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SPEECH

TRIAL TACTICS IN A COMPLEX CASE

VINCENT BUGLIOSI

I. INTRODUCTION

Vincent Bugliosi is the best-selling author of *Helter Skelter* and *Till Death Us Do Part*. Noted for his aggressive prosecution of Charles Manson and the "Manson Family" for the Tate-La Bianca murders, Vincent Bugliosi is considered one of America's foremost prosecuting attorneys. Bugliosi reveals his "secrets" on successful trial tactics in a complex case in the following speech sponsored by the Campbell University Student Bar Association.

II. PREPARATION

Applicable to every phase of the trial, be it cross-examination or final summation, preparation is the sine qua non of the successful prosecution or defense of any case. Hamlet said, "The readiness is all." Shockingly, many lawyers who were very conscientious in law school come into court shooting from the hip. In some first-degree murder cases, the lawyer has not even read the preliminary examination transcript. Frequently lawyers argue that they do not have time to prepare their cases, that they are handling too many cases. That is really hogwash because some lawyers work exclusively on one case and still do not prepare their cases under the definition of preparation below. The first paradox is that all lawyers agree that no substitute exists for preparation, and they are told throughout their law school career a hundred times that they have to prepare their cases. The second paradox is that many lawyers sincerely believe that they have prepared their cases when in point of fact they have not.

If merely one thing can be learned from a class, a book or an experience, the course, the book or the experience has been worthwhile. In learning the definition of preparation, time will not be wasted. Preparation means more than just going to the scene of

the crime, interviewing witnesses, reading the police reports, listening to tape-recorded conversations, employing experts to examine parts of the case—the parts that so many lawyers confuse as constituting thorough preparation. Thorough preparation means these and reducing to writing: (1) everything that is in one's mind and (2) the manner intended for use in presentation to the court.

Writing is where nine out of ten lawyers fail. Either they use hardly any notes at all (which is becoming very fashionable today even among many prominent trial lawyers) or—which is much more commonly the situation—they use notes which are woefully sketchy and inadequate. Hundreds of pieces of information are in their heads; but, because they are human beings not computers, of necessity the information is disorganized, undigested. A dangerously high percentage of that information is going to be ineffectively presented in court when it leaves the lawyer's lips. The sequence should not be from the lawyer's mind to the jury. The sequence should be from the lawyer's mind to his legal pad for organization, digestion, polishing and review; then, to the jury. When the information in one's mind has not been reduced to this pad, not only is it by definition disorganized, but also it is deficient in its quantitative content. Working on a legal pad and contemplating the wallpaper in the study, the lawyer discovers all types of questions, ideas and articulations. Surprising are the impressive thoughts and articulations that can be produced just by working with a pad and pencil. Obviously, reducing to writing what is in the mind is extremely tedious, extremely time-consuming and pure drudgery; it is sweat, sometimes agony. Still it is the only way both to try a complex lawsuit and to make a superior—as opposed to a good or merely adequate—presentation of the case in court. For instance, in preparing the cross-examination, the lawyer might know in his mind the point he wants to make, but he might have to sweat one hour on this pad to work out the best way of establishing this point in court. Before asking the key question, the attorney might decide he has to ask ten preliminary questions in a particular sequence. Some of these preliminary questions may be rewritten several times because a close examination of them reveals that by their phrasing the witness is going to be able to do something unwanted: to discern the direction which the lawyer is taking him. In final argument, the lawyer might know very clearly in his mind what he wants to argue to the jury; but when he tries to articulate it on his pad, all of a sudden his pencil stops writing. At that point he realizes that he did not understand this particular

point as well as he thought he did, or even if he did. If he understood it completely, he certainly realizes that he was unable to extemporaneously articulate that point with the power and the clarity necessary. To verbalize this point in the best way possible, the right words—even the right pauses—take a lot of time. Moreover, many ideas, thoughts and concepts do not lend themselves to easy articulation, but they can be mastered if lawyers will devote the time. Better is a pencil coming to a stop in the privacy of the lawyer's home or office than an attorney sounding incoherent in front of the jury.

