

# **Eight Traits of Great Trial Lawyers: A Federal Judge's View on How to Shed the Moniker "I am a Litigator"**

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## **I. INTRODUCTION**

Walk into any state or federal jury trial from Alaska to Florida, or from Maine to Hawaii, and you will likely discover the long-awaited cure for insomnia. Bottle it, sell it on a TV infomercial, and you could get rich. So what is this cure? It is boredom: "the sounds of lawyers droning on and on with their technical arguments, their redundant questioning of reluctant witnesses, the subtle points which are relevant only to them."<sup>1</sup>

George Bernard Shaw might as well have been describing modern "litigators" when he observed that "[t]he single biggest problem in communication is the illusion that it has taken place."<sup>2</sup> The vast majority of lawyers do not communicate effectively with jurors. How do I know this? As a federal trial court judge for nearly a quarter century, I have carefully observed lawyers from all over the country try cases in federal courts.<sup>3</sup> More importantly, at the

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1. Dana K. Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, 21 N. ILL. U. L. REV. 1, 1 (2001).

2. THOMAS J. VESPER, *UNCLE ANTHONY'S UNABRIDGED ANALOGIES: QUOTES, PROVERBS, BLESSINGS & TOASTS FOR LAWYERS, LECTURERS & LAYPEOPLE* 862 (Thomas J. Vesper, ed., 3d ed. 2012).

3. I was a U.S. magistrate judge for nearly three years in the Southern District of Iowa (1991–94) before my appointment to the Northern District of Iowa

conclusion of each trial, I have given every civil and criminal juror a questionnaire to evaluate the lawyers (and myself as the trial judge). Reading thousands of these juror evaluations has given me rare insight into how jurors view trial lawyers.<sup>4</sup>

After all these years as a federal trial court judge, I remain shocked that lawyers with both the perseverance to make it through law school and the courage to enter a federal courtroom are still so lacking in the art of persuasion and in the traits necessary to become great trial lawyers. Many articles have been written about the vanishing civil jury trial,<sup>5</sup> and I recently wrote about the rise of the “litigation industry” and the demise of trial lawyers through a mock obituary for the death of the American trial lawyer.<sup>6</sup> In this Article, I

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as a district court judge in 1994. I have tried jury trials in four districts: both districts in Iowa, the District of Arizona, and the District of the Northern Mariana Islands (Saipan). I have also reviewed numerous trial transcripts while sitting by designation on the United States Courts of Appeals for the Eighth and Ninth Circuits.

4. After reading a verdict in open court, I debrief every juror in the jury room and answer their questions. As they are leaving, I give them a juror questionnaire, with a self-addressed stamped envelope, and ask them to fill it out at their convenience and mail it back to my chambers. I discuss this questionnaire with potential jurors in jury selection as a means of empowering them. I let them know that the lawyers and I are vitally interested in their feedback. I tell them that our court has made many changes in the way we do our business based on juror feedback over the years. When the questionnaires are returned, my judicial assistant shares the information with the attorneys for their review.

5. See, e.g., John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012) (exploring the historical rise and fall of the civil jury trial); Mark W. Bennett, *Judges' Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 306 (2005) (discussing that the decline of jury trials is a “grave and urgent concern”); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (discussing the decline in jury trials).

6. Mark W. Bennett, *Obituary: The American Trial Lawyer; Born 1641-Died 20??*, A.B.A. SEC. LITIG. J., Spring 2013. In that mock obituary, I wrote:

ALs [American Litigators, replacing the ‘deceased’ American trial lawyers (ATLs),] do not try cases; ALs ‘litigate’ them. ALs populate large and small firms alike. Most importantly, ALs are defined by their lack of real jury trial experience. They spew courtroom jargon to clients and opposing counsel as if they were real trial lawyers . . . ALs prance around their law firms espousing how they routinely pound opponents into the ground in the courtroom. They don’t. The closest they get to

share four decades of experience, including thousands of hours spent observing trial lawyers, in hopes of reversing the trend of “the dying trial lawyer” and helping attorneys who seek to become the next generation of Clarence Darrows<sup>7</sup> and Gerry Spences.<sup>8</sup>

During my time as a federal trial court judge, I have identified—and this Article will discuss—eight traits of highly effective trial lawyers: (1) unsurpassed storytelling skills, (2) gritty determination to become a great trial lawyer, (3) virtuoso cross-examination skills, (4) slavish preparation, (5) unfailing courtesy, (6) refined listening skills, (7) unsurpassed judgment, and (8) reasonableness. By mastering these, one can become a feared and admired trial lawyer.<sup>9</sup>

Of course, readers will not become great trial lawyers by reading and memorizing these eight traits. This Article is not a trial lawyer’s “magic bullet” that can be obtained from an infomercial by

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trial is as office Clarence Darrows. They file motions as if they are preparing to go to trial and bill endless hours for developing untested and unrealistic trial strategies—knowing they will never be used. ALs earn a living by generating Everest-like mountains of paper. They are paper tigers. They never work alone, always traveling in packs. As trial dates approach, their relentless bravado evaporates into unlimited excuses to settle. They will do virtually anything to avoid trial.

*Id.* at 4, 6–7.

7. See *Clarence Darrow*, ENCYCLOPEDIA BRITANNICA ONLINE ACADEMIC EDITION, <http://www.britannica.com/EBchecked/topic/151820/Clarence-Darrow> (last visited May 3, 2013) (describing Darrow as a “lawyer whose work as defense counsel in many dramatic criminal trials earned him a place in American legal history”).

8. See Gerry Spence, <http://www.gerryspence.com/> (last visited May 3, 2013) (“Gerry Spence, born, reared and educated in Wyoming, is recognized nationwide for his legacy of powerful courtroom victories.”).

9. The authors of a recent article on twenty-first century litigators’ lack of jury trial experience advance a compelling argument that the failure to disclose this lack of trial experience to prospective clients is an ethical violation. Tracy Walters McCormack & Christopher John Bodnar, *Honesty is the Best Policy: It’s Time to Disclose Lack of Jury Trial Experience*, 23 GEO. J. LEGAL ETHICS 155 (2010). This is all the more reason to become a real trial lawyer and shed the “litigator” moniker.

making three monthly payments. However, by identifying these traits and working hard to develop and enhance them, attorneys can improve their jury-trial effectiveness.<sup>10</sup>

This Article's limited context precludes a full explanation of how one masters these traits or why doing so will make you a great trial lawyer. My more modest and achievable goals are to help lawyers identify the eight traits of great trial lawyers and to illuminate a path toward mastering them.

## II. SPELLBINDING RACONTEUR

“Storytelling, especially among lawyers, is a dying art.”  
—Tom Galbraith<sup>11</sup>

A truer sentence about lawyers has never been written. Where have all the raconteurs gone? Why are so precious few lawyers great storytellers? This Article will explore many attributes that separate great trial lawyers from average and below-average ones. However, there is one trait that always separates great trial lawyers from lesser ones: superb, masterful storytelling. I know of no exception. This does not mean that all great storytelling lawyers are great trial lawyers—but that all great trial lawyers are great storytellers.

Forms of storytelling probably precede the development of most spoken languages. Petroglyphs (rock engravings) told stories from times dating at least as far back as the Neolithic Era or Early

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10. In my experience, some trial lawyers never improve or improve very slowly. For these lawyers, experience is not helpful. On the other hand, lawyers who are highly motivated and work hard at improving their trial skills improve rapidly with each trial. One lawyer, who was a “C+” lawyer on a good day, returned from three weeks at Gerry Spence Trial Lawyers College and, in her next trial, was a solid “A-” trial lawyer. She gave the opening statement and closing argument in a narrative from the perspective of the five kilograms of drugs her client was charged with in a drug conspiracy. It was mesmerizing. Often, experience is vastly overrated—and this is great news for young, aspiring trial lawyers. One of the very best opening statements I have ever heard was by a third-year law student under the supervision of her law school clinic professor.

11. Tom Galbraith, *Storytelling: The Anecdotal Antidote*, 28 LITIG. 17, 17 (2002).

Bronze Age (between 8000 and 1000 BC), appearing in the northern Chinese regions of in Inner Mongolia and Ningxia.<sup>12</sup> As old as the art of storytelling is, one would think that lawyers would have mastered it.<sup>13</sup> They have not.

Is the legal academy to blame for poor storytelling skills among lawyers? While criticism of legal education is certainly reaching a modern-day zenith,<sup>14</sup> it would be unfair to place too much of the blame on the education system, since “[n]arrative theory and storytelling have emerged as threads in legal scholarship steadily

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12. See Paola Dematte, *Beyond Shamanism: Landscape and Self-Expression in the Petroglyphs of Inner Mongolia and Ningxia (China)*, 14 CAMBRIDGE ARCHAEOLOGICAL J. 5, 12 (2004) (explaining that petroglyphs in Inner Mongolia and China animated hunting, early pastoral subsistence, and primitive farming, including *Megaloceros* (ostrich) and *Elaphurus davidianus* (deer), “which became extinct in the area early in the post-Pleistocene”); the term “petroglyph” comes from the Greek words *petro*, meaning rock, and *glyph*, meaning engraving or drawing. *Petroglyph*, OXFORD DICTIONARIES, [www.english.oxforddictionaries.com/definition/petroglyph](http://www.english.oxforddictionaries.com/definition/petroglyph) (last visited May 3, 2013).

13. Some members of the legal academy claim that lawyers have mastered it—the only problem is, those lawyers reach “back to the days of the classical Greek orators who were lawyers.” Nancy Levit & Allen Rostron, *Calling for Stories*, 75 U. MO. K.C. L. REV. 1127, 1127 (2007) (citing THE INSTITUTION ORATORIA OF QUINTILIAN (H.E. Butler trans., Harv. U. Press 1966)); see also Nancy Levit, *Legal Storytelling: The Theory and the Practice-Reflective Writing Across the Curriculum*, 15 J. LEGAL WRITING INSTITUTE 259, 262 n.7 (2009) (citing THE INSTITUTION ORATORIA OF QUINTILIAN (H.E. Butler, trans., Harv. U. Press 1966) (beginning a discussion of the topic with “[i]n the days of the classical Greek Orators who were lawyers . . .”).

