

## CLOSING ARGUMENTS: HOW BEST TO PRESENT YOUR EVIDENCE TO INFLUENCE A JURY

Elizabeth A. Leone  
Raleigh, North Carolina

“There is one way in this country in which all men are created equal – there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution, gentleman, is the court”.  
Atticus Finch, *To Kill a Mockingbird*

Not every person that graduates from law school and passes the bar is a trial lawyer. It is not easy to be a trial lawyer. To be a trial lawyer, you should take as fact that your cases will be unpredictable and it will take you many hours, days, even weeks to prepare for a single trial. Trial lawyers have certain traits that distinguish them from the rest. They are spontaneous, compassionate, courageous and bold. They are empathetic to their client’s cause and they are willing to fight for the underdog. Most importantly, a good trial lawyer must have a certain level of charisma that will allow a jury relate to him or her. Nowhere is it more fun then to allow your natural charisma to carry you through your closing arguments, with an unbeatable ability to reach a jury of cynics.

### TECHNICAL ASPECTS

Closing argument is the time to summarize all of the evidence and argue the conclusions that you wish the jury to accept. You need to gather all evidence, good or bad, into your argument and bring your thesis together. Your argument should be built around a thesis, a point of view that is advanced by the argument.

You should also have a theme that readily advances your cause. A theme is the soul of your case. In order to develop a winning strategy (theme) for your case, you must find something about your client or case that a jury can hang their hat on when they deliver a great verdict. A good theme that is repeated throughout your argument will also help jurors to remember much of your entire argument. We have all heard some of these commons themes:

“Human need versus corporate greed”  
“Let’s put honor back in the handshake”  
“This did not have to happen”  
“Took the money and ran”  
“Followed every rule”

Before preparing your closing argument, you should ask yourself, “What am I trying to accomplish?” Most legal scholars agree you will rarely change someone’s mind during deliberations. By the time you are arguing your heart out to a jury; most jurors are tuning you out because they have their minds already made up. So why bother? In his book *Theater Tips and Strategies for Jury Trials*, David Ball suggests you focus on three groups of jurors:

1. Undecided jurors
2. Adverse jurors
3. Favorable Jurors

Your goal should be to reach each group in a different, but equally important way. For the undecided jurors, you want to at least open their minds up to listen to other jurors during deliberations. For adverse jurors, you want to at least soften their resistance to the favorable jurors, and perhaps get them to accept just a few of your points. For your favorable jurors, they are your own personal army and you want to motivate them to strongly champion your cause during deliberations.

So how do you start your closing argument? I suggest by starting at the very beginning of your trial preparation. That is, before you construct one word of your opening, before you even consider jury selection, before you prepare one direct or cross examination, write out your closing argument. This will help to focus your thoughts and will re-affirm how much you really know about your case. Now use this document as a very basic first draft from which you will continue to build as you do your other trial prep.

There are two things you must do to give a great argument:

1. Preparation
2. Courage to tell your story

Whether you are trying a multi-million dollar products liability case, or a \$15,000 soft tissue injury case, do not rely on your wits and cunning charm to reach the jury. You should do advance preparation on your closing, and continue to massage and build it until the time comes to give it.

Do not be afraid to try something unique. Have the daring to step outside your own boundaries. Quit saying, “The judge will never let me get away with it”. Just do it. The worst that can happen is that a judge will tell you to stop. (I’ve never yet seen someone get thrown in jail for daring to be different during closing arguments!)

When preparing your closing argument, always remember that people have short attention spans. This is simply a product of our technology age, where so much information is absorbed by people from TV and the Internet. You must make your argument concise, fast paced and stimulating.

As suggested, you should start your closing argument first. Some lawyers prefer to jot notes, others write out in longhand on yellow pads; still others type their arguments word for word on the computer. Writing down the facts and assembling them will provide a fund of “gross” thoughts from which you can then begin to arrive at the “net”. These are all good tools to start out with, but remember, you will NEVER, EVER read your argument to the jury. Rather, you are going to know your case so well, and be so comfortable with yourself, and so convinced of your winning position, you are going to get up and tell the jury a story they will never forget. (More on that later!)