Almost invariably, the most obvious danger of not reducing everything to writing for cross-examination or final summation in a complex case (where a lawyer has virtually no time in court to pause and cogitate) is the omission of many points, some of which may have been crucial to the client's cause. How many lawyers walk out of court every day saying, "I forgot to ask this question" or "I forgot to argue this"? If everything is reduced to the legal pad, that situation just is not going to happen. Subscribe to the old Chinese proverb: "The palest ink is better than the best memory."¹

Reducing everything to writing does not mean, for example, that on cross-examination the lawyer reads his questions. Reading questions is very amateurish and ineffective; however, if the lawyer has written his questions, the lawyer can review them to the point where they are so firmly in mind that at cross-examination the lawyer fires the questions at the witness. A good portion of the trial—arguments, counter-arguments, questions and objections—literally can be orchestrated before counsel calls the first witness to the stand. The trial is merely the acting of the previously written script.

Granted, unpredictable things frequently happen at a trial; but if the lawyer does his homework, the lawyer can anticipate some of these otherwise unpredictable things. A *Newsweek* reporter once told me he enjoyed reading *Helter Skelter*² with one exception: I had not indicated any significant errors I had made. Finding the omission to be completely unrealistic, he asked directly if I had made any significant errors. He said he wanted the truth so I told him that I did not make any significant errors. Before he could throw something at me for my apparent pompos-

1. E. CLEARY, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 9, at 18 (2d ed. 1972).

2. V. BUGLIOSI, *HELTER SKELTER* (1974).

ity, I hastened to add that I had made errors during the Manson case, but I made them on a legal pad before I entered the courtroom. I already had spotted and eliminated them. Lawyers who religiously avoid the pain and agony of the yellow pad often say that if they prepare their cases and reduce everything to writing, they are going to be neither flexible nor able to improvise when something happens in court that is not covered in their notes. That is a classic non sequitur. Being prepared in writing does not imply inability to improvise. Instant improvisation and flexibility are not the domain of only those who are unprepared.

In summary on this issue of preparation, my method of trying a lawsuit is relentlessly simple: I sit and determine what I think I will need to win the lawsuit; it might be one-hundred separate pieces of testimony and evidence. I then dedicate myself with total emersion first to going and finding those facts on which the testimony and the evidence is going to be based and then, with the help of this pad, getting these facts before the jury by way of direct examination, cross-examination and final summation in the most powerful, effective way possible. That way if I lose, I do not have to kick myself in the derriere for not doing the best job possible. That is what I mean by preparation.

III. JURY SELECTION

Most lawyers have been disimbuied of the notion once had fresh from law school that they could pick jurors who would be favorable to their cause merely by noting the prospective jurors' outward appearances, their manners of speech or their answers to questions—even though the common subject for joking in the judge's chambers still is that prosecutors are looking for the crew cut Nordic type and defense attorneys are looking for the long-haired fellows with the wide red ties. The limited scope of allowable questions on voir dire reduces jury selection to one-third art and skill and two-thirds guesswork.

I know some prominent lawyers, like F. Lee Bailey and Melvin Belli, frequently bring into the courtroom psychiatrists who send notes to the lawyers on whom to select. Although I have no negative view about psychiatrists, I almost reject out of hand jury selection through psychiatrists because from my experience psychiatrists cannot agree on anything, at least in a courtroom. People can be married for thirty years and not really know each other; how can someone talk to a person for a couple of minutes and find the way he is going to think without using guesswork?

In the area of art and skill, preparation is the main ingredient. First the lawyer must decide what type of juror would be the best for the client under the known facts. Second the lawyer must decide what type of questions he needs to ask in order to ascertain whether or not the juror is of the type best for the client. Obviously, excuse jurors who have prejudices which will work against the client. Ironically, to ask the juror that very question (*i.e.*, if he or she is prejudiced against something) is almost pointless because jurors rarely will admit prejudice against anything. Phrases like "lean towards," "preference for" or even "like or dislike" have to be employed in indirect questions to expose bias.

Jurors usually sit wooden in the jury box during a trial. They believe they are never supposed to change their expression, almost like they are participants in a black-tie poker game. This extreme decorum on their part—amidst the atmosphere of officialdom completely foreign to them—starts with *voir dire*. Tell jurors during the selection process to relax because no reason exists for them to be tense.

Always tell jurors that, if they disagree with any of the rules of law mentioned in the questions, they are to speak now—not later in the jury room. If they do not disagree, get a commitment from each one of them, individually, under oath, that they faithfully will apply those rules of law to the facts of the case. Remind them of that commitment during final summation. Good tactics during *voir dire* are trying to: (1) instruct the jury on those rules of law which you feel will apply favorably to the client and (2) find out the jury's state of mind with respect to those rules of law. For instance, some people understandably are disinclined to assign equal guilt to a conspirator who did not actually perpetrate the crime. Thus always go into depth with the jury during *voir dire* on the vicarious liability rule of conspiracy to ascertain whether or not the jurors have any objection to it. No one can afford to have some juror at the end of the case saying back in the jury room, "I cannot convict this person of first-degree murder because he was not even at the scene of the murder."

