

THE GREAT BURDEN OF PROOF

Delivering Persuasive Openings & Closings

Lisa M. Marchese
Davis Wright Tremaine LLP



OVERVIEW OF PRESENTATION

- THE POWER OF PERSUASION
- THE ELEMENTS OF PERSUASION
- OPENING & CLOSING
 - Effective Speech & Communication Strategies for Persuasion at Trial
 - The Poetry of Persuasion
 - ‘Out-Persuading’ the Opponent

THE ART OF PERSUASION

The Foundation of Openings & Closings

- Successful persuasion requires the projection of a belief system
- Successful persuasion requires the creation of an environment in which jurors adopt that belief system and feel both motivation & obligation to act
- Successful persuasion requires that the jury see that you represent what is right and just
- Every phase of a trial presents an opportunity for successful persuasion
- Opening & Closing are the trial lawyer's critical moments for successful persuasion

THE POWER OF PERSUASION

Persuasive speeches have changed the world. . .



FDR SPEECH TO U.S. HOUSE OF REPRESENTATIVES

December 8, 1941



JFK INAUGURAL ADDRESS – January 20, 1961

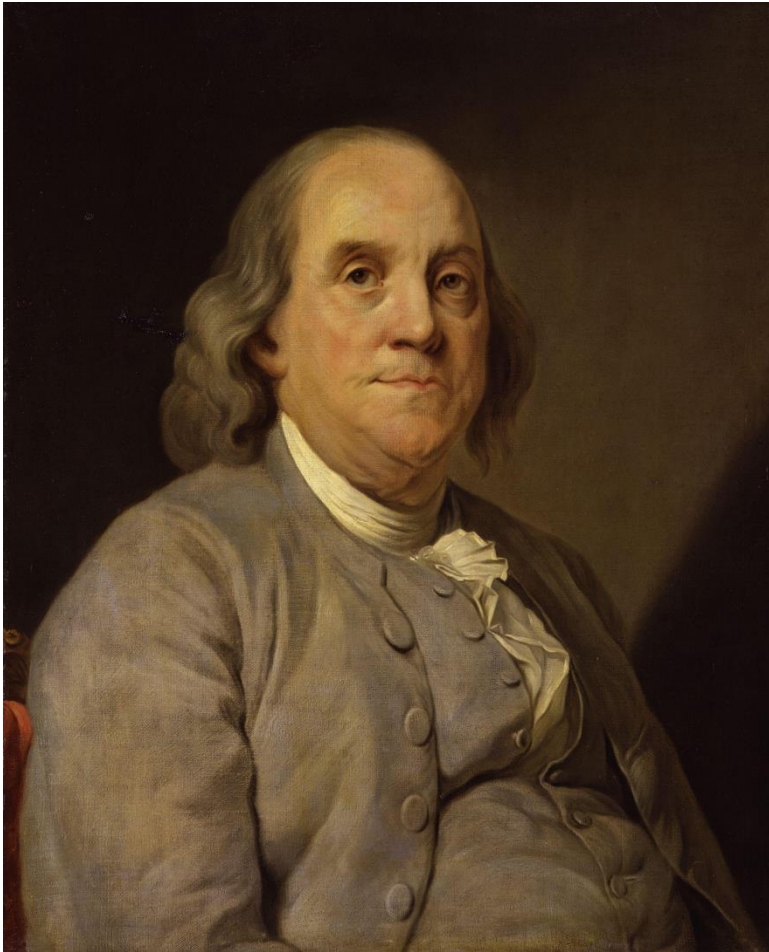


RONALD REAGAN ADDRESS AT BRANDENBURG GATE

June 12, 1987



THE POWER OF PERSUASION



*“If you would persuade,
you must appeal to
interest rather than
intellect”*

- Benjamin Franklin

THE ELEMENTS OF PERSUASION

Themes

- What are themes?
 - Concepts & ideas that capture the essence of our case
 - Extrapolations of common life experiences
 - Distinct and unifying idea(s)
 - Concepts that motivate us to form and/or adopt a belief system
 - Concepts that motivate us to make a decision, take a position and take action

THE IMPORTANCE OF THEMES

- A story without a theme is not a story worth listening to
- Trying a case without a theme is like fighting without any weapons
- Absence of a theme allows an opponent to define the issues and label the case
- Theme gives jury a key conceptual framework within which to decide the case

THEMES & JURY VERDICT RESEARCH

- Jurors deliberate in themes
- Jurors use themes to decide disputed facts
- Jurors organize and characterize evidence with themes
- Jurors resolve credibility issues with themes
- Ultimately, jurors express their conclusions in verdicts with the aid of themes

THEMES & MOTIVATION

- Human needs, wants and desires which influence judgment:
 - Self-preservation
 - Preservation of society
 - Self-esteem
 - Financial well-being
 - Security of family and friends
 - Happiness

IDENTIFYING A PERSUASIVE THEME

- Sour Grapes
- Profits over Safety
- Buyer's Remorse
- Greed
- Anger
- Jealousy
- Love
- Hatred

MODERN DAY IAGO?



CORPORATE AMERICA?



ELEMENTS OF PERSUASION

Gaining & Maintaining Jury's Attention

- **Intensity**
 - *Voice, attitude, presence*
- **Change**
 - *Pace, pausing, varying degrees of intensity*
- **Unity**
 - *Changes must be consistent with ideas/approach*
- **Familiarity**
 - *Jurors understand ideas based on their experiences, not yours*
- **Novelty**
 - *Develop different approaches to holding juror's attention*
- **Repetition**
 - *Primacy/Recency and reinforcement of a particular idea/belief system*

THE POETRY OF PERSUASION

- Word Choice - *use the strongest language possible in a given situation*
- Verbal Imagery – *describe objects/events as they would be perceived with all the senses*
- Personification – *attributing human qualities/characteristics to inanimate things*
- Simile – *comparison of two concepts or things by using “like” or “as”*
- Metaphors – *equating a new concept with an existing and familiar one*
- Repetition – *repeating key words, themes, concepts to reinforce in minds of jurors and deepen their dramatic effect*

THE POWER OF REPETITION



MARTIN LUTHER KING - *"I Have a Dream"*

Lincoln Memorial – August 28, 1963

- *"I have a dream"* – repeated in 8 successive opening sentences
- *"Freedom"* – used 20 times
- *"Dream"* – used 11 times
- *"We"* – used 30 times



OPENING STATEMENT

The Importance of Primacy

- Jurors tend to place greatest emphasis on the information they receive first – '*Primacy*'
- Best attention from Jurors is the first 30 seconds of Opening
- The Jury should understand the essence of our case within the first 60 seconds of our Opening
- Opening is the start of our Closing

JUSTICE ROBERT JACKSON - Opening International Military Tribunal – November 21, 1945



CLOSING ARGUMENT

The Importance of Recency

- What jurors hear last they retain in their memory – ‘Recency’
- Recency promotes the jury’s ability to recall key details and important facts
- Primacy, in contrast, entails the formulation and adoption of a belief system
- Closing is our final opportunity to reinforce our case themes
- We start and end with our most powerful and persuasive points

OUT-PERSUADING YOUR OPPONENT

- Anticipate opponent's arguments
- Know where your opponent will try the case
 - Law: does the law/jury instructions help?
 - Facts: strong and emotional facts to be emphasized?
 - Equity: sympathy, bias, prejudice, nullification?
- Preempt opponent's arguments
- Meet opponent's arguments head on
- Thematic reversal
 - Opportunities to use Opponents' themes against them?

CONCLUDING THOUGHTS

