Jury Argument: You, the Facts, and the Law

by Michael E. Tigar

Jury argument has been the subject of notable articles, essays, and treatises. Yet, there is always something fresh to say about it. I listen hungrily as accomplished advocates recount their secrets of persuasion, and I voraciously read speeches made by the giants of the profession. Almost always, I come away having learned something new.

Here I will focus on nine principles of argument. I will not call them commandments: First, the numbers don't work out right. Second, these are principles to adapt and use, not rules to memorize. Third, the image of the 10 commandments is not happy, because the original 10 are, in the real world, paid so little heed.

These principles are presented in topical groups as they relate to you, the facts, and the law.

1. You are always on. Jury argument is the sum of intentional and unintentional communication. A good lawyer understands this, and strives to make sure that every syllable, every gesture, every expression in the jury's presence is conscious. My mentor, Edward Bennett Williams, made this point repeatedly, and his own courtroom demeanor was a powerful example of it.

Let me illustrate. Not long ago, I spent six weeks trying a criminal case in which the jury deliberated for two more weeks. They returned a verdict of not guilty on the key count and hung in favor of acquittal on the remaining counts.

The Justice Department had sent two of its finest tax lawyers to the fray. These lawyers, of course, had the counsel table closest to the jury. Because their backs were to us defendants throughout the trial, we did not know what the jurors had observed until they related their perspective to us after they were discharged.

About three weeks into the trial, the jurors nicknamed one government lawyer "Picky," and juror assessment of him was indelibly influenced by this sobriquet. He got the name because, when he thought nobody was looking, he picked his nose.

Imagine being a juror. Jurors are cooped up in chairs for hours on end. They are neither spectators nor participants. Not every moment is riveting. They will look around; daydream; or watch the lawyers, the judge, the law clerks, or other court personnel. They often will try to figure out what the lawyers are doing. Are the lawyers worried about what is happening? Do they look like they know what is going on? At any moment, the odds are high that at least one juror is watching any given lawyer. And, given the judge's injunction that the jurors are not to talk about the case until they deliberate, lawyer behavior is a favorite subject of conversation in the jury room.

You Must Be You

As lawyers, we know we are supposed to think about where we stand, what gestures we make, and what image we diffract during the parts of the case called argument or opening and closing statement. We also must remember that argument, in the sense of communicating persuasively to the jury, is going on at every moment that the jury is in the courtroom.

2. You must be you. An advocate must delve into the literature of persuasion, from Aristotle to Darrow and beyond. He or she should have at hand a copy of *McElhaney's Trial Notebook*. If lucky, the fledgling will have a mentor whose techniques are worthy of study.

Drink deep at the well of others' knowledge, but do not ape their ways. A trial is too intense and taxing to sustain a characterization that is not yours. The jurors will detect the pretense and conclude you are trying to cover up for disbelief in your case.

Some of us come naturally to intense and even dramatic utterance. Others thrive with a more matter-of-fact approach. In our daily lives, we constantly seek to persuade others that this or that proposition is true, or that a given cause is just. The advocate who is learning how to argue must start and end with his or her own personal style.

A related observation: You may not, as McElhaney explains, "state your personal belief in the justice of your cause," nor "personally vouch for the credibility of any witness." You may, and must, radiate confidence in your painstaking and thorough preparation and in your analysis of

Mr. Tigar holds the Joseph D. Jamail Centennial Chair in Law at the University of Texas School of Law, Austin, and is vice-chairman of the Section of Litigation, American Bar Association.

the law and the facts. You are an advocate, not a certified public accountant.

3. Your credibility is a necessary, though not sufficient, condition of victory. A trial, particularly in a criminal case, is a study in alienation. The defendant may or may not testify. The government usually has no visible "client." Even in a civil case, the client's speaking part will seldom consume a tenth as many minutes as do all the lawyer's words. The jury will, however, lean toward doing what is right based not only on the "facts and the law," but on some sense of inherent justice.

In this setting, the lawyer *represents* the client in a quite literal sense. The lawyer's credibility, or lack of it, is the first and easiest measure of the client. The lawyer's task is to build the case credibly, and then to transfer that image of "right" to the client.

