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Litigation Series: Session 4 - From Evidence to Verdict: Crafting the Perfect Closing Argument

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From Evidence to Verdict: Crafting the Perfect Closing



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INTRODUCTION

Closing argument is a great persuasive device to help you win your case.

- Closing argument is the most powerful part of the trial.
- It comes last and has the psychological advantage of recency.
- It is the only part of the trial which can be used without restrictions for setting forth relationships of facts and ideas, for emphasizing certain things, and for putting the case together in argument form.

Closing argument must have *persuasion* as its primary purpose.

- Other parts of the trial may not be argumentative and, if so, are stricken as “objectionable”.
- The law permits closing argument to be an argument and to be persuasive.



During closing argument, the attorney has the opportunity to address each issue that the jury must decide and persuade the jury that he has the winning side of that issue.

Closing argument allows the attorney to reach depth in discussion of the issues, which is necessary to reaching the truth.



Closing argument is the only opportunity during the trial to analyze the factual issues in dispute and to apply the facts to the law.

Closing argument is the place for weighing factors and placing emphasis on that which is important to the case.

Closing argument must not be a summation or rehash of the evidence.

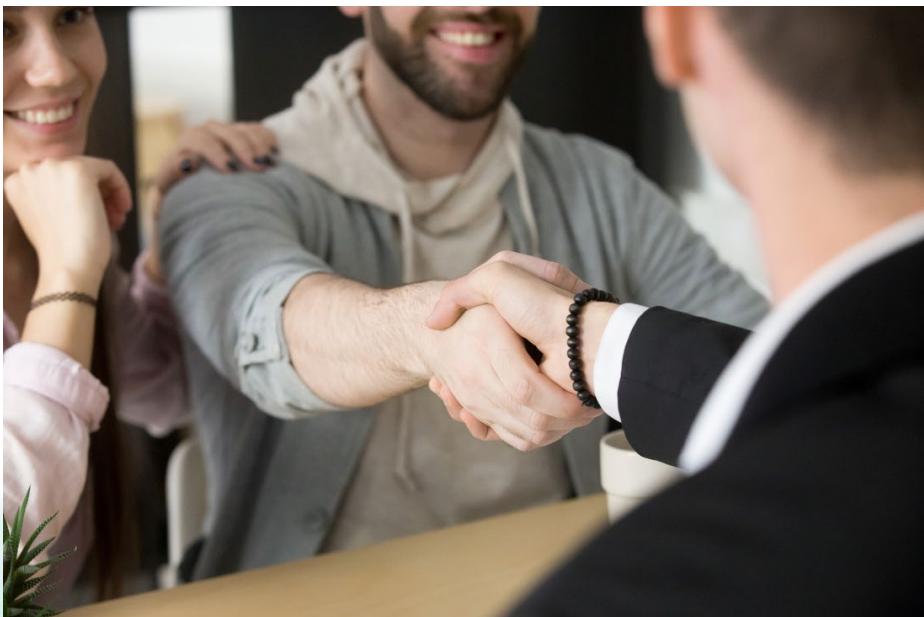
The subject matter for persuasive closing argument does not spring from the law but from non-legal disciplines such as rhetoric, persuasion, communication, nonverbal communication, speech, and drama.



Successful closing arguments depend on how well ideas are organized, how well facts are interpreted and characterized, and the extent to which inferences taken from facts add meaning to these facts and assist the jury in understanding them in a light that is most favorable to your case. This comes from creative thinking and brainstorming.

Closing argument skills must be people-oriented as opposed to being legally oriented. The law, of course, furnishes the framework.

Closing arguments which consist of stream of consciousness, adherence to legal ritual, a rehashing of evidence, or a diatribe are not persuasive.



CONTENT OF CLOSING ARGUMENT

- The law comes from the court's instructions and the facts come from evidence admitted at trial, but the content of a closing argument goes well beyond these two sources.
- Closing argument must be limited to the facts admitted and the reasonable inferences from these facts. It is in the area of reasonable inferences that great arguments are found.



Just as important as the actual facts in a case are the ideas that organize the facts, interpret the facts, reach inferences from the facts, and give life to themes that resonate with the jury.

Ideas come from creative thinking and brainstorming before and during the case and end only after the closing argument has been made. Brainstorming must continue during the course of the trial in order to take advantage of targets of opportunity and to adjust to new developments.

Indirect Proof

A trial is a contest over which of two (or more) different versions of a litigated event are true. The winning edge may come from indirect proof.



Indirect proof consists of details such as background, context, motive, character which do not directly go to an element or contested issue but which make the attorney's version likely to be true when considered in light of the jury's life experience and beliefs as to how the world works.

Indirect proof comes from the details of the story. Too often attorneys rely exclusively on content that bears on the elements of the offense and lose the persuasive power of details that make the story come alive and captivate the senses.



SELECTING POWERFUL ARGUMENTS

Selecting arguments that have persuasive power is not an art or a science.

Sensitivity, feel, and judgment are critical to the selection process.

The first rule of persuasion is to know and adjust to your audience. In terms of trial, this means that the preparation and delivery of the closing argument will be jury-centered.

I recommend discussing possible arguments with non-lawyers to better judge the strength of each argument and the best approach for presentation.

