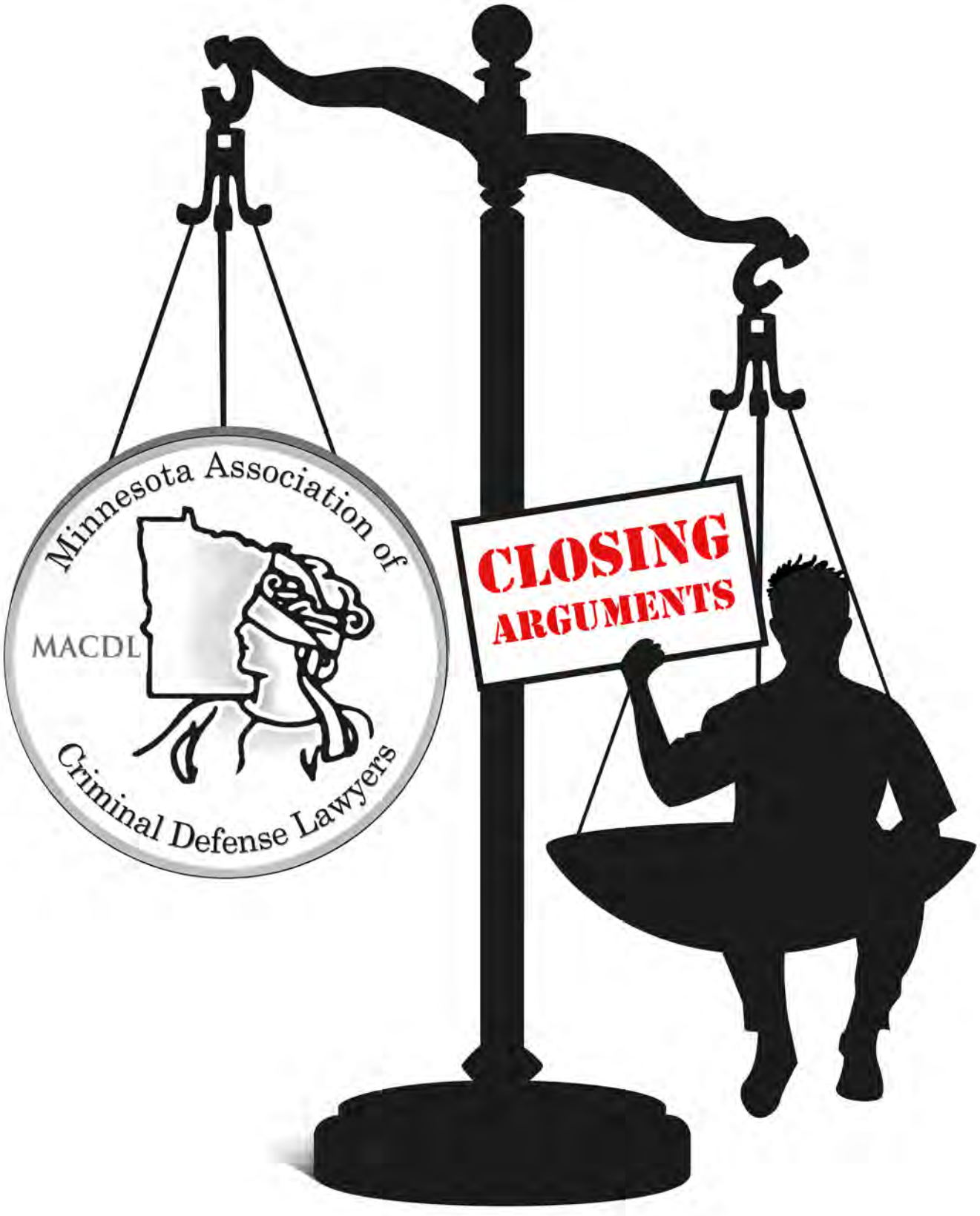
The Minnesota Association of Criminal Defense Lawyers

Challenger

SPRING 2014



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Challenger is published two to three times a year by MACDL, a Minnesota nonprofit corporation. Its mission is to advance the advocacy skills of MACDL members, to inspire and motivate aggressive, ethical,and effective defense for all accused, and to connect the criminal defense community in Minnesota.

Articles express the opinion of the contributors and not necessarily that of Challenger or the MACDL. Headlines and other material outside the body of,articles are the responsibility of the Editor. Challenger accepts letters and unsolicited manuscripts about the practice of criminal defense or the trial of criminal cases. Contact:

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Features

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Departments

President's Column

Mike Brandt

As the new President of MACDL, I pondered what to share with our members for this edition of The Challenger. I contemplated what tidbits of knowledge I might be able to pass on that might make a difference in our organization, (or the criminal defense bar in Minnesota for the matter). Then it hit me—it's not about *me* and what *I* might add, it's about what our collective group can do; what we can do if we take our collective knowledge, wisdom and experience to make all of us better lawyers, better advocates, better guardians of the rights of everyone.

This made me reflect on the comments I made at the MACDL Annual Dinner a few weeks ago and it came to me. Now, as much as I hate overusing trite phrases or quotes, one seems to work here. It was 1960 and John F. Kennedy was giving his inaugural address. While talking about the role that each American has in furthering the ideals of our country, Kennedy uttered that memorable phrase—"My fellow Americans, ask not what your country can do for you, ask what you can do for your country." That's the theme that hit me: Alas we've focused on increasing visibility, membership, and the impact of MACDL, our concentration has surrounded what we can do for our members, but very little talk about what our members can (and should) do for MACDL. That's what I'd like to explore here.

At the annual dinner I noted that as experienced lawyers, that we had an opportunity—no a duty—to mentor new lawyers which, in the long run would make us all better lawyers and better guardians of the rights of our clients. But the duties of MACDL members doesn't end with seasoned lawyers. Our younger lawyers have the same opportunity and duty to get involved, ask for help, and to put of their youth, new ideas, and energy to work.

So, to the members out there that have experience and insights to share, I propose we establish a mentorship of sorts. Nothing quite as structured as with the Federal Defenders, but something that is more ad hoc and available as a resource for newer attorneys (heck for *all* attorneys) that are part of MACDL. My thought is that we establish a list of attorneys (a database if you will) that would be willing to be available to mentor attorneys or answer questions about a particular area of expertise they might be familiar with. This could be as simple as taking a phone call, but it could also include grabbing coffee, going to lunch, or meeting to get some insights or direction into whatever issue they might be facing. We could make

a list for certain counties, certain types of cases, or for state or federal cases. I would envision a list of some sort that would be on the member's only section of the website. I think this would be a great resource for attorneys and would be yet another selling feature of MACDL membership.

From time to time I've called upon other lawyers to give me some insights into an issue, a judge, a prosecutor, or a particular type of case. I've found that the criminal defense bar is very open to assisting each other and, quite frankly, it's very flattering to be sought out. Yes we all (hopefully) have busy practices and time can be at a premium. But we need to remember that we all have an obligation to help each other and contribute.

Now, the obligation to contribute isn't limited to those of us with gray (or little) hair. The newer attorneys also have an obligation to contribute. How? There are any number of ways. First, I would encourage newer members of MACDL to get involved. There are a number of things they can do:

- Join a committee and get involved in the committee's activities
- Annual dinner
- Continuing Legal Education (CLE)
- The Challenger
- Legislative
- Membership
- Communications/Website
- Get involved with the softball team as a player or spectator
- Attend the happy hour events

All of these activities do several things. First, they give everyone an opportunity to get engaged and get to know other members. Second, it gives folks an opportunity to give back to MACDL and to help share the workload of MACDL. And third, it makes us stronger as an organization.

So–get involved, reach out to a younger member, volunteer for a committee, volunteer to be mentor. Let's continue to improve MACDL and continue to make our organization influential in the Minnesota Criminal Justice System.

Issue Editor's Column

Ryan Garry

This magazine is not an NACDL professionally published work of art. It is not meant to be flashy. It is simply raw, rugged, and the volunteer effort of Minnesota criminal defense lawyers who know very little of publishing a magazine. This issue simply represents what we all strive do at during a trial … wrap up our case with a closing argument that will return a "not guilty." The lawyers who wrote the passages in the following pages graciously gave their time to share their emotions, logic and strategies when closing a criminal case. My hat is off to you all.

This issue is the combined work of the *Challenger's* wonderful committee, including Piper Kenney, Nicole Nichols, Dan Guerrero, and Gretchen Gurstelle. They volunteered their time to hunt down and harass the top-notch lawyers listed in the pages that follow to write and most importantly … *finish* the enclosed articles. No easy task.

Ryan

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Reasonable Doubt: The Scales of Justice

The Honorable Jack Nordby

The most potent tool and the greatest advantage the defense has in a criminal trial is final argument. But it is very often poorly understood, undervalued, neglected, and therefore emasculated.

Three factors operate to give the criminal defendant an enormous edge: 1) the burden of proof is exclusively on the prosecution; 2) this burden is very heavy–proof beyond a reasonable doubt; 3) the defendant is presumed innocent.

These are familiar concepts, *but they are not understood by lay-people,* that is: jurors. The only way and time to explain them is final argument. Jurors have *heard of* the presumption of innocence and reasonable doubt, but have no practical, working conception of them. The task of final argument is to explain and above all to *illustrate* why and how these abstract principles not only allow but *require* jurors to acquit a defendant against whom there is probably a good deal of evidence and whom they quite rationally (and usually correctly) suspect is in fact guilty.

The jurors therefore must be told (and convinced) that the question is *not* whether the presumably innocent defendant is guilty, but merely whether there is a reasonable doubt of that. But what *is* a reasonable doubt? What is the presumption of innocence? And how are they related?

The most effective illustration, because it is easily understood and applied, is the highly pertinent image of the scales of justice. The figure of justice (the jury should be told) holds scales, with two balances. In a *civil* case at the beginning of trial these balances are equal. (Here counsel holds his or her hands out to illustrate, palms up, at equal heights). The plaintiff produces evidence into one balance (one hand, which therefore gradually lowers). Then the defense produces its evidence, and the scales (and hands) adjust, until one side finally outweighs the other, be it ever so slightly, and thereby prevails. That is a civil case.

But in a criminal case things are very different (because the Constitution makes them so). The balances are not even to begin with – because the presumption of innocence is already in the defendant's side of the scale which therefore (illustrated by that hand) tips dramatically down, while the other (prosecution) balance is proportionately elevated. (This advantage is given because an accused cannot prove a negative, that he did not do it).

