

Trial Lawyers as Storytellers

by Samuel Schrager

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Trial lawyers — that is, attorneys who regularly argue cases before juries — attain excellence in their work by learning how to perform for the only audience whose opinion finally matters: the twelve ordinary citizens of the community who make up the jury. Skilled lawyers know how to engage these men and women as a trial unfolds, how to appeal to them and move them while the opposing attorney attempts to do the same, until by the end of the trial they have communicated their version of the truth so well that these people decide to believe it and reject the other side's.

When lawyers attempt to describe their persuasive art, they often compare themselves to psychologists, salespersons, playwrights, or directors — occupations heavily involved in understanding human motivation. An even richer comparison can be made to storytellers, especially the oral raconteurs of folk societies, who could enthrall their audiences over long stretches of time with harrowing tales of life and death. For, like traditional storytellers, lawyers in jury trials have their own distinctive styles and approaches to telling stories; they compose them from a small stock of basic plots, using techniques perfected by generations of their predecessors; and they improvise from moment to moment as they perform. And, like storytellers, they address the great need societies have to comprehend the extremes of human action and human nature in a way that sustains belief in a moral order.

The primary concern of skilled lawyers when they encounter a new case is to construct what they call their "theory of the case" — a consistent and satisfying interpretation of what happened, a story that the jury can accept. From then until the trial, they keep refining the story by testing it against the evidence that could be brought out in court. They plan their strategy so that everything they do in the course of the trial will support their interpretation of the facts and blunt the force of the opponent's. Each side will be intensely aware of what the other wants to accomplish, but neither can be certain how original or how effective the other will be.

The strength of the story depends on how artfully the lawyer can use (or defuse) the standard plot conventions familiar to all lawyers. In criminal cases that rely on informants, for instance, the classic defense tactic is to argue that the "snitch" is a liar with a criminal past who is "cutting a deal" to avoid prosecution. The prosecutor's classic retort is that the informant came forward voluntarily: "We didn't choose this person as an associate, the defendant did." The defense attorney in a criminal trial typically tells a story about an innocent defendant who is on trial because the police and the district attorney are under pressure to get a conviction, whereas the prosecutor tells a story about the crime and its solution, with the D.A. and the police playing their proper roles as protectors of the



people. At an emotional level, the defense appeals to jurors' sympathy for an accused person and their distrust of institutional authority, the D.A. to their desire for retribution and a lawful society. In civil trials, the plaintiff typically argues that the defendant is responsible for the injury, while the defense contends that someone else is to blame — often, that it was the injured person's own fault — or that no one is responsible.

Although storytelling formulas are largely the same from one part of the United States to another, lawyers are also attuned to particular local environments and recent events. Among attorneys in Georgia, for example, there is a saying that juries in a homicide case ask two questions: "Did the person deserve to die? And did the right person do the killing?" A defense attorney whose story gets the jury to answer "yes" to both questions may win regardless of what the law or the judge says. Similarly, the news of the hour is sometimes important, as recently when New York City's "subway vigilante" briefly became a hero to many, causing attorneys in major eastern cities to think that vigilanteism might provide a viable homicide defense. Then there are inveterate prejudices about "those people" which jurors may hold about certain parties in the trial. "Those people" may be gang members, women, politicians, or any stereotyped group. Lawyers are keenly conscious that such preconceptions exist, and frequently attempt to undermine or subtly confirm them.

In the psychological dynamic of the trial, jurors transfer much of their interest from clients and witnesses to the lawyers. For the story to be believed, so must the storyteller. There is considerable sensitivity among trial lawyers to the common view that they are "acting" in the courtroom, in the sense of pretending or lying. Bad attorneys may dissemble, but good lawyers insist that they must be convinced within themselves of the case they are going to make before they can go before the jury. The feeling among leading trial lawyers is that sincerity is the *sine qua non* of their art. It is a matter of the presence and character that each lawyer has developed in the course of life and that the jury senses in all the lawyer does. For every lawyer it is the expression of a style that is unique, yet also contains cultural dimensions which jurors identify with specific groups. A midwestern lawyer who is easy-going may be perceived as a homespun rural

Opening statements to the jury in New Jersey v. Robert O. Marshall and Larry N. Thompson, January 1986. Left, Prosecutor Kevin W. Kelly outlines the State's case. Right, defense attorney Francis Hartman argues on his client's behalf. Note the similarity in hand gestures as each lawyer shapes his version of the case. Photos by Scott E. Stetzer



type; an eloquent Black lawyer may evoke the oratory of a southern preacher. The lawyer speaking to the jury is not Every-American, but a person with a cultural background and individual history that flow into the story that gets told.