Arguments which appeal to attorneys generally do not appeal to lay persons.

Arguments based on legal concepts do not resonate with jurors because they are not steeped in human experience.

Jurors take an argument and measure it against their belief systems, attitudes, life experiences, backgrounds, values, education, and training. These factors determine the persuasive power of the argument. Look for arguments that “ring true,” “hit home,” or “strike a chord.”



SELECTING POWERFUL ARGUMENTS

Persuasive arguments must directly address the issues before the jury.

**Arguments which do not have
persuasive power should not
be used.**

Your adversary may select the weak argument, exploit it, and tear it up into smithereens. Not only does that gut the argument but it implies that all of your opposing arguments are equally weak.

Presenting weak arguments detracts from the emphasis that could be given to fewer, but stronger arguments.

Developing strong arguments is pick and shovel work and involves a burst of creative thinking.

ORGANIZING CLOSING ARGUMENT

Closing argument must be organized with an eye towards achieving unity, coherence, and emphasis. This allows the case to be presented in the most powerfully persuasive manner.

Closing argument should be organized based on the issues the jury must decide. This directly ties the argument to the decisions that the jury must make.



The attorney's side of an issue becomes a major point which then becomes a unit of argument called a "block".

A block of arguments is based on a single point and consists of:

- A statement of that point.
- Support for the point.
- A restatement of the point in conclusion.

Notes for each block of argument should be placed on a separate sheet of paper for easy use. Careful consideration should be given to the order of arguments and having the notes on separate notecards will facilitate this.



The psychological principles of primacy and recency dictate that the beginning and ending of the closing argument contain the most powerful points.

Points should be treated separately just like separate sections of a brief. Transitions between points is not only helpful but essential.

Avoid speaking in a stream of consciousness – ideas spoken as they occur to the attorney has many pitfalls, not the least of which is that it will be harder for the jury to follow along.



DEVELOPING A POINT

Closing argument is most effective when it consists of a series of carefully developed points with persuasive power.

Each point must be explicitly stated.

Each point must be developed separate and apart from the others while at the same time not being cast aside in an isolation chamber. There is always going to be some overlap between points.



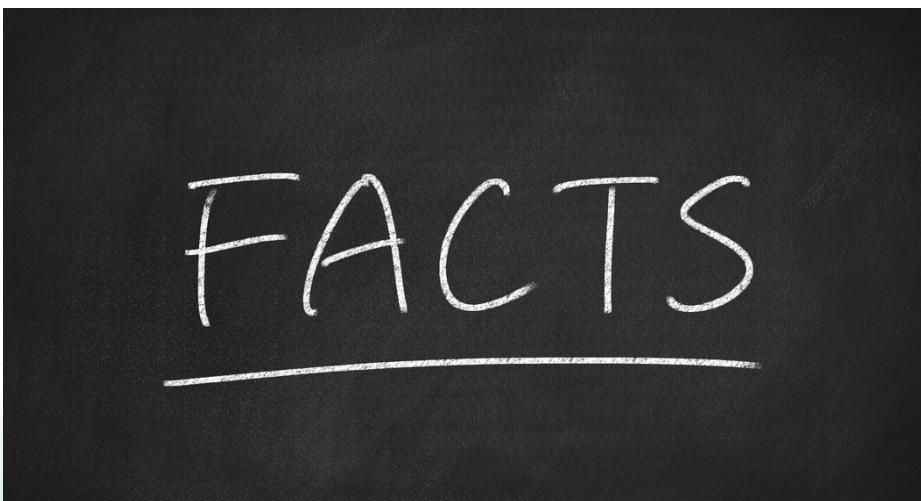
Each point must be thoroughly developed. Making a note of a point and hoping to develop it off the cuff while you're on your feet in court is a recipe for disaster. You must be laser-focused on the single point as you prepare and deliver it otherwise you risk getting distracted with collateral matters that dilute the point. The point will lack the type of support it needs to have unity and coherence. You do not want your point to rest on a shaky foundation. As the attorney, the point will seem so clear to you due to how long you have been working on the case that it may seem redundant to state it. As a result, many attorneys fall into the trap of rehashing supporting facts and the jury simply does not understand what point is being made.



Two mistakes to be avoided:

1. The mere rehashing of facts without relating them to a stated point.
2. Droning on by stating the point over and over again without support.

Developing each point can be reduced to a simple formula: (1) state the point and (2) support the point. This combination packs a “one two” punch as it results in powerful persuasion.



FACTS



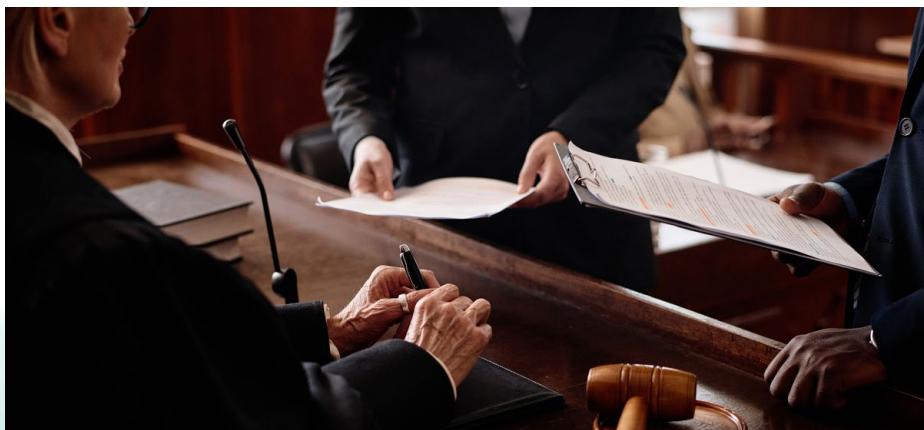
The point should be stated and restated frequently enough that the jury is not only aware at all times of the point that is being made, but feels the power with which the supporting material carries the point.