Unfortunately, the majority of judges during *voir dire* will not permit an attorney to explain the specific law of the case or ask if that specific law is understood and can be applied without hesitancy if the facts so warrant. Most judges only will permit asking the prospective jury the general question of whether or not they will follow the law the court gives at the conclusion of the case. This restriction by most judges is incorrect. How assured can an

attorney be by jurors saying they will follow the law the court gives them at the conclusion of the case when they do not know what that law is going to be? If a judge offers resistance to inquiry into the specific law of the case, appeal to his logic with this type of argument: A juror with a fixed opinion concerning a particular rule of law always cannot be impartial as required by law. Despite conscious desire to follow the law the court gives, human nature can sway unconsciously either in application of the law or in finding those facts which give rise to application of that law. Although the right to inquire into the specific law of the case and the jurors' understanding and sentiments with respect to that rule of law has not found its way into most hornbooks, a judge who refuses to permit such inquiry is committing a judicial error. Several California cases specifically authorize such inquiry.³ Thus knowing the specific law of the case is very important when picking the jury.

IV. OPENING STATEMENT

In a complex case where the facts are fragmented—scattered in time, places and events—make an opening statement to enable the jury to better follow the evidence when it is presented from the witness stand. Most lawyers give an opening statement. The distinct advantage to making an opening statement is that it gives one extra opportunity to sell the case to the jury. If the case is not complex, normally I waive opening statement principally because I feel that it takes the edge or the drama away from my witness' testimony when the jury has heard the story previously from me. Waiving an opening statement is a close call. I do not feel strongly that I am right about this; strong arguments are on the other side.

In making an opening statement, the attorney must make sure that he does not "bite off more than he can chew." Do not promise the jury proof of something while feeling proof may be lacking; otherwise the attorney might have to contradict himself or retract by trial's end. Opposing counsel during his final argument very effectively can remind the jury of broken promise to prove something. Lack of proof certainly hurts credibility and can adversely affect a juror's perception of the entire case.

3. *People v. Tuthill*, 31 Cal. 2d 92, 98, 187 P.2d 16, 19 (1947); *People v. Wolfe*, 182 Cal. 728, 736, 190 P. 22, 25 (1920); *People v. Bennett*, 79 Cal. App. 76, 90, 249 P. 20, 25 (1926).

V. DIRECT EXAMINATION

During direct examination doggedly try to force into that trial record the facts and the evidence on which the case is based as found on the legal pad containing hundreds of questions.

Try to introduce damaging evidence if the opposition is going to introduce it. Introduction of damaging evidence achieves two objectives: (1) conveying to the jury the attorney's fair-minded willingness to see that all evidence in the case, favorable as well as unfavorable, is introduced so that the jury can consider it for its own relevance and (2) shaving a few decibals off the opposition's trumpets by indicating to the jury that the evidence cannot be really all that bad if the attorney presented that evidence on direct examination of his own witness. Most lawyers do not do this. They present their case and the opposition presents his case. Instead, try to present both sides of the case. Recently in a celebrated murder case, the defendant did not testify nor did he present much of a defense at all. The defendant's attorneys devoted most of the defense and almost the entire trial not to the murder case but to making the defendant's wife, the star witness for the prosecution, look like a cheap, tawdry Jezabel. The so-called *Bible-belt* jury, aghast at the revelations of immorality by the defendant's wife, in fact convicted her; almost as a by-product, they found her husband not guilty. What the result would have been had the prosecutor matter-of-factly presented all the negative, depreciating evidence on direct examination is worth considering because the defense would not have had anything on which to cross-examine since the defendant did not take the witness stand or present much of a defense.

VI. CROSS EXAMINATION

As old and venerable as the history of jurisprudence, cross-examination has been the principal weapon known to the law. A legal scholar said that cross-examination is the best technique for separating truth from falsehood, actual knowledge from hearsay, fact from imagination and opinion and for reducing exaggerated statements to their true dimensions. Professor Wigmore, the foremost authority in the law of evidence, called cross-examination "beyond any doubt, the greatest legal engine ever invented for the discovery of truth."⁴ The famed San Francisco trial lawyer Jake

4. 5 J. WIGMORE, EVIDENCE § 1367 (Chadbourne rev. 1974).

