



*Now I hear the music, close my eyes, I am rhythm
In a flash it takes hold of my heart
What a feeling, bein's believing*

Irene Cara

A FEW SECRETS ABOUT CLOSING ARGUMENTS:

What Would Flashdance Have Been Without The Music?

By Stephen P. Lindsay¹

INTRODUCTION

1983 was a big year for me. I was a 1-L at the University of North Carolina at Chapel Hill. Michael Jordan was the talk of the town. Times were good. Along came a sleeper of a movie called “Flashdance.” The title song by Irene Cara, “What a Feeling,” shot to the top of the charts.² It marked the changing of an era of song and movie -- disco was dead. From this chart-topping, toe-tapping, feel-good creation come many lessons to learn and remember about closing arguments.³ What would “Flashdance” have been without the music? Understand how, as set forth below, the lawyer is in reality the music that brings life to the words and pictures of the case. Without the

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² The lyrics to “What a Feeling” can be found at the end of this paper.

³ This article was written to supplement a live presentation that contains various video clips, movie segments, and overhead visuals. I recommend that you get a copy of “Flashdance,” watch the final scene without any sound, and then watch it again with the audio backdrop. Just as the music makes the pictures come alive, the lawyer must make the closing come alive.

music the story is usually limp and lifeless. With the music the story takes wings, it glides, has substance and greater meaning.

There are two truths about closing arguments which must not only be remembered but must never be forgotten. **First Truth: A good case can be easily lost in closing argument; Second Truth: a marginal case can still be won through closing argument.** Experience suggests that once we reach closing argument there are three, broad groups of jurors. Those jurors who are with us, those who are against us, and those who are on the fence. The task that confronts the defense attorney is threefold: Give more power to the ones with us; don't give additional ammo to the ones against us; and sway the ones on the fence in our direction. In the pages that follow I will share with you some secrets about closing arguments that will make you more persuasive, more compelling, and more likely to succeed in giving closing arguments. We will examine those things that should be done and those things that should be avoided. In the end there will hopefully be agreement as to the components of a quality closing argument as well as the methods for presenting a powerful and persuasive closing.

“First, when there's nothing but a slow glowing dream....”

When it is time for closing argument it is no time to **start** deciding what to say. Closing argument is formed from the day you first pick up the file, from the moments when you first start contemplating the case, and from the first time you look into the eyes of your client. Albert Krieger once said about closing argument that “its genesis is in the foresight, the imagination, the dexterity, and the wit of the lawyer. It is shaped from the clay of the first meeting with the client, formed with the preparation for trial, and fired in the kiln of the trial itself.” Without proper investigation, planning and formulation, all conducted from the onset of taking the case, the closing argument will not be what it should be and will not do what it is supposed to do. Lest we forget – **A good case can be easily lost in closing argument.**

But the obligation of the trial lawyer, and the ultimate persuasiveness of your closing argument, is bigger than mere pre-trial investigation and preparation. The essence of persuasive closing arguments is known and practiced before jury selection starts. The closing must be theory-driven and dovetail with the message delivered in the opening statement. The structure that it ultimately takes, as well as some of the content, remains somewhat fluid and flexible. As the trial progresses you will make notes of things that have come up and things worthy of discussion that were not fully contemplated when the closing was first created, then work them in as needed and called for. It is in this way that the job of the lawyer, in creating and delivering a closing argument, remains a carefully crafted and prepared work-in-progress until it is given and the jurors retreat to deliberate.

From an organizational perspective, remember the concepts of primacy and recency. Jurors tend to remember more of what they hear at the beginning and what they hear at the end. For this reason it is important that you begin with something powerful. “Good afternoon, my name is Edwin Blankenship and as you know I represent the defendant. I am about to give you a closing argument. Before I do so I want to thank each of you....” A start like that is a waste. It is not powerful, it is not persuasive, it does not even approach compelling.

There is no requirement that your closing argument be delivered in chronological order. Lawyers tend to deliver information chronologically because it is much easier for us to remember information chronologically. Unfortunately, chronological order is usually the least persuasive way to present your case. Once again recall primacy and recency. If your client is accused of shooting someone, you probably don’t want to start your closing in the maternity ward of the local hospital when your client was born. Now if he suffered oxygen deprivation during birth that contributed to his limited mental capacity, you will want to talk about that. But probably not as the first words out of your mouth.

“That your fear seems to hide deep inside your mind...”

There is perhaps no greater calling in a trial than the opportunity to give a closing argument on behalf of another living, breathing human being. Whether they have hired you or you have undertaken appointment, the life of the client is posited squarely in your hands. Awesome as the task may be it is no time to be distracted by your knees knocking. And it is no time to get off of track and lose focus. The energy that is filling you with anxiety must be reformulated into strength, passion, and a trusting confidence that instills in the jurors a desire to listen and walk with you. You must be interesting, worthy of trust, honest, and thoughtful. When you feel anxiety creeping in, take a moment and just be quiet. Silence is an extremely powerful thing in a courtroom. The silence can captivate the jurors and you can get your act together.