“Tell them what you’re going to tell them, tell them, and then tell them what you told them.”

The point should be supported by marshaling all of the facts, inferences, interpretations, explanations, and details that support the point. Avoid diluting the point by overlapping points.

Keep each point separate.

Choose a sequence which creates a streamlined flow of ideas.



EXTEMPOREANOUS APPROACH TO DELIVERY

- Speak to the jurors. Don't be a conduit for what is on the yellow notepad.
- It is entirely appropriate to use notes. However, notes should only be used to jog your memory or to help in transitioning to a new topic. It should not be used as a crutch. In other words, its' use should be minimal so as not to interfere with communication between you and the jury .



I recommend dividing your closing argument into blocks, naming each block, and using these names to jog your memory.

- Reducing your closing argument to an outline and having it readily available on counsel table will give you confidence and provide a checklist for use during closing argument.

BE IN the moment

Being in the moment is a drama term indicating that your argument is happening right now. It lives now and will never be done in the same way again.

One cannot be in the moment if one is thinking about how one prepared last night or trying to remember what one memorized.



COMMUNICATION IS FUNDAMENTAL

Communication of the case to the jury is fundamental and must be top of mind at all times. Points not communicated cannot persuade.

Meeting legal requirements and making sure nothing is left out are often most important to attorneys, and communication with the jury is lost.



THE LANGUAGE OF CLOSING ARGUMENT

The language of closing argument is diametrically opposite from the abstract and general language ordinarily used by lawyers. One must learn the language of closing argument. Use language precisely – say exactly what is meant.



Use standard English – ease the legalese by translating it into vivid, plain, simple language.

Use power language

- Take out qualifiers like, “I think,” “I believe,” “I will attempt to show ...”
- Use the active voice.
- Rely on nouns and verbs.
- Leave out unintentional hesitations.
- Use language that has appropriate emotional content and appeal.



Use vivid language

- Use concrete, not abstract language.
- Use specific, not general language. The “just” thing is death!
- Paint vivid word pictures.
 - Visualize the matter described and paint it for the jury.
 - There is great power that comes from being able to see an event in detail.
 - Use of word pictures must be learned. Lawyers intuitively speak in abstract and general terms.
- Vary up your sentence length, but tend strongly toward short sentences. Written sentences are normally longer, clunky, and more complex than sentences delivered orally.
- Use “quotables” – ways to say things that “stick” in the listener’s mind .



A NOTE ABOUT THE HYPO

- In the hypo that I gave you about the mother bear and her cub, this rich story influenced every aspect of the trial, including jury selection.
- I knew that a desirable demographic of jurors were female jurors between the ages of 35 and 50 who had teenage kids.



PRACTICAL ADVICE

- It's critical to meet your adversary on their turf. What I mean by that is anticipating the state's strongest arguments (and most damaging to you) in advance and confronting them "head on" during your closing argument. Every effort must be made to undermine the argument by showing how absurd it is or how weak the evidence is upon which it is based.
- In so doing, you will blunt the impact of these arguments when it's the prosecutor's turn to sum up. Moreover, the prosecutor will be forced to refute the points that you made, thus taking them off-script. The worst thing is to ignore these "bombshells" hoping that the jury will overlook them. They won't.