You can never be over prepared for trial. I remember hearing recently, that Jamie Foxx, in preparing for his role as Ray Charles, glued his eyes shut so he would know what it was like to be blind and reliant on your other senses. Much in the same way, you must prepare thoroughly so that you can adequately convey the devastation of your client’s injuries. For example, if your client were blinded in an accident, you may need to spend many, many hours at your client’s home to see the impact; you might stay the night so you can see what it’s like for your client first thing in the morning, how they have to bathe, get dressed, get fed, fend for themselves.

Once your argument is finished, practice, practice, and practice! Nothing seems sillier than standing in front of your bathroom mirror, or in my case, in front of my two tortured Golden Retrievers who have to listen to me give my arguments over and over. You should practice the delivery of your argument and it is often good to have an audience (something of the human variety) that can give you feedback. Don’t spit out a memorized speech but know your key points well. Once you know all key issues that go into your closing, you can learn to deliver a line with different feelings or emotions. If you practice your argument this way, you can then learn to be spontaneous in your delivery and speak in an impromptu, unrehearsed manner.

The layout of your closing argument will probably always look different depending upon the facts of your case. Sometimes it’s good psychology to start your story from the end – start in right at the point where your client suffered the injury (i.e., the actual crash/death of your client) versus starting at the beginning chronologically (i.e., how the car was manufactured).

Because jurors tend to remember things that have meaning to them, or pose a certain familiarity, use of analogies is an excellent way to reach jurors. Jurors can be swayed by comparisons to something they know in life. Analogies can also help jurors accept notions they might otherwise resist. Use of rhetorical questions can also be a very effective tool if used properly, and if the answer to the rhetorical question is absolutely clear.

Also remember that retention and comprehension are increased when jurors are shown and told something instead of just hearing words. You should always try to incorporate something visual to stimulate the juror’s interest and hone their focus on your argument. Common visual aids include:

- enlarged portions of transcripts
- enlarged photographs
- medical illustrations
- timelines
- Power Point
- Computer animations

One Caveat: only use your visual aides for the crucial issues. Overuse can cause you to look too slick, or can actually result in boredom. In a medical malpractice case I tried in Cumberland County, the defense attorney used the same Power Point presentation to guide all three of her experts through their direct examination. Their testimony, likewise, was redundant of each other and the jurors were literally slapping themselves to stay awake. It is a very, very bad sign when your jurors go to sleep!

### HOW TO CONNECT TO YOUR JURY

“The law is that which has been confidently asserted and boldly maintained.” Alexander Hamilton

#### BUILD THE RAPPORT:

Connecting with the jury is all about building a rapport with them. While the foundation of the rapport starts during jury selection, you must continue to maintain a jury’s trust and belief in the goodness of your rapport up through the end of your closing argument.

Closing argument is an exercise in persuasion. But because of all of the legal dramas on TV, jurors expect to get the 3 minute impassioned argument they see on Law and Order. They don’t understand that it certainly takes longer than 3 minutes to give a closing argument, but they are never prepared for us to have to discuss the law (boring!) Thus, you must be able to reach your jurors on a consistent basis through your entire argument, and the way to start is by building that rapport.

Make sure you speak to each juror individually, especially the leaders (you will usually know who they are based on your jury selection and observations throughout the trial). Warning: do not focus just on the leaders as the others will feel slighted.

Your closing argument must motivate the jury to give you what you want. Your argument should appeal to their sense of righteousness and social duty. You should tell the jury in some form or fashion that our jury system is really what democracy, and listening to the will of the people, is all about. Give the jury some ownership in the matter, much they way every citizen has when they vote.