14. See, e.g., A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1949 (2012) (“Contemporary critiques of legal education abound. This arises from what can be described as a perfect storm: the confluence of softness in the legal employment market, the skyrocketing costs of law school, and the unwillingness of clients and law firms to continue subsidizing the further training of lawyers who failed to learn how to practice in law school. As legal jobs become increasingly scarce and salaries stagnate, the value proposition of law school is rightly being questioned from all directions.”); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL L. REV. 1231, 1252 (1991) (“At best, elite law schools prepare their top five students to become law professors but fail to prepare the rest of their students to become practicing lawyers.”); and Johnson, *supra* at 1252–56 (cataloguing some of the current problems with legal education).

over the past 20 years.”<sup>15</sup> Regardless, I have never heard any judge comment that lawyers are improving in the art of storytelling. Why is this? Perhaps Professor Nancy Rapoport described it best:

Few law professors stay in touch with the practice of law [and, as a result, w]e just don’t have much credibility when it comes to telling students how lawyers work, or what good lawyers need to know, because few of us stayed long enough in the practice of law to have been considered good lawyers.<sup>16</sup>

Professors Brian J. Foley and Ruth Anne Robbins have asked, “[W]hy does no one teach lawyers how to tell stories?”<sup>17</sup> They argue that this is because few actually know how to tell stories. In their view, law professors’ lack of jury trial experience also explains why the vast majority of the legal academy’s writings about

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15. Carolyn Grose, *Storytelling Across the Curriculum from Margin to Center, from Clinic to the Classroom*, 7 J. ASS’N. OF LEGAL WRITING DIRS. 37, 37 (2010). Storytelling and telling the “narrative” have generated a lot of interest among academics, enough to produce law review articles examining “the sudden, and rather vehement, resistance to legal storytelling.” Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 256 (1994). Baron also notes that “[t]he words ‘storytelling’ or ‘narrative’ now frequently appear in the titles of articles on a bewildering variety of topics, suggesting that there is almost no legal subject that cannot be seen as some form of ‘story.’” *Id.* at 255 n.3.

16. Nancy Rapoport, *Where Have All the (Legal) Stories Gone?*, M/E INSIGHTS, at 7, 11 (Fall 2009). With all due respect to my hundreds of friends in the legal academy, had they stayed longer in their firms, they may have become good “litigators,” but few, if any, would have been great trial lawyers. I am quite sure that very few of the nation’s greatest trial lawyers were on law review or in the top 5% of their law school class. In my view, the skill sets for being a great law professor and a great trial lawyer are quite different. The simple truth is that learning legal analysis and “to think like a lawyer” not only does not help very much in being a great trial lawyer, it is often counterproductive. You may win motions to dismiss and summary judgment motions with terrific legal analysis, but I assure you, you will not win jury trials with it.

17. Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 RUTGERS L.J. 459, 461 (2001).

storytelling focus on brief writing and not on trying cases to judges and juries.<sup>18</sup>

Lawyers, like everyone else, intuitively understand that storytelling is a very powerful form of communication. “[W]e dream in narrative, daydream in narrative, remember, anticipate, hope, despair, believe, doubt, plan, revise, criticize, construct, gossip, learn, hate, and live by narrative.”<sup>19</sup> I recall from my Torts class in law school forty-one years ago, that one of the first opinions we studied was Chief Justice Cardozo’s famous discussion of causation in *Palsgraf v. Long Island Railroad Co.*<sup>20</sup> I could not now accurately explain the legal concept of “proximate cause” without grabbing my most recent jury instruction on it. However, I still vividly remember the small, newspaper-covered package falling to the ground, the exploding fireworks, the ensuing shockwave, and the scale at the other end of the train platform falling on poor Ms. Palsgraf, who was on her way to Rockaway Beach.<sup>21</sup> It is the compelling story that stays in my mind.<sup>22</sup>

Trial lawyers’ major problem is that most of them tell stories like lawyers and not storytellers. This simple truth prompted acclaimed Wyoming trial lawyer Gerry Spence to write:

[L]awyers are not trained as dramatists or storytellers, nor are they encouraged to become candid, caring, and compassionate human beings. Most could not tell us the story of Goldilocks and the Three Bears in any

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18. See, e.g., *id.* (discussing storytelling in the context of brief writing); see also Philip N. Meyer, *Convicts, Criminals, Prisoners, and Outlaws: A Course in Popular Storytelling*, 42 J. LEGAL EDUC. 129 (1992) (offering suggestions to improve law school appellate-writing coursework).

19. Nancy Levit, *Reshaping the Narrative Debate*, 34 SEATTLE U. L. REV. 751, 758 (2011) (citing Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) Are as Important as IRAC*, 25 T.M. COOLEY L. REV. 267, 268 n.2 (2008)).

20. 162 N.E. 99 (N.Y. 1928).

21. *Id.*

22. See Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS’N LEGAL WRITING DIRS. 1, 3 (2010) (suggesting that storytelling in appellate briefs is more persuasive than pure logic argument).

compelling way. We would be fast asleep by the time they got to the first bowl of porridge.<sup>23</sup>

Spence then gives an example of how a lawyer might tell the story of Goldilocks and the Three Bears:

Once upon a time in an unspecified and otherwise unidentified place was found, upon reasonable inquiry, a certain female child who allegedly bore the given but unlikely appellation of Goldilocks. She ambulated into and around a conifer growth one day and, unintentionally and without malice aforethought, lost her directions and was thus unable to ascertain whether she was proceeding in a northerly or southerly direction. By random unanticipation the said female child came upon an insubstantial abode constructed of conifers severed from the surrounding growth, and at said time and place, the said female child, allegedly named Goldilocks, entered, without invitation, inducement, or encouragement, the said structure, which, at said time and place, therefrom the rightful and legal owners had absented themselves. Thereupon she espied three bowls of various sizes containing a substance that, upon inquiry and investigation, proved to be a concoction created out of certain boiled meal, grains, and legumes commonly known as porridge.<sup>24</sup>

Another classic example of the unfortunate way lawyers tell stories is this version of “The Three Little Pigs,” called “The Trio of Diminutive Piglets,” as told by a lawyer:

Whereas these said piglets reached the age of majority;

Whereas the sow desired the piglets to become self-sufficient;

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23. GERRY SPENCE, O.J.: THE LAST WORD: THE DEATH OF JUSTICE 113 (1997).

24. *Id.* at 113–14.



It was therefore resolved that this said trio of piglets should go forth into the world for the purpose of establishing their own domiciles.

The initial piglet that went forth into the world met a homo sapien of the masculine gender who possessed a bundle of straw. The piglet inquired, “Would you be so kind as to bestow, devise and bequeath upon me that straw so that I may forthwith construct a dwelling?” The straw was bestowed upon him, and he constructed a dwelling.

Presently along came a carnivorous lupine (hereafter referred to as “the Wolf”) and commenced to rap upon the portal and said, “Diminutive Porcine, Diminutive Porcine, grant me entry to thy abode.”

After due consideration the piglet responded, “Not by the follicular outgrowth on my lower jaw bone.”

“Then I’ll inhale and exhale massive quantities of air and cause your dwelling to implode!” said the Wolf.<sup>25</sup>

To become a great trial lawyer, one must make the transition from telling a story like a lawyer to mastering the art of storytelling. The analytical training one receives in law school—learning to “think like lawyers”—makes this task even more difficult. Because of this training, lawyers make simple events far more complicated than is necessary to win a jury trial. Lawyers are great at taking a six-second automobile accident and morphing it into a two-week jury trial. An average lawyer makes simple events complicated, but great trial lawyers make complex events simple. Gerry Spence described the experience of turning difficult fact patterns into approachable, simple stories for trial:

I have tried cases with many exhibits, cases that took months in which scores of witnesses were called,

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25. Jill Schachner Chanen, *Yarn Spinners: Storytellers’ No-Tech Craft Proves Refreshing, Educational*, 83 A.B.A. J. 92, 93 (1997).

cases with jury instructions as thick as the Monkey-Ward catalog and supposed issues as entangled as the Gordian knot. But I have never tried a complex case. . . . All cases are reducible to the simplest of stories. . . . The problem is that we, as lawyers, have forgotten how to speak to ordinary folks.<sup>26</sup>

Most trial lawyers simply do not comprehend the magical effect that simplifying cases has on jurors. If they did, they would try cases very differently.<sup>27</sup> Indeed, emerging cognitive psychology research indicates that storytelling is the most powerful way to activate our brains.<sup>28</sup> Indeed, storytelling has both a psychological and neurological component that explains the human predilection favoring the narrative.<sup>29</sup>

Law and storytelling have always been inextricably intertwined. All lawsuits (and criminal prosecutions) are stories about events gone bad: the breakup of a marriage or a business, a devastating physical or emotional injury, the alleged violation of a civil or constitutional right, a stock swindle, a drug deal gone bad. The list is endless. Every lawsuit is generated by the occurrence of events, and it is the explanation of these events that comprises the case narrative. A trial is “essentially a form of story-battle. In the courtroom, each attorney will tell the jury a different story, call witnesses to support that story, and make arguments for what a just

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26. Gerry Spence, *How to Make a Complex Case Come Alive for the Jury*, 72 A.B.A. J. 62, 64–66 (Apr. 1986).

27. For example, a lawyer’s case narrative or story would be brought out in jury selection and delivered powerfully in a short opening; the direct examination questions would be simpler and shorter to allow the witnesses to better tell the story; the selection and sequencing of witnesses would be focused on telling the story; cross examination would be more laser-like, covering fewer points and significantly shorter; and after all the witnesses are called the case would already be nearly won, unless the closing argument was really bad.

28. Annie Murphy Paul, *Your Brain on Fiction*, N.Y. TIMES, Mar. 18, 2012, at SR6 (“Brain scans are revealing what happens in our heads when we read a detailed description, an evocative metaphor or an emotional exchange between characters. Stories, this research is showing, stimulate the brain and even change how we act in life.”).