Earlik says cross-examination is the lost art.

Cross-examination takes on more importance than direct examination because juries listen a lot more closely. The reasons that they listen are both because they realize instinctively that the dry run in the lawyer's office, so apparent in direct examination, has not occurred for cross-examination and because they find its adversary nature much more interesting.

As with all other facets of the trial, the keynote to successful cross-examination is thorough preparation. Before starting to prepare cross-examination, always try to interview the opposition witnesses. Many prosecutors make no effort either to ascertain the identity of the defense witnesses or to interview those witnesses. The majority of defense attorneys rely almost exclusively on what they are given by way of discovery and make no effort to interview the prosecution witnesses personally. Attempting to interview the opposition witnesses is a no-lose proposition: if they give a statement, use that statement as a basis for impeachment if it differs from their trial testimony or any other statement that they might have made; if they do not give a statement, advantageously introduce this fact on cross-examination. Refusal to give a statement tends to show the bias of the witness and otherwise affect his credibility.

Two hallowed maxims of cross-examination are: "Never ask a witness a question unless the answer is known," and "Never ask a 'why' question."

Although the rule of never asking a question to which the answer is unknown is valid for the most part for direct examination of one's own witness, the overwhelming majority of experienced trial lawyers will say that it is not always applicable to cross-examination. Although the ideal situation certainly would be to know what the adverse witness' answer is going to be to every question, the reality is that very frequently the attorney had no opportunity to interview the witness. Of necessity, cross-examination often times is a trek through new terrain. Experience, caution and instinct sometimes are one's only guides. Thus this antiquated commandment should be amended to read: "Never ask a question concerning a matter critical to the case without being reasonably sure what the answer is going to be."

The second maxim advocates never asking the witness why he did something implausible because the question gives free reign to explain his conduct. In the explanation he may incorporate a statement very damaging to your cause. A speaker at a Los Angeles trial

lawyer's convention said: "Now the last thing I want to call your attention to is that you should never ask a hostile witness 'why.' This is the question that will really murder you." Respected cross-examiner Louis Nizer in his highly acclaimed book *My Life in Court* says, "One can quickly spot a bad cross-examiner if he asks 'why.' This opens the door and the witness may buttress whatever weakness has developed in his story."⁵ *Till Death Us Do Part*⁶ includes many pages of cross-examination wherein I frequently ask this frowned upon "why" question. In scrutinizing my prior cross-examinations to try to ascertain how my cross-examination, although not always so-called homicidal, had never yet been suicidal even though I consistently was violating this well-recognized maxim of cross-examination, I found a very consistent pattern emerging surrounding the use of the "why" question, a pattern that instinctively developed when I was preparing my cross-examination. If I feel a witness is lying, a simple technique is to elicit on preliminary matters answers which in totality show that if the witness were a reasonable man he *would be expected to take a certain course of action*. The witness having committed himself, I then ask the witness what course he in fact took. My third question is why did he take that course of action. If time after time a witness is unable to satisfactorily justify conduct of his which is incompatible with what would be expected of a reasonable man under the same circumstances, the jury usually will conclude that his testimony is suspect.

Note the common denominator between my approach and other approaches. The attorney must first get the witness to commit himself. F. Lee Bailey in *The Defense Never Rests* makes the excellent observation that applies whether the lawyer uses the "why" question technique above-mentioned or some other approach: "The most common error lawyers make on cross-examination is that of immediately attacking a witness who has not been sufficiently pinioned. The result is that the witness escapes."⁷ In the process of escaping, they frequently drop a bomb on you, and witnesses do have a remarkable proclivity for escaping. Unlike their fictional counterparts in novels and on the screen, real witnesses simply do not cave in under the pressure of the third good question. When all but trapped and at the brink of a public court-