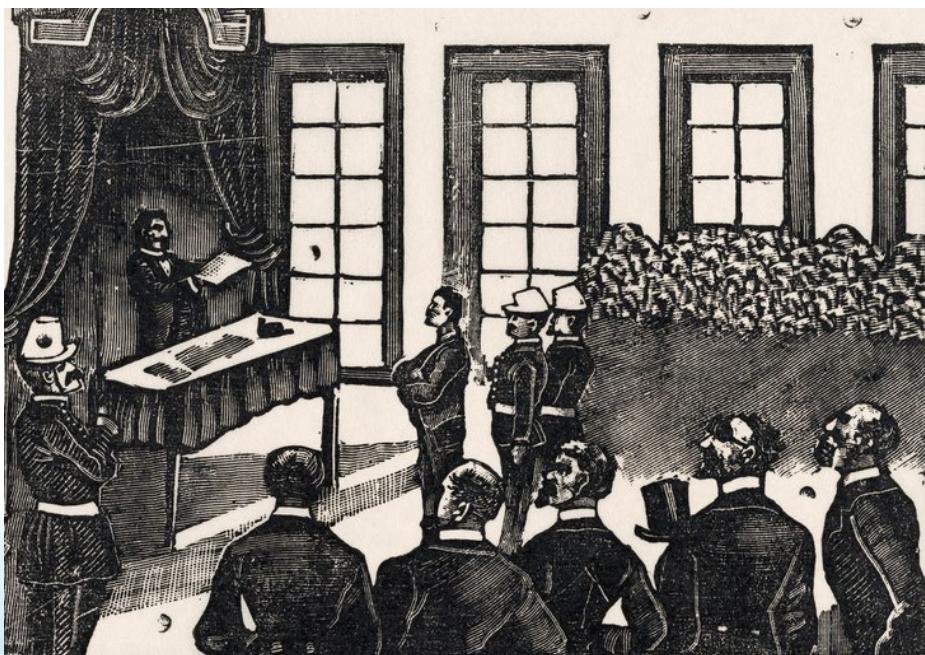
NONVERBAL COMMUNICATION

- Nonverbal communication in the courtroom is deafening. Its importance cannot be overstated.
- 65% of communication is nonverbal. Studies show that when there is conflict between the verbal and the nonverbal, the nonverbal will win out.



Two aspects of nonverbal communication:

- Awareness of the feelings of jurors as communicated nonverbally by them and sensed by the attorney. Awareness is important because it may allow adjustments.
- Far more important is that which the attorney communicates nonverbally (see below).



THE SELF AS A POWERFULLY PERSUASIVE INSTRUMENT

Experts say that one is persuasive if he is: (1) trustworthy, (2) competent, and (3) dynamic. Following the suggestions below will assist in exuding these qualities.



- One cannot expect to persuade others of that which one does not believe himself. Your nonverbal communication will reveal the uncertainty.
- Find the cause in the case and promote and develop that cause throughout the trial.
- Focus on the cause and on communicating it to the jury.
- Have and show feelings appropriate to the case and to the cause.
- Project the intensity and vitality that the cause justifies.
- Immerse yourself in the case so that it is you who is influencing and not the bear monosyllabic words on your notepad.
- Make the closing argument come to life. It will only come to life if it lives within you.



- Have the strength and conviction that comes from having a cause that you truly believe in
 - Eliminate all doubts and ambivalence.
- Put aside your doubts and inhibitions and dare to be great.



THE SPAN -OF- ATTENTION PROBLEM

- Experts say that the average attention span is less than three minutes. This fact poses a significant problem for trials that last hours at a time.
- Vital to keeping the jury's attention during closing argument is having appropriate emotions that will “carry” the attention of the jury. Avoid wringing the meaning out of emotionally-charged arguments.



Achieving variety is the antidote to the span -of- attention problem

- For each block of argument have an appropriate feeling.
- Changing feelings from block to block is the basis for variety.
- As feelings change, it will be natural to change location in the courtroom, tempo of speech, and volume.



- Changes in location, tempo, and volume naturally reflect the different feeling appropriate to the block of closing argument.
- Variety can also be achieved through use of visual aids and other means of communication.



DELIVERY

- Posture must reflect the dynamism of a person with a cause.
- Use your full range of gestures.
- Movement must be natural and effortless. Use movement when it is appropriate, such as to make a transition, to approach an exhibit, or to write on a poster board.



- Each block of argument has a dominant feeling or emotion from which ebbs and flows location, tempo, volume etc.
- Use movement and pauses for emphasis, such as to signal a transition and/or to show relationships of points.



EMPHASIS & IMPACT DEVICES

- Emphasize your points so that they will dominate the conversation in the deliberation room.
- Cases are lost because the jury does not know that something is important and, therefore, does not remember the point.



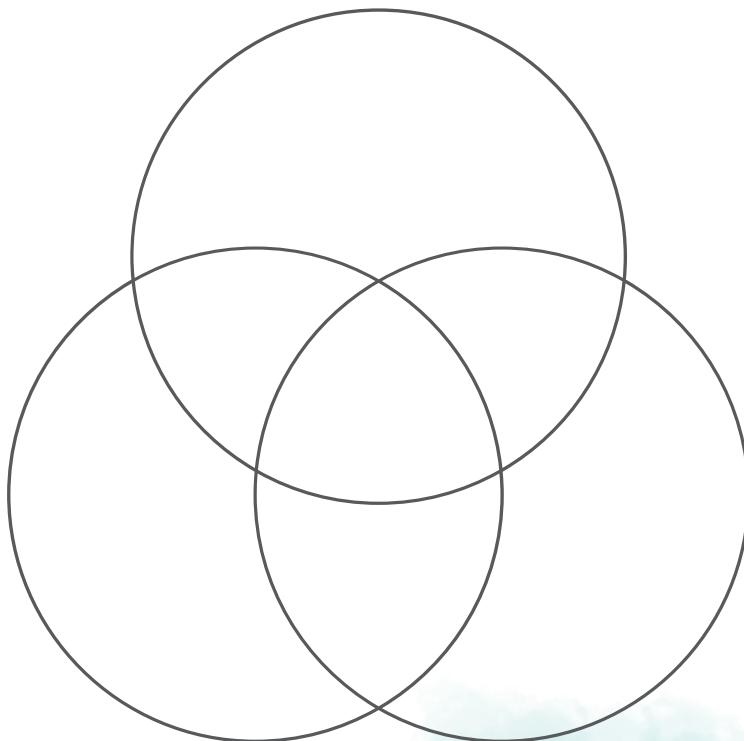
- Emphasis may be gained by outright telling the jury how important something is, by spending time on a given point, by using visual aids, and by writing on a chart.

