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The Stuff of Good Jury Trial Lawyers

By William A. Barton
Barton & Strever, PC

INTRODUCTION

What stands in our way, or more properly, what stands "most in the way of most of us" from being an effective jury advocate? At the deepest levels of psychology, it is fear. This fear expresses itself behaviorally in dry, rote presentations devoid of passion and creativity.

When I asked Peter Richter of Miller Nash "What is the stuff of great trial lawyers?" he said it is "preparation, imagination and passion." I, too, think it is three qualities. I say it is "Hard work, creativity and passion." It is obvious Peter and I are in agreement.

William Barton

This paper doesn't rate the three attributes in terms of importance, but I do submit there is a dearth of creativity and passion in the courtroom. I offer my thoughts on why that is, and suggest how any lawyer can acquire these attributes. The bottom line is, in order to be an effective trial lawyer, you must be persuasive. That's what this paper is about.

FEAR IS YOUR GREATEST LIMITATION

Fear is the primary impediment to lawyers becoming "more than the facts," or more than simply competent technicians. This results in inexperienced lawyers being driven more negatively than positively. Rather than giving their best pitch with gusto, their primary motivation is to not "screw it up." To say it is

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the fear of failure is a bit trite.

Begin by trying to taste your own fear. What is its essence? By incrementally peeling away the emotional varnish, you will probably find that it is really a fear of embarrassing yourself. In other words, what you are really afraid of is being vulnerable. Now we are getting close to the core of fear.

The irony is that the problem is also the answer. With reflection, you will come to understand that your fear is also a gift; a gift from you, to yourself. All you have to do is be honest enough to unwrap your own present; i.e., be honest with yourself.

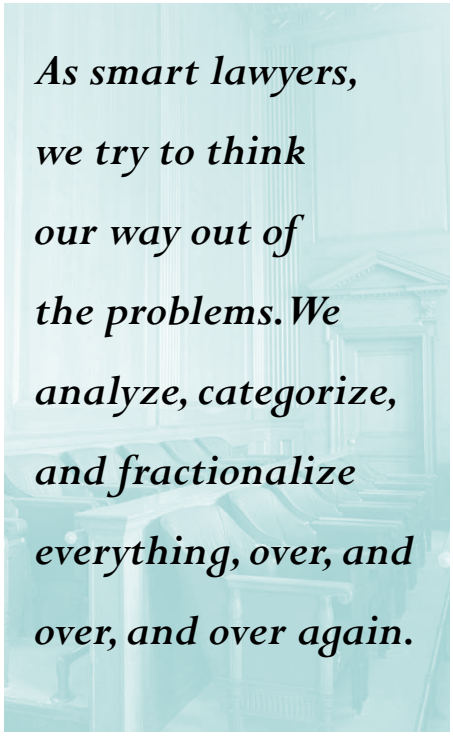
This kind of honesty requires you go to the very place you don't want to go. You must embrace your own fear. By being really honest with yourself you will then have the ability to be really honest with others, meaning the jurors.

Why is this kind of honesty so difficult to access? Because it requires a vulnerability that is the precise opposite of not only how we want to know ourselves, but more important, how we want others to view us. We want others to see us as competent, strong and confident; yet down deep, we rarely think of ourselves that way.

"STACK-A-FACT"

Most of us are scared when we go to court. We feel weak and impotent. Every fiber of our being is at risk. What do we, as lawyers, do when threatened at such a primitive level? What everyone else does. We marshal all our resources to protect us from the threat. We defend ourselves. As smart lawyers, we try to think our way out of the problems. We analyze, categorize, and fractionalize everything, over, and over, and over again. I call this kind of behavior "stack-a-fact."

No surprises here. After all, "stack-a-fact" is an integral part of every lawyer's training. Much of the work young associates do, and must do well, requires



behavior and skills that are in direct opposition to the principles of persuasion. For example, when responding to motions for summary judgment, a lawyer's job is to identify fact questions that must be resolved by the jury. "Any question will do, just find me a fact question. Defeat that damn motion!" shouts the boss. More theories and more facts surely increase the chance that the judge will agree there is a fact question somewhere. This behavior is the opposite of simplification.