Then, with the scales (the lawyer's hands) so tipped very conspicuously in the defendant's favor, the prosecution begins to put its evidence into its balance, and the scales (hands) slowly adjust. But the prosecution's burden is a heavy one. It must not only counterbalance the presumption of innocence, or bring the two sides (hands) into equilibrium, or overbalance the scales slightly or even substantially, with suspicion. It must outweigh the presumption dramatically – beyond any reasonable doubt (where the lawyer's hands are now again greatly separated, the reverse of where they began). Failing this, the defendant *must* be acquitted. This is the jurors' *duty* (not privilege or power or

option but *legal* duty) despite what may be considerable evidence on the prosecution's side of the scale.

This is counterintuitive. It is not an even playing field. It is not a process that applies in any other human activity. But it is the law – the Constitutional law.

With an illustration such as this, jurors can be brought to understand both *what* they are required to do, and *why* and *how* they must do it. (Although it is not advisable as part of the argument, because it may concede too much, the underlying rationale includes our collective belief that it is better that ten or fifty or a hundred guilty persons should go free than that one innocent person should be convicted.)

The presentation, of course, must be adjusted or adapted, or even occasionally eliminated, in cases where the defense presents evidence, particularly when an affirmative defense is involved. But there are few if any trials where the defense cannot and should not benefit from an emphatic and persuasive explication of reasonable doubt and presumption of innocence. I was surprised and disappointed during my years as a trial judge to see how rarely defense lawyers made the points I have just discussed, effectively or at all.

Reasonable Doubt

Daniel Gerdts

During a weeklong child pornography trial with Judge Doty, a young Japanese woman sat quietly in the back of the courtroom for the entire proceeding. My client was Japanese also, and the woman was his wife. No mention had been made of the woman at any point during the trial – but it was not necessary.

In my closing, I borrowed from Doug Thompson, with a twist. As I finished my discussion of proof beyond a reasonable doubt, I raised my voice and pointed to the back of the courtroom: "it means that twenty years from now, you can look that woman in the eyes and feel comfortable telling her that you are still certain he is guilty."

The jury acquitted.

Closing Argument: A Few Thoughts

Caroline Durham

For most criminal defense lawyers, the closing argument is their favorite part of a trial. The sense of being free from the constrictions of a particular witness' recollections or the limitations of the opening statement, the closing argument allows a lawyer to shine. More than a mere recitation of the facts that support a verdict of not guilty, a closing argument is the moment for impassioned persuasion.

A soliloquy that is a dialogue: Throughout the trial, a lawyer's attention is focused on the witness stand. During closing argument, your attention is directed at the jury. You speak to the jurors and engage them with your words, body language and eye contact. Effective closing arguments are more than a recitation of the facts that support your position. They are an integration of those facts with analogies, parables and logical persuasions derived from the evidence presented at trial.

It is a time to engage in the dramatic, persuasive storytelling that pulls together the pieces you have laid out throughout the trial.

Preparation for a closing argument begins not at the end of the case, but rather throughout preparation of the case. As reports are read and witness statements deconstructed, facts and ideas will surface; facts that support a finding of not guilty, ideas for persuading the jury that a verdict in favor of your client is just. Jotted down on post-its, the ideas for closing argument are culled as the case comes in. A witness statement changes on the stand and you get to highlight the change, or explain why it should be ignored.

Typically, I have a folder entitled "Closing Argument." Post-its with ideas and references to particular pieces of evidence are stored there. What pieces of evidence support the theory of the case? Which witnesses' story sheds light on the client's innocence? The testimony at trial adds to, and helps extract, the ideas that arise in trial preparation. Certainly, the final preparation of closing argument comes the evening or two before the closing is presented. And, yet, it is a process that is the culmination of the work throughout the case.

Years ago, a friend responded to a guilty verdict by saying, "A good closing argument would have won this case." Certainly his thought was tongue in cheek, and yet, the sting of those words is an often unspoken sentiment of a lawyer whose client was convicted. A meaningful, thoughtful, intentional closing argument may not be enough to win a case. Yet, with one, you will at least know you gave your client a strong, complete defense.

No Reason for Doubt

Andrew Birrell

"The judge will tell you that your verdict must be unanimous. That you all must agree on the verdict, whatever it is. But the law does not require you to agree on the reason for doubt. One person may have a doubt for one reason. Another person may doubt for a different reason. But before anyone can be found guilty of any crime, each and every juror must agree there is no reason for doubt."

Sometimes Less is More

Carolyn Agin Schmidt

Twenty years ago and six months after hanging out my own shingle, I found myself embarking on my first criminal jury trial. I had tried family law cases, but I had yet to try a jury trial by myself. Most criminal defense attorneys start out with a DWI, domestic, or some other type of misdemeanor for his/her first trial. Well, not me. I was about to start a federal multi-defendant drug conspiracy trial that would last six weeks. Talk about being thrown into the deep-end!

Ok, first for a little background about the case. My former mentor, Jack Wylde, who unfortunately is now deceased, referred me one of the co-defendants. Jack was an extraordinary lawyer, a true gentleman, and a good friend. Little did I know when I took this case what I was getting myself into.

The defendants were believed to be of some gang affiliation and all had street names. One street name that stood out the most was "Monster," represented by David Desmidt, and he was a scary guy. And the best was "Chatter," represented by Jack Wylde. Chatter definitely lived up to his name. At the preliminary hearing he talked so much that after being warned repeatedly to shut up, Magistrate Cudd had the Marshals tape his mouth shut! He also talked so much on the phone that the majority of the six-week trial was listening to Chatter talk on the wiretaps, and with each call put another nail in the coffin for the defense.

In addition to the above-named well-known lawyers, there were several other accomplished criminal defense lawyers: Andy Birrell, Marsh Halberg, Kevin Short, Demetrius Clemmons, Chuck Hawkins, and Earl Gray (his client plead guilty at the 11th hour). Jeff Paulson was prosecuting the case and Judge Magnuson was presiding. To say I felt intimidated is an understatement! Or as Doug Thompson once said: a mouse walking among elephants.

If you are a young lawyer reading this, please know that it is normal to be scared. I was not only scared but I was terrified! My client was looking at a minimum of 10 years in prison and had turned down an offer to do less than five years. I also had a one-year-old child at home, two stepchildren, a spouse who traveled for work, and no support staff. Oh, and by the way, most lawyers didn't have Westlaw at the time, so any legal research had to be done in the library over lunch.

There were two witnesses against my client other than the cops: one a jail house snitch and the other a former girlfriend who could not be found, so her grand jury testimony was read to the jury, over my objection. (This was pre-Crawford). My client also happened to be present at the scene when the big bust went down. He was never caught talking on the wiretaps, and maybe referred to by his so-called street name a couple times. So in six weeks I kept a pretty low profile, only objecting or cross examining when absolutely necessary. This tactic was more born out of terror than any legal strategy.

Anyway getting to the part about closing arguments. After six weeks of trial we came to closing arguments. I had spent hours preparing my closing argument, complete with all kinds of great quotes, anecdotes, explanations of reasonable doubt. I was ready to go. However, I had to wait for eight other lawyers to do their closing arguments first.

I sat at counsel table listening to the closings while the tension mounted. As each lawyer gave his closing, they were using all my stuff that I had planned in my closing.

I was furiously crossing out sections of my closing and was in a state of panic. At one point I leaned over to Jack Wylde and said, "Jack, everyone is using all my shit." Jack, being the brilliant mind he was, took out his Mont Blanc fountain pen, and began to write something in his elegant cursive. I forget exactly what it was; I think a quote from Andrew Jackson. Not two minutes later, Chuck Hawkins, used the very same quote that Jack had just written down.

After an entire day of closing argument, the jurors were slumped in their chairs and finally it was my turn. It's now after 5:30 and the Judge wants to finish the closings.

I was exhausted, hungry, scared, and I had tickets to see Les Miserables at the Ordway at 7. Oh, and remember my closing had been gutted throughout the day.

I walked up to the podium, feeling like it kept getting father away as I walked, like in the movie The Shining. I set my legal pad on the podium and then clutched the podium for dear life. Whether it was the long day, lack of food, lack of sleep, or sheer terror, I began to feel faint. I actually saw the black circle like in the end of a Looney Tunes cartoon start to circle in.

I stood holding the podium saying nothing for what seemed like ten minutes, although it was probably only about three seconds. I had to do something to calm myself and do my closing. Then I got an idea and here's what I said,

"Ladies and gentleman of the jury, you have been sitting through closing arguments all day long. You have heard more explanations of the presumption of innocence and proof beyond a reasonable doubt than I heard in three years of law school. You have heard every quote and anecdote that has ever been used in a closing argument. But I am not going to do that."

At this point the jurors are getting curious and starting to sit up in their chairs. As you the reader now know, I didn't have any of those things left in my closing, but they didn't know that. Then I said,

"I will make you guys a deal, if you will give me your undivided attention I will talk no longer than 20 minutes. I won't give you any quotes, anecdotes, or fancy legal jargon."

Now I had their full attention. I started out saying something along the lines of:

"You haven't heard much from me for the past six weeks. I've kind of been sitting over there like a mouse in the corner not saying much. That is because for the past six weeks all of the evidence you have heard has nothing to do my Mr. Smith (not his real name)." I went on to talk about just the facts or lack thereof as they applied to my client.

Playing on the jury instruction of reasonable doubt, I used the analogy of another big life decision: buying a house. I asked the jury if the two people who were recommending they buy a house are a snitch who is a convicted felon and hoping to get a shorter sentence and a disgruntled girlfriend who didn't even bother to come into court and testify, are you going to buy that house?

In the end this closing was not fancy, but simple and to the point and it got the jury's attention. The lessons that I learned from this were, as the title says, sometimes less is more; and be flexible because there are times when you have to drastically alter your closing argument.

Epilogue: I made it to the Ordway just in time for curtain call, I cried in the opening scene when Jean Val Jean is working in a rock quarry after stealing a loaf of bread, and after three days of deliberation my client was the only one acquitted!

Circumstantial Evidence

Charles Hawkins

"The case you have been selected to sit upon is one of the most graphic and dramatic examples of why an accused is presumed innocent in an American Criminal Courtroom. Graphic because the Government is asking you to convict the defendant based upon the untrustworthiness of adverse inferences drawn from the circumstantial evidence in this case. Go with me, if you will, to the days of the sailing ships, when tall ships were sailing from Nantucket to the West Indies to fill their holds with spices and other items. As tradition has it, the first mate stood both the first and the last watch. When the first mate arrived at the ship, and just before the ship was ready to depart, he was intoxicated. The first mate was in no condition to stand watch. So the Captain was forced to stand the first mate's watch. The Captain was irritated, and at the conclusion of his watch made his entries into the ship's log. The last entry he made was,'first mate drunk tonight.'