How simple is it to build rapport with someone? Here are a few no-brainers:

- Smile! That is, smile if you are genuine about it. Don’t fake a smile the jury as there is nothing more obvious. If there is something to smile about, smile. If it is time to be serious, don’t smile... be serious. If you want to know the

importance of smiling, go to the mall and walk around. Each person walking in the opposite direction, look them in the eye and give them a warm smile. They'll smile right back and have some of your happiness. You will have with them, if even for a small moment in time, a rapport.

- Be nice – don't be syrupy, just be nice. You don't have to use heavy sarcasm or poisonous disdain to make your point. Be tough when you need to be, but be nice when you can.
- Be charismatic – never, never read your closing from paper; that's not an argument, it's a boring speech. When you speak from your heart and soul, your charisma (emotional energy) will be transferred to the jury when you are speaking your feelings in the truest form
- Be yourself. Don't talk lawyerly.

Now, it is impossible to build rapport if you are insincere in your efforts. You must believe your client's case, every bit of it. Jurors will know if you are not. How do you know the difference between a sincere argument and an insincere one? Try standing up to a group of people and argue to them that aliens exist. Then argue to them why you love your children. You'll have no trouble telling the difference.

Speak candidly to jurors. Talk to them as if they are your friends. Bring them into the conversation and make them part of the events. You should be relaxed and natural (easier said than done, I know), confident and sincere. Do not be flippant or cocky.

Don't ruin any rapport you have built with the jury by making a rookie mistake when starting your closing. That is, don't state the obvious and don't make self-serving statements. Avoid:

“I want to thank you for your time”... come on... they had not choice to be there.

“You have now heard all of the evidence” ... Duh!

“It's been a long, tough week for all of us”... spare these people... it's probably been tougher on them to sit all week.

If you want to start your closing on a good note, start with a zinger of a statement that resounds a major point of your case.

While you need to be passionate about your client and your cause, don't try to be anybody that you're not. Don't try to emulate Johnnie Cochran, be yourself. Nothing comes of more badly than if you try to give an emotional argument that doesn't fit your true demeanor. If you are a more logical and calculated type of person, don't try to move away from that. The way the message is delivered looks like it must belong to the deliverer.

Humor in the courtroom sometimes will just happen at the right moment, and everyone will enjoy a good laugh. But misplaced humor can have devastating effects and can ruin

rapport with your jury. Most jurors take their jobs very seriously, and anything you do that might trivialize the issues can be harmful to your credibility. The better practice is to never try to contrive humor. Go with the flow if it happens, but stay away otherwise.

#### RELEASING EMOTION:

What do we have in common with the jurors? How about the fact that we are all human beings? You should use this common bond to solidify your rapport with jurors.

How do we convey our client's pain? You convey it by establishing an emotional connection with the jury. There are many trial lawyers are not comfortable with their emotions and will have a hard time with this concept. But you must focus on your inner feelings about your client and connect with those feelings first, before you can ever convey them to the jury. Examine what it is about the case that pulls on your heartstrings. If you must, imagine your wife, or your son as your client, and how would it make you feel. Take those feelings that you identify, and funnel them into your argument.

You must then find a way to release your feelings to the jury. Now, I'm not talking about getting up in front of the jury and sobbing out your argument. But you must give almost a tangible feeling to the emotion you need to convey. Unfortunately, some folks are just not comfortable wearing their emotions on their sleeves but you have to do it to truly connect with a jury. When I was at the Trial Lawyer's College in 2000, I was taught the meaning of releasing your feelings. In addition to many practices that were taught to us so that we could get in touch with ourselves, Gerry Spence felt that singing was a great way to release emotions and feeling. Before you left his ranch, every student had to get up individually, in front of all the other students and teachers, and sing an entire song to them. It was horrifying to me and I was one of the last ones to do it. By the time I stood up on the picnic table to belt out my song, I had so much fear and anxiety built up I thought I was going to pass out. I mean, the only song I knew in its entirety without having to make up words, was the Marine Corps Hymn (drilled into me by my drill sergeant father). Once I got started though, it all flowed out of me and was a tremendous high, but I'll tell you one thing, I was sure in touch with my feelings that day!