5. L. NIZER, *MY LIFE IN COURT* (1961).

6. V. BUGLIOSI, *TILL DEATH US DO PART* (Bantam ed. 1979).

7. F. LEE BAILEY, *THE DEFENSE NEVER RESTS* (1971).

room humiliation, human beings seem to secrete some type of mental adrenalin that gets their minds working almost as fast as Houdini's hands. Textbooks on the art of classic courtroom cross-examination reveal that the most piercing cross-examination rarely, if ever, destroys a witness. A witness only is hurt or damaged, not demolished. The witness on that stand is almost inherently formidable. But just as no one—not even Houdini—can pull a rabbit out of the hat when the rabbit is not in the hat, a witness cannot go somewhere when he has nowhere to go. So if you use the “why” question technique, you have to sit with your legal pad and block all possible anticipated escape hatches. For example, in the second murder in *Till Death Us Do Part*, I alleged that the male defendant, Alan Palliko, was responsible for the murder of Judy, his wife. The defense presented evidence that on the night before Judy's murder, two of Judy's and Alan's friends, Mr. and Mrs. Daryl Lott, stopped by Judy's apartment. Judy was alone, armed with a gun and in deathly fear of some former boyfriend. The implication was that the former boyfriend was responsible for her murder the next day. Using the “why” question approach of first eliciting answers which show that the witness would be expected to take a certain course of action, then asking what course he took and then following with the “why” question, I started on the issue of whether or not Mr. and Mrs. Lott even had ever stopped by the victim's home as they claimed that they did. These are the preliminary questions from the trial transcript which blocked the escape hatches:

Q. How did you happen to stop by Alan's and Judy's apartment around 11:00 P.M. Friday night, April 19, 1968, Mr. Lott?

A. I don't know. I do a lot of things on the spur of the moment. Just decided to stop in, say hello. . . .

Q. I understand you were a closer friend of Alan's than you were of Judy's, is that true?

A. Well, I knew Alan longer. Let's put it that way.

Q. Is there any question in your mind that you were much closer to Alan than to Judy?

A. No. I was. You're right.

Q. You had been to Alan's Grand Duke Bar on previous Friday nights, had you not?

A. Yes. . . .

Q. About what time did Allen normally close the bar?

A. Two o'clock in the morning.

Q. Did you think that this particular Friday night Alan would be home instead of at the Grand Duke?

- A. I had no idea.
 Q. The Grand Duke is pretty close to their apartment, isn't it?
 A. Sure is.
 Q. Would it have been out of your way to first stop at the Grand Duke?
 A. I don't suppose so, no.

I have blocked escape hatches, and now I ask him what course of conduct he took.

- Q. Did you first stop at the Grand Duke to see if Alan was there before you went to Judy's apartment?
 A. No, I don't believe we did.

Now ask the "why" question.

- Q. Any particular reason *why* you didn't, Mr. Lott?
 A. Uh . . . no reason at all.⁸

The procedure is simple and not at all esoteric. No matter how bright the attorney, if he does not sit with his legal pad, he will fail to block an escape hatch. If the witness is a typical witness, he is going to find it. Later in my cross-examination on the issue of whether or not Judy in fact had been in fear of some other person on the night before she was murdered, I first wrested from Daryl Lott the admission that he felt the police genuinely were interested in ascertaining the identity of Judy's killer. I then asked:

- Q. So Judy left this boyfriend from New York more than a year ago, but the night you came to the door, she was armed with a gun; right?
 A. That's right.
 Q. And she led you to believe that she was in constant, everyday fear of this man killing her, is that correct?
 A. Yes, she led me to believe that.
 Q. Then you learned that the very next day Judy was murdered.
 A. Right.
 Q. And in your mind Alan Palliko was innocent; isn't that true?
 A. Yes.
 Q. I take it the thought must have entered your mind that maybe this man from New York was the one who did it?
 A. Yes, it did.
 Q. Did you ever contact the police in any way whatsoever, by phone, letter, or by going down to the station, and telling them what you knew?

8. V. BUGLIOSI, *supra* note 5, at 320.

A. No, I didn't tell the police.

Q. *Why* not, sir?

Now the Houdini routine.

A. Well, I believe I told Alan and I figured that was enough.

Q. But you believed Alan was innocent and you knew he was being charged with murder. Didn't you want to help your friend Alan by telling the police that someone else probably murdered Judy?

A continuing Houdini routine.

A. That's why I'm testifying here right now.

Q. You decided to wait until now, a year later, to tell your story. Is that right, sir?

A. No.

Q. *Why* didn't you call the police then, Mr. Lott?

A. I don't know. I just didn't call them. I don't really know.⁹

When a witness has done something which is implausible—for instance, Mr. Lott not going to the police—on re-direct, his lawyer, if his lawyer is alert, will ask the “why” question if it is not asked on cross-examination. Everyone agrees that counsel can ask it on re-direct. The witness then often has had a court recess or perhaps overnight to think of the very best answer to that “why” question. Force him to answer that question on cross-examination without any time to fabricate. Of course, both lawyers can avoid asking the “why” question and save for final argument the implications of the witness' testimony; but by that late point in the trial, the witness' reason for his improbable conduct is a matter for competing speculations by the lawyers not court record.