"They made their long voyage to the islands and their equally long voyage back during which time the first mate's behavior was exemplary. Before the first mate was to commence his final watch as they arrived home, he was invited to dine with the Captain. At dinner the Captain said, 'Your behavior on this trip has been exemplary, it has been a pleasure to sail with you. If there is anything I can do for you please do not hesitate to ask.' The first mate responded, 'as you say, my conduct has been exemplary and above reproach since the night we sailed, the log entry you made on the first day disturbs me very much and I would ask you to erase it. My license, my job, and the welfare of my family all depend upon it.' The Captain said, 'I wish I could but I can't. It is a fact, it's true, it will remain.'

"So the first mate stood his last watch and at the conclusion of his watch he made his entries into the ship's log. The first mate's last entry read, 'Captain sober tonight.' Beware of the untrustworthiness of the adverse inferences the government is asking you to draw in this case. (Then go through the circumstantial evidence and analyze it in the context of the multiple interpretations that can be drawn)."

Spoiled Meat

Bruce Rivers

Doug Thompson once said in an opening statement during the Midwest Federal trial, "My client is merely a butterfly, between two fornicating elephants." The imagery created surely was not lost on the jury, but how do you tie something like that up in your closing argument?

Closing arguments are the most important and last opportunity to showcase the defense theory of the facts. As I was about to give a closing argument in a crim sex case in Chisago County, I called my mentor, Joe Friedberg, for inspiration. After telling me, "Bruce, this losing streak of yours is beginning to bother me. Could you please quit telling people you know me," he gave me a gem. I'll shorten it up here but it goes like this.

Let's say you were going to make stew for your family for dinner. You get home from the grocery store and take out the meat. You notice as you unpack it that some of the meat is spoiled. It smells and is rotten. Now, would you pick out the spoiled meat and serve the other meat to your family risking their health? Of course not. Just as you would throw out all of the meat to protect your family, you should throw out all of her testimony to protect my client. If she is lying about even one thing, you must throw out everything. Her testimony is spoiled meat.

The Presumption of Innocence

Charles Hawkins

"Now, let's look at the law. It is not my intention to discuss all of the law that the Judge is going to instruct you on in the interest of time and so forth, but I will discuss these aspects of the law, the presumption of innocence, proof beyond a reasonable doubt, circumstantial evidence, credibility of witnesses, and gross negligence. I do not plan to dwell on it. I merely want to present to you what I think are the important aspects of these laws, what I hope will help or assist you in carrying forth your duties and responsibilities of enforcing that law.

"Now, first of all, let's take the presumption of innocence, and it's not an easy concept, and I know that each and every one of you when you were questioned as jurors here in good faith and good conscience said you would give to my client the presumption of innocence. But that is tough, that is really tough, and the reason is because of the suspicion that I have just talked about when somebody reads a Complaint that somebody is charged with [death by criminal negligence] and you come into the courtroom, and although you in good conscience want to give him the presumption of innocence in actuality, if we're honest with ourselves, there is an aura and suspicion of guilt (I recognize it and I think you recognize it) and it is a very difficult concept to set any feelings of guilt or any suspicions of guilt aside and afford the defendant the presumption of innocence. Now, the only thing I can say in that regard that might help you in carrying forth your duty and responsibility is this: Ask yourselves, look, why don't we presume people who are charged with a crime to be guilty of a crime and then make them prove their innocence? Well, if you think about that a moment and apply good logic and common sense you'll recognize that that is an impossible burden because you see, ladies and gentlemen, you cannot prove a negative. You cannot prove that you did not do something. It's not susceptible to proof. For instance, if during the course of this trial if I had the temerity to walk up to any one of you in the corridor and point an accusing finger that when you came down to the Courthouse today you were speeding. Now, if you drove to the Courthouse today how are you going to prove that you weren't speeding? There is no way you can prove that you were not speeding. The only thing you can do is deny it, deny it the same as my client has denied this charge when he entered his plea of not guilty. We have denied this charge throughout this entire trial, and as I stand here right now, we deny it. The reason why we have the presumption of innocence is because it's impossible to prove you did not do something. It's impossible to establish a negative, so that is why under our American system of justice, a person is presumed to be innocent. The burden is therefore placed upon those who have done the accusing to prove beyond a reasonable doubt each and every essential element of what they allege."

Reasonable Doubt – Our Weakest Argument

Deborah Ellis

Reasonable doubt is the weakest argument we have in closing argument. That is not to say it is not worth mentioning. A discussion of reasonable doubt and how it is the highest standard of proof recognized in our judicial system should be saved for the end of a closing, in my opinion. Of course we all have, or will have, cases where all we can argue is that the government didn't prove its case beyond a reasonable doubt. That should be the rare exception and not the foundation of a good closing argument. If reasonable doubt is all you have to argue: you have nothing. (As my mentor Douglas Walser Thomson would say, "If the law isn't on your side, pound on the facts; if the facts aren't on your side, pound on the law; if neither are on your side, pound on the table.") Especially telling of a case where the defense has nothing is if reasonable doubt is the subject of an opening statement! Reasonable doubt should not be a topic of discussion in the opening statement.

An effective closing argument (as well as an effective opening statement) has to be based upon the defense version of the events that occurred, why the prosecution's case is misdirected, overcharged, or why the prosecution's witnesses have no credibility. Both the opening statement and closing argument have to be about facts in the case. The jury will hear about proof beyond a reasonable doubt from the judge a few times. They will have been indoctrinated about it and they also know that convictions are not impossible under that standard. The jury is going to decide the case on which party's version of the case they like better, are more credible, more logical, more fair. The jury needs to hear in the closing why it should decide the case in favor of the defense. Putting all your eggs in the "they didn't prove it" basket is not going to cut it.

After going through all the reasons why the defense's version of the facts is more logical, believable, reasonable, then talk about reasonable doubt. This is the fall back position. Reminding the jury of how high that burden of proof is might help with a couple jurors who favor the prosecution but can live with an acquittal because the case wasn't proven by the requisite standard of proof. But without more substance to a closing argument, don't expect to convince the entire jury panel to acquit by relying on our old friend reasonable doubt.

Bias

Catherine Turner

I had an arson trial in Scott County.

On the whiteboard, every time I pointed out a flaw in the arson investigation, I drew a dot. At the end of my argument, I connected the dots to spell the word "bias." Took some practice beforehand to know where to arrange the dots so they'd spell the word. In trial it had a dramatic effect.

The Sphinx

Charles Hawkins
Attributed to Doug Thompson

"At the time I heard the prosecutor's preliminary remarks regarding what he was going to prove here, I couldn't help but be reminded of Edgar Allen Poe's short story, 'The Sphinx,' which I read in high school, and somehow this entire proceeding reminded me of that story.

Perhaps some of you recall the story of this man who lived in New York when the plague broke out, the cholera. People were dying by the droves. So this man took himself up to New England to visit a friend, and every day he would get word of the death of a dear friend or relative. His mind was conditioned so much with all these bad things happening with the plague in New York City, he could think of little else. One day while he is sitting in the library of his friend's house in New England ruminating on the horrible effects of the plague, he looked out the window and on the hillside in the distance he saw this gigantic monster with a wing span of a hundred yards, a death's head on its breast, and ugly scales, coming down the hill and disappearing into the trees. And his friend came in, and the man said to his friend, 'You should have seen this monster. It just came down the mountain and went into the woods.' His friend looked to the window and sees the monster coming down the hill; but then he walks over to the window sash, and what he sees is not a monster at all but the reflection of a little bug about a centimeter long. The lighting has cast a big shadow, creating the appearance of something it was not. It is a moth, and it's called the sphinx. And somehow this reminded me of the case here today."

"In the emotion of this type of allegation, it's very easy to see a monster. But if you sit back and calmly and coolly evaluate what you have heard here throughout this trial, there is nothing more than a little bug on a window sash, and that's about it."

Self Defense

Dan Guerrero

"The problem with violence is that the results of it look exactly the same whether it was justified or not. The wounds of a store clerk shot and killed in a robbery look just like the wounds in the body of the person who committed a violent armed robbery and was shot to death by the police. My point is: an act is not criminal just because it results in violence or injury. It's a tragedy of course that anyone has to be hurt, but the law excuses one when there is reasonable doubt that he or she may have harmed in self-defense."

Closing a Criminal Sexual Conduct Case

Paula Brummel

Opening Line of March 3, 2014 Closing (where Paula obtained Not Guilty Verdicts on all charges):

"With one hand around his cash, and the other hand around his penis, she had him right where she wanted him. Frederick Morris was about to be robbed." (17-year-old tough young woman accusing 40-year-old homeless street hustler of raping her downtown at 5:00 am.)

Later in the closing, Paula took the defendant's words in his scales tape and used it this way:

Defendant: "Officer, I was going to call the police but I got scared when I heard she was only 17. I was in a no-win situation."

Paula about the crim sex kidnapping Spreigl:

"The judge told you that race has no place in a fair trial, but ladies and gentlemen it is entirely appropriate for you to consider that when a black man is accused of assaulting a white woman in Duluth, he is in a no-win situation. Mr. M. pled guilty to that kidnapping charge because he knew he was in a no-win situation. But this time, he's not backing down. He is innocent of these charges and he's going to fight all the way."

Making the Most of Your Closing Argument

Joe Tamburino

A truly effective and powerful closing argument can be described in three terms: straightforward, intuitive, and good theater. Jurors should understand what you're saying, how your argument makes sense with the evidence, and how it agrees with what you stated in the opening statement. You should anticipate what the jurors' questions might be and the best way to answer them. Most importantly, your performance must be good theater – if you're not interested and emotional about your case, why should the jury be?

Many litigators make the unwitting mistake of apologizing during their closing arguments. They profusely thank the jurors for their service and say they're sorry if they can't answer every one of their questions. Do not do that. Be respectful and pleasant, but don't minimize your own words with apologies. Be steadfast in your theory of the case and believe what you're saying.

Let go of all the trite and hackneyed adages you've been told about trials. Here are some "oldies but goodies" that you need to disavow.

If the law is on your side argue to the judge, and if the facts are on your side argue to the jury. This is totally unrealistic advice for defense attorneys because usually *nothing* is on our side. If the law was really on our side, we'd have won the evidentiary hearing – we didn't. If the facts were on our side, the prosecutor wouldn't have charged the case – she did. Therefore, all you have left is trying to convince a jury that your argument is correct.