There is a selection mechanism that excludes anyone from being a lawyer who is not adept at the skills tested on the LSAT. Your ability to perform a multifactorial analysis will reward you with a fine test score, but what does that have to do with your compassion, creativity or common sense?

My trial lawyer friends from the big firms tell me that the best students from the best schools do not necessarily make the best jury trial lawyers. Why? Because they're not comfortable making quick decisions on their feet. They always need to be in control and tend to overanalyze everything. After all, their analytical prowess serves them well, both as students and lawyers. While much can be anticipated and briefed pretrial, something always harkens unbidden. Do I object? If I ask this question, will it "open the door" to evidence that wouldn't otherwise be admissible? My friend from Salem, Ralph Spooner, reminds us that "Trials are live action, baby!"

THE THREE INTANGIBLES

Now let's talk about the three attributes of persuasion and the stuff of great trial lawyers: hard work, creativity and passion.

1. HARD WORK

This is what we do best. We generate lots and lots of billable hours. There is no need to belabor this. You already know too much. Two thousand-plus billable hours a year. I rest my case.

2. CREATIVITY

This is in short supply among lawyers for many reasons. First, we intellectually worship logic, and emotionally we want structure and order in everything. Some of what we do in our own work is generating legal syllogisms, which has everything to do with classic deductive thinking, and nothing to do with inductive thinking. We need and demand lots of 90 degree angles. The big news here is that jurors think inductively, not deductively. This is important.

Bill Wheatley's Thoughts

Here I include some comments from my longtime friend, Eugene lawyer Bill Wheatley. He practices in the areas of defense of personal injury and commercial claims. I quote from a recent letter he wrote me:

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"I've been wanting to talk to you or drop you a line concerning our last conversation. You put forth the proposition that the three keys to effective trial advocacy are:

1. Passion
2. Hard work
3. Creativity

Persuasive as you are, I thoughtlessly accepted the proposition and agreed with you. However, it has been haunting me ever since.

"I believe you've got it right with hard work and passion, but I'm a bit concerned about your message of 'creativity.' In my experience, more cases are lost because someone is trying to be creative (when it really isn't necessary), than cases lost because of a need for creativity. Obviously, there are those rare cases, and where talents like yours can capture the soul of a case with a creative approach. In most cases, however, the concept exceeds the ability of most trial attorneys and, thus, becomes a vice rather than a virtue.

"If I were to look for a third link in your trifecta, I would probably adopt the concept of CREDIBILITY. Credibility of the cause, credibility of the attorney, credibility of the client and credibility of the approach to the trial is essential. Obviously, that concept can overlap with other concepts such as passion, etc., but I think it is deserving of being incorporated into your trifecta. With hard work and passion, 'creativity' will either naturally occur or simply become unnecessary because someone else already thought of the idea and your hard work allowed you to make good use of it."

I suspect Bill Wheatley's concerns about the importance of creativity reflect the view of many accomplished defense attorneys. Plaintiffs' lawyers face the burden of proof, are temperamentally inclined to be a bit more passionate and risk-taking, and creatively challenge the edges of the common law when necessary. For obvious reasons, defense attorneys tend to stick with the facts . . .

Credibility of the cause, credibility of the attorney, credibility of the client and credibility of the approach to the trial is essential.

How to Be More Creative

It isn't necessary to jettison your ability to "think like a lawyer." I only ask that you attempt to recapture your lost ability to understand legal questions through the eyes of ordinary folks. People just like you used to be . . . The best jury trial lawyers I know are legally and psychologically ambidextrous. They deftly tiptoe between the mandates of positive law [the court's instructions] and the jurors' sense of sidewalk justice [common sense]. When this occurs, a legal symphony is afoot.

Drop the Legal Jargon

Think about all the synonyms the word *contract* has. How about "bargain, deal, understanding or agreement?" This is what your case is about. Lawyers talk about a "breach of contract." Jurors understand a deal, or someone not keeping their word. Instead of discussing damages, consider talking about lost hopes and stolen dreams.