“All alone I have cried silent tears full of pride...”

As lawyers we have much about which to be proud. On the educational front we have chalked up 12 years of basic education inclusive of kindergarten, elementary school, middle school and high school. There were the four years of undergraduate study in which we had a major field of study and a minor field of study. This was followed by three (maybe more) years of intense training in law school. And along the way there were all of those tests we took. The end of grade tests, the achievement tests, the PSAT, the SAT, the LSAT and then the BAR EXAM. Whew!!! What a list of accomplishments. These accomplishments would seem to warrant screaming at the top of our lungs something along the lines of “Damn I’m good. And I am ooooooh soooooooo smart. You will listen to what I say and do what I ask. After all, I am SOMEBODY!!!” Understand, though, that closing argument is not the place to advance yourself, get caught up in the personal pride of the moment, or get confused between self-importance and your goal. As the words to the song explain, pride is best left to times when you are alone and times when it is bestowed upon you by others. There is no exception to this rule for closing arguments even though at times we wish there was.

“In a world made of steel, made of stone....”

The closing argument is your final opportunity to communicate directly with the jurors. Communication, in its simplest terms, involves the sending of information and the receipt of that information. When we talk about verbal communication the process implies that there is a speaker and a listener. If the jurors don't listen there is no communication and you might as well be delivering your closing argument to a carefully selected, purposefully organized, group of power poles. In a very real sense jurors come from a world made of steel and stone. They are in the artificial setting of a courtroom, dealing with issues of crime and ugliness. Their desire to listen to a criminal defense attorney is skeptical at best. If you make the closing about you, by talking at them instead of with them, by being condescending in your voice and mannerisms, by telling them what to do instead of showing them the way and letting them get their on their own, they will tune you out and turn you off quicker than dammit. There is much more in this world, and to people, than steel and stone, black and white, and the fears that are bred by polar extremes. It is your job, as the lawyer giving the closing argument for someone accused of committing a crime, to open the eyes of the jurors to the various colors, textures and life experiences that have molded your client's life and resulted in his or her being forced into the courtroom.

“Well I hear the music, close my eyes, feel the rhythm...”

Lawyers can learn much about closing arguments, and about trials in general, from two other professions; acting and storytelling. These professions teach us that the error in addressing an audience is in getting between the message (the lines delivered by the actor, the story being told by the storyteller) and the audience (jury). In simple terms the messenger (lawyer) ends up blocking the vision of the jurors, limiting their ability to see what it is you want them to focus on. Instead, the focus in on the lawyer/teller/actor. Although it is important for the lawyer to “hear the music” and “feel the rhythm,” it is more important for the jurors to appreciate these things.

There is an easy and fun exercise you can do that will let you see the difference between being behind the story as a facilitator and being in front of the story and blocking it. When you are practicing your closing pretend that you are 85 years old. You are still you, a lawyer, giving the closing. But you must also be 85 years old. Bend over a bit, pretend you are holding a cane, and use a voice that sounds old and tattered. If you have the ability to videotape your presentation do so. Watch the difference between giving your closing from your own body and voice and that which you give as the older, wiser you. The difference is immediately noticeable and is a wonderful example of being in front of and then behind the story. Now your task is to take the closing given by the older lawyer and present it through your own voice.

Note carefully that this exercise does not require you to be anyone other than you. It merely changes one facet of your being. The essence of what happens is that you remove a presently existing filter – the lawyer filter as I call it – and you begin to speak and act in a non-lawyer, people-embracing, persuasive style. It is in this voice, and from this perspective, that you can not only hear the music and feel the rhythm of your client’s story of innocence, but can effectively convey it to the jurors. They will want to listen.

“Wrap around, take a hold of my heart....”

A well-crafted, well-delivered closing argument causes jurors to pay attention, listen intently, and remember what you have said. More importantly, it causes jurors to invest in your case with their hearts -- not just their minds. I would much rather have two or three jurors who believe in my case with their hearts than six or eight who believe with their minds. Mind believers will change their votes with the blink of an eye for they tend to analyze from the perspective of "show me how I am wrong and I will change." Heart believers will fight for you and your client, persuading others that their/your position is right, for they analyze from the perspective of "I am right and you are wrong and you are going to change your mind."