As the authorities admit, a “why” question can bury an attorney, but this is only true if the attorney has failed to first block all possible escape hatches. An attorney only can block them by anticipating them. The primary purpose of cross-examination is to destroy credibility and the secondary purpose is to seek new information even though many books on cross-examination say that the principle purpose of cross-examination is to give new information. When trying to destroy credibility—although not necessarily aggressive and although sometimes velvety in tone and nature—the majority of the questions have to have a cutting edge. The “why” question is one of the very best techniques to destroy credibility.

9. *Id.* at 321-22.

The over-used question heard not only on television but also in court is: "Isn't it true that at blah, blah, blah." Now that is an extremely effective way for a lawyer to testify before a jury without taking the witness stand, because the lawyer has given his own personal views about the case in the question without being under oath. Invariably the witness says, "No, it's not true." They do not say like on television, "Well, yes, that's true; you got me." In real life they shout right back you, "No, it is not true!"

VII. FINAL ARGUMENT

If the case is extremely weak, chances are that final argument cannot save the case, no matter what is said. Conversely, if the case is extremely strong, chances are final summation is not going to play that important a part in the usually favorable verdict. The close case is where final summation tips the scales one way or the other. In the close case, final argument is the most important part of the trial.

Usually the first thing to consider after beginning to learn all the facts of the case is how to best argue those facts to the jury. Frequently work backwards from final summation since summation has to be based on testimony that comes from the witness stand. Questions on direct and cross-examination often are asked for the specific purpose of getting into the trial record testimony which will permit the desired argument.

Writing two-thirds of the final summation before the case even has started is not uncommon because as soon as the strengths and the weaknesses of the case are apparent, the lawyer can start working on how to argue those strengths to the jury and how to respond to the opposition's attacks on the weaknesses. So many times while one of the lawyers is making a summation, the other lawyer is feverishly writing his summation: what he is going to argue and how he is going to respond. Do all of that in advance. Usually the opposition lawyer is not going to catch all of the weaknesses. Even if he catches a hundred percent, the lawyer knows the weaknesses of his own case just as well or better than the opposition does. When the opposition makes his argument and attacks the weaknesses, be ready with six or seven points, the right articulation and the right sequence. Getting an early start on summation and continuing to expand and modify it during a trial gives extra weeks and sometimes months to develop arguments and articulations.

Many trial lawyers do not feel that final summation is the most important part of the trial. Yet when a person applies for a

job or asks for a raise, he plans what he is going to say and how he is going to say it. If a person is accused of wrongdoing, what is he going to say and how is he going to say it? If a person is proposing marriage, what is his pitch? If a salesman or advertiser wants to sell a product, what is he going to say? What is said is almost always the bottom line. A trial is no different. As in every other area of life, try to convince someone—in this case the jury—of the righteousness of the cause; therefore, direct the majority of preparation and effort towards the final appeal to the jury.

Most lawyers and several authorities definitely recommend essentially extemporaneous final summations. One such authority is Mr. Louis Heller, Justice of the New York Supreme Court and formerly a very prominent New York City trial lawyer. His highly acclaimed book, *Do You Solemnly Swear*, says, "An address to the jury should be extemporaneous and reflect spontaneity."¹⁰ The late eminent trial lawyer Lloyd Paul Stryker, who defended Alger Hiss' first perjury trial and who was a regular lecturer at Yale Law School, advises lawyers in his book *The Art of Advocacy*¹¹ that if their memories have been well trained, they will remember the main parts of the evidence in their final summations. Many expressions of the witnesses will stick in the memory verbatim.

