

# New York Law Journal

 [newyorklawjournal.com](http://newyorklawjournal.com)

<http://www.newyorklawjournal.com/id=1202644040529/Case-for-the-Rhetorical-Question-as-a-Summation-Technique?slreturn=20140126155810>

## Case for the Rhetorical Question as a Summation Technique



Ben Rubinowitz and Evan Torgan

The art of persuasion comes in many forms. It is the manner in which the trial lawyer chooses to present certain facts that will serve as the driving force behind a successful outcome. Since every aspect of the trial should be conducted with an eye toward summation—toward creating the most powerful argument that can be advanced—the trial lawyer must be acutely aware of how each part of the trial will affect the summation.

While it is important to focus on the affirmative facts that have been elicited during the trial to create a powerful argument on summation, it is equally important to focus on the "negatives," or the absence of certain facts. Specifically, it is the failure of the opposing party to produce certain proof or call certain witnesses that often serves as a hammer and one of the most powerful means of exploiting the opposing party's weaknesses. To illustrate this point, consider the following example: Assume that a plaintiff in a personal injury action suffered injuries to his neck and back. Prior to trial, the defense chose to have the plaintiff examined by both a neurologist and an orthopedist. However, at the time of trial, the defense chose not to call either of these expert witnesses. The plaintiff provided detailed testimony on direct examination, explaining that he had been examined by the defense neurologist and orthopedist. The plaintiff also testified as to the scope of those examinations.

Clearly, during summation, the plaintiff's lawyer must emphasize the importance of the defense's failure to call these experts to the stand, and illuminate for the jury the weakness of the defense's case in this regard. But it is the manner in which these facts are presented during summation that will either make for a persuasive argument or result in a worthless critique of the defense's evidence. An effective trial lawyer should consider the following techniques for best exploiting the deficiencies of the opposing party's case in such a scenario.

## The Rhetorical Question

To ensure that the argument does not fall flat, a time-tested and powerful means of exposing the weakness is to make use of the rhetorical question. With this technique, each question posed to the jury, in rhetorical form, should serve to persuade. That persuasion is made stronger by reiterating and reinforcing the important facts prior to actually asking the rhetorical questions. An effective set-up can also be accomplished by answering a series of preliminary rhetorical questions, and then continuing to pose additional questions as the line of argument progresses and gathers strength. The goal of the rhetorical question is to subtly influence the desired response:

We know [the plaintiff] was examined not just by a neurologist but by an orthopedist. We know that each of those witnesses conducted a thorough examination. We know that each of those experts conducted physical and clinical tests. We know that each of those doctors was an expert in his field. And we know that the defense chose not to call them. Why didn't the defense call their examining neurologist? Why didn't the defense call their examining orthopedist? Isn't the answer obvious? Because they were afraid of something. Why didn't the defense call the very expert witnesses they hired? Because they didn't want you to hear what these witnesses had to say. What are we to gather from [the defense's] failure to call these witnesses? What is it that they are afraid of? What didn't they want you to hear? Isn't the answer simple? Do you think for one moment that if either of these experts could have contradicted what the [plaintiff's experts] said [the defense] wouldn't have had them testify? Of course not!

In this example, the jury already knew, by reason of the plaintiff's testimony, that the defense did not call its own doctors. However, the line of rhetorical questions serves to hammer home the importance of this point by reminding the jury of several critical facts: that these doctors are experts in their fields, that they thoroughly examined the plaintiff, and that if they had any evidence to contradict the testimony of the plaintiff's experts, then the defense would have certainly called them to the stand to testify. In essence, the rhetorical questions are designed to lead the jury to one inescapable conclusion: that the defense did not call its own doctors because they would have helped the plaintiff's case and harmed the defense's case.

Before devising a line of rhetorical questions for use in summation, the trial attorney should always consider the language in the Pattern Jury Instructions. These instructions not only serve as a guide for the jury, but also for the trial attorneys, allowing them to create powerful arguments that fit neatly into those instructions. Consider, for example, the language in Pattern Jury Instruction 1:75, the Missing Witness charge. This instruction makes it clear that, among other things, the jury may draw the strongest inference that the opposing evidence permits against a witness who fails to testify in a civil proceeding. This instruction speaks, in part, about the negative inference that may be drawn by the jurors for the party's failure to call a witness, or to produce a relevant, important document (see PJI 1:75; PJI 1:77). When the language in the rhetorical questions tracks the language in the charge that the jurors will soon hear, the use of the rhetorical questions creates an even more powerful argument that will resonate beyond the attorney's summation. Needless to say, this type of argument is available to either side:

Why didn't the [plaintiff or defendant] call their expert witness to the stand? Why weren't you allowed to hear what [that witness] had to say? What is the only real inference to draw from that failure to call [the witness]? What is the only legitimate inference to draw from that failure? What is the strongest inference to draw from that failure? Isn't the answer clear? They knew that if they called that witness it would not support their position. It would not support their claim. It would not support their case. But it would support our position and it would support it completely. It would support our position 100 percent. And it would ruin their claim. There is no excuse for their failure to call [that witness]. That's why they didn't want you to hear from [him].

Similarly, a series of rhetorical questions can be used to demonstrate the importance of a missing document or exhibit. It is the rhetorical question that heightens the importance of that document in the mind of the jurors. When the rhetorical questions adhere closely to the language and principles in the jury charge for failure to produce documents or other physical evidence (see PJI 1:77), the use of the technique is even more effective:

Ladies and gentlemen, there is one piece of evidence that is more important than any other piece of evidence in this case. You heard about that piece of evidence from the beginning of this case—from the opening statements forward. You know how important that piece of evidence was. And you now know how important that piece of evidence is. You know that it would answer the most important question in this case. So ask yourselves, why wasn't it produced? Why haven't you been allowed to see that [piece of evidence]? Where is it? And why has it been kept from you? The answer is clear. It wasn't produced for one reason and only one reason. If it was produced it would have made meaningless their claims. If it was produced it would have destroyed their arguments. And if it was produced it would have destroyed their case!

At the end of any trial, the jury should be fully aware of what evidence it saw and heard, and what evidence it did not see or hear. It is the role of the attorney to provide a persuasive and appropriate context for that evidence, or missing evidence, as the case may be. By using rhetorical questions that track or adhere to the language in the jury charge, the attorney can ensure that his or her argument transcends the summation itself and follows the jury into the deliberation room. The rhetorical questions should subtly and effectively guide the jury down a path to one inescapable conclusion: that certain evidence, or lack thereof, proves his or her client's case.