or used subject to connection, but was never moved for admission into evidence, move the evidence for admission prior to resting your side of the case.

Authentication of Electronic Evidence: In today's world, more and more discovery is focused on electronically stored information, meaning that soon more and more evidence proffered at trial will be from electronic storage sources. Authentication of that proffered evidence will be a vitally important issue at trial when the material is first offered. At present, authentication must generally be accomplished via the procedure under Federal Rule of Evidence 901, or its State analog.

Federal Rule of Evidence 901:

"(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
(b) Examples. The following are examples only--not a complete list--of evidence that satisfies the requirement:
(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.
…
(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.
…"

However, bear in mind that just because something is *authenticated*, does not mean it is

automatically *admissible*. Often the material must overcome a second evidentiary hurdle, including relevancy and/or hearsay. The Court is the ultimate gatekeeper. See U.S. v. Vayner, 769 F.3d 125 (2d Cir. 2014); U.S. v. Ulbricht, 79 F.Supp.3d 466 (S.D.N.Y. 2015); Sublet v. State, 442 Md. 632, 113 A.3d 695 (Md. Ct. Apps. 2015); Fed. R. Evid. 401, 402, 801-803. For other court decisions addressing the matter of authentication, see, *inter alia*, State v. Hannah, 448 N.J.Super. 78, 151 A.3d 99 (N.J. App. Div. 2016); In re Colby II, 145 A.D.3d 1271 (3d Dep't 2016) (citing People v. Agudelo, 96 A.D.3d 611 (1st Dep't 2012); People v. Green, 107 A.D.3d 915, 916-917 (2d Dep't 2013)); White v. State, 228 So.3d 893 (Miss. Ct. Apps. 2017) (citing Smith v. State, 136 So.3d 424, 432 (Miss. 2014)); State v. Smith, 192 So.3d 836 (La. Ct. App. 4th Cir. 2016). For more on the authentication of electronic evidence, see Michael L. Fox, PRIMER FOR AN EVOLVING EWORLD (Kendall Hunt Publishing Co. 2019) (Chapter 9).

One thing to note – there are relatively new amendments to the Federal Rules of Evidence, 902(13), (14). The amendments took effect on December 1, 2017. The rules created a process whereby electronically stored information that is copied from an electronic device, storage medium or file, may be authenticated by digital identification, accompanied by a certification of a qualified person complying with F.R.E. 902(11) and 902(12). The certification, of course, must provide the same information and supporting material as would the witness seeking to authenticate the material at trial. See Report of Advisory Committee on Rules of Evidence, Judicial Conference of the United States, October 21, 2016 (Tab 3); F.R.E. 902(11)-(14). If the opposing party objects to the contents of the certification, the credentials of the expert, or on other grounds, it may be necessary to authenticate at trial. The purpose of the rule amendments was to streamline the overall process when possible, since often parties would spend a great deal of resources and time securing experts and having them testify at trial, only to find that a challenge to authenticity ultimately did not arise. Id. Of course, again, the opposing party may still object by motion *in limine* or at trial on other, separate evidentiary grounds, including again hearsay or relevance.

So, ultimately now, if you have an exhibit that you wish to make use of during summation be sure that it is easily visible, especially any small print, to everyone in the jury box. You may wish to have a large blow-up made so the jurors can see it clearly. Or have transparencies of it available for use with an overhead projector.

I have not mentioned PowerPoint. It can be a very effective presentation tool. I know it works very well … when it works. If you are going to use PowerPoint, or another technological tool, first check with the judge or court clerk for approval to bring in the equipment. Then make absolutely certain that you have someone who is proficient in running it and troubleshooting the inevitable problems. Finally, get to the courtroom early and have several practice runs. It is disconcerting when you plan to use a device to present a document, and then fall victim to a technical glitch that you are unable to quickly remedy. It sends a negative message about your professionalism and preparation, particularly when a judge, pressed for time, directs you to "go ahead without it counselor, we can't keep the jury waiting any longer." Have a back-up plan ready, just in case.