In my opinion, a summation must be either written completely or put into a comprehensive outline. Many trial lawyers address the jury almost off the top of their heads after only a small amount of preparation which often results in their delivering arguments which are disjointed, difficult to understand and injurious to their clients in that the arguments frequently omit a number of salient facts helpful to their cause. In my obsession about the preparation of final summation, I spent about six-hundred hours on my final summation for the Manson case. Of course, over twenty-eight thousand pages of transcript were involved. Conceding my probable unnecessary extreme, going to the other extreme and waiting literally until one second before midnight to start working on a closing argument is unwise. I admire no lawyer in this country more than Louis Nizer. Among all prominent trial lawyers, he is noted for his preparation. He has said that preparation is the be-all and the end-all in the trial of a lawsuit. Yet even Nizer apparently short-changes final summation by relegating it to a relatively minor role in the trial of his case. In his most famous trial in which

10. L. HELLER, *DO YOU SOLEMNLY SWEAR* (1970).

11. L. STRYKER, *THE ART OF ADVOCACY* (1954).

he represented Quinton Reynolds in a libel suit against Westbrook Pegler, he was involved in the case for well over a year. He had put a tremendous amount of preparation into it (he had gone to Europe to interview witnesses), yet he apparently waited until one second before midnight to prepare his summation. In *My Life in Court*, he describes the night following the last day of testimony, the night before final summation:

With the assistants I culled the citations from the record and organized a summation that would predigest the enormous amount of testimony without sacrificing emotion or lucidity. A few of my associates found themselves in grotesque postures of slumber on the edge of the sofa or on the carpet, before the sun rose.¹²

In a complex trial involving upwards of a hundred witnesses and thousands of pages of transcripts, to discuss with the jury in final summation the highlights and the nuances of the case, to draw the necessary inferences and, in the most telling sequence, to seek simplicity and clarity of expression require a tremendous amount of written preparation.

Arguing extemporaneously to a jury has only one advantage: ability to talk to the jury eye to eye with the candor of spontaneity. But if a trial lawyer is willing to put in the necessary time, he can have such a grasp of his written argument or outlined argument that, like an actor on a stage whose lines flow naturally, he can give the appearance of spontaneity. A lawyer could look at one word on each one of his outlines and the whole page would be in mind. He could walk around the courtroom and give the appearance of spontaneity. Final argument is nothing more than just a speech. Probably no generally accepted great speech in history, whether it be Lincoln's Gettysberg Address or some presidential swearing-in address, has not been prepared previously. Whether the role is that of a prosecutor or defense attorney, if the lawyer has a legal pad, a pencil and one- or two-hundred dollars, no matter how bright the opposition is—no matter if he were Editor-in-Chief of the Harvard Law Review or winner of the National Moot Court Competition—if the lawyer puts a modicum of preparation into his final summation in a *complex* case, he will dominate the opposition in summation.

An extremely essential ingredient for successful trial lawyers is confidence. If he is not confident, the jury will pick it up in the

12. L. NIZER, *supra* note 4, at 134.

way the lawyer walks, the way he talks, the expression on his face, the inflection in his voice. A lawyer cannot expect the jury to buy his cause if they conclude that he does not believe in it completely himself. So if he is not confident in his cause, he better be a good actor and convince them that he is confident. Of course, the lawyer has to be very careful that he does not trespass beyond the permissible margins of confidence into the area of arrogance and condescension because that could be very harmful to him.

Juries are very conscientious. I believe in juries more than in judges. An attorney can deliver a powerful, exciting argument that is sprinkled with metaphor, with example, with humor—particularly if he convinces that jury that he has a lot of important observations to make about this case, and they can fulfill their oath to reach a proper verdict only if they listen to him closely. In other words, if the attorney convinces them that they need him, he can keep their attention. An illustration of humor tied into the facts of the murder case on which *Till Death Us Do Part*¹³ was based occurred when one of the defense witnesses had changed his testimony several times on the witness stand. I told the jury that this defense witness' flip-flops reminded me of a story about an old civil case where the plaintiff sued his neighbor because while he was walking on the sidewalk outside his home, the neighbor's dog ran out, bit him and caused injury. The neighbor filed an answer to his complaint setting forth three contentions: (1) My dog is chained to my house; the chain does not extend to the sidewalk, so no way in the world can my dog have bitten the plaintiff. (2) My dog is a very old dog and he has no teeth; so even if he had bitten the plaintiff, he could not have possibly caused any harm. (3) I do not even own a dog. That type of humor helps the jury. They feel that they are not supposed to laugh, but they chuckle a little bit when an attorney tells them things like this. Humor helps to keep their attention. The use of example coupled with metaphor is always advantageous. In the same murder case on which *Till Death Us Do Part* was based, the defense attorneys made the old argument that circumstantial evidence was like a chain: if one link breaks, the chain is broken. They argued several missing or broken links in the People's case. Using metaphor I responded that counsels' problem was that they misconceived circumstantial evidence.

