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ARGUMENT AND COURTROOM THEATRICS*

Larry Geller** and Peter Hemenway***

In all trials, jurors generally are (or should be) told that statements made by the attorneys in the courtroom are not evidence. As Judge Weisberg instructed the jurors in the first Rodney King beating trial in Simi Valley, California (*People v. Powell et al.*)³ The arguments of the attorneys are not evidence. (JI-28) the comments of counsel are not evidence... (JI-30)

Sometimes it seems as if lawyers are constantly talking throughout the trial. They may conduct some of the voir dire; they usually make Opening Statements; they ask questions; they raise objections; they introduce items into evidence; and then, at the end of the trial, they make their Closing Statements.

When the lawyers talk, they are not under oath. They are not presenting testimony as to what they have seen, heard, felt, tasted or smelled. They did not prepare the medical reports, use the PR 24 baton, find the bloody glove. Not one thing the attorneys say during Opening Statements is evidence, even though many jurors may be enthralled by the performances of the lawyers, and may even form an opinion of the case based on those statements. But Opening Statements are simply the comments of the lawyers as to what they expect the evidence to show.

If the lawyer states that the evidence will show that the

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³In this chapter, we will quote portions of the actual jury instructions read to the jury at the close of the trial in *People V. Powell et al.* In pursuit of clarity and understanding, we have designated the jury instructions by number and made the examples easier to follow by separating long paragraphs into segments and integrating them into our discussion. We believe that having the opportunity to read the instructions individually in a relevant context (instead of having them presented at one time) will generate a better appreciation of our points.

An important point to keep in mind is that the jurors introduction to the instructions is hearing them read by the judge.

defendant was at home during the time the crime was committed because several witnesses will be called who will testify to that fact, jurors will have to wait to see if the witnesses are called, and if called, what they actually say.

Suppose during Opening Statement, the lawyer goes further and tells the jury that the defendant had an airtight alibi and that witnesses will prove beyond any reasonable doubt that the defendant was at home and therefore could not have committed the crime. The lawyer is arguing the case to the jury, because the lawyer is telling the jurors what conclusion they must draw from evidence that has not yet been presented.

In the O.J. Simpson case, Johnnie Cochran Jr. eloquently explained in his Opening Statement to the jury that Rosa Lopez and another witness would provide testimony that would show O.J. Simpson could not be the killer of the victims, because his car was parked in front of his home at the time the murders were committed. The defense did not put these witnesses on the stand before the jury despite what was said in Opening Statements. This does not necessarily call into question the integrity of Johnnie Cochran Jr. At the time he made his statements, he may have believed that these two witnesses would be called. But this example highlights why jurors should not give a great deal of credence to what lawyers say in their Opening Statements.

While the lawyers' statements may be helpful and important in understanding the case, there is no assurance that any evidence will be presented to support their contentions and analysis. Remember, the lawyer is trying to get you to form a picture in your mind before any facts have been presented. Lawyers know that if the jury gets a certain mind-set, it's hard to change.

If verdicts are based on the charm of the lawyer or the argument the lawyer advances, then whichever side can hire the most charming or persuasive attorney will prevail. All the more reason why jurors must wait and see what evidence is actually presented before making even a preliminary decision.

Lawyers are not supposed to argue their cases during Opening Statements. Since judges differ, in some trials lawyers have more leeway to argue the case in Opening Statements than others do.

After Opening Statements, the prosecution presents its Case-in-Chief to the jury. Witnesses are questioned in an attempt to establish the facts necessary to convict. The defense in rare cases may not present an Opening Statement. The decision will be based on tactical considerations. And in some cases, the defense may also choose not to present any witnesses because of its belief that the prosecution's case failed to establish the guilt of the accused.

On cross-examination by the defense, counsel try to convince the jury that there are certain facts in evidence by the content of the question, or by the tone of the question. For the unsophisticated juror, the suggestion may work even if the witness answers in the negative, or an objection is sustained and the witness is never required to answer the question.

For example, if the defense is trying to convince the jury that Detective Mark Fuhrman is a racist, the attorney asks: "Isn't it true that you've often used the term 'nigger' to describe African-Americans?" Then, if the answer is "No" the lawyer can look shocked, and ask whether this term wasn't used in speaking to Mr. X on the night of May 5, 1992.

Suppose the answer is "No" but Mr. X is never called. Jurors may still have a seed of suspicion, or even the conviction, that such a conversation occurred and that some obscure legal theory is keeping the actual evidence from them. If the question is stricken, jurors may believe that Mr. X has told defense counsel of such a conversation.

Think about it. Has any evidence actually been presented? Can any inference be properly drawn?

Lawyers' insinuations and innuendoes must be disregarded, so the skillful prosecutor does not get a conviction that is unjustified and the accomplished defense counsel does not obtain an acquittal or a hung jury when the evidence establishes guilt.