PowerPoint itself – does it run afoul of evidence rules in New York, because the slides may not be in evidence? Well, the New York Court of Appeals addressed this in April 2017. Here is an excerpt of the Court's holding:

> In *People v. Ashwal*, 39 N.Y.2d 105... (1976), this Court explained that it is "fundamental" that counsel must stay within "the four corners of the evidence" during summation and that the prosecutor "may not refer to matters not in evidence or call upon the jury to draw conclusions which are not fairly inferable from the evidence"…. As we observed in *People v. Santiago*, 22 N.Y.3d 740, 751 …. (2014), PowerPoint "slides depicting an already admitted photograph, with captions accurately tracking prior ... testimony, might reasonably be regarded as relevant and fair ... commentary on the ... evidence, and not simply an appeal to the jury's emotions."
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> At bottom, a visual demonstration during summation is evaluated in the same manner as an oral statement. If an attorney can point to an exhibit in the courtroom and verbally make an argument, that exhibit and argument may also be displayed to the jury, so long as there is a clear delineation between argument and evidence, either on the face of the visual demonstration, in counsel's argument, or in the court's admonitions. We reject defendant's position that trial exhibits in a PowerPoint presentation may only be displayed to the jury in unaltered, pristine form, and that any written comment or argument superimposed on the slides is improper. Rather, PowerPoint slides may properly be used in summation where, as

> here, the added captions or markings are consistent with the trial evidence and the fair inferences to be drawn from that evidence. *When the superimposed text is clearly not part of the trial exhibits, and thus could not confuse the jury about what is an exhibit and what is argument or commentary, the added text is not objectionable. The slides, in contrast to the exhibits, are not evidence. The court properly instructed the jury that what the lawyers say during summations is not evidence, and that in finding the facts, the jury must consider only the evidence*.

People v. Anderson, 29 N.Y.3d 69, 72-73 (2017) (emphasis added) (some citations omitted).

HOW LONG SHOULD YOU SPEAK:

There is, of course, no easy answer to this one. You must take the time you need to cover the issues. If you are the defendant and have to close first, you should plan to include some time in the presentation to attempt to anticipate and address opposing counsel's arguments.

REMEMBER the jurors are intelligent people who care about doing the right thing. Do not insult their collective intelligence by overstating the proof or by talking down to them. You do not need to repeat every point and every detail over and over.

PACE: Some studies have shown that the average attention span of jurors on a particular subject is about seven minutes. So, do not lose them. Watch them as you speak. Are they with you, paying close attention, or are they drifting? Change your tone of voice, change position to signal a change of subject as you move on to your next point, do something to ensure your closing does not become monotonous – as that can be an ineffective argument.

Has the Court placed any time limits on argument? Better to ask during the pre-trial conference than to be embarrassed and interrupted halfway through your summation by the judge telling you that you have five minutes left. (*i.e.* "Counsel, everyone knows I limit closings to 30 minutes.")

Advocacy is a responsibility. As lawyers we must effectively and convincingly argue the case for our client.

To effectively advocate on summation, the key, as with all aspects of trial work, is to prepare,

prepare, and then prepare some more. We all know that. But HOW should we prepare? I firmly believe that the summation should be prepared by writing it out in long-hand or on a computer, word for word. BUT, that does NOT mean that it should be READ to the jury. When I was litigating, I found that the process of writing helped to organize my thoughts and formulate arguments using more effective wording than I could come up with by simply "winging it" during trial.

That thought particularly applies to the key words and phrases central to the theme of the case, to how you will relate the facts and proof to the theme, and to the way you will segue from one point to the next in your closing argument.

Once the closing is drafted, practice it OUT LOUD. It may sound silly but it works. The closing is an oral presentation. What works on paper does not always work in the spoken medium. Some words look fine on paper and read well, but are awkward in speech. Our minds and thought processes tend to work more quickly than our mouths can speak. Practicing out loud slows the pace and enables us to form the words, to determine the tone and manner of the presentation, and to deliver it to the best effect. One additional benefit to practicing out loud: It is the best way to see for how much time you will be speaking. Once you know that, you can make whatever adjustments might be necessary, ESPECIALLY if practicing it out loud took one hour, and you promised the Court in the pre-closing conference that you could complete it in 40 minutes.

If you are still skeptical, I only ask that you try it one time. If you do I guarantee that you will become a believer.

THE UNSPOKEN WORD: Some psychological studies assert that 80% of communication is non-verbal. I am not sure about the actual percentage, but I do know that we have all experienced situations during conversations when we picked-up non-verbal cues from those with whom we were speaking. The same is true of juries. If you are sending the wrong non-verbal message it does not matter what

words you use, because your arguments will not be well-received – or at least not received in the manner you intended.

The advocate must project confidence. Everyone is nervous before summation. Expect it and use the resulting adrenaline to your advantage. Before standing up to begin, take a number of deep, slow breaths. That will saturate your lungs with oxygen and will eliminate a nervous, too fast and high-pitched opening line.