Useful speech devices

- Quotations.
- Analogies.
- Similes and metaphors.
- Illustrative stories.
- Painting word pictures.
- Repetition.
- Triples like “blood, sweat, and tears”.
- Parallel structure like “Ask not what your country can do for you but what you can do for your country”.



THE SECOND CIRCLE



CIRCLES OF CONCENTRATION

- I use “circles of concentration,” as developed by Patsy Rodenburg to help lawyers focus and energize their voices. The various circles the exercises below take you through are tools, placing you in the here and now.
- They serve as tools primarily when you lack clarity regarding the focus of your speech. While there are three main areas of concentration, the variations are limitless and not at all fixed.
- As speakers, we find ourselves within one of these circles at every moment of our lives, often transitioning swiftly between them. Each of the three can be encapsulated in a single sentence or even a single word. Through experimentation with this method, you will come to understand that language is typically linked to the focus of our current situation.



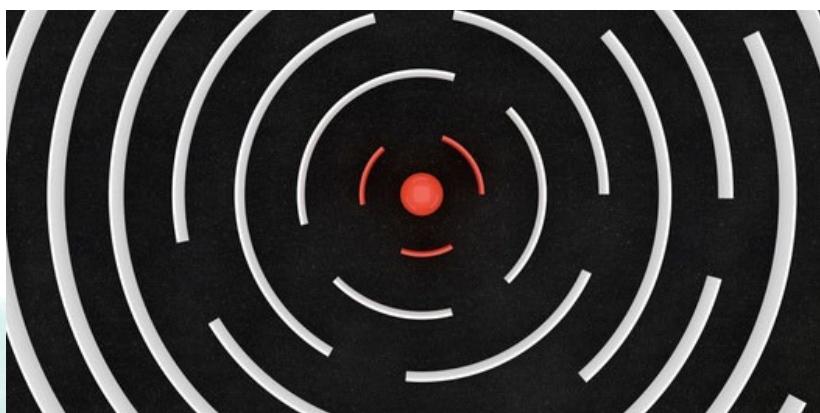
- These circles of concentration correspond to Stanislavski's "Circles of Attention" as found in his book, "The Actor Prepares."



FIRST CIRCLE OF CONCENTRATION

The following outlines the circles of concentration:

The First Circle involves self-dialogue. This form of imagination is deeply personal. Personally, I recognize that I am in the First Circle when I cannot find items such as my phone, glasses, or keys. In a calm and reflective manner, I might ponder, “Where are my keys?” or “Where did I leave my glasses?”

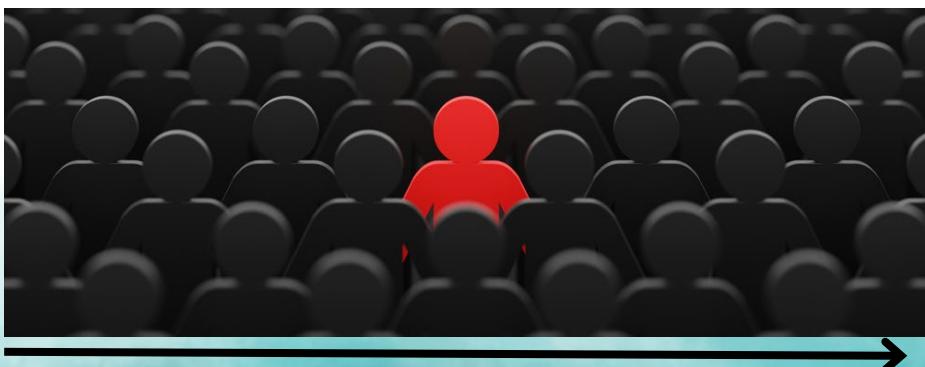


- This is what Stanislavski referred to as the “small circle of attention.” Imagine yourself with a light above your head that only extends a half-inch from your body. Be aware of anything within that circle of light, but only within that circle of light. If your attention wanders out of the small circle of attention, nudge it back in.



SECOND CIRCLE OF CONCENTRATION

- The Second Circle pertains to direct communication with a single individual. Although you may quickly engage with multiple people, your focus remains on one person at any given moment.
- This is what Stanislavski referred to as the “medium circle of attention.” In this circle, the light above your head expands to two to three feet around you. Notice how it is more difficult to pay attention as the circle of attention expands. There is more information to process!



THIRD CIRCLE OF CONCENTRATION

- The Third Circle engages a wide audience or the cosmos. The act of imaginative expression is broadly disseminated.
- This is what Stanislavski referred to as the “large circle of attention. The light has expanded to the entire room and everything in the space.



CIRCLES OF CONCENTRATION

- Fundamentally, these circles relate to our focus during speaking or listening. Our attention can gradually or swiftly transition between these areas from one moment to the next, often without our conscious realization.
- However, actors who recognize these fluctuations in concentration can leverage them to craft impactful and insightful moments in their performances.