29. TEDxTalks, *TEDxGallatin - Amanda D'Annuncci - Storytelling, Psychology and Neuroscience*, YOUTUBE (Aug. 16, 2011), [http://www.youtube.com/watch?v=KKB\\_JVNGjLY](http://www.youtube.com/watch?v=KKB_JVNGjLY)

verdict looks like according to the plot of the advocate's told story."<sup>30</sup> Some trial lawyers fancy themselves good storytellers simply because they interpose an occasional anecdote, joke, famous quotation, or piece of advice their mother gave them as a child into their opening statements or closing arguments. However, as Nashville trial lawyer Phillip H. Miller has written, "A story is not a collection of facts interspersed with proverbs, analogies, metaphors, biblical references, song titles, and anecdotes."<sup>31</sup> Mr. Miller is spot-on, and most trial lawyers do not understand his point.

Most lawyers think storytelling skills are important only for closing arguments and, perhaps, opening statements. I have heard many great closing arguments, even some by mediocre trial lawyers. But highly effective trial lawyers understand that their storytelling skills are crucial at all stages of the case. This includes jury selection, opening statements, direct and cross-examinations, and closing arguments, which should powerfully reinforce the unified story of the case. I have actually heard closing arguments that attempt to introduce or tell a different story than what was presented in the opening statement; this was not caused by any surprise evidence or a real need to change the story—just bad lawyering. Great trial lawyers work on the story of the case long before jury selection begins so that they are able to maintain a consistent and powerful story theme throughout the trial. One of the nation's premier capital defense lawyers, Michael N. Burt, has written that the refinement of the story narrative begins long before the trial starts.<sup>32</sup> Burt, who has appeared in my courtroom in a complex death penalty habeas case, observed that "[w]hatever jury selection strategy is employed, storytelling has its place."<sup>33</sup>

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30. SUNWOLF, PRACTICAL JURY DYNAMICS 272 (LexisNexis ed., 1st ed. 2004).

31. Phillip H. Miller, *Storytelling: A Technique for Juror Persuasion*, 26 AM. J. TRIAL ADVOC. 489, 489 (2003) (emphasis removed).

32. See Michael N. Burt, *The Importance of Storytelling at All Stages of a Capital Case*, 77 U. MO. K.C. L. REV. 877 (2009) (beginning his discussion of effective story telling with pre-trial events). Burt discusses, *inter alia*, the importance of using a storytelling narrative to convince prosecutors early in the proceedings not to seek the death penalty. *Id.* at 883–89.

33. *Id.* at 895.

I have often wondered why the quality of opening statements is so incredibly low compared to the quality of closing arguments. Ninety-nine percent of lawyers should spend far more time than they do crafting a powerful story of the case for opening statements. The Northern District of Iowa's local rules limit the length of opening statements to fifteen minutes.<sup>34</sup> For nineteen years as a judge, I waived this rule in every case—always against my better judgment. Without fail, at the twenty- to thirty-minute mark, the jurors' eyes started to glaze over. An hour into the opening statement, virtually every single juror had "the look." In 2013, I stopped waiving the rule and the opening statements have improved. With only fifteen minutes, lawyers do not have time to bore the jurors with a witness-by-witness account of the testimony—the worst and most common approach to opening statements. Enforcement of the fifteen-minute rule virtually requires that the lawyers tell a story to maximize their time.

Opening statements can also be made ineffective by a lawyers' reliance on notes or typed text. I shudder when a lawyer takes a legal pad or typed pages of text to the podium for his or her opening statement. This is a harbinger that the opening statement will be mediocre at best and probably dead on arrival. Eye contact will be poor, the delivery will often be stiff, and the lawyer will shield himself or herself from the jury by standing behind the podium. I have never heard a great opening statement delivered from notes behind a podium. Period.<sup>35</sup>

Storytelling in opening statements must come from the heart. Jimmy Neil Smith, founder and president of the International Storytelling Center in Jonesborough, Tennessee, spoke to renowned storyteller Elizabeth Ellis about an interaction she had with a group of small children:

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34. N.D. Iowa LR 83.5(a) (December 1, 2009), *available at* [http://www.iand.uscourts.gov/e-web/documents.nsf/0/58BE642F7E9E99E2862573C00000E093/\\$File/2009+Local+Rules+Redline+Version.pdf](http://www.iand.uscourts.gov/e-web/documents.nsf/0/58BE642F7E9E99E2862573C00000E093/$File/2009+Local+Rules+Redline+Version.pdf).

35. We make a podium available for lawyers to use for jury selection, opening statements, and closing arguments *only* if they want it. Unfortunately for the art of advocacy and for the jurors' attention spans, most lawyers want it and use it.

Suddenly, one of the children jumped up and said “Do you memorize those stories?” Before she could answer, the little boy next to him poked him in the ribs and said, “No, stupid! She knows them by heart.” “I chuckled inside,” says Elizabeth, “but I was struck by the truth of the child’s statement. No, my stories aren’t memorized. I do know them by heart. For if the story isn’t told through the heart, the story has little power. The stories that really move us are those that we learn, take in, and tell through the heart—not the head.”<sup>36</sup>

But how do trial lawyers, schooled in legal analysis, learn storytelling from the heart? Above all else, they must read everything they can on the art of storytelling. There is an amazing amount of published material, particularly available on the Internet. Some of this material is written by lawyers for lawyers,<sup>37</sup> and some

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36. JIMMY NEIL SMITH, HOMESPUN: TALES FROM AMERICA’S FAVORITE STORYTELLERS 328–29 (1988). Jimmy Neil Smith is the founder of both the National Storytelling Festival, first held in 1973 in Jonesborough, a tiny town in the mountains of Tennessee, and the National Storytelling Association, founded in 1975 in Jonesborough. *About ISC*, INT’L STORYTELLING CTR., <http://www.storytellingcenter.net/experience/about-isc/> (last visited April 29, 2013). The National Storytelling Association is now known as the International Storytelling Center and its webpage boasts: “[A]fter years of scientific research in 17 different fields, analysts conclude that storytelling is our most powerful tool for effective communication.” *Id.* The webpage also hosts a storytelling blog, *Story Revolution*, which “pushes the envelope to bring new and innovative thinking to traditional narrative applications. Dedicated to exploring the next stage in the storytelling movement, discussions focus on the latest breakthroughs in applying storytelling and what’s on the horizon.” *Story Revolution*, INT’L STORYTELLING CTR., <http://www.storytellingcenter.net/experience/about-isc/> (last visited April 29, 2013).

37. *See, e.g.*, DAVID BALL, *THEATER TIPS AND STRATEGIES FOR JURY TRIALS* (3d ed. 2003) (providing practical theater and film techniques for trial lawyers to excel in the courtroom); JOHN D. MOOY, *ADVOCACY AND THE ART OF STORYTELLING* 1 (1990) (explaining that “storytelling . . . is a rhetorical device for spanning the gap between the legal world and the day-to-day world.”); Burt, *supra* note 32, at 879 (explaining how defense counsel in death penalty cases can develop an effective “mitigation counter-narrative” as a storyteller); Kenneth D.

of it is written by storytellers for storytellers.<sup>38</sup> There are national, regional, and local storytelling organizations, festivals, events, and short courses to participate in. Internet resources, including the website of TED, which hosts thousands of eighteen-minute or less talks on “ideas worth spreading,” provide ample examples of great storytelling. Two examples of compelling storytelling available on TED include Joshua Prager’s “In Search of the Man Who Broke My Neck”<sup>39</sup> and Ben Dunlap’s “The Life-Long Learner.”<sup>40</sup> If Mr. Prager can tell his incredibly rich and powerful story in under eighteen

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Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS’N LEGAL WRITING DIRS. 1, 3 (2010) (providing empirical evidence to conclude that story argumentation is persuasive to appellate judges and others); Foley & Robbins, *supra* note 17, at 461 (explaining how to write an excellent statement of facts section by focusing on key elements of storytelling: character, conflict, resolution, organization, and point of view); Miller, *supra* note 31 (explaining how to develop the skill of storytelling for use before a jury); Gerald Reading Powell, *Opening Statements: The Art of Storytelling*, 31 STETSON L. REV. 89 (2001) (discussing the significance of identifying the elements of a story in a lawsuit and the importance of storytelling in the opening statement); Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239 (2012) (articulating twenty-five specific propositions about storytelling techniques).

38. See, e.g., MADISON SMARTT BELL, *NARRATIVE DESIGN* (1997) (examining the strengths and weaknesses of twelve stories and explaining how to analyze a story’s use of time, plot, and character); K. SEAN BUVALA, *HOW TO BE A STORYTELLER* (2012) (including fifteen essays from master storytellers to teach the art of oral storytelling); JACK HART, *STORY CRAFT: THE COMPLETE GUIDE TO WRITING NARRATIVE NONFICTION* (2012) (providing a guide for true-life storytelling, focusing on story, structure, point of view, character, scene, action, dialogue, theme, reporting, narratives, and ethics); Andrew Stanton, *The Clues to a Great Story*, TED TALK (posted Mar. 2012) [http://www.ted.com/talks/andrew\\_stanton\\_the\\_clues\\_to\\_a\\_great\\_story.html](http://www.ted.com/talks/andrew_stanton_the_clues_to_a_great_story.html) (featuring Stanton, the writer behind the three “Toy Story” movies, discussing the greatest story commandment: “Make me care.”); NATIONAL STORYTELLING NETWORK <http://www.storynet.org/about/index.html> (last visited Sept. 29, 2013) (“The National Storytelling Network brings together and supports individuals and organizations that use the power of story in all its forms.”).

39. Joshua Prager, *In Search of the Man Who Broke My Neck*, TED TALK [http://www.ted.com/talks/joshua\\_prager\\_in\\_search\\_for\\_the\\_man\\_who\\_broke\\_my\\_neck.html](http://www.ted.com/talks/joshua_prager_in_search_for_the_man_who_broke_my_neck.html) (posted Mar. 2013) (relating his journey to Israel to find the man who made him a hemiplegic twenty years earlier).