It is fundamentally important that you have a true empathy for your client. If you see your client's trial as just another job, or look upon your trial practice as a way to make great money, you will never convince the jury you believe in your client. That's because you cannot argue truthfully to a jury if you don't feel the truth of your case. (More on credibility later!)

Gerry Spence says we all have a power that helps us reach the jury. He says it is "the surf, the swell, the wave, the storm we feel in our veins that propels us into action. It is our creativity. It is our joy, our sorrow, our anger, our pain". Now, that can sound hokey to some people, but there is truth in his concept. You need to spend some of your time, in

preparing for your case, in learning who you are, and then present yourself as genuinely as you can to a jury, most particularly in your closing arguments.

Remember that bond we share with the jurors (human beings). Well, you need to humanize your client to the jury so they share the same bond. You have to make jurors understand the pain and feel the human consequences of this case. Emotion can have great affect on undecided jurors and could be just what you need to swing them your way. During opening statements and testimony, you are giving favorable jurors the ammunition they need. Your closing should make them get locked and loaded, and nothing will do that better than making them feel the emotion of your argument.

### TELLING A STORY:

So, you've built a rapport, you've tapped into the emotion of the case... how do you get that out of your mouth and into the juror's ears? You simply tell a story.

Words, word choices, sentence structure, feeling, emotion... these are all powerful tools you have in your tool shed. You should attempt to create vivid images by your word choices. Words that have no intrinsic emotional or visual content should be avoided. Words that produce images do not have to be long and flowing. Use of simple words work wonderfully as long as they create pictures and action, and generate feelings. Most importantly, after your choices are made, you have to let the words flow naturally. After 3 years of legalese drilled into us lawyers, we are simply the worst at plain talk. Abandon the superior words, the air of invincibility you might have, and get down on the jurors level. Remember, there are no rules against originality and there are no rules against speaking from your heart, with passion.

Talking in story form is the easiest way to make an argument. As long as you know your facts, when you tell a story, you don't have to remember your next thought, you don't have to memorize anything; you already know the whole story... you just tell it. Telling a story comes from your heart, not from your head.

One effective way to make a story vivid to a jury is to talk in first person or present tense. This brings the action up close and personal to a jury. To get into this frame of mind, and be able to deliver the story this way, you should think in story form. Visualize the picture yourself and talk yourself through the action.

Example: I could tell the following story during my closing argument of my client, [Jim Smith], who died in a terrible crash on Highway 24 a few years back.

I could tell the jury that my client was driving down Highway 24 outside of Beulaville when he was rear ended by a high speed driver. Upon impact, he went down an embankment, hit a tree and was ejected from his vehicle. He suffered major internal injuries and died a few hours later after doctors made a valiant attempt to save his life.

Or, I could tell a story in present tense, just as I visualized it in my head.

“I see Jim driving his Chevy S-10 truck down Highway 24. He’s had a long work day, and he’s tired... but he is also excited to get home to see his lovely wife of 32 years, Sarah. They have plans to go out to a new restaurant tonight that they have been dying to try. I see Jim, driving down the highway, completely unaware that in the next few hours, he is going to die a brutal death. I see Fred Jones, also driving down highway 24; he’s driving approximately 20 miles over the 55 mph speed limit. He is going to be late for his night shift job with Federal Express in Raleigh, and he can’t afford to get in any more trouble there. I see that Mr. Jones is bearing down on Jim. I also see that Jim has no time to get out of the way. When Jim’s vehicle is hit in the rear, he loses control; his truck veers off the highway to the right, careening down a steep embankment into someone’s yard. The flight of his truck is forcefully stopped by a tree, but Jim’s flight has just begun.... You see, Jim is ejected through the windshield of his vehicle with enough force that he leaves both his shoes and socks behind. I can see Jim’s flight... as his body strikes another tree, then pummels across the top of an old Ford truck, where... he leaves behind a part of his femur bone. I see, Jim’s flight is almost over ... gravity pulls him back to earth, with such force and momentum that his body plows up the earth when he hits; it is only a cinder block well that stopped his forward progress.”