In order to effectively tap into the hearts of your jurors, you need to find and develop the emotional center points of your case. These center points are tied into one of many archetypes. The archetypes you are seeking to tap into are ones that transcend age, sex and ethnic background. They stand for emotional truths that exist in every corner of the world, in every person with moral fiber, and are applicable in a completely non-discriminatory manner. Some of these archetypes include love, hate, parent-child relationship, rush to judgment, fear, courage, dishonesty, in the heat of the moment, and certainty versus accuracy. The power of finding and using these types of archetypes is that any closing argument can be understood, appreciated and accepted if you put in terms that jurors know, have experienced and can embrace.

A technique that you can use in closing argument to touch individual jurors is to remember and recall to them who they are. During voir dire pay attention to who your jurors are. For example, you may learn that Mrs. Jones is a schoolteacher, Mr. Smith is a farmer, Ms. Dawson is an accountant and Mr. Davenport is a retired obstetrician. During closing you are not permitted to invade the jury box. You cannot physically touch a juror and you likely cannot call an individual juror by name (although some jurisdictions may permit the latter). You can, though, cross over into the box with your words and your eyes. Pick a point in your closing where you are talking about certain basic truths (archetypes for example). As you describe the basic truth talk look the jurors in their eyes. “It doesn’t matter whether you have chose to teach young children (while looking into Mrs. Jones’ eyes), or whether you drive a tractor for a living (while looking into Mr. Smith’s eyes), of whether you handle financial matters (Ms. Dawson) or have devoted your life to bringing babies into this world (Mr. Davenport)...” This technique demonstrates to the jurors that you remember who they are and that you care. You have crossed into the jury box without setting foot across the line. You have touched the ones you connect with without ever making physical contact.

“I can't have it all, now I'm dancin' for my life...”

Although in closing you might feel as if you are dancing to beat the band, you are not really

dancing for **your** life. You are dancing for you client's life and you must convince **the jurors** to return the verdict you are asking for. Lawyers seem to forget that the trial occurs before a group of people. These people come from a variety of walks of life. Seldom, though, are our juries composed of lawyers. Even more seldom is a jury composed entirely of lawyers. Too often lawyers seek to address and answer the questions and issues that they, as a lawyer, think are interesting or important. The problem is that few, if any, of the things we as lawyers think are important turn out to be anything that is of interest to the jurors. Our cases must be prepared and presented in a juror-centered manner. Develop and address those issues and questions that the non-lawyer jurors will have about your case. If you didn't get what I just said let me say it again -- but louder: **DEVELOP AND ADDRESS THOSE ISSUES AND QUESTIONS THAT THE NON-LAWYER JURORS WILL HAVE ABOUT YOUR CASE.** When all is said and done and the verdict has come in, it is far more important that you get a not guilty verdict than it is for your lawyer friends in the coffee shop to say how wonderful your closing was and how it addressed all the things they thought were important but that it is a crying shame the jury came back with a guilty verdict. Create your closing from a human perspective not a lawyer perspective.

“In a flash it takes hold of my heart...”

It has been the death of many a closing argument that the jurors did not feel as if the lawyer believed in what he or she was saying. The jury-centered issues and questions you have identified must be conveyed with feeling, an appropriate level of emotion, and in a way that leaves no juror wondering whether you, the lawyer, believe in what you are saying. Think about this – how can you reasonably expect a jury to acquit your client if not even you think that is the right outcome? There are a few ways that your credibility and persuasiveness can be immediately improved.

First, don't confuse passion with aggression. I want you to try something. Think about something, anything, that makes your blood begin to boil. Now, at the top of your lungs, vent about it. And I mean loud. Shake the rafters. Make the neighbors call 911. Shout it out as loud as you

can must. Good. Now find a mirror. Walk up to it and look at yourself. Think back to the spaghetti westerns that Clint Eastwood made. Repeat the one or two “stud” lines from each movie. Examples include: Bounty Hunter: “Man’s got to make a living.” Clint: “Dying ain’t much of a livin’ boy.” Poker Player: “I didn’t hear what the bet was.” Clint: “Your life.” Even the Dirty Harry movies have some material. “Do you feel lucky? Well do ya – Punk?” Get the aggression out of your system. Good! Got it out of your system? If not then repeat this exercise until you have exorcized the aggression.

When your adrenalin starts pumping and you are in the heat of final argument, it is very easy to become aggressive, especially towards the prosecutor. **DON’T GO THERE.** Be it the result of adrenalin or testosterone, don’t go there. Little can be gained by launching into an assault on the prosecutor. That is their game. It comes from the gutter. When you play that game you are likely to end up there. In the gutter. That is not a powerful or persuasive place to be if you are trying to motivate the jurors.

Second, establish and maintain eye contact with the jurors. In virtually every walk of life it is felt that if you can’t look someone in the eye when talking with them you are not worthy of belief. The same is true with jurors. A few exercises will demonstrate the point. Get your spouse, loved one or a friend. Have them sit in a chair. You must stand (as you would in front of a jury). It is your job to get them to go out on a date with you. It doesn’t matter what sex they are. Go with it. You may not, however, make any eye contact with them. You have thirty seconds. When it is done ask them what they thought and how they felt. Now try the same thing using eye contact. The difference is incredible. Juries are no different. If you can’t look them in the eye they will conclude either that you are not worthy of belief, that you don’t even believe in your case, or both.