40. Ben Dunlap, *The Life-Long Learner*, TED TALK [http://www.ted.com/talks/ben\\_dunlap\\_talks\\_about\\_a\\_passionate\\_life.html](http://www.ted.com/talks/ben_dunlap_talks_about_a_passionate_life.html) (posted Mar. 2007) (telling the story of a Hungarian Holocaust survivor that taught him the value of life-long learning).

minutes, then surely attorneys can give a powerful opening statement in equal or less time.<sup>41</sup>

While mastering storytelling in trial will not come overnight, here are five quick tips to keep in mind. First, a good story can be relatively short: the 256-word Gettysburg Address said a great deal. On a related note, keep in mind that most audiences show up voluntarily. Juries do not. Second, keep it simple. Simple words should replace complex words. Simple sentences are more powerful and easier to remember than complex sentences. Third, summarizing each witness's testimony renders your opening statement dead upon arrival. Fourth, a mediocre trial lawyer armed with graphics and PowerPoint is still a mediocre trial lawyer. Graphics work best in the context of telling a great story, but all too often they interfere with the story. Finally, speak in the active voice and present the story as your witnesses experienced it. This is critical—the most powerful and profound key to great storytelling. Instead of telling the jury “what the evidence will show,” lawyers would be well served by explaining what actually happened. This allows jurors to place themselves, as observers, into the story as it unfolds before them.

Lawyers can practice storytelling during their day-to-day activities—while taking a bath, mowing the lawn, cooking dinner, or driving in the car. Practice need not be formal, and it can be done by simply picking out a nearby object, building, or person and spinning a yarn.

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41. Watching Joshua Prager's TED video demonstrates the wisdom of our local rule allotting only fifteen minutes for opening statements. The last three minutes and thirty seconds of his video (the portion past the fifteen-minute mark) lose some of Prager's powerful effect, failing to hold viewers' attention as effectively as the first fifteen minutes. Prager's talk illustrates that one skilled in the art of storytelling can weave a powerful story in fifteen minutes or less. Prager, *supra* note 39.

### III. GRIT

“The only thing that is distinctly different about me is I am not afraid to die on a treadmill. I will not be outworked, period. You might have more talent than me, you might be smarter than me, you might be sexier than me, you might be all of those things—you got it on me in nine categories. But if we get on the treadmill together, there’s two things: You’re getting off first, or I am going to die. It’s really that simple.”

—Will Smith<sup>42</sup>

Not all gritty trial lawyers are great trial lawyers, but all great trial lawyers have grit. Grit—what it is, who has it, and how it is measured—has been the subject of great interest to academic psychologists studying its role in achievement.<sup>43</sup> Professor Angela Duckworth and her colleagues, who lead this field of research, define grit “as perseverance and passion for long-term goals.”<sup>44</sup> Duckworth’s hypothesis “that grit is essential to high achievement”<sup>45</sup> came out of interviews with professionals in law, medicine, investment banking, painting, academia, and journalism.<sup>46</sup> When asked what qualities distinguish “star performers” in their respective fields, those interviewed answered “grit or a close synonym as often as talent.”<sup>47</sup> They “were awed by the achievements of peers who did

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42. *Will Smith—Not Afraid to Die on a Treadmill.mov*, YOUTUBE (Jun. 17, 2011), [http://www.youtube.com/watch?feature=player\\_embedded&v=d0qS35FfcUE](http://www.youtube.com/watch?feature=player_embedded&v=d0qS35FfcUE).

43. For more information about the work of Professor Duckworth, a leader in this field, see Angela Duckworth, *The Duckworth Lab*, UNIV. OF PA., <https://sites.sas.upenn.edu/duckworth> (last visited Nov. 23, 2013) (providing, among other information, Duckworth’s “grit test” and information about participating in the lab’s research); see also Angela Duckworth, *The Key to Success? Grit*, TED TALK, (posted May 2013) [http://www.ted.com/talks/angela\\_lee\\_duckworth\\_the\\_key\\_to\\_success\\_grit.html](http://www.ted.com/talks/angela_lee_duckworth_the_key_to_success_grit.html) (discussing the need to emphasize grit in childhood education).

44. Angela L. Duckworth, Christopher Peterson, Michael D. Matthews & Dennis R. Kelly, *Grit: Perseverance and Passion for Long-Term Goals*, 92 J. PERSONALITY & SOC. PSYCHOL. 1087, 1087 (2007) [hereinafter Duckworth et al., *Grit*].

45. *Id.* at 1088.

46. *Id.*

47. *Id.*



not at first seem as gifted as others but whose sustained commitment to their ambitions was exceptional.”<sup>48</sup> Many also “noted with surprise that prodigiously gifted peers did not end up in the upper echelons of their fields.”<sup>49</sup>

Talent and grit are very different characteristics.<sup>50</sup> All great trial lawyers have both, but even one with unsurpassed talent, like a Gerry Spence, has no assurance of grit.<sup>51</sup> Indeed, as Duckworth recently observed, “in most samples, grit and talent are either orthogonal or slightly negatively correlated.”<sup>52</sup> Duckworth added that, in 1892, Sir Francis Galton studied the biographical information of highly successful judges, poets, scientists, statesman, and painters. Galton observed that high achievers were “triply blessed by ‘ability combined with zeal and with capacity for hard labour.’”<sup>53</sup> A century later, educational psychologist Dr. Benjamin Bloom studied world-class chess players, mathematicians, sculptors, swimmers, pianists, and neurologists, and wrote that “only a few of these individuals were regarded as child prodigies by teachers, parents, or experts.”<sup>54</sup> Rather, the individuals who became world class in their fields worked for ten-to-fifteen years, day after day, and had the “desire to

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48. *Id.*

49. *Id.*

50. University of Texas men’s basketball coach Rick Barnes discussed grit during a recent interview: “I don’t know any program that has not gone through failure at some point. But the real measure of it is your grit. Are you tough enough to come back from it? And keep coming back, keep getting up. This group of guys, they have that grit.” Eric Prisbell, *The Revival of Texas Basketball and Coach Rick Barnes*, USA TODAY, Feb. 6, 2014, <http://www.usatoday.com/story/sports/ncaab/big12/2014/02/06/university-of-texas-longhorns-basketball-coach-rick-barnes/5264209/> (internal quotation marks omitted).

51. Angela Lee Duckworth & Lauren Eskreis-Winkler, *True Grit*, ASS’N PSYCHOL. SCI. OBSERVER (April 2013), available at <http://www.psychologicalscience.org/index.php/publications/observer/2013/april-13/true-grit.html> (“Our research suggests that prodigious talent is no guarantee of grit.”).

52. *Id.*

53. Duckworth et al., *Grit*, *supra* note 43, at 1088.

54. BENJAMIN S. BLOOM, *DEVELOPING TALENT IN YOUNG PEOPLE* 533 (1985).

reach a high level of attainment” and a “willingness to put in great amounts of time and effort.”<sup>55</sup>

In a study of 1,218 freshman “plebes” at the U.S. Military Academy at West Point, “[g]rit predicted completion of the rigorous summer training program better than any other predictor.”<sup>56</sup> Specifically, the cadets’ scores on the “Grit Scale” developed by Professor Duckworth better predicted success in the program than even the Whole Candidate Score (WCS) developed by West Point to gauge applicants for admission.<sup>57</sup>

Grit is also a strong predictor of success in academia. In a study of students at an Ivy League university, the participant pool’s SAT scores averaged 1,415, “a score achieved by fewer than 4% of students who take the SAT.”<sup>58</sup> But students who scored higher on the Grit Scale outperformed their less-gritty peers.<sup>59</sup> The survey results showed that “[g]rit scores were associated with higher GPA’s” and “a relationship that was even stronger when SAT scores were held constant. . . .”<sup>60</sup> The results demonstrated that grit was actually associated with lower SAT scores—“suggesting that among elite undergraduates, smarter students may be slightly less gritty than their peers.”<sup>61</sup> Across six studies performed by Duckworth and her colleagues, grit accounted for “significant incremental variances in success outcomes over and beyond that explained by IQ, to which it was not positively related.”<sup>62</sup>

Duckworth’s observations about grit among undergraduates comport with my experience on the bench and in the classroom. The smartest law students are almost never the best trial lawyers. The top law students—recruited by large national law firms from the nation’s elite law schools—are generally among the most marginal trial lawyers. Although they make excellent motion-filing and

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55. *Id.* at 544.

56. Duckworth et al., *Grit*, *supra* note 44, at 1095.

57. *Id.* at 1094–95. The WCS “is a weighted composite of high school rank; SAT score; Leadership Potential Score, which reflects participation in extracurricular activities; and Physical Aptitude Exam, a standardized physical exercise evaluation.” *Id.* at 1095.

58. *Id.* at 1093.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 1098.

paper-pushing litigators (as well as great law professors), they are infrequently great trial lawyers.

Great trial lawyers did not become great overnight.<sup>63</sup> They are gritty individuals who often lost in their early careers and did not lose sight of the long-term goal of improving and learning from each loss. They were not easily deterred or discouraged by early setbacks and failures.<sup>64</sup> They were willing to travel the long road and exert enormous effort to become great trial lawyers. For each of these individuals, the short-term goal was to win every trial, but the long-term goal was to become a great trial lawyer. As trial lawyer Rick Friedman explained:

In fact, many successful trial lawyers initially showed little or no talent for trying cases. Perhaps the most notable is Gerry Spence, who by his own account failed the Wyoming bar exam on his first attempt. After passing it on the second try, he proceeded to lose his first eight trials.<sup>65</sup>

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63. This is true not only of great trial lawyers, but of many individuals who rise to the top. The 2013 U.S. Open Golf Champion, thirty-two-year-old Justin Rose, turned pro just after the 1988 U.S. Open and proceeded to miss the cut in his first twenty-one professional golf tournaments. Bob Harig, *Justin Rose Closes Out 1st Major Win*, ESPN GOLF (June 17, 2013, 8:40 AM), [http://espn.go.com/golf/usopen13/story/\\_id/9393366/2013-us-open-justin-rose-wins-phil-mickelson-second-again](http://espn.go.com/golf/usopen13/story/_id/9393366/2013-us-open-justin-rose-wins-phil-mickelson-second-again).