The trial judge is tough but fair. This is code for "we all know your client is guilty and you will lose most of your evidentiary motions." Always know that you are on your own, and do not ever count on the court saving you from your own mistakes or poor tactical choices at trial.

The purpose of a trial is to get to the truth. No, it's not. The Constitution has rightfully provided us with an adversarial criminal trial system, wherein a jury's purpose is to determine whether the state has proved its case. Whether the "truth" is ascertained is irrelevant; the issue is whether the state proved the charge(s) beyond a reasonable doubt.

Closing arguments alone win trials. This is hardly ever true, because if you're hoping to raise "reasonable doubt" with the jury, you had better have done that before closing arguments at the end of the trial.

A great closing should seamlessly dovetail with jury selection and the opening statement, because they are the first salvos launched against the state's case and the first seeds of reasonable doubt planted in a juror's mind. Even the best closing argument will be ineffective if jury selection was boring and useless and/or if the opening statement fell flat.

Your argument must be straightforward. Look to three areas to succeed at this. First, the closing argument should incorporate aspects

of jury selection. Selecting a jury isn't about trying to uncover a person's secrets, having someone struck for no real reason, or having people half-heartedly commit to legal ideas. Rather, it's about making people doubt what they are about to see. To do that you should focus on jurors' individual experiences with doubting facts or scenarios in their own lives.

Great examples are when you have potential jurors who manage people, are schoolteachers, or have a job requiring them to arbitrate grievances. These are people who have only disciplined others when they have determined what actually happened. They almost always will provide you with a good story about how they thought someone did something wrong, but later they discovered that the person was innocent. Or, they've experienced situations where there were different sides to a story and they simply couldn't figure out which side was correct. These jurors usually conclude their story by telling you that they didn't take any action against anyone because they couldn't be sure who was right. These stories provide you with wonderful real-life examples of reasonable doubt in action.

Artfully weave the premise of these stories into your argument. You can't single out a juror and foolishly display his or her story for the entire courtroom. But you can argue the point of the story and how it applies in your case.

For example, there is the common story of a manager who was tasked with resolving a dispute between employees but couldn't determine for herself which employee was truthful, so the manager didn't discipline anyone. This is great to use because you can argue something along the lines of, " . . . in this case we have no physical evidence, only differing stories of what happened. And, as we know from our own personal experiences, like when we try to resolve disputes with employees, what people say might not always be accurate, and we cannot act and make judgments in situations where we simply don't know what happened . . . " Use these stories to subtly remind the jury that if they doubt the veracity or correctness of the state's case, they must acquit.

Second, the closing should also agree with the opening statement. In practice this means that the predictions you gave the jury during the opening statement were accurate, i.e., the state failed to prove the exact items you said they would fail to prove. Remind the jurors of what you said in the opening and how you explained that the supposed evidence would not conclusively show guilt. Point out specific pieces of evidence that help you.

Additionally, if the evidence is so overwhelming toward guilt, find some other anchor in your case. It doesn't have to be much, just something. For example, perhaps there's some piece of physical evidence that doesn't conclusively support a finding of guilt. Or maybe there's evidence that proves only a lesser intent for a less serious crime. Or perhaps the foundation of the state's case rests solely on speculation from minor pieces of evidence. In essence, your anchor should be the vessel through which the jury sees the case from your point of view.

Lastly, explain reasonable doubt in a no-nonsense/common sense way. Make it easy for jurors to understand the reasonable doubt jury instruction (JIG), because the JIG is confusing.

Many trial attorneys believe that they're more effective by impressing a jury with complicated words and tales of history or thanking our founding fathers for giving

us the Constitution. Some attorneys waste precious minutes explaining the different levels of burdens of proof in our system. Others fritter away at trying to analogize their case with some hypothetical story explaining different types of evidence. This is all a waste of time and a shrewd prosecutor will point that out in her rebuttal.

Most people have no working knowledge of the term "reasonable doubt," so don't expect them to understand in just a few minutes how "reasonable doubt" is a greater burden of proof than the standards concerning "preponderance of the evidence" or "clear and convincing."

Forget the allegorical stories, the historical tales, and the wonders of James Madison. Tell the story of your case and how the state has failed to prove guilt. Methodically and actually argue how the weak foundations of the state's case crumble under the weight of doubt. Make it easy for the jury to comprehend.

Here's how to explain reasonable doubt to the jury: "– *you were all selected to serve as jurors because you are all reasonable and fair people. If you have a doubt about the evidence that is based upon reason, then you have a reasonable doubt and cannot convict.*"

Your argument must also be insightful. You should be thinking throughout the trial about what questions the jury may have concerning the evidence in the case. Make an educated guess on what your questions might be if you were a juror.

It's helpful to have someone watch your trial. Not necessarily a second chair; just someone who could give an opinion as to what questions they would have after viewing the trial.

Let the jury know that you're answering common sense questions that anyone would have if they observed the whole trial. Stress the questions that remain unanswered by the state, and fold them neatly into your arguments on reasonable doubt. Do not apologize for any questions you think are left unanswered by you, because you don't have a burden of proof in any trial.

Remind the jurors that the defense need not put in any defense at all to any charge – all burdens of proof are on the state and you don't have to answer any questions. But also remind them that you did put in a case and tried to answer their questions.

The defense presents its case in two ways: cross-examination of the state's witnesses and/or calling its own witness. When you cross-examine a state's witness, you're presenting a defense. You're not required to question anyone, but when you do, the answers to the questions are part of your case. You may also call your own witnesses, including the defendant. Obviously, anything that your witnesses say is part of your case.

Use your intuition and personal tools to determine which links in the chain of proof seem weak, and which adverse witnesses seem shaky or unclear. Argue how those weaknesses place the prosecutor's entire case in question.

Remember that everything you do in closing argument is centered toward creating uncertainty in the state's case.

Lastly, your closing argument must be good theater.

Please don't be boring. Find something interesting to say, even if it doesn't seem like much. Don't read from a script like a small child at play practice. Don't stare at your feet and shuffle like an old man. Most of all

– don't use a power-point display unless you absolutely, 100% know how to work it.

Jurors want to believe that you believe what you're telling them. You will lose their attention and emotional commitment to the case if you appear to have no belief in your own case. This is the time where actions do speak louder than words, and if your body language displays indifference or a lack of command of the events of the trial, you will lose the case. Also, if you are overly dramatic, insincere, or a mime of what you've seen in the media, you will lose the case.

Here's a good example of what not to do. I started my career right when the L.A. Law TV show was at its peak. Many younger attorneys mimicked the L.A. Law look, suits, and mannerisms. One of the "techniques" was to start the closing argument by speaking while still seated at counsel table.

I personally witnessed several young attorneys start their closings leaning back in their chairs, behind counsel table, and stretching out their arms. Then, after about 5 minutes of this tedium, they stood up, swaggered to the jury box and started to speak loudly. It was excruciatingly hard to watch. I guess they thought their conduct would add gravitas to their argument. It didn't.

Good theater also means successfully executing separate acts in a play. You do this by having clear and distinct "acts" in your argument. Begin strong with a solid position on your theory of the case and why that theory is correct. Then weave the evidence into the theory and show the jury how easy it is to see your position. Review helpful portions of witnesses' statements and remind the jury of any physical evidence that helps your case.

Next, add the parts of the law that help you. For example, if your theory of the case is "lying witnesses," then argue the JIGs on impeachment and credibility. If your theory is "lesser intent," then argue the JIGs that tell the jury to look towards a lesser crime if they have a reasonable doubt to the greater crime. If your case is about an affirmative defense such as self-defense, then argue the JIGs that place the burden on the state to *disprove* the affirmative defense.

Also, be sure to address in one of your "acts" the prosecutor's forthcoming rebuttal. Tell the jury that the prosecutor will have an opportunity to speak again right after you and that you only have this one chance to talk to them. Try to make them feel that it's unfair for you to only have one bite at the apple whereas the prosecutor gets two.

Try to diffuse what the prosecutor might say. For example, tell the jury that the prosecutor might argue X, and if she does, ask them to think of how you would respond. Tell them that you would respond to certain points by stating this or that.

The number of "acts" to your closing depends upon the type of case and length of the trial. But always remember that arguing for more than one hour should only be done on extraordinary and long trials. Many successful first-degree murder cases had closings less than one hour. You will lose the jury's attention if you're too verbose.

A closing argument, like all parts of a trial, is more art than science. You definitely need a thorough knowledge of the law, evidence, and procedure. But all will be lost if this knowledge cannot be capably exploited on your stage.

Trial Tactics: Closing Arguments

Mike Brandt

Here are a couple of thoughts about the importance of the jury and reasonable doubt that I weave into my closing arguments. As with any suggestions about trial tactics, it is always important to do what works for you. While these strategies may be effective for me, everyone needs to use what works best for them.

A theme I like to develop in closing arguments is the importance of the jury in our system of justice. Towards the beginning of my closing arguments, I relate to the jury the history of the jury process. I trace the roots of the right to a jury trial to before the Magna Carta, when subjects were tried by the crown. This typically meant the king or one of the king's representatives would decide guilt or innocence. After establishing the history, I explain how that system was changed with the adoption of the Magna Carta and how a right to jury trial is guaranteed in both the United States and Minnesota constitutions.

When talking about the importance of the jury, I explain that the jury is a shield between the government's awesome and overwhelming power against a lone individual—my client. I point out the different agencies that were involved in the investigation of my client by listing the initial police agency, the sheriff, the Bureau of Criminal Apprehension, the courts, the county attorney, etc. To emphasize this, I even pull out the jury instructions, which have the title of the case, and point out that the title of the case is the State of Minnesota with all its power and resources against my client. The jury is the shield that protects individuals from the awesome power of the state.

As I discuss reasonable doubt, I will commonly talk about the different levels of proof in our judicial system: reasonable suspicion, preponderance, clear and convincing, all the way up to reasonable doubt. I explain how reasonable doubt is the highest burden in our system. Depending upon the facts of the case, I will create an analogy tied to how reasonable doubt is the care that each juror must use in making their most important decisions.