Finally, pick your language carefully always remembering that your audience is composed of non-lawyers. Persuasive closing argument storytelling language is considerably different from the language ordinarily used by lawyers. As Terry MacCarthy says, “use language that you would use if you were talking to someone you had met in a bar.” Jurors are generally not lawyers, they don’t

think like lawyers, they don't talk like lawyers. Let's try another exercise. Use your same partner (spouse, loved one, friend) and pretend you are sitting with them at a bar. Your goal is to pick them up. However, you must use lawyer/cop talk. For example you might start like this: "Hey baby, you should see the vehicle I just exited." See how far you get before your partner wants to get up and walk away. Jurors are the same way. The goal being to increase persuasiveness, you must talk "with" jurors, as opposed to "at" jurors, and eliminating lawyer/cop talk is a huge step in the right direction.

"What a feeling, bein's believin'..."

Technically speaking, closing arguments differ from opening statements in that not only can you make argument, but you can argue any reasonable inference that springs directly or indirectly from the evidence. Because closing argument is rather unlimited in comparison to opening statement, you are limited only by the bounds of creativity. Your voice, that of the lawyer, comes with certain baggage that, as set forth above, can cause problems for jurors. In closing you can take on other personas (animate) or objects (inanimate) and speak from first person. When taking on another persona you can present it from the voice of first person past tense or first person present tense. Delivered through the voice of another, your persuasiveness can increase markedly. You must pick your characters carefully always keeping in mind what it is that the jurors need to know, feel and understand in order for them to render a verdict in your favor. In addition, remember that too much first person is -- well -- too much. I don't recommend doing your entire closing argument in first person. It is probably more persuasive for you to present segments in first person. And there is no limitation on the number of different personas you can present during closing. Again, though, remember that too much first person is -- well -- too much.

When presenting a part of your closing from first person, be mindful of courtroom space and the sense of space that jurors have. Select a particular place in the courtroom where all words you speak in first person from the persona of another will be delivered. The jurors will quickly learn that

when you move to that space you will be talking from the voice of that persona. The persuasiveness of first person as a part of your closing can be extremely powerful.

“Pictures come alive, you can dance right through your life...”

Not only is “bein’ believin,” but seein’s believin.’ In the words of McCormick: "Since 'seeing is believing,' and demonstrative evidence appeals directly to the senses of the trier of fact, it is today universally felt that this kind of evidence possesses an immediacy and reality which endow it with particularly persuasive effect." McCormick On Evidence § 212 (E. Cleary 2d ed. 1981). Closing argument is no time to forget the power of demonstrative evidence. Make use of visual aids and physical evidence during your closing argument.

“Take your passion, and make it happen...”

There is no greater calling than to be a criminal defense lawyer. There is no greater compliment than to be selected to represent another human being. There is no greater tragedy than that of a poor person, falsely accused, caught up in the criminal justice system. From all of this comes our calling to step forward, muster all of our energy, ingenuity and creativeness and persuade twelve jurors to do the right thing. Ours is not an easy job. But it is one that can be so very rewarding. Without the music, “Flashdance” was just another dull, lifeless, movie. Without us, our cases are no different. It is up to us to find and play the music behind our cases. In the words of Irene Cara, “take your passion, and make it happen....”

FLASHDANCE... WHAT A FEELING

By: Irene Cara

First, when there's nothing but a slow glowing dream
That your fear seems to hide deep inside your mind
All alone I have cried silent tears full of pride
In a world made of steel, made of stone
Well I hear the music, close my eyes, feel
the rhythm
Wrap around, take a hold of my heart

What a feeling, bein's believin'
I can't have it all, now I'm dancin' for my life
Take your passion, and make it happen
Pictures come alive, you can dance right through your life
(Solo)
Now I hear the music, close my eyes, I am
rhythm
In a flash it takes hold of my heart
What a feeling, bein's believin'

I can't have it all, now I'm dancin' for my life
Take your passion, and make it happen
Pictures come alive, you can
dance right through your life
(Solo)
Now I'm dancing through my life

What a feeling
What a feeling *I am music now*, bein's believin' *I am rhythm now*

Pictures come alive, you can dance right through your life
What a feeling *I can really have it all*
What a feeling
Pictures come alive when I call
I can have it all *I can really have it all*
Have it all *Pictures come alive when I call,*
call, call, call, call, what a feeling
I can have it all *Bein's believin' bein's believin'*
Take your passion, make it happen
make it happen *What a feeling* what a feeling... (to fade)