Judge Weisberg so instructed the *Powell* jurors:

Do not assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it enables you to understand the answer.
(JI-26)

It is not only the lawyers' implications which have to be disregarded. It is also the false friendship that the lawyer tries to develop with the jury, while simultaneously attempting to depict opposing counsel as mean-spirited and dishonest.

Again, instructions exist to tell the jury not to fall into the trap. Judge Weisberg noted:

If in argument any counsel made reference or seemed to make reference to the veracity or personal integrity of any other attorney, you are to disregard any such comment. Such comment should play no role in how you decide this case.
(JI-29)

At the conclusion of the trial, the lawyers are allowed to do what they have been trying to do throughout the case. They get to argue the case. In fact, the Closing Statements phase of the trial is sometimes called Argument or Closing Arguments.

Gerry Spence, a well-known defense attorney, has written a best seller called *HOW TO ARGUE AND WIN EVERY TIME*. Consider what he means. He's saying he can convince you even when his theory has no merit. If he's right, it's because he—and other skillful lawyers—are like magicians. And you—the audience—are looking at the wrong thing. At a trial, you are looking at the lawyers for guidance and truth, when it is the evidence which will provide you with that.

That is not to say that argument in the Closing Statement should be eliminated, or that it's inappropriate. The able lawyer is using argument to piece together the puzzle, assembling the evidence in a coherent picture or collage. The lawyer has a chance to emphasize the evidence which is favorable, and to attack that which is harmful to the case. Counsel can explain why one witness is more credible than another, why one expert has more expertise than the other and why there either is or is not a reasonable doubt as to the defendant's guilt.

These summations can be very helpful. Jurors can compare the two pictures drawn by opposing counsel, and highlight the strengths and weaknesses of each side.

But when the facts asserted by counsel aren't consistent with the evidence, the pieces don't match, the puzzle doesn't fit together.

You can use the lawyers to help get at the truth if that truth has been proven by evidence introduced at the trial and ignore "the truth" which exists only in the lawyers' hyperbole.

If the stakes weren't so high, courtroom theatrics could often be considered entertainment. The give-and-take is sometimes as exciting as going to the theater, as illustrated by some of the sensational trials seen on TV. It is often different for the ordinary trial which gets little or no attention. These trials may be dull and tedious. But in either situation, it is important for jurors to put the proceedings into perspective and not lose sight of their role. You are judges of the facts.

Remember, lawyers are always trying to manipulate the jury, but the jury is often self-manipulated as well. Jurors assume, based on their individual experience, or their contacts with others, that certain groups are more likely to act in one way or another. Cops may be seen either as good guys, or persons trained to lie; people in gangs as liars and no-goods. African-Americans may be considered irresponsible; Asian-Americans are responsible. These are stereotypes which must be avoided.

The same holds true for the attorneys representing the

prosecution or defense. If a juror dislikes prosecutor Marcia Clark, while another thinks she is very attractive, that should make no difference in reaching a verdict. If a juror thinks O.J. Simpson's "A" Team is great, that Robert Shapiro and Johnnie Cochran Jr. give off incredible energy, that F. Lee Bailey is a legend—all that has nothing to do with whether O.J. Simpson was guilty of the crimes he was charged with committing. These same lawyers will carry all that energy and charisma with them into any courtroom on behalf of any defendant who can afford their fees.

It is not in the interest of justice for jurors to get attached to counsel, or to consider their negative feelings towards individual lawyers during their evaluation of evidence. You might react negatively to the attorney who is always making objections. You might see that attorney as a whiner, who constantly interrupts the other side in an attempt to keep damaging evidence from the jury. The reality may be that the lawyer asking the questions is intentionally asking improper questions to force the other lawyer to object. That accomplishes the dual purpose of annoying the other attorney and causing the objecting attorney to be seen by the jury as antagonistic.

It is natural to like a lawyer who makes you feel good, has a keen sense of humor, is polite and either pleasant to watch and listen to or dramatic and exciting. It is also natural to dislike a dull, plodding or repetitive lawyer. But the conduct of the lawyer or our personal feelings towards him or her does not establish guilt or nonguilt. Only the evidence establishes guilt or nonguilt. It is the defendant, not the lawyer, who is on trial.

The attempt to create a bond between lawyer and jury is sometimes almost crude. It should have surprised no one that one of the People v. Powell prosecutors was African-American, or that the O.J. Simpson trial would have a team of prosecution and defense lawyers who were women and men, black and white, old and young.

Recall the hoopla involving the way Marcia Clark looked.

At times it seemed as if the most important matter at the trial was whether she wore a symbolic chain, how she coiffed her hair, and the outfits she wore. Both sides were subtly trying to influence the jury by convincing jurors they were sympathetic, understanding and the kind of people—by race, gender, dress, empathy—to whom the jurors could relate.

Our advice is to let the commentators comment, the media blather on, the media “experts” run their surveys, and opposing counsel choose any kind of team they wish. But the good juror will fool them all, ignore the trappings and focus on the picture which is being developed through the evidence.