Circumstantial evidence is not . . . like a chain. [A chain could

13. V. BUGLIOSI, *supra* note 2, at 361.

span] the Atlantic Ocean from Nova Scotia to Bordeaux, France, consisting of millions of links, and with one weak link that chain is broken. Circumstantial evidence, to the contrary, is like a rope. And each fact is a strand of that rope, and as the prosecution piles one fact upon another we add strands and . . . strength to that rope. If one strand breaks—and I am not conceding for a moment that any strand has broken in this case—. . . the rope is not broken. The strength of the rope is barely diminished . . . [b]ecause there are so many other strands of almost steel-like strength that the rope is still more than strong enough to bind . . . defendants to justice.¹⁴

VIII. JURY INSTRUCTIONS

Legal scholars openly have confessed that the term “beyond a reasonable doubt” does not lend itself to a good definition and that the attempt to define it only confuses further. Look at all the books on the law, and look for the section on reasonable doubt. Nothing is there to be learned because the phrase does not seem to lend itself to a definition; however, one all-important principle, although damaging to the prosecution, is implicit in that term “beyond a reasonable doubt”: a jury does not have to believe in a defendant’s innocence in order to return a verdict of “not guilty.” In fact, even belief in guilt, if only a moderately held belief, is not sufficient to render a verdict of “guilty.” To convict, belief in guilt has to be beyond a reasonable doubt; moderate belief is not enough.

In every federal court, the judge properly instructs the jury that to convict the defendant they must be convinced of his guilt beyond a reasonable doubt. But in the very same instruction—as if he merely were telling the jury the same thing in a different way, which he is not—the judge says, “you are here to determine the guilt or innocence of the accused.”¹⁵ This added instruction not only is inconsistent with the first, it is one-hundred percent wrong. Yet even the United States Supreme Court in case after case¹⁶ continues to define the jury function in a criminal trial loosely. County, municipal and state courts throughout the country make the same mistake; many defense attorneys also use the two terms,

14. *Id.* at 340-41.

15. 1 E. DEVITT, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 11.06 (3d ed. 1977).

16. *Jackson v. Denno*, 378 U.S. 368, 394 (1964) (“entitled to a complete new trial including a re-trial on the issue of guilt or innocence”).

proving guilt beyond a reasonable doubt and determining guilt or innocence, interchangeably.

While a defendant's guilt or innocence obviously is the most important moral at every trial and could not possibly be more legally relevant because if the jury believes that a defendant is innocent the verdict has got to be "not guilty," the ultimate legal issue for the jury to determine is not the defendant's guilt or innocence; the legal issue is whether or not the prosecution has proven guilt beyond a reasonable doubt. These two issues are not the same. Stated another way, to say one is guilty is to say that he committed a crime. To say that he is innocent is to say that he did not commit the crime. In American criminal jurisprudence, the legal term "not guilty" is not totally synonymous with innocence. "Not guilty" is a legal finding by the jury that the prosecution has not met its legal burden of proof. A "not guilty" verdict based on the insufficiency of the evidence can result from one of two states of mind on the part of the jury: (1) they believe that the defendant is innocent and did not commit the crime or (2) although they do not believe that he is innocent and tend to believe that he is guilty and he did commit the crime, the prosecution's case was not sufficiently strong to convince them of his guilt beyond a reasonable doubt.

As long as courts use the terms "not guilty" and "innocent" interchangeably, thousands of defendants throughout the nation will continue to be tried before juries who are misinformed and misinstructed on the most fundamental issue in a criminal trial. Although this instruction is never given, a defense attorney could argue very persuasively to the court that the court should instruct the jury that the terms "not guilty" and "innocent" are not synonymous and that they do not have to believe in a defendant's innocence in order to return a verdict of "not guilty." The way in which the defense attorney should argue this critical distinction between "not guilty" and "innocent" without thereby conceding or implying to the jury that he has conceded that his client is not innocent usually is the single most important issue with which a defense attorney has to deal in his final summation. It is a discussion all by itself.

IX. CLOSING

In closing, I again stress that true preparation, as expounded in my definition above, is the obligation of each attorney. Prepare every case. Reduce thoughts, articulations and the trial plan to

writing. Struggle with the yellow pad and the pencil until every aspect of the case is mastered. Every attorney owes the duty of complete preparation to himself, his clients and his noble profession.