To tell a story with good visualization, you have to prepare. You cannot just look at an accident report to know how this story went. In this case, I asked the Trooper to meet me at the accident scene, and I had him walk me through Jim’s flight in painstaking detail. I went over the photographs he took at the scene, and asked as many questions as I could.

Telling a story is not good enough. You have to tell a great story. It should be filled with the obvious knowledge that you care for your client. Ergo, you **MUST** really care for your client. That can be difficult in smaller cases that have become sort of “run of the mill” for you. You need to find a way to connect to each of those cases in an individualistic manner. If you cannot connect, if you cannot find something that the jury will love about your client, then you need to think twice about trying the case.

In telling your story, remember that you do not have to re-hash in great detail every single story that was every told by any witness on the stand. Use general terms describing your client’s condition; remember to point the jurors back to specific incidents that were described during witness testimony. Remember when he forgot his wife’s birthday? Remember when she was at the mall and everyone was pointing and laughing at her scars?

In the book, *Closing Arguments: The Last Battle*, a story is retold about famed New York trial lawyer, Moe Levine that is representative of how you should tell a story. You will note, there is no flowery language, or grandiose argument. He simply told a short story. He told the jury during the rebuttal phase of his closing:

“You have heard a very capable lawyer tell you how the amputation of my client’s arms is something that he will overcome with proper rehabilitation. Let me tell you what I have observed about my client. I had lunch with him today before we came into this courtroom for these arguments. He sat there without his arms, bent his upper body down toward his plate, and ate the food off his plate like a dog.”

#### EMPOWERMENT:

How do we empower the jury to give a just result?

The jury sometimes will close off their ears to our arguments. Many times it is out of fear (fear that my doctor will move away, fear my rates will go up). If we are a threat to a jury member, they will not listen to a thing we have to say. You must deal with the juror’s fears. You need to “empower” them to reject what you have to say for once they know they can do that; they will be open to listen to you.

Think to your own practice of law. Don’t we often empower our own clients? Haven’t you had a client that comes to you for advice and you give it to them with honesty, and they in turn don’t like that advice; what do you do? You empower them to go elsewhere, to get a second opinion, get seek another attorney if they wish.

In the book, *David Ball on Damages*, David Ball says you should always make sure the jurors know what their job is. Their job is to fix, help and make up for that which cannot be fixed or helped. He says you should empower your juror’s to be healers. For example, juror’s who are angry at the defendant tend to give more money. If you have an egregious fact situation, recklessness, lack of remorse, you should play upon it and empower the jury to do something about it.

David Ball gives us common sense ways in which we can empower our jurors to give us justice:

- Make a social statement; they are the voices of the community.
- make an example of defendant
- make the defendant face responsibility
- reward persistence – jurors love the injured victim that tries to do things despite the adversity (no couch potatoes here)

If you can empower your jury, and you can get jurors to speak on your behalf during deliberations, they are not likely to change their opinion of the case.

Although you should empower your jurors, it is often good to remind them of their boundaries. Remind jurors that in the course of their job, they are not to be swayed by prejudice or preconceived notions and beliefs, nor sympathy for one side or the other. Their job is to judge the facts and apply the law.

### ARE YOU CREDIBLE TO A JURY?

One of my favorite quotes about credibility comes from Gerry Spence. He said, “The first trick of the winning argument is the trick of abandoning trickery”.