Everybody talks about lawyer credibility, but few understand the problem of transference. In the opening statement, create a bond between you, the client, and the jury. You are going to be asking for justice from this jury for this person. The person has a name: not "my client" or "the one I am privileged to represent." By your movement in the courtroom, by standing next to or behind your client, by conversing with him or her seriously and attentively, you reinforce that bond.

Be honest about the hard choices the jurors have to make:

> There will be a direct conflict between the story told by the government's witness and the testimony under oath of Mary Jones. When this case is over, you will be the ones who will decide what the truth is. Fortunately, you will have some stars to steer by as you chart that course. I am Mary Jones's lawyer, and I will be able to cross-examine the government's witness, so you can see the web of contradiction and deceit he has woven to avoid punishment. You also will hear the judge, when the case is over, give some very important instructions on the rules of law about your weighing the believability of people like this government witness. And most important of all, the oath you took, the judge's instructions on the law, and your promises to me and to the prosecutor on voir dire will tell you that this government witness, with whatever else they bring up, has to convince you beyond a reasonable doubt. Put another way, Mary Jones and I have no burden of proof here. When we go forward with evidence—if we do—it is only to underline the reasonable doubt in the government's case.

Borderline argumentative for an opening? I don't think so, certainly not where I practice. But, the point is that you have leveled with the jury about the hard task they face and told them what your client and you are going to do about it.

Take another credibility issue, this time from a closing argument.

I was trying a criminal case. The trial judge refused our requested instruction on an element of the offense, and ruled that he would give an instruction that we thought was pretty bad. It contained some language that could be argued for the defendant's position, but it would take some doing to find it. Yet, the prosecutor, in closing, overstated the matter and unfairly stressed the pro-government parts of the instruction.

I replied somewhat like this:

> Mr. X (the prosecutor) has never invited me to have supper with him. I don't hold that against him, but I think we might agree on some things. Let me tell you why. My sister and I used to get a cupcake as a special treat. We never fought over it, because she liked to lick off the frosting, and I liked the cake. Well, that's the way Mr. X thinks it should be with the judge's instructions on the _____ element of this alleged crime. When he gets hold of that instruction, he treats it like my sister did that cupcake. He licked off the frosting—the part he likes—and left the rest.
>
> Now fortunately, these instructions are supposed to be read as a whole. The judge is going to tell you that, and I am sure Mr. X, when it comes his turn to rebut, will agree with us about it. I also am quick to say that there is a lot in the instruction that I don't particularly like. But it isn't fair for me, nor for Mr. X, to take just part of it and claim that part is the essence of the matter.
>
> You will hear the instruction from the judge, but let

me read it to you now—all of it—and you can see how, if you read it all, there is some good argument that the government has failed in its burden of proving every element of this charge beyond a reasonable doubt.

4. You must ask for what you want. This principle of jury argument is of universal application, but with variation depending on the case and the local practice: lawyer voir dire versus judge voir dire; civil versus criminal; special verdict versus general verdict.

In a special verdict (or special issues or special interrogatories) case, the court will strive to construe the jurors' answers as a whole to make sense out of the verdict. But, there is no substitute for showing the jury what you think the evidence requires. Some lawyers do this with a blackboard, but that detracts from a final argument and takes too much time. Alternatives are to use a large tagboard with the issues written (or summarized) on it, and with space to write in the "proper" answer using a marker pen. Another method is to use an overhead projector with transparencies; these are easy to create on a copying machine.

But in a general verdict case, the jury still will be looking for guidance. After all, they have to thread through the court's instructions and make a finding on several issues, even though their ultimate verdict will be a general statement.

In such a case, it might be useful to list the elements of the claim on which the proponent must bear the burden of proof. This may be as simple as "duty, breach of duty, proximate cause, damages," or "taking, trespass in the taking, carrying away, and intent to deprive owner permanently."

Jury argument then can invoke the testimony and tangible evidence relevant to each issue. For a criminal defendant, the listing of elements is a means to underscore the prosecution's burden of proof. These references may be reinforced by recalling the discussion of burdens during voir dire. In any case, the list is a means of drawing the jurors closer to their task and of showing mastery of the evidence and the law.

Finding the Facts

5. The facts do not announce themselves. "The facts" are "found" by a trier, either a judge or a jury. Sometimes the facts are found "specially," and sometimes they are not.