Learn some of the basics of body language. Stand-up straight and face the jury directly with your weight balanced on both feet, knees slightly flexed (not locked and rigid). This is a relaxed, confident, open and friendly position – the one you want to occupy when trying to convince the jurors that your position is the correct one. If you slouch or cross your legs as you lean on the podium you you may project weakness and a lack of confidence, or you may project an informality and lack of respect that will work against you.

Use your eyes, not as you would on cross-examination to confront and challenge, but rather in a pleasant and easy manner, meeting the eyes of each juror as you speak to them. Remember, if you like them (and you should, you selected them) they will hopefully like you, and hopefully be receptive to what you are asking them to do – decide in favor of your client.

Use hand gestures sparingly and only with purpose. A clenched fist communicates anger. Hands held waist high with palms out convey sincerity. Your gestures should complement and add emphasis to your words. Do not let hand motion or pacing back-and-forth distract the jury from what you are saying. Do not jingle keys or change in your pocket, do not play with your hair. Use body language to communicate effectively about the case, and make your points on behalf of your client.

THE PAUSE: Take control of the courtroom before you start. Come forward, look around and see that you have everyone's attention. If the judge is shuffling papers or speaking to the courtroom

deputy clerk, wait. If the Court then says "Counsel, you may proceed", respond: "Thank you, Your Honor". Now you have the center stage and everyone's attention.

Some adversaries may find it necessary to have an animated (albeit whispered) conversation with co-counsel or the client just as you are about to begin. Again, pause and simply look directly at them. The jury will pick-up on the rude behavior. If the Court states: "Counsel, I said you may proceed", you can respond: "I am sorry Your Honor, I did not want to interrupt Mr./Ms. _____." The pause can work wonders. Indeed, as the late-Justice Antonin Scalia has said, the pause is the rhetorical device most undervalued by lawyers.

Another use for the pause: If during argument, or while questioning a witness, you get tangled up in your words (it occasionally happens to all of us), do not follow your instinct to try to rush your way through it. Instead, PAUSE, organize your thoughts, and begin again slowly, with exaggerated deliberation and enunciation. The pause will allow your mind catch up with your mouth, and the words and phrases will fall into place.

A Note on Civility – I mentioned rudeness earlier. Civility is "contagious". Jurors generally do not like rude behavior. Despite what may be viewed on fictional or scripted/"reality" television programs, rude behavior makes everyone uncomfortable. See Fox & Fox, *Civility In Litigation – A Path To Winning*, 85 N.Y. ST. BAR J. 30 (July/Aug. 2013). See also, generally, 4B N.Y.Prac., Com. Litig. in New York State Courts § 71:4 (4th ed. 2016) (citing Fox & Fox, *Civility in Litigation – A Path To Winning*); 4B N.Y.Prac., Com. Litig. in New York State Courts § 71:7 (4th ed. 2016) (same).

Civility is contagious. Its decline in recent years has impacted law, government and society. That is why Ohio Congressional Representatives Beatty and Stivers announced the launch of the Congressional Civility and Respect Caucus in 2018. See https://beatty.house.gov/media-center/press-releases/reps-beatty-and-stivers-announce-launch-of-the-congressional-civility (last visited Jan. 12, 2019). As explained on the website, "Beatty and Stivers formed the Caucus to encourage all Members

of Congress to act with civility and respect in their political discourse. To join the Caucus, each member must have a partner from the other side of the aisle…. Stivers and Beatty will be visiting high schools and civic organizations across Central Ohio to promote the use of a respectful dialogue on tough issues. Other members of the Caucus will be encouraged to lead similar discussions on civility and respect in their own congressional districts." Id.

Did you ever see the show on the ABC network "What Would You Do?" with host John Quiñones? If so, then you will have noticed that when one person speaks up concerning "the right thing to do", others will usually follow. Have you ever held the door for someone walking behind you? Notice that most of the time, that person will then hold the door for the person behind them. Civility builds your credibility with the jury, it helps establish you as someone who is polite, and someone that perhaps they can trust. Remember again, people – jurors – tend to decide issues based on what they feel, and then justify their conclusion with logic.

DRESS WELL: To project confidence you must appear confident and comfortable. To appear so, you must feel confident and comfortable. Wear the courtroom-appropriate clothing in which you are most comfortable. For example, I like dark blue or black suits, with white shirts and conservative ties. You may prefer gray or brown. It does not matter. What is important is that you feel confident and look professional.