64. On June 2, 2006, thirteen-year-old eighth grader Katharine Close, from Spring Lake, New Jersey, correctly spelled “ursprache” (a hypothetical parent language) and took home over \$42,500 in cash and prizes for winning and beating 274 other finalists in the Scripps National Spelling Bee. Jill Capuzzo, *For New Jersey 8th Grader, ‘Ursprache’ Means Fame*, N.Y. TIMES, June 3, 2006, [http://www.nytimes.com/2006/06/03/nyregion/03bee.html?\\_r=0](http://www.nytimes.com/2006/06/03/nyregion/03bee.html?_r=0). The best predictor of success in this spelling bee has been determined to be “deliberate practice,” that is, “the solitary study of word spellings and origins.” Angela Lee Duckworth, et al., *Deliberate Practice Spells Success: Why Grittier Competitors Triumph at the National Spelling Bee*, 2 SOC. PSYCHOL. & PERSONALITY SCI. 174, 174–75 (2011). Participants in the National Spelling Bee rated deliberate practice “more effortful and less enjoyable than alternative preparation practices.” *Id.* at 175. I strongly suspect that the same long, effortful, and deliberative practice is also necessary to become a great trial lawyer.

65. RICK FRIEDMAN, ON BECOMING A TRIAL LAWYER 39 (2008).

Furthermore, Duckworth states that “[g]rit entails working strenuously toward challenges, maintaining effort and interest over years despite failure, adversity, and plateaus in progress.”<sup>66</sup> She argues that an individual with grit “approaches achievement as a marathon; his or her advantage is stamina.”<sup>67</sup> It takes persistence, a burning passion to become the best, an unparalleled work ethic, an insightful introspection to learn from your mistakes, and a desire to read and learn everything you can about the craft to become a great trial lawyer. This is grit.<sup>68</sup>

#### IV. VIRTUOSO CROSS-EXAMINER

“Cross-examination is the greatest legal engine ever invented for the discovery of truth.”

—John Henry Wigmore<sup>69</sup>

Not all virtuoso cross-examiners are great trial lawyers, but every great trial lawyer is a virtuoso cross-examiner. Professor Jules Epstein has written that “[t]he mythic power of cross-examination remains enshrined in the American adjudicative process” and “is regarded as the *sine qua non* of the American trial system.”<sup>70</sup> I agree. Many trials are won or lost on a successful or failed cross-examination of key witnesses. Most lawyers are mediocre cross-examiners, even on a good day. In my experience, trial lawyers’

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66. Duckworth et al., *Grit*, *supra* note 44, at 1087–88.

67. *Id.* at 1088.

68. Lest one thinks grit is only relevant to becoming great in one’s respective profession, a recent study found a positive relationship between a high Grit Score as a predictor of happiness and life satisfaction. Kamleash Singh & Shalini Duggal Jha, *Positive and Negative Affect, and Grit as a Predictor of Happiness and Life Satisfaction*, 34 J. INDIAN ACAD. APPLIED PSYCHOL. (SPECIAL ISSUE) 40, 40–45 (2008).

69. *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 3d ed. 1940).

70. Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and “At Risk,”* 14 WIDENER L. REV. 427, 427–48 (2009).

poor cross-examinations can be attributed to a lack of experience and insufficient grit to work to improve one's cross-examination skills.<sup>71</sup>

I agree with Wigmore that "[c]ross-examination is the greatest engine for ascertaining truth."<sup>72</sup> But I counter that cross-examination is less about a search for truth than it is a crucial vehicle for a lawyer to tell his client's story, albeit in a very different way than in jury selection, an opening statement, a direct examination, or a closing argument. Most lawyers neither try enough cases nor think deeply and prepare diligently enough to become great cross-examiners. Cross-examination is often called an "art," but this is a misconception. As Fred Metos explained, cross-examination is "a skill that can be learned with practice . . . [involving] a great deal of work and even more concentration."<sup>73</sup>

So how does one become a great cross-examiner? Start by reading, studying, and thinking deeply about four cross-examination classics: Francis Wellman's *The Art of Cross-Examination* (the first edition is more than a century old),<sup>74</sup> Irving Younger's "The Ten

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71. Of course, not everyone agrees with me. Famed Miami criminal defense lawyer Roy Black blames Professor John Henry Wigmore for lawyers' poor cross-examination skills: "Lawyers seem unable to master the art of cross-examination. I hold Wigmore responsible for this failure by boldly proclaiming that: 'Cross examination is the greatest engine for ascertaining truth.' Perhaps in some alternate universe, but not this one. The engine works better in theory than practice." Roy Black, *Irving Younger's Ungodly Ten Commandments*, BLACK'S LAW, A BLOG, (July 18, 2012), <http://www.royblack.com/blog/irving-youngers-ungodly-ten-commandments/>. Black also criticizes Irving Younger and his famous "Ten Commandments of Cross-Examination." *Id.* While there is some truth in Black's scathing attack on the Ten Commandments, I suggest that mediocre or novice cross-examiners still follow them unless they have a terrific reason for deviating, or until they develop the skill and judgment to know when it is better to deviate than to follow.

72. Green, 399 U.S. at 158 (quoting 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed. 1940)).

73. G. Fred Metos, *Cross-Examination: Methods and Preparations*, UTAH B.J., Nov. 1990, at 11.

74. FRANCIS WELLMAN, *THE ART OF CROSS-EXAMINATION* (1903). The four editions of Wellman's book generated so much buzz in the legal community that the Harvard Law Review reviewed the book three times. Book Note, 17 HARV. L. REV. 433, 433-34 (1904); Emory R. Buckner, Book Note, 37 HARV. L. REV. 402 (1924); Book Note, 50 HARV. L. REV. 859 (1937).

Commandments of Cross-Examination”;<sup>75</sup> Larry Pozner’s *Cross-Examination: Science and Techniques*;<sup>76</sup> and Terence MacCarthy’s treatise on cross-examination.<sup>77</sup> These insightful works on cross-examination offer different perspectives with conflicting advice on solving the same cross-examination problems. Together, they provide a thorough theoretical and practical foundation of the goals of cross-examination. Trial lawyers who study them all can then

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75. IRVING YOUNGER, *THE ART OF CROSS-EXAMINATION* (1976). His Ten Commandments are:

(I) Be brief; (II) Short questions, plain words; (III) Never ask anything but leading questions; (IV) Ask only questions to which you already know the answer; (V) Listen to the answer; (VI) Don’t argue with the witness; (VII) Don’t permit a witness on cross-examination to simply repeat his direct testimony; (VIII) Don’t let the witness explain; (IX) Avoid asking one question too many; (X) Save it for summation.

*Id.* at 21–32. For video of Irving’s lecture, see National Institute of Trial Advocacy, *Irving Younger’s 10 Commandments of Cross-Examination*, YOUTUBE (Jan. 10, 2013), <http://www.youtube.com/watch?v=cFT5qEquiVZ>. There are many modifications, refinements, and iterations of Younger’s Ten Commandments. See, e.g., Timothy A. Pratt, *The Ten Commandments of Cross-examination*, 61 FED’N DEF. & CORP. COUNS. QUARTERLY 178 (2011), available at [http://www.thefederation.org/documents/V61N2\\_CoverToCover1.pdf](http://www.thefederation.org/documents/V61N2_CoverToCover1.pdf) (providing an update on Younger’s Ten Commandments by a partner at Shook, Hardy & Bacon, L.L.P. who went on to become general counsel of the Boston Scientific Corporation). *Id.* at 179.

76. LARRY POZNER & ROGER DODD, *CROSS-EXAMINATION: SCIENCE AND TECHNIQUES* (1993). Their now-famous “Chapter Method” of cross-examination presents the most illuminating and insightful technique for cross-examination I have ever read. Rick Friedman has offered this advice about Pozner and Dodd’s book on cross-examination in his own must-read book: “This is the definitive book on cross-examination. Any trial lawyer who has not read this book should be ashamed. Learn the techniques. When you have mastered them do not be afraid to cast them aside when the occasion warrants it.” FRIEDMAN, *supra* note 65, at 195.

77. TERENCE F. MACCARTHY, *MACCARTHY ON CROSS-EXAMINATION* (2007). Mr. MacCarthy retired from the Federal Defender Program of the Northern District of Illinois at the end of 2008, after serving that office for forty-two years. He is a nationally renowned expert on cross-examination and a much sought after CLE speaker. Press Release, United States Dist. Court, N. Dist. Ill. Terry MacCarthy Stepping Down as Top Federal Defender in Northern District of Illinois (Oct. 31, 2008), available at [http://www.ilnd.uscourts.gov/home/\\_assets/\\_news/maccarthy%20-%202010-31-08.pdf](http://www.ilnd.uscourts.gov/home/_assets/_news/maccarthy%20-%202010-31-08.pdf).

perfect whose strategy works and whose does not, given the precise situation presented for cross-examination.<sup>78</sup>

The leading question is to cross-examination what the leash is to walking a temperamental dog. Both are means of control: when you let a temperamental dog off the leash, nothing good ever happens. The same is true of the adverse witness. The use of a non-leading question is often a near fatality, unless you are a highly skilled cross-examiner, have a distinct purpose in mind for asking the non-leading question, and have instantaneously and correctly performed the risk-benefit analysis.<sup>79</sup> Otherwise, you are just plain lucky. I can guarantee that you will not be lucky very often.

Over the years, I have developed Bennett's "Top Ten Sins of Cross-Examination"—the ten most frequent "mistakes" lawyers make in cross-examination. They are based on my own observations and jurors' evaluations. The Top Ten Sins of Cross Examination are:

- (1) simply re-hashing the direct examination,
- (2) not having a specific purpose in mind for each question,

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78. In Chapter 8, "Beware of Formulas," of Rick Friedman's *ON BECOMING A TRIAL LAWYER*, he writes:

So we read Irving Younger's *Ten Commandments of Cross-examination* and try hard to follow his precepts to the letter. By calling them the "Ten Commandments," Younger implied we must always follow them, and when we do, everything will be okay. Many lawyers have strictly followed these commandments through one bad cross-examination after another. This is not to say there isn't great wisdom in Younger's Ten Commandments or in many of the other principles advocated by those who study the trial process. It is to say that none of them are universal—that is, always controlling or true.

FRIEDMAN, *supra* note 65, at 71–72.

79. Timothy Pratt gives several examples of when it is better to ask a non-leading question. In cross-examining an opposing expert, where you already know the answer, it is fine to ask: "How long has it been since you have treated a patient?" or "Of the thousands of medical journals published around the world, tell the jury how many you have asked to publish the opinions you have expressed in this courtroom?" Presumably, you know the answer is none. Pratt, *supra* note 75, at 186.