To be credible, you must be willing to tell the truth, not only about your case, but about yourself. You can be the greatest talker in the world, possess psychological skills that allow you to read jurors like an open book, you can have the quickest mind... but without credibility, you have nothing. Never promise something in opening you can't deliver. When you over promise and under deliver, you have lost your case. Technique, oratory, and theater skills have nothing to do with credibility...those are only skills to fool a jury. Acting credible is not the same as being credible. Your arguments cannot be so schmaltzy or grandiose that you make the jurors suspect of your credibility. Cynicism of these types of cases is at an all time high now.

Why is credibility so important? Well, Spence also said, “The problem with credibility arises when what we say is not what we mean, when we speak of caring but do not care, when we feign deep beliefs but our soul is empty.... The problem of credibility arises when we fail to tell the truth...factual and emotional.”

Well, we trust those that tell us the truth. When someone lies, the foundation of trust is quickly eroded. It only takes one mistruth to bring down an entire house of trust. Bottom line: If you are open about your feelings with the jury, you will automatically establish credibility.

A great way to establish credibility is to concede the harmful parts of your case. By admitting the obvious, even if it hurts, shows you are truthful to the jury. It also takes the wind out of your opponent's sails. Failing to confront bad evidence against you makes you look afraid of it and gives it extra importance to the jury.

As stated above, the best arguments are not written and read. Don't worry about having the cleanest most literary sentences when you speak from the heart because people recognize the truth and you don't want to sound contrived.

In David Ball's book, *Theater Tips and Strategies for Jury Trials*, he points out that because someone has to win in a trial; jurors are going to think one side or the other is mistaken or stretching the truth. The best way to show the truth to the jurors is not to tell them what it is, but let them be led to their own conclusions about the truth. For example, don't just say “Bob Smith was a hard worker”. Talk about the man that worked

2 jobs to support his family and put his kids through college, often coming home only to grab a few hours of sleep, and head back out to do it again.

## THE PSYCHOLOGY OF ASKING FOR MONEY WHY IS IT SO HARD?

Probably the hardest part of any trial is the moment when you have to ask the jury for a sum of money. You are afraid you're asking for too much and you repulse the jury. Or you're terrified you've asked for too little. It is crucial that you give the jury an actual amount. They need guidance, particularly so because it is hard to quantify the non-economic damages. Because jurors often will correlate the amount they give for non-economic damages to the amount of actual economic, tangible damages, it is important to get your economic damages as high as possible, without killing your credibility.

David Ball suggests that you argue your non-economic damages (intangibles) are actually the "greatest harm" in your case. You do this by pointing out the money for medical care went to other people to help take care of your client, and the money for lost wages just makes your client even. So none of that money makes up for the biggest losses... the human losses. Those are the greatest harm in the case.

It is often hard for jurors to understand how money can make anything better at all. In *Closing Arguments: The Last Battle*, the authors told of a simple way to first introduce the concept of money damages and why it is common sense to award them to a jury:

"A little more than 200 years ago, Mr. Baxter, my client, would have had the legal right to challenge Mr. Devin, the CEO of this big corporation, to a duel to the death because of how the actions of Mr. DeVink played into the death of Mr. Baxter's wife. Mr. Baxter could have picked a time and a place for the duel. Referees and judges to oversee the gun duel would have been present, and either Mr. Baxter or Mr. DeVink would like dead on the ground by the time that duel was over. The stakes were very high in the way two people would deal with disputes such as the one we have heard about in this trial this week. People would simply take civil disputes into their own hands and let the chips fall where they might. Well, in America, lawmakers decided that there needed to be a better way for two people to resolve their disputes. The civil jury system is now the only legal way available for a man like Mr. Baxter to confront a man like Mr. DeVink. Not by violence with a sword, but by the wisdom and insight of a jury."

When it boils right down to it, if you have followed the above advice; that is, built a rapport with your client, established and maintained credibility, brought emotional impact

to your jury, and told a compelling story, asking for the money should be the easiest thing. The jury that trusts you will give you what you ask for.