There are times when something happens early in the morning before trial that is upsetting and makes one feel that his or her bio-rhythms are off, and that it is going to be a bad day. You break a shoelace, your pen runs out of ink, you spill coffee on your shirt, you lose a button. If something like that happens on the morning of summation it can really throw off your concentration and confidence. Try to eliminate as many of these potential distractions as you reasonably can. Carry extra pens, shoelaces, and a small sewing kit in your trial bag. If you are on trial out of town, pack extra clothing. If

you are at home, keep an extra suit, shirt and tie at the office, so that someone can quickly get it to you in the event of an accident.

Leave a lot of extra time to get to the courthouse. It is truly awful to arrive at 9:40AM for an argument scheduled for 9:30AM, only to find the Court in session, waiting for you as you rush in, short of breath and babbling about bad traffic. Much better to be there an hour early, get settled at counsel table and use the time to go over your notes and thoughts for summation. If you would arrive two hours early at an airport for a flight, arrive one hour early to court, and build that time into your day and your plans.

TRIPLETS: Steven Wisotsky, tenured professor of law at Nova Southeastern University, Fort Lauderdale, Florida, wrote a wonderful article on public speaking published in the ABA *Journal of Litigation* several years ago. See *37 ABA Journal of Litigation No. 2*, at 16 (Winter 2011). He wrote: "Triplets are another form of word or phrase grouping. They seem to have some deep primal root in human learning or recall. Stories have a beginning, a middle, and an ending. Learn your ABCs; easy as 1-2-3; the good, the bad, the ugly; tic-tac-toe; stop, look, and listen; ready, set, go; Father, Son, and Holy Ghost; life, liberty, and property; location, location, location. Note the prominence of three in stories ('Goldilocks and the Three Bears,' or 'The Three Little Pigs')…. [and] Julius Caesar's 'I came; I saw; I conquered.'…."

If the facts lend themselves to the use of such a rhetorical device it can be an effective vehicle to make your point.

USE TRANSCRIPT OF TESTIMONY: Often during trial a key point is made on the cross-examination of an adverse witness. The case (and your budget) may not allow for daily copy of all the testimony. You can, however, ask the reporter to provide you with the few pages that you need, which set forth the key questions and answers.

Then, in preparing for summation memorize the exact words set forth in the transcript and

quote them from memory in your argument. If the trial Gods smile, you may be very fortunate and draw a knee-jerk objection from adversary counsel: "Objection Your Honor, that was not the testimony". You then reach into your trial bag, come out with the transcript, and say: " Your Honor, Mr./Ms. _____, our court reporter, was kind enough to provide me with a certified copy of the trial transcript of that portion of the witness' testimony. Since counsel questions the accuracy of my memory, may I read it to the jury?" You know that all of the jurors will now remember it.

SUMMATION: So, (1) in opening, tell the jury the story and your theme, tell them what you are going to prove, set-up your theory of the case; (2) during trial, prove those facts that you promised the jury, with witnesses and exhibits; and (3) on summation, tell the jury what you proved, how the proof confirms the theory of the case that you presented, and why those facts are important and lead to the irrefutable conclusion that your client wins.

As attorneys, we are doctors of law (and *yes*, if you hold a J.D. you have a doctoral degree).[2] You are privileged to have the opportunity to stand before the bar of the Court and represent your clients. It is stressful, it is exhausting, it is certainly among the most difficult of all human endeavors. It is also exhilarating, exciting and rewarding. It is never boring, it is a source of great war stories …. and you get to make a living doing it. What more can a person ask for?

[2] In many jurisdictions, attorneys may refer to themselves as "doctor", reflecting their advanced education and training, so long as there is no confusion or misleading advertising (for example, confusion with doctors of medicine). See, *inter alia*, Suffolk County (N.Y.) Opinion 87-6; N.J. Opinion 461 (1980); A.B.A. Informal Opinions 1151 & 1152; M. Roper, *Lawyers and the Title "Doctor"*, 6 AKRON L. REV. 83 (1973); K. Maher, *Lawyers Are Doctors, Too,* ABA JOURNAL (Nov. 2006). See also W. Shakespeare, *The Merchant of Venice*, Act IV Sc. 1, for the historical/literary context in civil law. Indeed, the title "esquire", although used by attorneys in the United States, has no specific or professional connection solely to law practice. See N.Y.C. Bar Formal Opinion 1994-5 (1994). For more, see D. Perry, *How Did Lawyers Become "Doctors"?*, 84 N.Y. ST. BAR J. 20 (2012).