- (3) not stopping while the going is still good,
- (4) failing to keep the questions simple,
- (5) beating up a witness who has not given you “permission” to do so,
- (6) impeaching a witness over a silly inconsistency,
- (7) flubbing the technique of impeachment,
- (8) using the “Mexican jumping bean”<sup>80</sup> approach,
- (9) lack of pace, and
- (10) failing to have a graceful exit strategy when the cross-examination inevitably goes south.

(1) Simply re-hashing the direct—This occurs when the cross-examining attorney has nothing better to accomplish than to reinforce the direct examination of the witness. Do not do this! Rehashing the direct examination—which has already damaged your client—perversely promotes both primacy and recency. A client will be much better off by a lawyer who says “no questions” with a feigned confident smile (a great tool for every trial lawyer in its own right). Indeed, it has been said that “perhaps the most important issue with regard to cross-examination [is] whether or not to cross-examine the witness at all.”<sup>81</sup>

(2) Not having a specific purpose in mind for each question—Cross-examination requires great preparation and thought. If you do not have a crystal-clear purpose for a question, skip it, or risk doing more harm than good in the long run.

(3) Not stopping while the going is still good—Over the last nineteen years, time and time again I have instant messaged my law clerk, seated to my left in the courtroom, during an otherwise

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80. Mexican jumping beans are “the seed[s] of certain Mexican shrubs, especially those of the genus *Sebastiania*, of the spurge family (Euphorbiaceae), that contain larvae of a small olethreutid moth (*Laspeyresia salitans*). The movements of the larvae feeding on the pulp within the seed, which are intensified by warmth, give the seed the familiar jumping movement.” *Mexican jumping bean*, ENCYC. BRITANNICA ONLINE ACADEMIC EDITION, <http://www.britannica.com/EBchecked/topic/379073/Mexican-jumping-bean> (last visited Sept. 21, 2013).

81. Gregory A. Hearing & Brian C. Ussery, *Guidelines for an Effective Cross-Examination: The Science Behind the Art*, 17 PRAC. LITIG. 7, 8 (2006); see also J. Alexander Tanford, *Keeping Cross-Examination Under Control*, 18 AM. J. TRIAL ADVOC. 245, 249 (1994) (“Too many lawyers automatically cross-examine every witness called by their opponent. No rule of trial practice requires this.”).



excellent cross-examination to ask, will he stop now? The inevitable answer is no. It is almost impossible for lawyers to stop after making three, four, five, or more excellent and devastating points in rapid-fire succession. Most trial lawyers have an internal need to keep going and going until they run out of steam. At that point, the cross-examination has gone on for so long that those of us in the courtroom—the judge, the law clerk, and presumably the jury—are left thinking that there was something quite good about that cross-examination a few hours ago, despite having long since forgotten what it was.

If you are fortunate enough to strike gold, then stop! Throw the legal pad away, sit down, and say “no further questions.” Most trial lawyers will not do this, though. Only the great ones stop. In my experience, this is because lawyers love the sound of their own voices, often to the detriment of their cross-examinations. They would be better served by setting aside their egos and sitting down.

(4) Failing to keep the questions simple—Keeping the cross-examination questions simple—both in terms of the words used and the length of the question—is essential to controlling the witness. Equally important, for the same reasons, is limiting each leading question to one fact. Otherwise, “The complexity of a question can allow a witness wiggle room to deny a point the attorney wishes to affirm, or vice versa.”<sup>82</sup> The consequences for ignoring this rule can be fatal. For example, a lawyer might ask, “Didn’t you run the red light because you dropped your lit cigarette on the floor of your car as you were turning off your car radio?” The defendant could honestly answer “no” to the entire question if the cigarette was not lit, if she dropped it on her seat and not the floor, or if she was turning the radio on and not off.

(5) Beating up a witness who has not given you “permission” to do so—There is an old English proverb that says, “You can catch more flies with honey than with vinegar.”<sup>83</sup> Jurors resent lawyers

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82. Hearing & Usery, *supra* note <sup>81</sup>, at 10.

83. “You can catch more flies with honey than with vinegar,” DICTIONARY.COM, <http://dictionary.reference.com/browse/you+can+catch+more+flies+with+honey+than+with+vinegar> (last visited Jun. 14, 2013) (citing THE AMERICAN HERITAGE NEW DICTIONARY OF CULTURAL LITERACY (3d ed. 2005)).

who bully witnesses unless the witness has given “permission” to be beaten up. Witnesses give this permission not literally, but rather when they are arrogant, nasty, obviously lying, extremely argumentative, or just plain obnoxious. Until then, roughing up or beating up the witness will backfire. When a witness has given the cross-examining attorney “permission” to beat him up, most jurors enjoy the entertainment value of aggressive cross-examination. They believe the witness is getting what he deserves. However, counsel should err on the side of caution in deciding whether the witness has given “permission” to ramp up contempt. Jurors, in their evaluations of trial lawyers before me, demonstrate a higher-than-expected threshold for witness “permission.”

(6) Impeaching a witness over silly inconsistencies—Not all prior inconsistent statements by witnesses are created equal. This is critical to understand. Impeaching on irrelevant, minor, or fringe issues undermines, rather than advances, a cross-examination. It weakens the stronger aspects of the cross-examination and lessens an attorney’s personal credibility with the jurors. It is much better to impeach on one core issue than to do so ten times on minor inconsistencies. For example, if a witness testified in the deposition that she “hated” Mr. X, perhaps the attorney could technically impeach her trial testimony that she “despised” Mr. X. But such a ridiculously technical impeachment gains nothing and would make the attorney look like a silly nitpicker. “Not all prior inconsistent statements by witnesses are created equal” would make an excellent tattoo for trial lawyers.

(7) Flubbing the technique of impeachment—Watching a botched impeachment effort is painful. The various techniques of impeaching a witness on cross-examination are fodder for a law review article of their own. Here are a few key points to keep in mind:

In my district, all of the courtrooms are well equipped with modern technologies. Of course, not all trial lawyers are created technologically equal. For this reason, some impeachment is done the old-fashioned way, and some is done using high-tech, video-taped depositions, with or without scrolling text. The scrolling text feature can increase the cost of the deposition; however, it is usually

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(“You can win people to your side more easily by gentle persuasion and flattery than by hostile confrontation.”)).

well worth it. Nothing is more powerful than seeing and hearing a witness contradict the courtroom testimony he or she just gave, especially since some jurors are primarily visual learners while others are auditory learners. But—and this is a big but—nothing takes away from the impact and value of a high-tech impeachment more than a lawyer or legal assistant fumbling to find the video clip while everyone in the courtroom watches and waits. High-tech impeachment is worth its weight in gold, but only for those who are extremely proficient with it.

The same is true of the old-fashioned way. If an attorney stumbles and makes everybody in the courtroom wait while he or a legal assistant scrambles to find a certain page of the witness's deposition, the impact is lessened. And doing this repeatedly for minor and fringe inconsistencies often makes the impeachment effort worthless and counter-productive.

In addition, some methods of using a written deposition to impeach a prior inconsistent statement are clearly better than others. I recently had a very good trial lawyer ask the witness to read both the questions and answers. The witness did so, but she read them so quickly that nobody in the courtroom could figure out where the question ended and the answer began, rendering the impeachment effort completely worthless. I have found that the most effective impeachment technique is for the lawyer to read the question asked in the deposition, and then have the witness read the answer they gave. There is something powerful in watching a witness effectively impeach him or herself.

(8) Using the “Mexican jumping bean” approach—Years ago, the prevailing thought on cross-examination was that jumping all over the place with questions and confusing the witness yielded greater fruit. The problem with this “Mexican jumping bean” approach is that it confused the jurors as much as or more than it confused the witness. Larry Pozner’s “Chapter Method” of cross-examination takes the opposite approach, and its structure works extremely well.<sup>84</sup>

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84. In Chapter 9 of *CROSS-EXAMINATION: SCIENCE AND TECHNIQUES*, “The Chapter Method of Cross-Examination,” Pozner and Dodd define their methodology of cross-examination as follows:

(9) Lack of pace—Much of the success of cross-examination depends on the lawyer’s ability to keep a strong pace, pausing for effect rather than shuffling through notes or deposition pages to impeach.<sup>85</sup> Jurors frequently comment negatively on lawyers who fumble for impeachment material or have trouble locating the allegedly impeaching statement in a prior exhibit or deposition. Gaps in the pace of cross-examination may lessen the effect of the good points you have made.

(10) Failing to have a graceful exit strategy when the cross-examination inevitably goes south—Even the best-prepared cross-examinations can and do go south. That is why it is critical to have an exit strategy for every witness. These are a few questions—the only ones that I suggest be completely written out—that allow you a graceful exit from the cross-examination. These “fail-safe” questions must be a component of each witness’s cross-examination outline in your trial notebook. Why? Because effective cross-examination—which is often more theater than direct examination—requires a strong beginning and a strong ending every time.

In my experience, the best cross-examiners are the top criminal defense lawyers and federal prosecutors. Trial lawyers who ply their craft in federal criminal cases do not have the crutch of taking depositions for impeachment purposes. Civil trial lawyers can learn from watching criminal defense lawyers and prosecutors, who are forced to be more resourceful and to think much faster on their feet. In this sphere, necessity truly breeds invention. In my opinion,

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Why use the word “chapter”? It signifies that there is a structure, a beginning and an end to the cross-examination on each topic. Just like a book, there is a purpose to each chapter, and each chapter interlocks with the others. Cross-examination is not a sputtering jumble of thoughts. It is a controlled, pinpoint series of inquiries into selected topics. The chapter method suggests and, it is to be hoped, demands that the cross-examination be a planned and controlled series of questions designed to accomplish well-defined goals.

Pozner & Dodd, *supra* note 76, at 187.