"Don't mimic another's style," Judge Charles Becton of the North Carolina Court of Appeals advises aspiring trial lawyers. "But borrow or steal every good technique or style of delivery and adapt it to your own style." Your style is who you are; beyond it, what you need to master are countless techniques of effective persuasion. These skills are learned, as they are in other occupational cultures, through observation and practice. Customarily, novices are expected "to sink or swim" on their own in their first jury trials. They do not lightly seek advice from senior attorneys, but when they have the chance they watch one who is renowned, and if they are unlucky enough to draw such a lawyer as an opponent they can learn a great deal during the encounter. They are inheritors of a great tradition of oral rhetoric which is transmitted, not by law books, but mostly on the job. The techniques they need to acquire cover every aspect of trial work. There are such mundane matters as where to stand when questioning a witness and how to state the grounds for an objection. There are more sophisticated techniques such as when to feign disbelief when cross-examining a witness and how to make points that will be stricken from the record but that the jury needs to hear.

When trial lawyers exchange stories and lore with each other, the focus is usually on their trial experiences. No part of the trial is as hedged by superstitions as jury selection, where lawyers must make snap judgements based on initial impressions and fragmentary infor-



Closing arguments to the jury, March 1986. Left, Hartman pleads his client's innocence. Right, Kelly dramatizes his point with an accusatory gesture. Photos by Scott E. Stetzer

mation. They have rules-of-thumb about the attributes of the jurors they want and those they fear in a given case, and tales of disasters that resulted when someone picked for the jury turned out to be the wrong choice. Judges are a prominent conversational topic, their actions and idiosyncracies catalogued in humorous stories that also serve as practical guides for dealing with them to best advantage. Lawyers keep "book" on other lawyers, too, as athletes do on other teams. Many like to "scout" the strengths and vulnerabilities of upcoming opponents by watching them in court, getting colleagues' opinions, or reviewing transcripts of their past trials, and in the competitive heat of the trial they may exploit perceived weaknesses however they can. The trials and the circumstances surrounding them provide unlimited grist for "war stories," as lawyers dub accounts of their battles. Most often these are singular incidents, memorable because they distill something of the character of the vocation. They can also become full-blown chronicles that draw listeners far into the complexities of a case and the paradoxes of human conduct.

Like practitioners of other crafts, trial lawyers as a group are local in their orientation, proud of their past, and worried that modern trends will drastically alter their identity. A high proportion practice in the same area where they grew up, or at least in the same state or region. Even the most respected among them are seldom known beyond their own legal community. In many localities there are one or two who have become legends for the present generation: lawyers who were flamboyant, brilliant, and funny, and enjoyed uncanny success with juries. These figures have come to represent the individuality and creativity that seem endangered today. The problems

lawyers cite include ever-increasing amounts of technical evidence, which make attorneys overspecialized and boring to juries; misguided attacks on the jury system and attempts to curtail its use; and declining opportunities for young lawyers to get civil trial experience or to go into practice on their own. One response by the profession in recent years has been a movement to offer trial training workshops, where beginners can learn techniques by conducting simulated trials with guidance from accomplished attorneys.

In the course of successive trials during their career, skilled lawyers develop a formidable repertoire of verbal artistry and strategies for conducting cases. Mastery of the art of trial work, however, is not a state that can be permanently achieved. It has to be accomplished again and again, in the consuming task of reaching each new jury. All the rules of the law and all the preparation of a case only provide a structure for the trial. What actually happens in the courtroom depends on how the lawyers seize the dynamics of the situation and adapt to them as the trial progresses from moment to moment. To a large extent their actions will be planned. But in response to the moment — to the flow of testimony, the mood of the jury, openings left by the other attorney, their own instinct and rhythms — they improvise. Spontaneity is the dangerous heart of their art.

A story: In front of a jury determining whether his client would be put to death for murdering a police officer, James Ferguson rapped on the courtroom table, marking the footsteps the prisoner would take as he walked from his cell to the North Carolina gas chamber. The jurors could have rejected the gesture as a rank appeal to their emotions and proceeded to condemn the man, as most observers, when the trial began, were convinced they would. They did not. No one can know whether Ferguson's raps were what saved his client's life. Nor could Ferguson know, as he took this risk and others, whether his whole approach to the jury would have the desired effect.

People today remain close to the folk societies of the past in the need to make sense out of the inexplicable, fearful side of human experience. When binding judgements must be made about guilt and responsibility, trial lawyers are called upon to retell the unfortunate events in a dramatic contest for the community to decide.

Suggested reading

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