MASSACHUSETTS LAWYERS WEEKLY

Persuasion and argument

By: F. Dennis Saylor IV and Daniel I. Small November 19, 2015

The point of courtroom advocacy is to persuade. Persuasion and argument are not the same thing, although of course the right argument can help persuade. Every trial lawyer should be focused on trying to persuade the jury — not "arguing" the case (or, for that matter, arguing with the other side, the witnesses or anyone else).

As a general rule, cases are decided on the facts. Persuasion is normally accomplished by eliciting the facts (that is, putting them in evidence), marshaling the facts (that is, putting them in the right order and framing them the right way), and persuading the jury why those facts require a particular conclusion.

For example, "The plaintiff is faking her injuries" is simply an argument. Standing alone, it does little to persuade. It might even do harm, if the jury thinks there's nothing behind it and the lawyer is just blowing hot air.

However, the same conclusion, built on a foundation of facts, can be very persuasive:

- "Mrs. Jones reported no pain, or even discomfort, at the time of the accident."
- "She was seen walking around normally after the accident."
- "She did not go to a doctor until two weeks after the accident, and only after she consulted a lawyer."
- "She never saw any doctor, other than the one her own lawyer hired."
- "She never had an X-ray or an MRI."
- "She never took any medicine stronger than Ibuprofen."
- "She never even asked for anything stronger."

And so on. Ideally, the lawyer can pull together the facts in such a compelling manner that he or she hardly needs to argue the point.

Persuasion is not something that occurs only during the closing argument. A surprising number of lawyers are content (or perhaps relieved) just to get the evidence "in," and leave it at that.

But how the facts are presented during the testimony matters just as much; indeed, usually more than how the case is argued at the end.

With rare exceptions, the best and most persuasive ordering of the facts is a narrative: a story in which relevant people, events and concepts are introduced and described in a sensible progression.

Trials are not always a conducive format for story-telling. The evidence comes in through different witnesses, documents and other evidence, and the language is that of question-and-answer, not narrative. If the jury needs to follow the story line (and why wouldn't they?), it is the lawyer's responsibility to make the narrative as clear as possible.

Normally, the narrative should be presented in chronological order. Why? Because a chronological narrative is easier to follow and, therefore, easier to understand. And because jurors like it that way. It's human nature to want to know "what happened," and the answer to that question is, by definition, a narrative.

In fact, if you don't give the jurors a narrative, or don't give them one that fits all the facts, they'll probably create their own. During deliberations, they'll say things to each other like:

- "Here's what I think really happened …"

● "This is what must have happened …"

Telling a clear story is not always easy. It might be a complicated story, with lots of twists and turns. It might require a lot of background and context to understand. You might have only part of the story, with some big gaps.

Sometimes, your side doesn't really have a story. In a criminal case, the defense may have no real option but to try to poke holes in the prosecution story. Still, it's your job to put the facts in a persuasive order. Don't leave it to the jurors to sort it out on their own.

Trials are largely, if not entirely, about facts. You're there to persuade, not to argue, and nothing persuades as well as the facts.

Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. He teaches trial advocacy at Boston University School of Law. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country. He can be contacted at dan.small@hklaw.com.