85. See, e.g., FRIEDMAN, *supra* note 65, at 145 (“A purposeful pause is one in which you interrupt the pattern, cadence, or drone of your speech to gather the audience’s attention or to emphasize a point. It is one of the most powerful techniques in the courtroom, and one of the least used.”).

depositions enable civil lawyers to become lazy. Take their depositions away, and few would have any effective cross-examinations. But since civil depositions are here to stay, it is worth noting that successful deposition skills in the conference room dictate how successful the cross-examination will be in the courtroom.<sup>86</sup> The major mistake made in civil depositions is the failure to use leading questions that limit one fact per question. This critical failure, as described above, allows witnesses to successfully wiggle out of and escape impeachment at trial. Although the first part of a civil deposition is often a fishing expedition for potentially impeaching material, a skilled trial lawyer will later elicit one fact per question to lock in that impeachment material.

So what can lawyers do to improve upon their cross-examination skills? First, pick one statement a day that you hear on television, radio, or at a social event. Practice aloud cross-examining the person making the statement. Second, read trial transcripts from any case and, after reading the direct examination, think through how the witness could be attacked on cross-examination. Then read the cross. Examine what the lawyer did well and how the cross could have been done better. Cross-examination requires practice, practice, and more practice—and even more preparation.

## V. PREPARATION

“In all things success depends on previous preparation, and without such previous preparation there is sure to be failure.”

—Confucius<sup>87</sup>

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86. For an excellent discussion of the interdependence between deposition skills and cross-examination skills, see Gary S. Gildin, *Cross-Examination at Trial: Strategies for the Deposition*, 35 AM. J. TRIAL ADVOC. 471, 511 (2012) (arguing that a successful deposition sets the stage for a successful cross-examination).

87. Confucius, *The Doctrine of the Mean*, THE CHINESE CLASSICS 136 (James Legge trans., 1887).

Just like Confucius, federal trial court judges place great value on the level of preparation by the lawyers appearing before them. In an informal, non-scientific e-mail poll of trial court judges in the Eighth Circuit, I asked respondents to list the three most important qualities or attributes of great trial lawyers.<sup>88</sup> Eighteen of thirty-three judges responded that “preparation” was either first or second in importance.<sup>89</sup> One judge said “slavish preparation.”<sup>90</sup> I agree. While intense preparation alone does not make one a great trial lawyer, you cannot be one without it.

Lawyers should dedicate a section in their trial notebooks for developing the case’s narrative and themes. Moreover, they should be thinking about and developing this section from the first client interview. I firmly believe that plaintiffs’ lawyers should draft the jury instructions on the elements of any potential claims and begin developing the case narrative and themes before accepting the case and executing the written retention agreement. Civil defense lawyers should do the same shortly after being retained.

When I was in private practice, I was always shocked when I received a call from a fellow lawyer asking if I had a set of jury instructions that he or she could use. I freely shared my work product and always inquired as to the date of the upcoming trial. A frequent response was “next week.” How can a lawyer accept a case, go through discovery, motion practice, and trial preparation and not know exactly what he needs to prove in terms of claims or defenses?

Lack of preparation is near the top of the list of jurors’ frequent negative comments about lawyers. It is also at the top of my list. Lack of preparation also manifests itself in lack of organization. Jurors and judges do not like lawyers that have to search and fumble for exhibits or notes. This is true both for lawyers who use high-tech exhibits and those who rely upon stacks of files in banker boxes. Jurors value their time too, and lack of organization creates juror resentment and wastes jurors’ and judges’ time.

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88. E-mail from author to trial court judges on the Eight Circuit (April 2013) (on file with author). The precise question I asked in April 2013 was “What three qualities or attributes do you think separate the very best trial lawyers from the rest?” *Id.*

89. *Id.*

90. *Id.*

Preparation means thinking of every detail, especially in communicating with juries. Lawyers who are oblivious to the needs and attention spans of jurors are doomed to failure. It makes no sense to have exhibits blown up on a board that jurors cannot read, nor does it behoove lawyers to show exhibits electronically in a font size too small for anyone to decipher.

After a decade in a high-tech courtroom, I still encounter lawyers who display a tilted document on the document camera, forcing jurors to crane their necks to read it. Others fail to enlarge the document enough for the jurors to see the relevant language. In my courtroom, I have a zoom feature installed on my control panel so that I can enlarge documents when the lawyers fail to do so.<sup>91</sup> On many occasions, I have called lawyers up to side-bar to point out that the jurors' glazed looks are due to their endlessly repetitive and mostly pointless direct examinations. I ask the lawyer to look at the jury when resuming the direct examination and, if the jurors appear bored out of their minds, I encourage him or her to wrap it up. Once, a lawyer responded that he was taught to never look at the jury, so he did not think he could follow my suggestion. Sometimes a lawyer cannot be saved from himself.

A major preparation attribute that separates great trial lawyers from lesser advocates is the ability to streamline their cases. Highly effective trial lawyers jettison redundant witnesses, unnecessary exhibits, repetitive questions, and causes of action that detract from the principal theory of recovery. All of this is critical to success at trial. Of course, it also takes a significant amount of judgment and courage—two related attributes of all great trial lawyers.

A team of alleged trial lawyers from a large national law firm recently brought several-thousand exhibits to a final pre-trial conference in my chambers. But the case was only complicated in their collective minds. When asked how many of the exhibits were important enough to mention in their closing arguments, they said less than fifteen, after some fumbling responses and further prodding. The team dramatically trimmed its exhibit list.

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91. I have even had lawyers exclaim: "Wow that's neat—it even does it automatically." Right.

This is not to say that only exhibits mentioned in closing arguments need be offered at trial. However, it is not a bad general rule of thumb. Great trial lawyers understand that less is almost always more. Indeed, wasting jurors' time with repetitive questions and unnecessary exhibits tops the list of jurors' criticisms of trial lawyers.

#### VI. UNFAILING COURTESY

"Life is not so short, but that there is always time enough for courtesy."

—Ralph Waldo Emerson<sup>92</sup>

There is a large public misperception that the greatest trial lawyers are those that employ "Rambo" trial tactics. "Rambo" lawyering<sup>93</sup> is derived from the fictional John Rambo character made famous by Sylvester Stallone in a series of movies.<sup>94</sup> Rambo was a fictional Green Beret—a one-man-army killing machine. Professor Perrin describes the Rambo lawyer:

The quintessential Rambo lawyer is one who terrorizes, intimidates, and obfuscates his way to victory in pursuit of the client's objectives, just as the Sylvester Stallone character laid waste to anything and everything in his way, killing and terrorizing the masses, in his effort to achieve vindication.<sup>95</sup>

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92. RALPH WALDO EMERSON, LETTERS AND SOCIAL AIMS 85 (1886).

93. Unfortunately, the phrase "Rambo lawyer" now appears in the venerable Black's Law Dictionary. See *Rambo lawyer*, BLACK'S LAW DICTIONARY 1373 (9th ed. 2009) ("Slang. A lawyer, esp. a litigator, who uses aggressive, unethical, or illegal tactics in representing a client and who lacks courtesy and professionalism in dealing with other lawyers. — Often shortened to Rambo.") (emphasis removed).

94. There are four films in the Rambo series. FIRST BLOOD (Anabasis N.V. & Elcajo Productions 1982); RAMBO: FIRST BLOOD PART II (Anabasis N.V. 1985); RAMBO III (Carolco Pictures 1988); RAMBO (Lionsgate et al. 2008) (the full series of movies).

95. L. Timothy Perrin, *Lawyer as Peacemaker: A Christian Response to Rambo Litigation*, 32 PEPP. L. REV. 519, 522 (2005) (footnotes omitted).



While I have encountered Rambo lawyering both as a practicing lawyer and as a judge, the vast majority of lawyers who have appeared before me in my twenty-four years on the bench are highly professional advocates. The best trial lawyers always are. They are as courteous to the courtroom deputy, court security officers, clerk's office staff, and my chambers' staff as they are to witnesses, opposing counsel, jurors, and judges. Tough, zealous, and successful trial lawyers do their best not to personalize issues, "win at all costs," or do anything to sully their most important currency: a reputation for civility, candor, courtesy, and integrity. These lawyers understand that no legal or factual issue and no case is worth spoiling the reputation that they have worked to create and maintain.

In a 1928 speech at Marquette University Law School, the Honorable Burr W. Jones, a lawyer and former member of the U.S. House of Representatives, said:

It is the popular conception, perhaps the true one, that the able and successful trial lawyer must be a fighter; that his life is one of battle and contention. I have known lawyers who seemed to act upon the theory that legal warfare is inconsistent with courtesy and gentlemanly manners in the court room and I have seen them fail of the high success which might have been within their reach. It is true that a client may sometimes gloat over the abuse which his lawyer hurls at the adverse attorney or party. For a moment even a jury may enjoy the excitement caused by such wordy encounters. But as a rule, both jurors and judges think of the legal profession as a learned profession, and that this conception should not be a mere fiction. When the time comes for rendering the verdict or the judgment they have more respect for, and more confidence in the fairminded gentleman than for him who deals in epithets and abuse.<sup>96</sup>

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96. Burr W. Jones, *Courtesy and Friendship in the Practice of the Law*, 13 MARQ. L. REV. 9, 10 (1928).

This is equally true today. Jurors, in their evaluations of trial lawyers, almost always give the most favorable evaluations to the most courteous and professional lawyers. While television shows may inculcate an expectation of Rambo trial lawyers, real jurors are critical of them and seldom evaluate them as effective advocates. Rambo lawyers are too busy bullying to listen to other lawyers and witnesses—a shortcoming discussed in the next section.

## VII. GREAT LISTENER

“When people talk, listen completely. Most people never listen.”

—Ernest Hemingway<sup>97</sup>

Lawyers often fit Hemingway’s description of “most people”: they love to hear the sound of their self-perceived silver tongues, but they are notoriously poor listeners. Just ask any judge or jury. The source of the problem could be legal education, according to Professor Neil Hamilton, who explained that despite being “critically important for effectiveness in both law school and the practice of law . . . listening skills are among the least emphasized skills in legal education.”<sup>98</sup> Kentucky lawyer Richard M. Rawdon, Jr. adds that while listening is not easy or natural for trial lawyers, they must learn to listen to be successful: “Listening develops knowledge. Knowledge grants power. With power, you can win.”<sup>99</sup> Spence’s views on listening at trial support both Hamilton and Rawdon’s assessments:

If I were required to choose the single essential skill from the many that make up the art of argument, it would be the ability to listen. I know lawyers who

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97. Malcolm Cowley, *A Portrait of Mister Papa*, LIFE MAGAZINE, Jan. 10, 1949, at 90 (quoting from a letter of advice from Ernest Hemingway to a young writer).