When I discuss reasonable doubt in cases where scientific evidence has been introduced, I make an analogy about a person getting on an airplane and flying. People can usually relate to this, and many people have anxiety about flying. I talk about the different people involved in the preparation and maintenance of the aircraft who have assured the airworthiness of the aircraft, from the maintenance crew who overhauls the engines, to the pilot who flies the plane. I talk about how we need to trust that they have done their job right by dotting every "I," crossing every "T," and that they have double-checked every item to ensure there are no problems with the plane. After introducing the plane example, I talk about the problems that were uncovered in the scientific evidence of my client's case, such as the various procedures that were not followed, the shortcuts that were taken by the person analyzing the evidence, and the importance of protocols and procedures. To tie these ideas together, I then ask the jury this question: If those people that are supposed to guarantee a plane's airworthiness and safety had used the same care in preparing the plane as those who handled evidence in my client's case, would they still get on that plane? Would they put their child on that plane? Would they put their significant other on that plane? The obvious answer is no; they would never get on a plane where procedures were not followed, short cuts were taken, and problems were not solved. Because the jury would not trust the aircraft, they cannot trust the evidence, and there is reasonable doubt.

Seven Ways to Prepare a Final Argument

Paul Engh

Here are seven ways to make your final argument entertaining and persuasive. On making a living in the law.

1. Turn off the phone, shut down the computer, and read for two hours a day. Read writers who form great paragraphs. Figure out how they did it, and copy their method. A final argument is just a series of related paragraphs. The better the internal paragraphs are, the better the speech will be.

Take, for example, two sentences from Joan Didion's A Year of Magical Thinking (Knopf 2005), describing the death of her husband, a heart attack: "Life changes in the instant. The ordinary instant." Id. at 3. In the criminal case, you could say, "Death came in an instant, what should have been an ordinary moment. It was not." This is a lot better than announcing, the man suddenly died and everyone was surprised including Mr. Defendant.

Consider James Joyce's last paragraph from the "The Dead," his short story masterpiece:

> A few light taps upon the pane made him turn to the window. It had begun to snow again. He watched sleepily the flakes, silver and dark, falling obliquely against the lamplight. The time had come for him to set out on his journey westward. Yes, the newspapers were right: snow was general all over Ireland. It was falling on every part of the dark central plain, on the treeless hills, falling softly upon the Bog of Allen and, farther westward, softly falling into the dark mutinous Shannon waves. It was falling, too, upon every part of the lonely churchyard on the hill where Michael Furey lay buried. It lay thickly drifted on the crooked crosses and headstones, on the spears of the little gate, on the barren thorns. His soul swooned slowly as he heard the snow falling faintly through the universe and faintly falling, like the descent of their last end, upon all the living and the dead.

Joyce uses the verb "falling" seven times, achieving a rhythm. His prose speaks of the sacred, an order, a soul, solemn headstones, the universe.

Using Joyce as a model, your closing becomes, "There is a swoon to Mr. Defendant's life, he has been touched and has touched so many, faintly, directly, everyone. He is of good character, it will be said at the end of his days, the winter snows falling down upon his grave and all the wonderful things he has done that should not be forgotten. We honor the living by preserving the defendant's good name." This is better than saying, "Mr. Defendant was a fine guy. He worked hard."

So emulate the masters, one sentence after

another. There is nothing wrong with learning that way. You're derivative from the get go anyway, your gene pool predetermined before birth.

An absolute original lawyer doesn't exist, nor an author. When writing what is considered the finest American novel of the last one hundred years, F. Scott Fitzgerald borrowed his plot lines from real life stories. See Sarah Churchwell's Careless People, Murder, Mayhem, and the Invention of the Great Gatsby (Virago 2013).

2. Study the great orators. Begin with Lincoln's Gettysburg Address. Check out Garry Wills' Pulitzer Prize winning book, Lincoln at Gettysburg: The Words that Remade America (Simon and Schuster 1992). The author takes each line of Address and traces its genesis to prove Lincoln borrowed the ideas from elsewhere. But he made the speech his own and utterly original. How? Observed Professor Wills: "Lincoln interlocks his sentences, making of them a constantly self-referential system. This linking up by explicit repetition amounts to a kind of hook-and-eye method for joining the parts of his address. The rhetorical devices are almost invisible, since they use no figurative language or formal tropes." Id. at 172.

Brief and to the point, Lincoln emphasized the solemnity of his task. "The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract." His closing sentence is a cadence, a repetition: "and that government of the people, by the people, for the people, shall not perish from the earth."

That's what a closing argument should be about – the sacredness of the defendant, framed against the ideals of law used to judge him.

Martin Luther King Jr.'s "I Have a Dream" speech covers a mere six typed pages. Download and study it for an hour to see how he formed the structure, and the techniques of persuasion that were used. The ending has become famous, of course: "I have a dream that . . . I have a dream that . . . I have a dream." That syllabic phrasing appears earlier. "Now is the time . . . Now is the time . . . Now is the time. . ." appears on page 2. "We cannot be satisfied," "we can never be satisfied," "no, no, we are not satisfied," is found on the third and fourth page. When King came to his dream sequence, on page 5, the listener was already familiar with the pattern.

From the heart King spoke, and believed in what he was saying. He had faith in the right. He ended with no less than five "Let freedom ring" sentences, a cadence that led to the last sentence, from a hymn, "Free at last, Free at last, Thank God almighty, we are free at last."

It is no coincidence that King quoted Lincoln. He started with "Five score years ago," mimicking Lincoln's "Four score." King recognized the "hallowed spot" on which he spoke (akin to Lincoln's "hallowed ground"), and from the Emancipation Proclamation he repeated this phrase: "We hold these truths to be self-evident, that all men are created

equal." Id. at pages 2 and 4.

3. Don't just read the speeches of old. Go see today's quality public speakers. The best around here tend to be members of the clergy. Pick one of the bigger churches (so as to be anonymous), and sit and wait for the sermon. The seasoned preacher will always have a planned first paragraph, and nail the closing. The Biblical text (read facts in law) will be interpreted in a commonsensical way in plain English. There will be a call to the parishioner to do right, to live a fuller life by embracing love and compassion.

What you're trying to persuade the jury to do is embrace a high ideal – the presumption of innocence – because it is the right thing to do.

4. Attend theater productions with four or fewer actors. Watch how the play starts. The first five minutes are beyond important. All the themes should be laid out by then. If the show is any good, you should be made to identify with the lead character. You should settle in sensing that you might know what work is about. That's what you should make your jury understand soon, very soon, in the first minute.

5. Watch the politicians give their speeches. How they start, eye contact, tone, structure, everything. Ronald Reagan was extraordinary on a number of levels. Note first that he got elected because he kept trying and failing, trying and failing until he got the nomination and beat Jimmy Carter who couldn't speak as well. Reagan practiced persistence. He lost before he began to win. Note second that he used to practice his stump speech against silent hotel room walls. Note third that he decided to memorize his lines, just as any actor would. Fourth note that smile of his was disarming, and conveyed a sense of warmth. You too should smile during trial and closing. You should telegraph the idea to the jury that you're a good person, doing your best.

By contrast, President Obama is a bit too cool to be persuasive. Mitt Romney had no feeling for the less fortunate, and his failure as a candidate predictable. He couldn't transcend his blue-bloodedness. The hallmark of Lincoln's being was empathy. Martin Luther King was all about the disenfranchised.

The best Minnesota speaker of late was Paul Wellstone. But for those who are old enough to know, Wellstone was a mere echo of Hubert Humphrey in the Happy Warrior's prime. Like his mentor, Wellstone was all about fury, jumping up and down. He won elections because he cared about what he said. You should consider elevating at certain key points in the final argument. There is no harm in pounding the podium. Jump up and down three or four times at the key moments.

6. Go to rock concerts. The professional bands start with a great deal of confidence. The first song is one of their strongest. Within ten seconds the crowd should be focused on the lead singer, whose job it is to command undivided attention. Watch thus how Bruce Springsteen begins.

If you don't like rock and roll, see Lucinda Williams, and witness first hand her insecurities and nervousness, and figure out why she's riveting from start to finish. So is Rickie Lee Jones on the good nights. All successful singers will have a command.

The professional musicians also don't look down, which leads to the last point:

7. Never use notes. Glancing at a text tells the jury that you're not as prepared as you could have been. Memorization of a final argument should take around twenty hours. Do that by taking walks. Circular lakes work well. The river is beautiful. After sixty miles you should be good to go.

With memorization, you must listen to your own sentences, how the arguments are phrased, the transitions between the paragraphs, and central ideas. By memorization, you're forced to know each line. You get to hear beforehand if the words work together.

Bob Dylan embraced the same technique.

> I had broken myself of the habit of thinking in short song cycles and began reading longer and longer poems to see if I could remember anything I read about in the beginning. I trained my mind to do this, had cast off gloomy habits and learned to settle myself down. I read all of Lord Byron's *Don Juan*, and concentrated fully from start to finish. Also, Coleridge's *Kubla Khan*. I began cramming my brain with all kinds of deep poems. It seemed like I'd been pulling an empty wagon for a long time and now I was beginning to fill it up and would have to pull harder. I felt like I was coming out of the back pasture. . . .

Chronicles (Simon and Schuster 2004) at p. 56.

By the age of twenty, Dylan had gone through the masters. "I'd read that stuff. Voltaire, Rousseau, John Locke, Montesquieu, Martin Luther – visionaries, revolutionaries . . . it was like I knew those guys, like they've been living in my backyard." Id. at 30.

* * * *

The final argument isn't supposed to be easy. It should be rich in language because you've taken the time to read elegant prose and tried to make it your own. It should be the very best you can do.

It has to be better than you thought you could do. Otherwise, you're not growing as a lawyer. You're stagnant, living in the yesterday.

The jury can smell effort. They can tell if you've worked hard. If you care about what you say, they'll figure that out, too. They'll know.

And in a close case they'll give your client the benefit of the doubt.

Let's Remember Why We're Here

Ryan Pacyga

When we went through jury selection, each one of you promised that you would presume Mr. _____ innocent, that you would hold the government to its burden of proof beyond a reasonable doubt, and that you would give Mr. _____ a fair trial.

And we talked about the difference between innocence versus not guilty. You are charged with the important task of determining whether the government has proven each and every element of its case beyond a reasonable doubt. Here is what that situation is like.

In a football game it's late in the 4th quarter, and it's 4th down and 10 yards to go. You are the referee that spots the ball. You know the offense needs all 10 yards to get the first down. You do not care if they get 3 yards versus 7 yards versus 9.5 yards. All you care about is if they get all 10 yards, and that is the line that you focus on. You stand right on that line and look at it. If they get over that line, then they've done their job. But if they come up even an inch short, then they haven't done their job and the ballgame is over. Because if they come up anywhere short of that, the ball is turned over to the other team.