FLUIDITY IN THE CIRCLES OF CONCENTRATION

- In life, we are fluid in all these circles. Indeed, we focus and pay attention differently in response to the needs of the moment. For example, you will often notice that your manner of speaking transitions swiftly among these three circles. There is rarely a consistent tone throughout.
- A speech is no different.



USING CIRCLES OF CONCENTRATION

- An individual may become “entrenched” in one circle, resulting in a demeanor that is intense and theatrical. It is possible that your personality leans more towards one circle than the others. The way you engage with the world is indicative of the circle you inhabit while speaking.
- By examining these circles, you can gauge the level of intimacy in your relationships. For instance, a couple that previously communicated in the Second circle may now only interact within the First or Third circles.

“THE VERDICT” – WHAT CIRCLES DO YOU SEE?

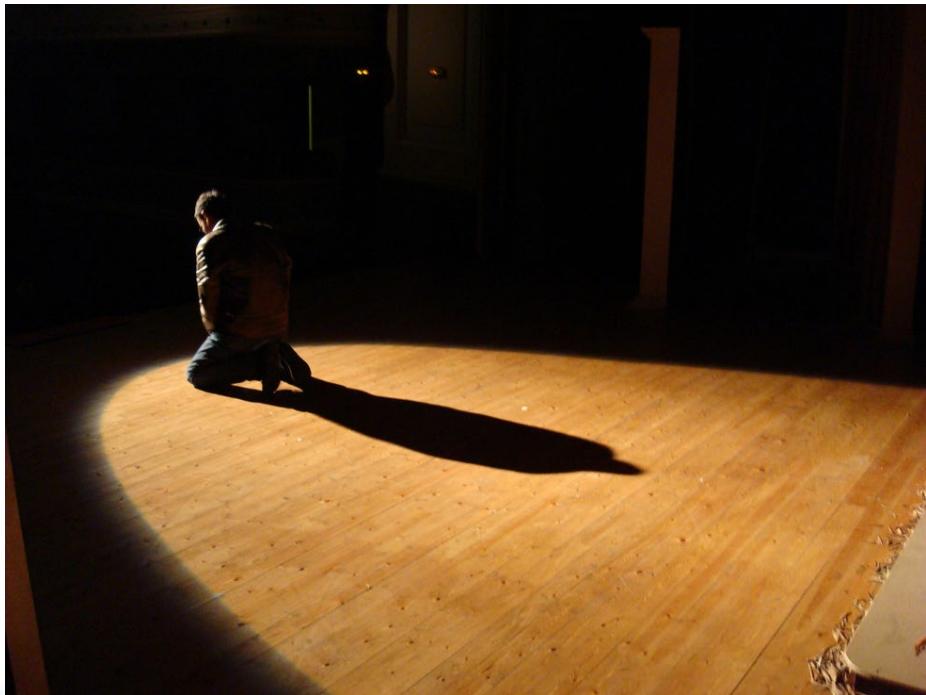


USING CIRCLES OF CONCENTRATION

Certain characters may utilize Second language in specific contexts while being unable to do so in others. For instance, Nora in *A Doll's House* exhibits a playful demeanor with Torvald using Second language, yet she does not adopt a serious tone until she transitions into a blend of First and Second language towards the conclusion of the play.



A lackluster performance can be characterized by an actor who remains entirely within a single linguistic sphere. Such an approach lacks psychological depth and fails to engage the audience, as it is restrictive to operate within a singular framework.



Here are several methods for incorporating the circles of concentration into your work:

Soliloquy can be delivered in the First or Third circle, or even a combination of both. For instance, I have encountered the famous line, 'To be or not to be' directed towards Ophelia in the Second circle.



Prayer can utilize any circle, but the choice you make reveals your connection with God and those in your community. This may indicate whether your relationship with the Creator is personal or communal. In numerous medieval mystery plays, characters exhibit a profound connection with God and often pray in the Second circle. When you listen to a priest pray, he is likely using the Second circle, as the Third circle tends to be overly formal and less engaging.



Certain professions are characterized by a distinct mode of communication. In the service sector, roles such as receptionists and flight attendants are expected to exhibit friendliness, which necessitates the use of second circle. However, maintaining this level of engagement consistently throughout their daily interactions can be challenging. As a result, their communication may come across as patronizing; although they are attempting to use second circle, they often revert to third circle. Phrases like, “Have a nice day!” may lack genuine sentiment. After all, sustaining second circle throughout the entire day could lead to



Shifting circles can serve as an effective comedic device. Imagine moving from Third to Second and then to First. Picture yourself at a dinner table with a group where no one is paying attention. You begin conversing with the individual beside you, but they too are disengaged, leading you to speak to yourself. Conversely, this approach can be highly invigorating. You might start with an idea and express it to yourself, then share it with the person next to you in Second, before ultimately presenting it to the entire group in Third.