Tell a Story

When presenting your case, it's kind of like the country-western song, "Somebody done somebody wrong . . ." It is the jury's responsibility to right that wrong. Show them why and how. Don't just give the jurors a timeline on a big laminated board. Focus on the key disagreements and explain why your client is being honest. You needn't call the opponents liars, but you can discuss human nature, choices and profit motives. Leave ultimate conclusions about an opponent's honesty to the jury. They know what to do. Judging is their job, not yours. Winning the motive battle puts you squarely in the driver's seat.

Keep It Simple Stupid

It is your job to make every case you try simple. I don't care if it isn't. Harry Truman, the only President to serve in the 20th century never to attend college, was fond of saying, "I make complex things simple, and refuse to make simple things complex." Easy to say, tough to do.

It is difficult to "be" creative, or "be" passionate. Maybe it just isn't your nature. I appreciate that. It takes a few trials to get the basic mechanics down. Once you are comfortable with the procedure, it then becomes easier to shift your focus to the more sophisticated aspects of advocacy. In the beginning, you are consumed with not embarrassing yourself by doing something stupid. You go to advocacy seminars and are told "Don't do this," and "Don't do that." It seems difficult to do anything right, particularly when you are focused on avoiding every-

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thing you shouldn't do.

Academics and judges are really good at telling you what not to do. They are O.K. when it comes to telling you what to do; however, they often don't do well when it comes to actually showing or demonstrating. Why? Think about it . . .

Start at the End

Begin your case at the end, meaning the jury instructions. Good lawyers build their cases teleologically, meaning everything is constructed with the final instructions in mind. What are the phrases that capture the key legal concepts? Build your case theme around those phrases and ideas. Do this and the judge's instructions will be a chorus for your closing. You are not a thief when foreshadowing the exact words of the judge's instructions, although your opponent might think so.

Consider requesting written instructions. [ORCP 59B]. If you file a written request then the judge must instruct the jury in writing. Prepare a separate set of instructions for each juror. This is discretionary with the court, but if you don't prepare them, and ask for them, you know you won't get them.

Use the Verdict Form

It is the framework around which to construct your closing. Enlarge it (with an overhead projector) and then during your closing, write the answers you are arguing for in the proper spaces on the special verdict form. You're not telling the jurors what to think, you're a guide, you're teaching. When arguing money, fill in the amount you claim the proof supports. Psychologists call your prayer an "anchoring number." Jurors can't agree with you if you don't explain to them what you think is fair, i.e., why the defendant should pay large sums of money, and thus, why your client deserves large sums of money.

Jim says "write to the ear and speak to the eye." When people read what I write, I want them to hear me talking, and when I talk, I want them to see what I'm saying.

Closings Should Explain Why, Not What

The closing for average lawyers is a verbal rock fight wherein they continuously repeat, with increasing volume, their three to five best facts. This is of no assistance to the jury. (Closings should explain why, not what, and then argue the reasonable inferences.) Here is where all the witnesses' biases and interests are discussed under the heading of motives. Jurors will remember the proof. It is your job to explain what the evidence means, not what it was.

McElhaney on Creativity

My friend, Jim McElhaney, who writes the monthly "Trial Tips" column in the *American Bar Association Journal*, advocates gastronomical jurisprudence. Your facts should provoke a visceral response that tells the story of an injustice. Arguments appeal to the intellect. Lead with a punch. Lead with facts. ("Balance Persuasion," *American Bar Association Journal*, March 2002.)

Tension is the product of conflict. If the listener doesn't care what might happen next, then the dialogue isn't working. Start with a crisis. Speak in the first person rather than a chronological third person narrative. Use literary techniques like foreshadowing in your opening statement: "This is a case about a woman's eyes." Explain what happened, why it happened, and who's responsible.

Jim says "write to the ear and speak to the eye." When people read what I write, I want them to hear me talking, and when I talk, I want them to see what I'm saying. ("Empty Words," *American Bar Association Journal*, December 2001.)

3. PASSION

Most trials are mechanical presentations long on "stack-a-facts." Passion may abound in life; however, I don't see much in the courtroom. Maybe it is there, but it is certainly well hidden, and when spotted, is easily mistaken for virtuosity and overt appeals to sympathy.