It's the same with beyond a reasonable doubt. You don't concern yourself with innocence, that's not your focus. Your focus is beyond a reasonable doubt, that 10 yard line. If they don't get all the way to the line, they haven't carried the ball far enough, and you must enter a verdict of not guilty. It doesn't matter why they didn't get the ball all the way there. Nobody can help them up or carry it for them. They have to do it on their own. That's how the rules work. Those are the rules everybody agreed to follow.

In this case, I'll submit to you that they were sacked in the backfield. But here's why they didn't make it to that 10 yard line…

The Decoy Strategy

Don Nichols

In almost any case, having multiple strategies is worth consideration. One of the most useful strategies is what I call "the decoy strategy." The purpose of this strategy is to give the opponent something to work on while you focus on your defense. You should proactively consider what you want your opponent to focus on during the trial. If you are successful, occasionally your opponent will continue focusing on the decoy all the way into final argument. Much of a decoy strategy can be prepared in advance of trial by preparing written motions or briefs on particular issues and therefore allowing you to focus on what matters. Your opening only foreshadows the main issue, during the trial your issues become more obvious, and your closing brings it home. Your opponent on the other hand spent too much time working on the decoy.

Legal Haiku

Steve Bergeson

Haiku is a poetic form and a type of poetry from the Japanese culture. Haiku combines form, content, and language in a meaningful, yet compact form. Haiku themes usually include nature, feelings, or experiences. Usually they use simple words and grammar. The most common form for Haiku is three short lines. The first line usually contains five (5) syllables, the second line seven (7) syllables, and the third line contains five (5) syllables. Haiku doesn't rhyme.

Closing argument
A few moments of candor
Then back to the grind

Closing argument
A few moments of candor
Jurors fall into your lap.

Closing argument
A few moments of candor
the case is dismissed.

Criminal Justice
Another oxymoron.
Quixotic, perhaps.

Brooks implies Consent
prosecutors all abuzz
Fourth Amendment death.

A story to tell
Simplicity is complex.
Opening Statement.

Closing argument.
A few moments of candor
the charge is dismissed.

Indigent defense
Always tilting at windmills
Quixotic, no doubt.
Arrogant judges
prosecutor misconduct
the law left behind.

Criminal defense
a negotiated plea
credit for time served.

Criminal intent
no evidence of intent
question for jury.

Defendant's counsel
Ineffective assistance
the appeal de jure.

He's done this before
Objection! Relevancy?
Motion is denied.

Suits with flashy ties
Big time city attorneys
Fancy pants gangsters.

Immigration law
Crime of moral turpitude
Deportable crime.

Defense counsel dream
A Fifth Amendment challenge
No harmless error.

The burden of proof
Presumption of innocence
Lawyers lick their chops.

Husbands and their wives
Quarrelling over the kids;
Lawyers lick their chops.

Stuck with grad school debt
Adjusting to the new job
Thank goodness for beer.

Golf, Facts, and Closing

Tom Kelly

In a final argument, lawyers have a chance to reveal to the jury a personal side of themselves. Since I believe many jurors view lawyers as pompous and arrogant, I try to tell a story that has some humor at my expense. You can tie the story into the argument you are making. This story deals with analyzing facts and inferences and is, sadly, true:

"Members of the jury, you have heard the prosecuting attorney recite the facts and inferences, which the State would like you to adopt. However, it is essential that you examine all the facts and inferences from different viewpoints. Allow me to tell you a little story that I hope exemplifies the importance of scrutinizing the facts.

"I like to play golf even though I am not very good at the game. The other day I was playing with a few friends and I hit a couple of good shots to get on the green for this hole that went uphill the last forty yards. I was excited. My ball was sitting on the green just thirty feet from the cup and I could make par on this tough hole if I could make this putt. I visualized the ball stroked firmly and rolling right in the cup. Simple facts: ball here, hole there, grass in between. I hit the putt and it started towards the hole. But to my amazement the ball began to pick up speed. The ball missed the cup and kept going, and going, and going . . . off the green and down the hill. I stood there frozen watching it, hearing my buddies laughing and yelling, "It was a downhill putt." I had only looked at the putt from behind. I did not see how sharply the green fell off. Like the good golfers do, I should have walked around the hole and observed the breaks and slopes. I missed the putt by only looking from the one position. The same is true in analyzing the facts, and the inferences from those facts, which have been developed in this trial. We need to look for at the facts from different perspectives. Now let us analyze the evidence from the view of the defendant. . . ."

Lessons From A Master Story Teller: A Conversation With Joe Friedberg

Gretchen Gurstelle

Joe Friedberg is known for his ability to relate to juries. I sat down with Joe in his Minneapolis office to ask him about his legendary ability to connect with those twelve strangers during closing argument. Joe was quick to remind me that an attorney's relationship with the jury begins in voir dire but it ends with the closing argument.

Joe devotes the first quarter of his closing arguments to discussing only the law: "I tell them that 'I'm going to discuss the law, and then I am going to get to the facts, and then I am going to integrate the facts to the law,'" Joe explains. "We discuss the trinity: burden of proof, proof beyond a reasonable doubt, the presumption of innocence. We want [the jury] to be in a position to believe that one possible verdict is not guilty." Joe refers to his mentor and former partner Doug Thomson with great reverence. Thomson taught Joe the importance of putting a jury in their proper place in history. He points out that "before you can argue with the jury to let your client go, you've got to get them to understand who they are, where they are, and put them in a mood to acquit." You are asking the jury to find a "not proven" verdict, not an "innocent" verdict.

But the style of Joe's closings is all his own; it's his ability to hypnotize juries with his monotone drawl and his memorable stories. Telling stories builds a rapport with those twelve strangers and reminds them just what they are in the courtroom to do. Joe shared some of his favorite stories with me:

The Blueberry Pie

The blueberry pie story is a response to a prosecutor's circumstantial evidence arguments. "There was a tobacco farmer who worked very hard pulling tobacco in Northern Carolina. The farmer had a pension for blueberry pie. So every Friday afternoon his wife would make a blueberry pie and place it on the windowsill to cool. The farmer had a teenage son who also liked blueberry pie. On one particular warm Friday afternoon, the farmer's wife had placed the blueberry pie out to cool. The farmer's son arrived home, saw the pie on the windowsill and decided to taste a piece of the farmer's blueberry pie. Before all is said and done, it's all gone except for some crumbs and berries. Now, the son looks out the window and sees the farmer coming up to the house. The son

knows he's in for a hell of a whopping, and at that point he sees the family dog standing in the entry to the kitchen. He puts the pie tin on the ground and the dog starts licking the tin and the son leaves out the back door. At this point the farmer comes in and sees the empty tin, the blueberries and crumbs on the dog's snout, and takes the dog out back and beats it to death. That's what it's like to get convicted on circumstantial evidence."

Joe adds, "You don't always have to kill the dog."

The Elephant

"I have a story I tell for stepping back and accepting things for what they really are. I use this in an entrapment or a frame-up case. There is one thing in this world that doesn't look like anything else. Nobody has ever said that was an elephant *or*. . . .There is nothing else in nature that looks like an elephant. There is nothing else in this world that is that big, there is nothing else in this world that has a trunk, and there is nothing else in this world that has ears like that. I am familiar with a town in Eastern North Carolina called Frog Hollow. And in Frog Hollow there is a lady people call Miss Bessy. Miss Bessy will have a little to drink before noon everyday. Something else we know about Frog Hallow is that the circus train from Sarasota, Florida passes through Frog Hollow twice a year, going north and coming south. This is important to what Miss Bessy saw looking out her back window one morning. Miss Bessy looked out her back window and she was greatly alarmed. She called the local sheriff and said 'Sheriff you have got to come out here, there is an elephant in my pumpkin patch.' The Sheriff said 'Miss Bessy, you go sit down and I am sure you will be okay. I am sure there is no elephant in your pumpkin patch.' Miss Bessy sat down and looked out there again and said 'Sheriff you need to come out here because I have an elephant in my pumpkin patch.' The Sheriff said 'Miss Bessy if I come out there and waste my damn time I am going to be mad at you.' She said 'you come out, I am telling you.' The Sheriff said 'Miss Bessy I am sure that is nothing but a big old gray dog.' Miss Bessy said to him 'Sheriff if this is a big old gray dog, this is the biggest old gray dog I've every seen in my life. It's got the biggest floppiest ears I have ever seen in my life, and it's reaching down with its tail, pulling my pumpkins out of my pumpkin patch, and I hate to tell you where its sticking 'em.' You see the Sheriff didn't know that the elephant had got away from the circus train the night before. And no matter who you are, or how drunk you are, you cannot mistake an elephant for a dog. And if you look at this case, step back from it, it's clearly a frame up. And the problem is they have to prove it isn't and haven't proven one thing in that direction."

The Hooded Defendant

Joe explains that one difficulty defense attorneys have is convincing a jury to give teeth to the presumption of innocence. He often likes to return to the presumption of innocence and end his arguments with the "hooded defendant."

"I say, look, everybody in this world has somebody who they revere and trust. For me it was my father, he wouldn't have stolen a wrong nickel. If he found a penny on the ground he took it to the nearest store. He was just a completely honest man. And everybody has somebody like that in their life, be it a spouse, a relative, or a friend, that whatever that person was accused of, you would say 'no goddam way did they do that.' Well I want you to assume that during the course of this trial my client here sat with a big sheet over his head. And now you're ready to begin you deliberations and I reach over and pull the sheet off, and there sits the person who you revere, who you trust, who you believe would do no wrong. If you would convict that person based on the evidence you heard, then you convict my client. But if you wouldn't convict somebody who you really gave the presumption of innocence to because you knew them and loved them, then don't convict my client, because we do not have two systems of justice in this country- one for people you know and love and one for people you don't know."

I asked Joe what advice he had for new lawyers. He notes the importance of staying true to your own style. Reflecting on his early career, Joe explained that his wife Carolyn would often come to his closing arguments. Carolyn critiqued one argument by calling it the worst imitation of Doug Thomson that she had ever heard in her life. Joe had fallen into trying to emulate his mentor, rather than doing what worked best for him. After Carolyn's comment, Joe returned to the language and stories that came naturally even if such language would have made his mentor cringe.

Joe laughed, "You have got to develop your own style. Give your argument to your spouse. You sold him or her on you originally, now see if you can sell them the story. If you can't sell your spouse, who the hell can you sell?"

Excerpts from an Earl Gray Closing

Your Honor, counsel, Mr. Taylor, ladies and gentlemen of the jury. It's now my privilege to make a final argument or some people call it summation, some people call it argument, on behalf of my client, Scot Taylor, the defendant in this case. The title of this case is State of Minnesota versus Scot Taylor and that's what it is, the state versus Mr. Taylor. And the State of Minnesota in this case presented a prosecutor, we've had an investigator, two prosecutors, an investigator and we have the law enforcement Officer Felix. And all these folks are dedicated to one thing, to convict Mr. Taylor of this offense. And the

dedication is there where some of the things said even said in the final argument of the state just isn't true.

