

# GERRY SPENCE ON CLOSING ARGUMENT

(TRANSCRIBED FROM HIS PRESENTATION AT THE WAYMART, PENNSYLVANIA REGIONAL SEMINAR 2002)

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So, you've done a poor job of selecting a jury. You failed in the cross-examination. And now it's time for the final argument.

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It comes after you've done all of the other things in the trial that must be done. The most important thing of all during the course of the trial is to have been yourself. If you have been who you really are, connected to your case, caring about your case, caring about your clients, and caring about yourself; if you have tried as I try every day and fail every day; if you have tried and sometimes succeeded in making one, pure, clean and honest true statement; if you have done this day after day in the courtroom and you are now ready to make your closing argument, haven't you already won the case? The jury believes you. The jury has made its choices. You have become the client you represent.

I think about your role in the trial of a case like a great Kit Carson or Daniel Boone who knows the territory. You have guided the confidence of the jury and they will follow you. They will follow you as the guide through this whole mess because they trust you. They have another guide there who they could follow. There's somebody over there who is called the prosecution in a criminal case and there's somebody over here called a defense attorney in a civil case, and he wants to be the guide. But you are the guide they have chosen. They've chosen you not because you are big or beautiful or strong or masculine. You don't choose guides based upon the sound of their voice. You choose a guide that you trust. The guide can be any sex, any size.

(To a student:) This is a guide that a jury followed in a recent case. How much did the jury give you?

Student: \$1.5 million.

And was this your first case with a jury trial?

Student: Yes it was.

What kind of a case was it?

Student: It was an Americans with Disabilities Act and retaliation case.

I am proud of her.

So, the guides come in every size. It's such a wonderful revelation to realize that you don't have to be somebody else. You don't have to change a thing about yourself. You should just get in deeper and deeper and become more real and shed all of the masks and just present whoever you are to the jury and become the guide that they follow.

So, it's time for the final argument. How have you prepared for it?

I begin to prepare the final argument the day I get the case. I have a file that is called "Final Argument" and I sometimes will be thinking about it in the middle of the night. I wake up and with a pad on the side of the bed I make a little note, it doesn't always make much sense, but sometimes they do. During the trial ideas and thoughts come up and I put them into the final argument file. But when I walk into the courtroom on the last day for the argument I have prepared the argument and have written out every word that I want to say on a piece of paper in the way that I want to say it.

We were talking about that this morning, Dan Williams and I. Dan, where are you? What did you say?

Dan Williams: Spontaneity only comes through preparation. It's when I'm not prepared that I have to go to my notes. Spontaneity comes from that confidence of being totally prepared.

I asked you to tell us what you said to me this morning because you said it so well and you said it so well again. That is exactly right for me. If there's nothing here (pointing to head) in the computer, there's nothing that comes out. If you

have thought of it, and you prepare, somehow a magic occurs because if you fill the computer full with all of these things, the stuff that comes out, comes out wonderfully if you give it permission to come out. Let it go. And the fear factor goes away too.

If you have prepared, you know that if you get stuck you have the notes. I noticed Josh this morning was down on his knees and he wasn't praying. He was reading his notes. He was making new notes. He was filling the computer and he was assuring himself that he knew what he wanted to say and how he was going to say it. He was relating to something that he knew was real, that was there.

I remember a particular case back in 1969. The reason that I lost the case was because I thought that I had to wait until I heard what the opposing counsel said in his close before I could make my rebuttal. Do you think you have to wait until you hear what opposing counsel says so that he or she ends up controlling your final argument? I thought. Then I hear what his argument is. I'm listening to his argument, I'm thinking to myself, "Oh, God! I can't answer that." Then I find myself saying, "Oh my God. I can't remember what it was he just said because I'm listening to this and now I've got to hear the next thing that he's saying and all of this, and it is overwhelming me." When I get up my thoughts are not ordered and I really haven't anything to say of any power.

If you begin to reverse roles and we have done this so often in this process, if you will reverse roles with the prosecutor or reverse roles with the defense attorney, you will know almost 95 percent of what he's going to say before he says it. You will have already prepared his argument. You know what he's going to say and you have prepared your answers to those arguments before you walk into the courtroom. People will think you are brilliant. You stand up there and answer all of those arguments just as if you are a genius. Besides that, the five percent that you don't answer is forgotten anyway.

Now, I haven't meant to undermine the importance of a final argument. If I had a choice between two arguments, the opening statement and the final argument, I would take the opening statement any day. But they have two different functions. The opening statement is story telling. That's when we tell our story of the case. This interesting narrative that excites people when they hear it. But the closing argument is no time for story telling. Story telling is over. It's now time to get justice. It's now time to get retribution. What is justice? Well, in your case, in the civil case, it's to get the only thing that can be given to you. They can't give you back this little baby. "Give me back little Jenny and you can have back all of the \$10 million dollars that I ask for in this case. I want justice. I don't want a little part of Jenny. Don't give me her little toes. Don't give me back just her little smile. I want all of her back. I don't want just \$500,000 for a little toe. I want all of her back. Don't cut her in half for me. Give her all to me. Will you?"

I have to tell you that the closing is when we get what we want. We get justice. It's the time, the salesman puts the contract in front of the person, gives them the pen

and says, "Sign it."

It's when I say to a jury in a criminal case, "You know, folks, you're going to walk out of here today. What a wonderful idea to walk out, just get up from your chair and walk out. I'm going to walk out of here today. I would like to join you when we all walk out of here today. Let's all walk out of here today together. What a wonderful thing to walk out of a room, free, to go home to your family, your children, to your friends, to your job, to your life, to the rest of your life. Twelve of us and me with you walk out today, but shall we leave Betsy here to go to some dank, devilish, ugly black hole for the rest of her life? Or shall we all walk out together?"

It's the time when we get what we want. It's not time to say; "Now as George Jones testified, the cop was....and then we had the witness and he testified...." This is no time for that. It is a time to argue the facts only as those facts support what you want.

Here's the story of the bird that some of you wanted to hear again. This is one I've used many, many times. It's a nice method by which you can transfer

responsibility for your client to the jury.

Ladies and gentlemen I am about to leave you, but before I leave you I'd like to tell you a story about a wise old man and a smart-alec boy. The smart-alec boy had a plan, he wanted to show up the wise old man, to make a fool of him. The smart-alec boy had caught a bird in the forest. He had him in his hands. The little bird's tail was sticking out. The bird is alive in his hands. The plan was this: He would go up to the old man and he would say, "Old man, what do I have in my hands?" The old man would say, "You have a bird, my son." Then the boy would say, "Old man, is the bird alive or is it dead?" If the old man said that the bird was dead, he would open up his hands and the bird would fly off free, off into the trees, alive, happy. But if the old man said the bird was alive, he would crush it and crush it in his hands and say, "See, old man, the bird is dead." So, he walked up to the old man and said, "Old man, what do I have in my hands?" The old man said, "You have a bird, my son." He said, "Old man, is the bird alive or is it dead?" And the old man said, "The bird is in your hands, my son." Ladies and gentlemen of the jury my client is in yours. 🍷