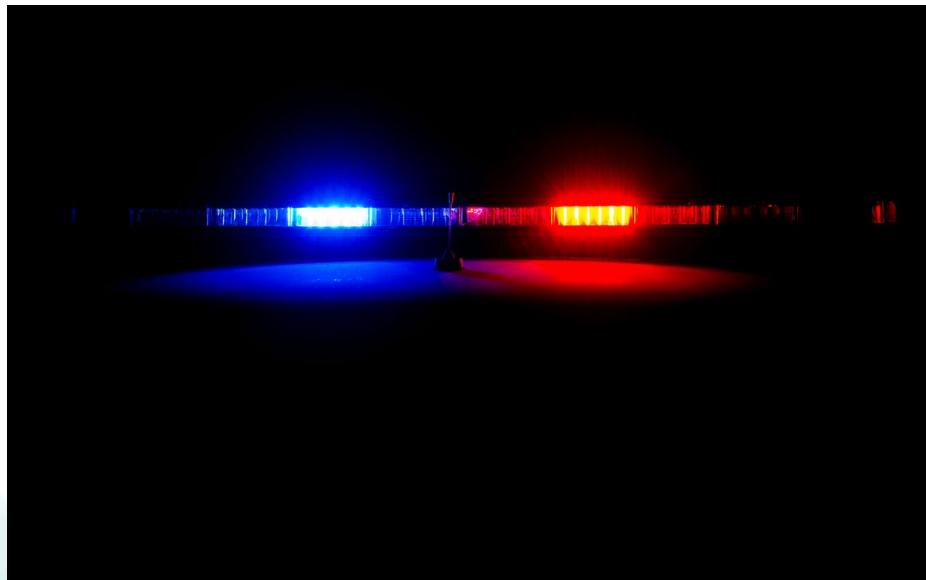
You may find that a character is capable of communicating solely in Second when addressing objects. This theme is examined in various plays. Engaging in conversation with a toy or a ventriloquist's dummy exemplifies this. While less theatrical, it is equally insightful to observe individuals who struggle with Second to the extent that they can only establish that personal connection while occupied with tasks. Activities such as making tea, ironing, or washing, or even walking to a window to gaze outside while speaking to someone in Second, illustrate this phenomenon.



- Before any verbal communication occurs, we are already aware that others are focused on us in the Second circle. This unsettling awareness arises when a homeless individual on the street attempts to engage us using First circle language, which is directed at us in the Second circle, and we are anticipated to comprehend it.
- Circles can serve as instruments of influence: the high-status individual who chooses not to communicate with us in the Second circle. We have an underlying suspicion that much of what transpires is happening beyond our immediate perception.



Establishing Second-circle contact with individuals can create a more personal connection. Typically, interactions with a police officer occur in Third-person. However, if you manage to engage in Second-circle communication, such as during a traffic stop for speeding, you may have a chance to avoid a ticket. Conversely, approaching the situation with aggression in Second-circle could lead to a confrontation.



If we find ourselves in such a situation, it is likely due to the presence of an extremely insensitive individual. Upon arriving at the party, we seek out a group of Third-circle communicators to help us acclimate. The English are particularly skilled at avoiding direct communication by not transitioning into Second. Their tendency to be polite and casual in either First or Third creates confusion, as the language appears courteous and somewhat familiar, yet the interaction remains distant and unwelcoming.



Telephones often expose underlying dynamics in communication. Some individuals find it easier to establish Second-circle connections over the phone, as they are not confronted with the physical presence of the other person.

Conversely, others struggle to achieve that level of connection and instead communicate in a Third-circle manner during phone conversations.



As we become increasingly isolated, both individually and collectively, we may find ourselves retreating into a shell-like state characterized by a First perspective. While this First perspective can possess a certain internal energy, it often proves difficult to break free from it. Additionally, our listening tends to occur in cycles. Experiencing genuine attention in Second is truly remarkable. Many of us likely recall moments from our childhood when an adult truly engaged with us in this manner.



In those instances, the listener's full attention is directed towards us, contrasting sharply with the more general or distracted listening associated with Third or First. It can be disheartening to realize that we have shared our innermost feelings with someone who is only listening from First or Third.

When artists discuss the concept of truly perceiving an object, I believe they are referring to a Second-circle perspective. Each circle can evoke a wide range of emotions. A Second-circle observation and expression can encompass anything from tenderness to aggression, intrusion, or love.

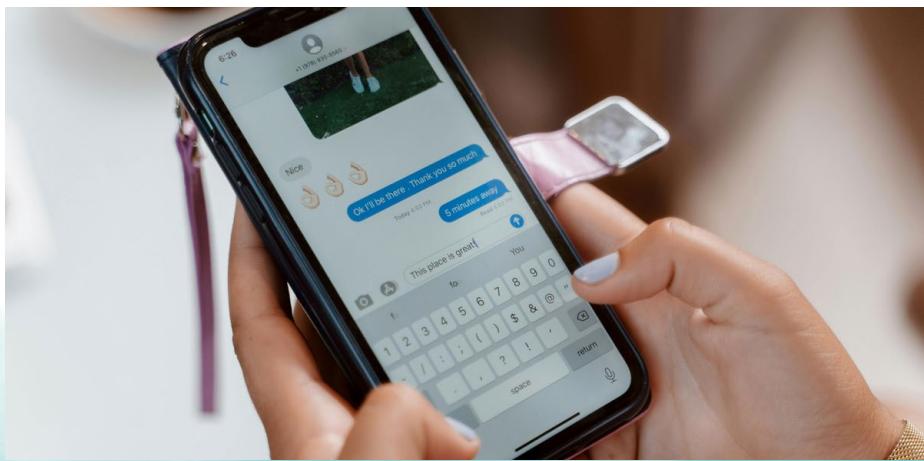


ATTENTION

Many individuals are only able to express their emotions in the First circle. For instance, we may feel intense anger towards someone—perhaps for making us wait—and engage in a passionate First-circle argument against them. However, when that person finally arrives, we often switch to a pleasant Second-circle interaction, concealing our anger. Conversely, some people find it easy to express their feelings openly in the Third circle, yet they may find the deep exploration of these emotions in the First or Second circles to be too painful.