So let's go through this case and we'll go through the testimony. But keep one thing in mind. We're not sitting here in hindsight like the state is. We're sitting back there as a reasonable person would do in this bar. And if you think in hindsight well, he should have done that, he should have done this, the state says should have told his

friends. Think about that for a minute. Well, in hindsight maybe. But what would have happened if he told his friend …

(Earl discusses the facts)

So what do we have? We have the presumption of innocence and the presumption of innocence means what it says. When you come in this courtroom, you're presumed

innocent and in this case the presumption goes to self-defense. You have a presumption of innocence and it's presumed that you acted appropriately and reasonably, you acted in self-defense. And that presumption of innocence in our law stays with us until and if the state proves beyond a reasonable doubt that he did not act in self-defense. That he did not act reasonable. Beyond a reasonable doubt. And beyond a reasonable doubt the Judge told you is the type of proof you'd act upon in your most important affairs in your life. And this is. You're jurors, I don't remember if any of you have sat on juries before, but this is extremely important affair for the state obviously and for my client.

Family man, owns a restaurant, and now he's in front of you asking that you apply the proof beyond a reasonable doubt and presumption of innocence.

You're to look at the interests of the outcome. And the state sort of mentioned this but when a defendant testifies you think oh yah he's saying that because why? Well because he doesn't want to get convicted … he has an interest in the outcome. But see that's the reason our forefathers came up with the constitutional rights to the presumption of innocence that buttresses any inference that he's testifying because he's interested in the outcome he wants to get out of it. Because he's presumed when he's on that stand to be innocent and that presumption stays with him until the case proves beyond a reasonable doubt he didn't act in self-defense. The credibility test that the Judge has instructed you on … I don't know what you think as jurors and reasonable people but when you weigh the credibility of these witnesses the state presented you wonder about it.

(Earl discusses the credibility of the State's Witnesses)

As far as his drinking, I'm sure some of you

have been in bars, hanging around with your buddies. When you're in a bar for five and a half hours to six hours like he was, come on, you're going to have two Guinness and a shot? But then he says I don't specifically recall at all how much I had to drink.And you're asked by our State of Minnesota to believe this guy beyond a reasonable doubt? They should be embarrassed to put that man on the stand. Every time he was asked some pertinent question it was I don't remember, or I don't know. He doesn't remember anything, except the little things that might help him before hand.

The law in this case, the Judge has instructed you on, is you have a right to defend yourself, to use reasonable force to resist or to aid Jessica Garrett in resisting an offense against her. If you reasonably believe that that occurred, you have a right to do it. You can't seek revenge, which he didn't do, he just swung his arm back. He didn't jump on him and pummel him.You can't use unreasonable force. You have to be in good faith. And if you can find a way to retreat reasonably, not just a possibility, reasonably possible, you're supposed to do it.What about his – they have to prove beyond a reasonable doubt that he had a place to retreat. Well, did he? And remember this, retreat? How is he going get his – he's not going to leave without Jessica. He wouldn't leave without her. How is he going to get her? The only opening was to the left because Lopez and Fischer were right behind him. So he could have gone to his left, but he would have had to go back to his right to get his girlfriend and by that time he could have been clubbed two or three times by this Bus Fischer. So yah, in hindsight maybe he could have done that. Possible. But when he went to grab her he could have had his arm broken, too. You know, seriously. These guys were that serious. They obviously were, they wouldn't leave after they were caught putting their arm around her. They stayed there, he pushed them away. The kind and degree of force a person may lawfully use in self-defense is limited to what a reasonable person in the same situation would do.

Any use beyond that would be excessive.

Now, the real key here is that the state has to prove, and this is important, beyond a reasonable doubt that this self-defense wasn't reasonable. That he didn't act reasonably. They have to prove that to you beyond a reasonable doubt. It has to be the type of proof you'd act upon in your most important affairs of your life.And they just simply didn't do There's no way that the state has proven beyond a reasonable doubt that he didn't act reasonably.

And finally, ladies and gentlemen, with respect what you would have done or what I would have done, that's not the case. It's what a reasonable person in the same situation looking at the same dangers involved with a 300-pound guy behind you, it's what that person would have done in that situation. And just keep the hindsight out of it. The truth in this and the fact we didn't make this up, make up some kind of defense, is what my client said to Kubias right after. What was I supposed to do? He was expressing his frustration that he thought what he did was reasonable. What was he to do? That shows you that in his

mind he was using what he thought was reasonable and he's not guilty. The evidence in this case is over abundant that he used reasonable force in the situation that was danger to him and danger to his girlfriend.

On behalf of Mr. Taylor, his family, I thank you or your attention. Just look at the pictures, think about the testimony, the testimony of Lopez and Mr. Fischer, and I'm sure you can only come to one conclusion, and that's not guilty. Thank you.

Interview of the 2014 MACDL Distinguished Service Award recipient:

Dan M. Scott

Piper L. Kenney, Ryan P. Garry and Gretchen L. Gurstelle

PLK: Dan Scott is the MACDL 2014 Distinguished Service Award recipient and we're going to ask Dan some questions and let our readership learn a little bit about him. Dan, I've heard that you've tried over 100 jury trials. Is that true?

DMS: Oh easily, yes. I've lost over 100 jury trials.

PLK: So you must have tried well over 200 then?

DMS: No, not that good.

PLK: With that experience, have you noticed any commonalities amongst Minnesota jurors?

DMS: Sure. Minnesota jurors trust authority. Especially federal jurors, because they're drawn from a wedge of a state that is about 50% rural. You know the classic line I got from Katherine Roe when I hired her – she'd been trying cases in Washington, D.C. – and she said "what do you mean I can't attack the cops for lying? That's what we do in D.C. and all the jurors know they're lying." Well, in Minnesota they think the police are telling the truth. And they believe in their government.

PLK: What did you do right out of law school?

DMS: I became a federal prosecutor.

PLK: And how long were you there?

DMS: About five years, little less.

PLK: And then you made the switch to defense work?

DMS: On Friday I was a federal prosecutor and on Monday I was the federal public defender.

PLK: Really? Why did you decide to make that switch?

DMS: Well, you know, there's a certain amount of arrogance in being a prosecutor. You're doing God's work and you get to decide what God is saying because you don't have a client. And it got to me eventually. I'd offered a defendant nothing, and he went to trial. The case was not defensible and I got really upset. When the case was over I said, how can you be getting upset? You know, he took his right to a trial and you offered him no reason not to, why are you mad at him? You have lost it, is what I said to myself. You have lost it to now think that people should all be doing what you want. And that's when I started

looking. I was actually looking to get out of criminal law entirely and into civil law when the judges decided to create the Federal Public Defender's Office. Peter Thompson and Tom Kelly, who had been the part-time community defenders, came to me and said we know the judges, they're going to pick a prosecutor and you're our favorite prosecutor, so apply. So I did. And I guess they were right.

PLK: And so the federal district court judges chose you?

DMS: Well legally the Court of Appeals chose me but as a practical matter the District Court is the one who really does the choosing and then the Court of Appeals puts their official imprimatur on it. There's supposed to be a cushion between the district court and the public defender, at least in theory. There isn't in reality, of course.

PLK: Did you have any assistants at the time or was it just you?

DMS: Me.

PLK: Really?

DMS: It was a new office. We had nothing. Absolutely nothing. I got a care package from Washington and in the care package were forms – carbon paper forms – and some pencils and they sent me a hacksaw with no blade. I don't know who did that but it took me a little bit to get the joke . . . well, where are the blades?

PLK: When did you start hiring lawyers?

DMS: I hired Scott Tilsen about eight months later, in May of 1979. I had opened shop in August of '78. I think I had tried maybe six or seven cases by then.

PLK: And what were you doing with conflicts cases at the time?

DMS: Peter Thompson had set up a panel – in fact, the whole idea of the part-time public defender was that there would be a panel administered by a private lawyer who would get a grant, and take a few cases himself. Minnesota had the only part-time public defender in the nation. Washington didn't like that model, so they came to the judges and said we think you ought to have a full-time defender. So the judges said okay – like with that tone of voice – well okay if that's what you want. They were quite happy with the way the system had been working before that. Peter was pretty aggressive back then so you always knew when Peter had a case because he was very good at ticking off the judges. Tom was more polite, so you didn't see the judges getting mad at him. I think they offered the position to Tom, but he didn't want to give up private practice.

GLG: Why do you think Minnesota was last to get a federal defender's office?

DMS: Well the law didn't get passed until 1970. Most people don't know that. There were no public defenders before 1970. In some of the big districts across the nation, the *Legal Aid Society* was taking federal cases and they would – just like a panel lawyer – send in their bill with their hours and then put the money in the pot. So Philadelphia, Detroit, New York, Atlanta, handled public defense that way. Chicago and San Diego

were the first to set up independent offices. They also lived on the vouchers. San Diego and Chicago started in probably the mid '60's taking cases on individual appointment, but having full time people doing it. Terrance McCarthy in Chicago was really the first public defender.

PLK: So how long were you the federal public defender?

DMS: 27 years.

PLK: And how did you see the office evolve during that time? What stands out the most?

DMS: What stands out the most is that the office went from a one- or two-person criminal defense office to a real law firm – with five, six, seven, finally I think nine lawyers when I left. Every time you add a lawyer to that type of system it became closer and closer to an intellectual hot house. Federal criminal defense was all we did all of the time. We were bouncing ideas off each other. The more people you have the more varied the ability to learn and get better. Before, they had Scott Tilsen and me, two guys who were good at shoveling legal manure.

PLK: So you were around pre-guidelines. Tell us about handling cases before the sentencing guidelines, afterwards, and after *Booker*. How do you see the sentencing process having changed over the years?

DMS: Most people don't really remember how different the sentencing process was pre-guidelines. A big sentence pre-guidelines was three or four years. The first sentencing commission was run by a judge from South Carolina. We got the sentences that people in South Carolina thought were fair. All of a sudden, sentences went through the roof.

The focus changed. Pre-guidelines, we went to the U.S.Attorney's Office with five cases, talking to the prosecutors, and working out caps on the sentences or whatever – we'll plead to this and you can drop that. You go into the court, present the deal to the judge. Now, we had a whole new area to litigate . . . sentencing and sentencing law. So, from a lawyer's standpoint it was great. From a client's standpoint it was awful.