What I often see from lawyers in trial are well-organized presentations that could be faxed to the jury with little loss of enthusiasm, energy or passion. Representing a client's interests isn't just another day at the office. What we do is really important, at least it is to our clients . . .

Don't talk about a "breach of a duty," or some other legal incantation. Talk about "choice." This is what $350-an-hour jury consultants will tell you, whether it is the defendant's negligence, the plaintiff's comparative fault or any other affirmative defense. Turn fault into choice. With choice comes responsibility, and with responsibility comes culpability. Get indignant when explaining why your opponent made the wrong choices. Motive is the key.

Being passionate doesn't mean you

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need to raise your voice. In fact, it is more effective to lower it. Silence can be deafening! For women litigators who are worried about striking the difficult balance between being assertive, but not too aggressive, it is gender congruent to lower your voice, while concurrently reducing the space between you and the jury. This fosters a powerful intimacy.

Let's not forget about the money, and yes, I know the legal term is "damages." This is my leading criticism of most trial advocacy teachers, colleges and institutes. Neither the faculty nor the students appear comfortable when talking money. Think about the character Jerry Maguire, from the movie by the same name, when he said, "Show me the money!" After all, that's why we are here!

You ask, "What is there to get passionate about in a simple negligence action, or a garden variety contract case?" Try putting yourself in your client's shoes. What really hurts? Start there. The case you end up trying says as much about you, as the core facts you work with. Search until you find the human story within the facts, then emphasize the moral imperative. Where is the wrong that demands correction?

Lawyers want to talk, talk, and talk about liability. More "stack-a-fact." Everyone seems so much more comfortable when NOT talking about pain and suffering, and the money owed because of it. Why shouldn't you be sharing with the jury why every dime you have asked for is reasonable? Ask yourself, "Why are we here?" The answer for the jury is "To right a wrong, and deliver justice. Ladies and Gentlemen of the jury, in our legal system justice can only be expressed in dollars."

One of the rules inexperienced lawyers have difficulty learning is not to express their personal opinions. The reason isn't a rule of evidence. It's one of ethics. See Oregon Rule of Professional Conduct 3.4 (e), which states in part that

"[a] lawyer shall not . . . state a personal opinion as to justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused." A simple way to address this, is to drop the "I, me and lie" from your closings. When your arguments contain tempered passion, you don't need to state your personal opinions. It will be obvious what you think! Why give your opponents the opportunity to state that the basis for their objection is a lack of ethics on your part, and then have the judge agree, and all this happens in front of the jury. How embarrassing! Not knowing your evidence is one thing, acting unethically is quite another . . .

There are clear economic incentives to being passionate. When you fight for your clients, and lose [as you will about half of the time], your clients won't blame you. They will blame the judge, or jury! This means they will write you a check that doesn't bounce, will hire you in the future, and will send all their friends and relatives to you. The greatest compliment is when jurors from one of your past trials want to hire you. Why all the new and repeat business? It's because you are a fighter. I promise you, if you lose without passion, the clients will blame you. It really doesn't matter whether this is fair, because we can agree losing without passion is simply bad business. All lawyers lose their share of cases. What I am talking here is how you lose. Clients ask, nay, demand, that you lose mightily, with enthusiasm and great heart.

You needn't act maudlin, shrill or wear the constitution on your sleeve. Nor am I talking about sympathy or pandering to the jurors' emotions. What I am talking about is representing your clients with a commitment and earnestness that shows you care. Everyone can do that. After all, if you don't care, why should the jurors?

PARTING THOUGHTS

Take a Speech Class

Read some books on public speaking. Yes, I know you were on the debate team in high school, took a speech class as an undergrad, and did moot court in law school. That was for credits and a grade. Now it's real. It's for money! It's for the client.

Don't be Afraid of a Video Camera

In our office, even though I have tried more than 500 jury trials to verdict, we still practice and practice our opening statements and closing arguments. By the time my partner Kevin gives the opening, it has been videotaped and critiqued at least a half dozen times.