Examining a text can reveal shifts in perspective through its language. First-circle language is easily identifiable, as it is used when speaking to oneself, eliminating the need for external communication about known details. There is no requirement to clarify or articulate what is already understood. Conversely, being overwhelmed by a Second-circle speaker who provides intricate descriptions of the optimal path through Central Park can be quite discouraging. However, if individuals refrain from using Second-circle language, their communication tends to lack directness.



Armed with this information, consider rehearsing your opening while being acutely aware of the transitions between different circles. Typically, a more pronounced shift will result in a more impactful and compelling delivery. Conversely, a gradual transition may convey hesitation or a slower cognitive process. Experimenting with contradictions can be intriguing; this involves using a perspective that does not align with the content of your speech.



- Alternate among all three perspectives—within a speech, a thought, or even a single word. Attempt to maintain Second for an extended duration; doing so without reverting to First or Third will likely leave you feeling fatigued. Prolonged engagement in First can quickly lead to feelings of isolation and disconnection.
- Engaging in similar practices in Third will instill a sense of confidence, bordering on self-assuredness. While you may not reach a definitive conclusion right away, through experimentation, you will uncover additional possibilities and identify areas where a speech may lack clarity. Throughout this process, having a diverse range of focuses will enhance the variety, tone, and tempo of your voice.

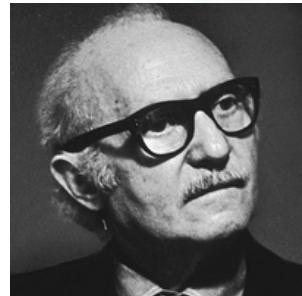
STRASBERG RELAXATION/ CHAIR WORK

I firmly believe that all the great teachers that came before us have a mythology all their own. Some are revered, some not so much. Lee Strasberg went a different direction than Meisner did with his teaching. I think his relaxation work, done in a chair, is one of his most useful exercises for actors.



CHAIR WORK

- Sit in a chair with arms to the side, feel on the floor, back supported by the chair. You should be comfortable.
- Isolate one muscle group by putting your attention on it. I like to start with the right shoulder. Object of attention on your right shoulder.
- Stretch your shoulder by lifting your entire arm up. ONLY STRETCH THE SHOULDER, everything else should be relaxed in neutral... do not scrunch up your face or lift the other shoulder or shift in the chair while you stretch. Only stretch the one muscle group that is the focus of your attention.



- After the stretch, drop the arm back down into the neutral “sitting in the chair” position.
- Now with your attention go back to that shoulder group of muscles and exercise your will to make them relax even further.... I use the phrase: ‘will it to release’.
- Now go on to the left shoulder... Then the right knee (lifting up the entire leg) or the right big toe...or the right thigh.... or the left....
- Explore muscle groups throughout the body with the same process:
- Put your attention on that muscle.
- Stretch it physically.
- Drop it back to neutral.
- Will it to release.



- Always work one at a time.... Not two shoulders, but one at a time.... the point is to relax the region and to learn to isolate control over the different tensions in your body... so you can begin to release your HABITUAL TENSIONS Should you choose to. If you are working on something like the jaw, which doesn't exist in a pair, work the entire jaw...
- This is a stretch and release exercise. Don't get slow and meditative. You should either be moving or willing something to release.... Avoid sitting and thinking or feeling, but.....



If you do feel something emotional lift your arms up at shoulder level like you are a scarecrow hanging Keep shoulders and elbows and wrists relaxed. Now breathe deep and release the feeling you are feeling on a low “huh” sound.... Don’t “make” the sound but let it all out of you. Focus on the feeling of the emotion being released as the sound is released. I like to experience the sound and the feeling as the same thing.



If you do chair work for a while you might get bored.... work through this... it is usually your resistance wanting you to stop before you start feeling your own vulnerability and emotions. Once you start releasing the muscles that are “holding” energy/tension it is not unusual to trigger feeling. This is where you breathe into sound on a low resonated, “huh”.



Chair work and Breath

I like to inhale while I stretch the muscle and exhale as I will it to release. This becomes really important when you are releasing emotional response into sound. I also like that I am training myself to associate releasing emotional response on an exhale as I can use this when I release the text out of me. Stay in and on breath support while you do chair work.



“THE VERDICT” WITH PAUL NEWMAN



“A TIME TO KILL”



CONCLUSION



"I want you to picture that little girl....

Can you see her?"

Powerful persuasion in closing argument is a natural byproduct of an attorney who uses creative thinking to produce ideas, selects powerful arguments, and then presents those powerful arguments in vivid word pictures using variety and appropriate feeling with the self as a powerful persuasive instrument.