Where do jurors find facts? Sometimes they must prospect for them, as for raisins in rice pudding. Advocates should never allow such a haphazard hunt. Charting a map that leads to the facts is a primary function of jury argument.

Note that I speak of a map to the facts. The voyage through the trial is shared by lawyers, parties, and jurors. But at the end, the jurors will go into a room and decide, without external influences. Jurors are conscious of their duty and responsibility and, like all other people, want respect that acknowledges their power and capabilities. You can suggest ways of looking at the facts, modes of analysis, gaps in the proof, and strengths and weaknesses of particular assertions. But in the end, you are striving to impose a certain logic on the case that leads to a result. You are arguing for that logic and not, in so many words, for a given view of the facts.

Mr. Thompson told you a story. You had a chance to see him, and to hear him cross-examined. How can you judge what he told you? One way is to recall that while you took an oath to set aside your prejudices and decide this case on the evidence, nobody asked you to leave your common sense at the courthouse door. Mr. Thompson's story doesn't make sense.

The jury is being told two things: one is about Mr. Thompson; the other, and the more important truth, is about how they can judge Mr. Thompson and the other witnesses.

Next, because the facts are not readily apparent, lawyers must sponsor witnesses, present tangible evidence, and cross-examine. In opening statement, the advocate should set out the direction the evidence will take. None of the jurors, nor the lawyers, was there when the important events happened. So people who know about those events—each with a different view, a different bias, a different ability to remember—will come and tell what they know. Out of this welter of often-contradictory evidence, the lawyers will argue their views, and the jury will decide.

After the lawyer has charted the course in opening statement, jury argument continues subliminally throughout the trial. It is not possible for the lawyer to punctuate every significant question and answer with a knowing look, but the pacing, phrasing, and order of presentation lend credence to the opening statement that was and the final argument that will be. Throughout, the jury follows the lawyer's game plan, keeping score on whether or not promises made at the beginning are fulfilled.

Because the facts do not announce themselves, in closing argument lawyers deal with two levels of reality and time. The ultimate reality is the event in issue, the actual past occurrence. The "facts" of that occurrence are "found" by the jury. The proximate reality is the trial process, in which witnesses and the tangible evidence they sponsor provide partial and imperfect glimpses of past events. The jury must get to the ultimate reality by evaluating the proximate reality they have just witnessed.

Knowing facts is familiar to us. Finding facts is a blend of the familiar and the unfamiliar. One familiar part is recollection, the constant stream of remembered images that guides us in daily life. Another familiar task is evaluation of information presented by our environment, or by the words of others, that we use to make decisions.

The unfamiliar, for young lawyers and jurors, is the structure of special rules about evidence and inference that govern a jury trial. Evidence is offered for a limited purpose, and the jury is told to honor an instruction requiring that the evidence be considered only for that purpose. The informer's testimony is questionable and must be scrutinized with special care. One party has the burden of proof by a certain standard.

The judge will tell the jury about these rules, but those admonitions are rightly regarded by trial lawyers as insufficient. In jury argument, the advocate must make those instructions on the evidence come alive. The advocate must help the jury take unfamiliar concepts about reconstructing a past event and apply them to reach a result.

Members of the jury, you have heard two totally opposite versions of what happened that night in Nita City. How can you decide? In a little while, I am going to talk about how this informer, Laura Hobson, told you a story that makes no sense and can be disproven by looking at a map and a clock.

But, I want to start by talking about something the judge is going to say when the lawyers are done argu-

ing. Suppose you get back there in the jury room, and you are talking about who to believe, about which version you are going to accept. I want to suggest that you stop right there, and remember something the judge is going to tell you. First, he is going to tell you that this is not a simple matter of which side seems to be more persuasive. No indeed. The government here—this prosecutor—has the burden of proof beyond a reasonable doubt. If what you have heard about the inconsistencies, the lies, the paid-for, made-up story of Laura Hobson raises just a reasonable doubt, then Fred Peters here is entitled to be acquitted. And, second, Laura Hobson is not an ordinary witness. All witnesses may have some interest in how this case comes out. Fred Peters sure does, and the judge will tell you that.

Listen to what the judge is going to tell you about Laura Hobson. (Here, the advocate would read the informer-witness instruction that the judge will be giving.) So when somebody gets to talking about believing people, please remind that person about what the judge said.