Let’s assume you have been able to disregard the lawyers’ comments, arguments, innuendos, and theatrics. You have kept in mind that your feelings towards any of the participants should not affect the verdict you render. That includes your feeling about the defendant.

The jury instructions, given at the end of the trial, make it clear that your like or dislike of the defendant or the lawyers should not affect your verdict. But, in our view, those instructions come too late, after the jurors have already formed their opinions.

In the O.J. Simpson case, the jury saw a good-looking, well-dressed, popular, and charismatic defendant. It seems clear some of them liked O.J., particularly the jurors who have spoken or written in his defense, and the juror who gave him the Black Power salute at the end of the trial.

In the Menendez brothers’ first trial for the murder of their parents, some jurors developed affectionate feelings for the defendants. Their lawyers wanted the jurors to develop positive feelings for the defendants so that the jurors would disregard the evidence. Were the Menendez brothers less guilty because they wore nice clothes, were young, good-looking, acted politely, and showed sadness or remorse? Exactly what does the appearance of the defendant in a court proceeding, which takes place long after the date the crime was committed, have to do with whether or not that person committed the crime?

Suppose the defendant is not likeable. If Sgt. Koonor Officer Powell, defendants in the Rodney King beating trial, were seen as arrogant or cold by jurors, should those factors have been considered in arriving at a verdict?

Have you noticed that the picture of a defendant in a line-up is almost always far different from the defendant you see in court? The line-up picture may show a man with long hair who hasn't shaved for days, wearing a T-shirt and jeans, with a sneer on his face. The man you see in court has short hair, is clean-shaven, wears a suit, and looks as clean-cut, upstanding and middle class as possible. Is that an accident?

Defense lawyers base their presentation on their experience, their intuition, and on paid consultants. They would not alter a defendant's image unless they believed that in doing so they would more likely convince you, the juror, of their client's innocence. You can conclude, then, that either defense lawyers are badly mistaken, or the defendant's looks do make a difference.

So you must look beyond the facade that is carefully constructed for you. Is a man in a business suit more likely to be honest than one in jeans? If you believe so—or if you believe the opposite—you are looking at the image, and not the reality. How a defendant is dressed in court is a matter of costuming for the part the lawyer wants the defendant to play.

This ploy is used not only by the defense nor does it involve only defendants. Prosecution witnesses also have an image of trustworthiness to present, and are encouraged to dress and act accordingly. The investigator who seems gentle and mild-mannered on the stand may have presented quite a different image when grilling the defendant. The cop, clean-shaven and dressed in a conservative suit at trial, may have looked and acted like a dangerous thug at the time of the arrest.

The same cautions also could apply as to how a defendant or witness speaks. The soft-spoken and polite witness may be a loud-mouthed, insensitive bully who has learned or been taught (by

the lawyers or jury consultants) to present a more positive and refined image. Remember, image is not reality.

Jurors who have avoided lawyer and/or witness manipulation must also not let themselves be influenced by the judge. Even when the judge seems annoyed at a lawyer, or appears to be dozing when a witness is testifying, jurors should disregard the judge's actions. Suppose a judge nods approvingly at a lawyer, or seems interested in what a witness says, that too shouldn't affect your decision. Judges may like certain lawyers better than others, or judges may simply be tired when they are apparently inattentive, or judges may be displaying inappropriate behavior.

Jurors do need to pay attention to the judge's rulings as to when testimony is to be stricken or when a question is improper. Other than that, the judge's reactions to the parties and the evidence is of no consequence.

Judge Weisberg instructed jurors to ignore his behavior:

I have not intended by anything I have said or done, or by any question that I may have asked or by any ruling I may have made, to intimate or suggest what you should find to be the facts or that I believe or disbelieve any witness. If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusions. (JI-172)

Ideally, jurors don't get snowed by attorneys with fancy suits and friendly smiles, and don't let their dislike for a lawyer outweigh the facts of the case. These jurors don't take their lead from the judge's demeanor and don't dote on the lawyers' arguments, unless those arguments are substantiated by the evidence which the lawyers actually introduce.

You will be surprised that once you tune into argument, the lawyers' words will jump out at you every time you hear them as mere words, and not as facts to be believed. Once that happens, lawyers will have to rely more on the evidence in the case and their

skills in presenting the evidence, and not on their skills in manipulating jurors. That's the goal.

The truly skilled lawyers will still argue the case every chance they can by artfully intertwining their argument with the evidence. It is the sifting of the evidence that is the juror's obligation. The juror's responsibility is simplified when judges or the attorneys focus the juror on the relevant evidence. It is made more complex when the attorney substitutes, with the judge's acquiescence, facial or body gestures, or comment, argument, or implication, for evidence.

The ideal juror will see whether the evidence, and the argument, fit together. Let's make the next best-selling book about lawyers be called: *How Great Lawyers Argued Brilliantly—and Lost!* Jurors can and must learn to outsmart the lawyers.