## APPENDIX 1

### FRESH ARGUMENT IDEAS

The following snippets of portions of closing arguments came from the book, *Closing Arguments: The Last Battle* by Levin and Papantonio and provide very good arguments against many problems we come up against routinely. I highly suggest this book to any trial lawyer wanting some fresh ideas. The following is just a small fraction of what the book has to offer.

#### JURORS DELIBERATING ON FACTS NOT IN EVIDENCE

“When you go back to reach your verdict, I would like you to remember something. That is, the lawyers on both sides of this case have been with this case for over three years. We know more about this case than the experts, the parties, or anyone else. There is not a single piece of evidence that has not been researched and looked at by a number of people. You can be assured that if there is anything in any of the evidence that was of benefit to either side, it would have been pointed out. The reason I am saying this is that sometimes jurors will go back and one juror will point out something he read or something he saw that was never pointed out by the attorneys, and sometimes the other jurors rely on this. When this happens, justice is not done because none of the attorneys are given a chance to respond.”

#### PUTTING ASIDE PERSONAL BELIEFS:

“Probably any juror who has ever had to face the responsibility you face in this trial would tell you that absolutely the most difficult part of his or her job was not to sort through the complicated facts or having to concentrate nonstop for hours everyday. The most difficult part was having to put aside all of his or her personal beliefs; all of his or her preconceived ways of viewing the world; and to simply, unquestioningly, follow the law even when he or she did not want to. A juror who sits on a jury has taken an oath and promised everyone involved that he or she will follow the law. If we have proven to you that the law is such that my client is entitled to a lot of money, then please don't go back and reduce my client's compensation just because we are talking about big numbers. A juror should be proud when he or she leaves jury service. A juror should be able to go to friends and relatives and say, “I don't know about what other juries have done or whether other awards were just, but I know that under the facts of this case, and under the law that Mr. Jones was entitled to a very large award. Even if I personally disagree with awarding large sums of money, I am very proud to state I followed the law”.

#### OPPOSING SIDE HAS THE EYEWITNESS... YOU DON'T

“Suppose that I were to give each of you jurors a questionnaire and ask you about something that occurred in this courtroom in the last twenty minutes. If I were to ask you specific things about what the judge was doing several minutes ago; whether he was reading something or writing something, or had removed his glasses, or for that matter, how many light fixtures there are about you, or without looking, tell me what the color of the seat you are sitting on is, I'm sure we'd probably get two or three different answers

among the [twelve] of you. Unfortunately, those are the problems that arise with eyewitness testimony. That is why the judge told you that you were not supposed to consider a decision in this case until you heard all parts of all the pieces you must fit together to arrive at a decision in this case. This is why physical evidence, common sense and logic are much more important than witness recollection when determining the truth of a situation.”

**DISCREDIT IME (DME) DOCTOR:**

“The beauty of the jury system is that people such as yourselves get to sit as judges of the facts. A jury is made up of people who have learned more about life through experience, mistakes, successes, pain and pleasure than can ever be learned with doctoral degrees. Real life is always a better teacher than academic life.

The bottom line is that an expert witness is a paid actor. He comes into a courtroom to perform and to convince you that the position of the attorney calling him is the correct position. If an expert witness does not agree with the position of the attorney calling him, then the attorney obviously would not hire him, and the expert would lose a large source of income. This is why you have the right to disregard all of the expert testimony... and to rely upon your common sense and evidence presented.”