Here is an example of introducing jurors to the process by which they must find the facts, and to the unfamiliar concepts they must apply in judging evidence. Note that the example talks about juror duty in a nonconfrontational way. It presents a jury deliberation in which an anonymous "someone" is saying something, or making an argument, and is then reminded of a rule or principle. I think this method works for presenting basic principles and imbuing those principles with an aura of neutrality and objectivity that rises above adversary contention.

Using the Law

6. The facts must acquire a life of their own. "Memory slides and slips away. That which is not written is soon forgotten." So wrote the lawyer Philip de Beaumanoir in 1283. Jury argument must recreate the image of witnesses who have testified, capturing their words, their gestures, their tone of voice. Evoke the witness with a gesture. Point toward the witness stand. In the collection of Darrow jury speeches, *Attorney for the Damned*, are brilliant examples.

Make jury argument a multimedia event. The rules of evidence permit you to make charts and summaries that are admissible in evidence. Use these in argument. Use the overhead projector or enlargements on tagboard for documentary exhibits. Handle the evidence. Tell the jurors they will have it in the jury room and that they can handle it, too. In a complex case, jurors will appreciate your pointing out important items of real evidence and significant summaries that they can build into arguments to persuade other jurors during deliberations.

7. The law is something jurors care about. From the opening day of trial—in most jurisdictions—jurors are told that they will decide the facts, but that the judge's rulings on the law are indisputable. In some cases, counsel may be able to get a jury instruction that leaves jurors some leeway to vote their consciences.

But jurors listen, and they regard the judge as an authority figure. In jury argument, as in all aspects of trial strategy, the advocate must decide whether to ride with and reinforce "the law as declared by the judge," or whether to urge jurors to listen to their consciences and common sense.

Fidelity to the law—a rule-oriented argument—suits the advocate who is seeking to override prejudice that may lurk in the facts of the case. The jury may look upon the criminal defendant as a worthless bum, but "the law" bestows rights upon him and duties upon a jury, namely, to weigh the evidence.

Suppose you are in the jury room, and somebody looks at you and says, 'Well, you know, that defendant didn't take the stand.' What can you say to that person? You can look them in the eye and say, 'Now wait a minute. We all took an oath that we would follow the law as the judge gave it to us. And the judge said, just as clear as anything, that the prosecutor has the whole burden of proof and the defendant doesn't have to prove anything. You can't hold it against the defendant that his lawyer advised him that this jury was made up of honest people who would follow the law the way the judge laid it out.'

Sometimes, however, lawyers—especially defense lawyers in criminal cases—need to argue against slavish adherence to outworn doctrine. Then, the argument must appeal to the decency, the common sense, and the free spirits of jurors. At such times, principle number 8 may be relevant.

8. The law includes the juror's duty to be independent. For at least as long as jury speeches have been set down in writing, lawyers have been telling jurors what it means to be independent. The advocate must not make a windy stump speech, but can and should weave the judge's charge, legal history, and observations on the juror's oath into a set of solid reasons why this verdict "must be the verdict of each individual juror."

9. The law includes the obligations of the juror's oath. Every juror is examined, in voir dire, under oath. The oath will be more or less significant, depending upon how extensive voir dire has been. Every juror also takes an oath to try the case "well and truly." These oaths are rituals that the advocate must reinvoke in final argument.

We all take an oath to be able to play our part in this case. I took one to be a lawyer. So did this prosecutor over here. His Honor took an oath, and swore to uphold the Constitution. This is the same oath that every judge across this land must take.

And each of you took an oath. In fact, you took two. Just before the first witness came in to take the stand, you swore to well and truly try this case. And, I believed you then. When the lawyers and the judge were asking questions in the first part of the case, when we were choosing you to be jurors, you were answering under oath. You said that if this prosecutor did not prove this case beyond a reasonable doubt, you would vote 'not guilty.' And, I believed you then. You said you understood that in America somebody like Mr. Smith here, who is on trial for his liberty, does not have to prove anything. And, I believed you then.

The form of argument is not as important as the concept, which is to return to the profound sense of obligation that experience and scientific inquiry show jurors bring to their task.

Jury argument is the highest form of the advocate's art. Study of its essential elements yields up the power to weave ever more dramatic tapestries of persuasion.