Credibility

Think of jury trials as a gestalt involving the generation, acquisition, consolidation, and utilization of credibility. (This

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is what Bill Wheatley was talking about.) Yes, there is a process going on as you wade through the mechanics of jury selection, opening, evidence, closing, and the instructions. However, underneath this elaborate process is another game, one that's much more primitive and visceral. It's lawyers competing to win the battle of trust. You may not be able to see credibility, but you certainly know when someone doesn't have it. Without credibility, it doesn't matter what you think or if you and your client are right. Why? Because unless you are believable, nobody cares what you think, and if nobody cares what you think or say, then it really doesn't much matter whether you're right or wrong, does it?

Quit Whining

Judges can be heavy-handed and intimidating. When you hear a judge say "Well, that would never be allowed in my courtroom," or worse, "That would never happen in my courtroom," at least you know who you're in front of.

Respectfully make your record and then do what you're told to do. A good portion of the time, they're right, and when they aren't, well . . . , they're still right! Now you know what the saying "Equity is the length of the chancellor's foot" really means. Being a trial lawyer is not for the faint of heart. You have to be hardy, strong and adaptable. Try to use the judge's abrasive attributes to your advantage. View every problem as an opportunity. In my experience, tough, mean judges treat you much better when: a) you show up early; b) you correctly pronounce the judge's name; c) you are completely prepared; d) you are familiar with their courtroom procedures; and, e) perhaps most important, you are respectful to their staff. So maybe the judge is having a bad day. Generally, I find they are equally hard on everyone, but particularly so to those who deserve it the most. If the judge is giving you a little extra, ask yourself what you may have done to earn it, then quit whining and go to work. Stick your butt up, your head down, and start picking grapes as fast as you can. Try and do better. Draw a deep breath and try to stand back from your feelings. Remember, this too will pass.

...unless you are believable, nobody cares what you think, and if nobody cares what you think or say, then it really doesn't much matter whether you're right or wrong, does it?

TO THE BYRDS AND MR. RINGO

Let me close by sharing with you two experiences that continue to inspire me years later. Once, while in Bend during the mid-eighties, I saw a sign advertising The Byrds in concert on a Thursday night. They were between shows on their way North to the Tacoma Dome. I couldn't believe it. The Byrds! In Bend, Oregon!

There were 26 people in the audience that night. I counted them. The band came out. The house was all but empty. The lead singer, Roger McGuinn, began the show by saying "We are the Byrds. Every night, we do a better show than we have ever done before." They rocked, they rolled and they dripped sweat. It was fantastic. In a small town, with barely two dozen paying customers, they put on a show I will never forget. They taught me something about what it meant to be a real professional, irrespective of the size of my case.

If I have trouble getting motivated when doing a smaller case, I think of the Byrds. I might even pause, and play one of their CDs. When I am through, it is easy to remember that I too am a professional, and therefore in every one of my trials, no matter what the size of the prayer, I will always bring my "A" game and do my best.

My last story is about my longtime friend and mentor Bob Ringo of Corvallis. Bob retired a few years ago. This trial occurred back in the mid-seventies. I had been out of law school 2-3 years. Things came pretty easy for me. I was winning most of my drunk driving defenses. I didn't need to prepare much. One afternoon I was sitting in the back of the Corvallis Municipal Court waiting for the arraignment of one of my clients. I was reading a sports page below the benches so the judge wouldn't see me.

There was a shoplifting ticket being tried to the bench. The defense attorney was a little guy. I looked up in the middle of his cross examination of the store manager. The cross was so intense the store manager actually had a heart attack. They stopped the trial, declared a mistrial, and packed him out to a waiting ambulance. With the siren of the ambulance fading into the background, I approached the clerk and asked who the lawyer was. She said "Bob Ringo." Whoa! I had heard of him, and now I had seen him. He was a big time lawyer. What was he doing here in a municipal court, defending a misdemeanor shoplifting ticket? I don't know, but one thing was obvious: Mr. Ringo was giving it everything he had.

I think of Bob often, with much fondness and respect.

Thank you. ❐