## APPENDIX 2

### THE ROLE OF JURIES

Closing Arguments: The Last Battle by Levin and Papantonio: The following are ideas about jurors' roles in trial, and should be re-emphasized in closing arguments, as appropriate:

- Their role is one of service that holds all the parts of democracy together. It is only through their service that the greatest judicial system in the world can exist.
- Their role is not to act like a legislator or politician and change the law according to how they think it should be but to follow the law as it is.
- Their role is to do what is sometimes almost impossible to do, which is to abandon their prejudices, biases, angry attitudes, and cynicism and replace all those negative human emotions with the wisdom, understanding, forgiveness, and compassion of Solomon.
- Their role is to accept the huge responsibility they agreed to in voir dire. That responsibility is to correct the injustice that we have seen from the facts of this case. This is no time to run from that huge responsibility. This is their time to roll up their sleeves and accept that responsibility.
- Their role is to do what may be uncommon in their everyday life. They are now confronted with having to make the kinds of choices and decisions that might be uncommon day-to-day for most of us. Those uncommon decisions require uncommon honesty and uncommon character.
- Their role is to understand the breadth of their power. They need to be willing to understand that their power to fix things in this trial is greater than that of any politician, any lawyer, even any judge as long as they use that incredible amount of power according to the law of this state.
- Their role is to remember that a little bit of history about how many wars have been fought and how huge the price has been that allows them to sit as decision makers in a trial that takes place in America's democracy. History shows that it is the greatest civil justice system in the world.
- Their role is relying on the common sense that they have developed in their years on this earth. They must not be afraid to draw on the collective common sense that they rely on everyday to evaluate and solve problems. When expert witness testimony differs from their common sense, they are probably better off with their own instinct and insight about how the world works.

- Their role is to evaluate and weigh only the evidence that has been presented in the trial. When they are back in the jury room deliberating, if one of them suggests that he knows about some fact or information about the incident that was not made part of this evidence, then it is their duty to remind him that that information cannot be considered. Their role is not to play Perry Mason or Sherlock Holmes and speculate about what evidence could or should have been presented. Their role is to merely weigh the evidence that was presented in this case on this day.
- Their role is not to try to dominate the discussion back in the jury room. It makes more sense to allow an open-minded discussion to take place. The deliberation should be respectful. Too often we see television shows these days where everyone on the show wants to believe that they are the expert and they have all the answers. They yell and they scream. They fail to listen to what the other participants have to say. They fail to honor the feelings and insights of people with whom they disagree.
- It is their role to now carry on the burden that has been passed to them. The judge has carried his burden. The lawyers have attempted to shoulder their burden. And now that burden has been shifted to the shoulders of the jury.
- Their role is to use their own sense of fairness where it comes to damage awards. What one lawyer said might sound like too much money for a damage award. What the other lawyer said may not sound like enough. We have to draw on our own common sense of decency and fairness everyday. Today is no different.
- Their role is that one deserves a sense of gratitude and thanks from your client. If it were not for jurors like them who were willing to take the time to work hard to be fair, unbiased, attentive, to struggle with all these facts, the system would not work. If it were not for jurors like them who were willing to serve democracy, then your client would be subject to being judged by bureaucrats and politicians as occurs in so many other countries around the world. Your client would not be judged by her peers. Instead, it would be justice by committee. The kind of justice that takes place in Russia, Iraq, or Red China. So they all are deserving of our sincere thanks for their time here this week.
- It is their role to be willing to take their time in deliberation and not feel rushed or pushed. It is their role to give this case the time it deserves in deliberation because this will be positively, absolutely the only time that your client will have his day in court. They will not be able to return next week or next month and have this case heard again. The time this jury takes this week will be the last time that is ever devoted to having justice done. It has taken your client three years from the time she first filed this case to have these few days to tell her story to jurors.

- Their role is to understand that juries affect important powerful change in America. When corporations do wrong, when the government does wrong, it is only the jury system in America that can make all of that right. Because of juries, we have safer cars, safer pharmaceuticals, safer schools, safer nursing homes. Juries have done more than all the politicians and bureaucrats put together where it comes to protecting the safety and rights of Americans.

SELECTED BIBLIOGRAPHY  
AND SUGGESTED READING

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Ball, David. *Theater Tips and Strategies for Jury Trials*

Ball, David. *David Ball on Damages*

Levin, Fredric G. and Papantonio, Mike. *Closing Arguments: The Last Battle*

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