After the Supreme Court decided *Booker*, the guidelines have become just that – suggestions. It really helped at sentencing. I've seen the statistics. Minnesota is about fourth best in the country when it comes to judges departing from the guidelines. Katherine Roe keeps a watch on it more than me. We can sell hope again to our clients. You say to the client, yeah, the guidelines are five but this judge always comes down a little bit. Once in a million years a judge will actually give a really good sentence. If we work hard, maybe we can convince the judge to do it.

PLK: So what are you most proud of about your work as a PD?

DMS: Two things. The first is my background – my background is old fashioned labor liberal democrat. I believe in organized labor. The problem was that prosecutors were always organized and the defense was not. I can remember saying to myself, I can tell somebody from the panel in the morning that the office policy

is X and in the afternoon I can tell a different lawyer the office policy is the opposite of X. And they don't know. They just don't know. The fundamental thing I wanted to do at the public defender's office when it opened was to make sure that the defense knows as much as the prosecution. It's not that the prosecutors are great lawyers, but rather they've got the facts and they've got the time to develop them. What we were missing on the other side was the extra advantages that they had.They knew the intricacies of federal law and procedure.The panel lawyers tended not to know federal law because they practice in state court. And federal court was this scary place they visited every once in a while. Defense attorneys needed to be organized. They needed to have some place they could go to have their questions answered. From the day we opened the FPD office until the day I left, our job first and foremost was to represent all of our clients. The panel represented our clients as well, and they should know everything that we could find out. Organized defense, not just at the FPD office, but the entire bar, that was our job.

The second thing was watching lawyers grow in my office – it was just wonderful. The pure joy of watching everybody grow into themselves was great. I had three waves; first, Scott, Cecilia, and Caroline; second, Katherine, Andrew, Andrea, and Virginia; third, Kate, Lionel, and Manny.

PLK: Who did you hire after Scott?

DMS: I hired Carolyn Short. She went on to practice in Philadelphia and twice got nominated to the federal bench. And then I hired Scott back. When we were authorized a third position, I hired Cecilia Mitchell. She left to go into civil practice and joined the CJA panel. In 1989, I hired Katherine Roe, Andrew Mohring, and Andrea George all on the same day – Andrea as an appellate clerk. In 1991, I moved Andrea up to be an assistant, hired Virginia Villa to be a clerk. Robert Richman transferred from Massachusetts. Kate Menendez came in first on a George Soros grant. Manny Atwal came out of the Ramsey County PD. Lionel Norris came from the state civil rights office. So that was how the office grew.

PLK: Everyone talks about you being a wonderful mentor. What is some general advice that you give mentees?

DMS: It's real simple. There are two things: They always told us this when we were young lawyers, which we listened to, but didn't understand . . . *PREPARE*. Preparation is everything. And second is . . . *be yourself*. All you have to do is look and realize that I had Andrea in the office – diva; I had Katherine – relentless; and I had Robert – surgeon, all growing up together. Three more completely different personalities you can never see. All developed into fabulous lawyers and not one of them could do what the other one was doing. Katherine could not do diva. Robert couldn't be emotional if he wanted. And Andrea is ANDREA.

PLK: You have moved to the dark side – you're now in private practice.

DMS: Yeah, I sold out! I'd worked for the government all my life and so I never had that part of being in private prac-

tice. Having clients coming in the door who want to hire you instead of being stuck with you, it's been a very different experience. I've been extremely lucky in the law firm I'm at. In terms of the clientele, I discovered when I got over here, especially in the corporate criminal law, is you have all these people that are not going to get prosecuted.

PLK: All these clients who never get indicted, yeah.

DMS: They never get prosecuted, they never get indicted, and they never get charged. As FPD, I never had anybody until they were charged. They are so grateful – they trust you, you're my lawyer and you've got like 99% chance that they're going to continue to trust you because their cases aren't going to get prosecuted. It is – oh what a feeling – a feeling I've never had before and it's really nice. The down side is I don't get to state court very much, so I still don't get to find out about that.

RPG: Let me ask a question about closing arguments. This issue of the *Challenger* is about closing arguments. Is there any general advice or specific advice that you could give to the readers about closing arguments and what you do what's worked?

DMS: My perspective is federal court where the government always gets the last word. And often times they save their best evidence for last. So you're constrained a little to talk more about the facts than you'd like. But nothing changes the real strength of an argument. The strength of an argument isn't the facts so much – it's emotional stuff – and it's the ability to tell stories. I'm not the world's best story teller. I'm more into the metaphors than stories. But jurors love stories. Jurors love an example if you can give them of why someone in a similar spot clearly is innocent. They take the stories back into the deliberation room – not the arguments. You watch somebody like Joe Friedberg in there telling a story and it's just magical. And that never changes. You have to talk about the facts in federal court but you can still tell stories and stories will resonate. The jurors will remember the story better than they will remember the facts.

The other part about federal court is you've got two final arguments – the one at the beginning of the case and the one at the end of the case. In federal court you never, ever skip the opening statement. You don't get to talk to the jury hardly at all when you pick them, so it's the first time you get to talk. The government has already said that your client is guilty, so you better get up and explain why he's innocent or the case is over before the first witness is called. I'll tell you that it's a risk because you tip your defense, but no defense matters if the jury's already convicted your client.

PLK: We criminal defense lawyers love to hear war stories from other criminal defense lawyers. Can you tell us one of yours?

DMS: I'll tell you my best war story and it involves lots of lawyers – all in the same case.

The government years ago ran a video tap – not an audio tap but a video tap – they stuck it in the corner of the basement of a bar run by a crook. They indicted everybody who talked about crimes in that room so

I ended up in trial with Andy Danielson, of all things; he was in between being a judge . . . and Joe – Joe was representing a bookie and me and Earl Gray and Barry Voss.

Earl had a client that he had represented like four or five times before and the client hadn't paid him for the last case much less this case. So the first week of trial, Earl made his client sit over in the corner of the courtroom where the bailiff normally sits . . . and told him he couldn't come up to the defense table until he paid Earl some money. Finally he paid some money – I have no idea how much – then the guy got up to sit up the table. But Earl said I won't talk to you until you get me more money – I don't have to talk to you to try this case.

I've got a client that I've represented and gotten acquitted before, who was into robbing gun stores and burglarizing pharmacies. Barry and I had tried him and another guy earlier and got them off. Barry got my client off even earlier back on a murder – got acquitted on a murder. So here I am, with this guy who has had this absolutely charmed life. During the trial Barry's client wants to testify. He's an idiot. And he complains to Barry during the trial and says Danny's client threatened to kill me if I take the witness stand. And Barry leaned over to this client and said, "I'd take him really seriously if I were you."

Joe's got the bookie. Joe's defense was, "I'm not a drug dealer, I'm a bookie." Joe tries the case on that ground and his client gets acquitted. Joe didn't realize that while the magistrate had severed the bookmaking count, it's going to be heard by the same jury. While we are waiting on the verdict, Judge Magnuson looks at Joe and says "well we're going to go trial on the rest of the case on Monday." Joe says, "What do you mean the rest of the case? It got severed." And the Judge says "No, no it's the same jury." So – word has it – Joe gets up and looks at the same jury that has now acquitted his client of the drug dealing and say's "I'll bet you think my defense is I'm a drug dealer not a bookmaker." The jurors all laughed and he got the guy off on the bookmaking, too.

My client's defense was that he was such a scary guy that when he came in and said, "I'm going to be robbing drug dealers. I want to sell the drugs to you." They were saying "yeah, yeah right" just to get him out the door. The jury acquitted him. But a couple of times during the trial we waived his presence so that he could go to the doctor. Well he wasn't going to the doctor; he was robbing drug stores while he was in trial. After the acquittal they charged him federally for the drug store robbery. He got acquitted on that, too. The whole case was so much fun.

PLK: What a great group.

MACDL SCHOLARSHIP OPPORTUNITY

The Minnesota Association of Criminal Defense Lawyers proudly offers an opportunity for members of good standing to apply for need-based scholarships to attend a qualifying trial school or to attend the MACDL annual Continuing Legal Education seminar. The board of the Minnesota Association of Criminal Defense Lawyers has established the following criteria for application for a need-based scholarship:

1. A scholarship applicant must be an active member of the MACDL who is presently practices criminal defense for a minimum of 75% of his or her practice in Minnesota State and/or federal courts.

2. An applicant must agree to maintain membership in MACDL for at least a period of three years following receipt of the scholarship. Failure to remain as a member of MACDL for three years following receipt of scholarship funds will require the recipient to refund to MACDL the full amount of the scholarship funds received.

3. The applicant's law practice must reflect a commitment to the representation of criminal defendant's and a demonstrated willingness to apply the knowledge gained for the betterment of the criminal bar practicing in the State of Minnesota.

4. The applicant must demonstrate a financial need for assistance to qualify for scholarship funds.

5. The applicant must clearly outline in their application how attendance at the trial school or the CLE will increase the applicant's aptitude in criminal law, foster a greater level of experience and demonstrate the likelihood of benefiting from the trial school or CLE.

Minnesota Association of Criminal Defense Lawyers

SCHOLARSHIP APPLICATION

The Minnesota Association of Criminal Defense Lawyers proudly offers an opportunity for members of good standing to apply for need-based scholarships to attend a qualifying trial school or to attend the MACDL annual Continuing Legal Education seminar. Please fill out this application and submit to MACDL:

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Name _____

Job Title _____

Employer_____

Address_____

Phone numbers office: _____ home/cell: _____

Email _____

Type of Practice
❒ State Public Defender ❒ Federal Public Defender ❒ Private Attorney

Employer Assistance What financial assistance will your office provide?
❒ None ❒ All tuition/housing ❒ $___ of tuition/housing

❒ Other _____

If little or no financial assistance is offered by your office, please explain why: _____

_____

_____

_____

_____

_____

_____

PRIVATE ATTORNEYS, complete this section:

Number of lawyers in your firm: Partners_____ Associates _____

Percentage of your work that is criminal Defense: _____

Number of pro bono appointments you take in a typical year: _____

ALL APPLICANTS, complete this section:

Numbers of years you have practiced law: _____

Number of <u>complete</u> jury trials:_____

Previous trial school experience, including program and year attended : _____

_____

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_____

Please explain how attendance at the trial school or the CLE will increase your aptitude in criminal law, foster a greater level of experience and demonstrate how you plan to apply what you learn to your practice:

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Please explain <u>in detail</u> why you need financial assistance (attach a separate sheet)

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