98. Neil Hamilton, *Effectiveness Requires Listening: How to Assess and Improve Listening Skills*, 13 FLA. COASTAL L. REV. 145, 145 (2012).

99. Richard M. Rawdon, Jr., *Listening: The Art of Advocacy*, TRIAL, Jan. 2000, at 99.

have never successfully cross-examined a witness, who have never understood where the judge was coming from, who can never ascertain what those around them are plainly saying to them. I know lawyers who can never understand the weakness of their opponent's case or the fears of the prosecutor; who, at last, can never understand the issues before them because they have never learned to listen. Listening is the ability to hear what people are saying, or not saying as distinguished from the words they enunciate.<sup>100</sup>

In my view, listening skills are incredibly underdeveloped in most lawyers I have observed in the courtroom. As Spence noted, poor listening skills have dire consequences for trial lawyers. For example, they almost always result in poor direct examination of witnesses. Unlike cross-examination, where the lawyer is the focus, direct examination should place the emphasis on the witness. The story or case narrative is told through the witness's testimony, not through the lawyer's questions. An attribute of all great trial lawyers is their ability to stay out of the way of their witnesses, who are the ones telling the client's story. This is impossible to accomplish without honing one's listening skills.

How many, when introduced to a new person, cannot remember that person's name ten seconds later? That is because too many of us are so focused on what we will say and making a good impression that we do not even listen to the person's name. The irony is, had we actually listened and repeated the person's name in our response, we could have accomplished both goals.

The same is true of the direct examination of virtually all witnesses by less-than-great trial lawyers. These lawyers commonly write out their direct questions in a script on a yellow legal pad.<sup>101</sup>

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100. GERRY SPENCE, *HOW TO ARGUE AND WIN EVERY TIME* 67 (1995).

101. The Chicago-based mega-firm of Mayer, Brown, Rowe & Maw (now shortened to Mayer Brown) used 1,200 legal size, 12,000 letter-size, and 4,200 junior-size legal pads a year, as of 2005. Suzanne Snider, *Old Yeller: The Illustrious History of the Yellow Legal Pad*, *LEGAL AFFAIRS*, May/June 2005, *avai*

At trial, they will go down their lists from question to question—paying little or no attention to the witnesses’ answers—hoping to get to the next question on the list without an objection. If these lawyers would listen more closely to a witness’s answer, they would be able to use the technique of “looping” to form the next question, rather than using the ones on their legal pads. Here is an example of looping in a defense lawyer’s direct examination of the human resources director who decided to terminate the plaintiff:

Q: Why did you decide to discharge Mrs. Smith?

A: Because she violated the company absenteeism policy.

Q: Please tell us what the company’s absenteeism policy included.

A: If you missed three days in a month without calling in you are subject to termination.

Q: How many days in July of last year did Mrs. Smith miss?

A: Six.

Q: Did she call in on any of the six?

A: No, but she had called in sometimes on other occasions during 2012 when she missed work, but she would not always do so.

Q: How often in 2012 did Mrs. Smith call in when she missed work?

Looping requires you to listen to the witness’s answer and form the next question based on that answer, much like you would in

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lable at [http://www.legalaffairs.org/issues/May-June-2005/scene\\_snider\\_mayjun05.msp](http://www.legalaffairs.org/issues/May-June-2005/scene_snider_mayjun05.msp). It would do lawyers and their clients a great favor by banning the ubiquitous legal pad from the courtroom. They are extremely inflexible because neither the actual pages nor the information on those pages can be easily reorganized to adjust to the ebb and flow of trials. To me, the legal pad is about as useful in trial as carbon paper or Wite-Out. Legal pads were invented in 1888, when a twenty-four-year-old paper mill worker, Thomas W. Holley, noticed the mill was wasting the paper scraps, known as “sortings,” and left the company to start his own paper pad business. *Id.* Holley eventually added the pad’s left hand margin 1.25 inches from the left edge, known as a “down line,” at the suggestion of a local judge so the judge could “comment on his own notes.” *Id.*

an interview or a conversation with a friend in which you are trying to elicit information.

Many times during oral questioning on an issue, lawyers in my court have demonstrated their poor listening skills by answering a question that I did not ask or by failing to answer the question that I actually posed. Listening carefully to the question asked—rather than focusing too soon on the response—will improve lawyers’ ability to try cases. Likewise, listening for an answer before asking the next question will also help lawyers be effective. Good listening is an acquired skill, and any lawyer can achieve it with a little gritty determination. To be sure, developing enhanced listening skills is important even if you are not a trial lawyer. For example, these skills are crucial to developing trusting relationships with clients, regardless of your practice area.<sup>102</sup> Strong listening skills also help to enhance judgment—yet another trait that all great trial lawyers possess in abundance.

#### VIII. UNSURPASSED JUDGMENT

“Failure is not a single, cataclysmic event. We do not fail overnight . . . [F]ailure is nothing more than a few errors in judgment, repeated every day.”

—Jim Rohn<sup>103</sup>

Not all trial lawyers with great judgment are great trial lawyers. But all great trial lawyers have great judgment. The most important exercise of great judgment by great trial lawyers is knowing when not to say something. Francis Bacon, Attorney General and Lord Chancellor of England, wrote that “[s]ilence is the

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102. See DAVID H. MAISTER, ET AL., *THE TRUSTED ADVISOR* 86–87, 97–98 (2000) (discussing the importance of listening skills in developing client relationships).

103. Jim Rohn, *The Formula for Success (and Failure)*, SUCCESS, <http://www.success.com/article/the-formula-for-success-and-failure> (last visited September 30, 2013).

sleep that nourishes wisdom.”<sup>104</sup> In every phase of a jury trial, the great trial lawyers know when to stay silent. In discovery, they do not take ridiculous positions or file unnecessary motions to compel. In jury selection, they do not personally embarrass or argue with potential jurors. On direct examination, they do not beat a question to death by asking it over and over again in slightly different ways. They have the confidence to know that the jurors got it the first (or maybe the second) time. Redundant questioning by lawyers has been the number one criticism by jurors in the jury evaluation forms over my entire judicial career. Jurors resent lawyers who waste their time with needless repetition. Great trial lawyers do not plead twenty-four affirmative defenses just because the word processor can spit them out in seconds. Great trial lawyers do not have six alternative objections in the pre-trial order to exhibits that are clearly admissible. Great trial lawyers do not file frivolous motions in limine in an attempt to exclude obviously admissible evidence. In jury or bench trials, great trial lawyers seldom object, even when they know the objection would be sustained. They know the evidence is not hurting their client’s case, and they have no need to show everyone how smart they are by reciting complex rules of evidence. Great trial lawyers do not want the jury or judge to perceive them as obstructionists.<sup>105</sup> I think most state and federal trial court judges would agree with “Bennett’s Anomaly,” which posits that the better the lawyers and the greater their knowledge of the rules of evidence and their proper application, the fewer objections they make in jury trials.

The best and most effective trial lawyers also strive to be extremely professional and are marked by unsurpassed civility and professionalism. As such, great trial lawyers do not fail to cite non-controlling, adverse authority, even though the rules of ethics only require the disclosure of adverse controlling authority.<sup>106</sup> They know

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104. FRANCIS BACON, *THE PHILOSOPHICAL WORKS OF FRANCIS BACON* 553 (John M. Robertson ed., 1905). Bacon was a noted scientist, statesman, orator, and author.

105. Admittedly, sometimes the strategy in a criminal case is a necessary exception to this rule.

106. I recently wrote an opinion on this very subject:

While Abbott’s failure to cite a contrary, but non-controlling decision did not violate any ethical obligation, ethical obligations establish only the

they will be viewed in higher esteem by the judge for citing and distinguishing non-controlling adverse authority. As a practical matter, the failure to do so sends a message to the judge that the lawyer thinks neither opposing counsel nor the judge is industrious enough to find the adverse authority. This is not a good message to send. Great trial lawyers understand that the state ethics codes and rules merely set the minimum floor.<sup>107</sup> No great trial lawyer wants to be known as a minimally ethical lawyer.

Over the years, I have observed other common judgment errors:

- (1) failing to ask questions in jury selection that go to the core issues of the case;
- (2) failing to bring out the weaknesses of the client's case before the other side does;

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barest minimum floor for attorney conduct. What attorney would want to be known as a minimally ethical lawyer rather than a highly professional one? Where the pool of decisions considering the same experts and methods is so limited, it is inconceivable to me that reasonably conscientious and highly professional counsel would not cite contrary authority, then meet it head on and attempt to distinguish it, not simply hope neither the opposing party nor the court would notice it—a vain hope, here, where the plaintiffs in *Burks* were represented by the same attorneys who represent the Conservator, and Abbott was represented by the same attorneys who represent Abbott here. Defense counsels' lack of candor is troubling. Hide and seek litigation strategy seldom works and did not work here. As a result, I will find it more difficult to rely on the trustworthiness of defense counsel—a trial lawyer's most important asset. This is not an auspicious beginning for counsel before a judge newly assigned to the case.

Sec. Nat'l Bank of Sioux City, Iowa v. Abbott Labs., No. C 11-4017-MWB, 2013 WL 2420841, at \*9 n.7 (N.D. Iowa 2013) (emphasis removed).

107. The Model Rules of Professional Conduct “prescribe minimum standards for conduct, the violation of which will, and should, often lead to discipline. On the other hand, professionalism should make a lawyer feel compelled to do more than the minimum required just to avoid being disciplined.” Mike Hoeflich & J. Nick Badgerow, *The Regulation of Courtesy: Does Kansas Need a Code of Professionalism?*, 60 U. KAN. L. REV. 413, 419 (2011) (footnotes omitted).

- (3) leading on direct and failing to be facile in asking non-leading questions;
- (4) failing to begin and end the client's case with strong, virtually unimpeachable evidence;
- (5) being argumentative with witnesses, opposing counsel, or the trial judge;
- (6) presenting too much cumulative evidence;
- (7) failing to take clues from observing the jurors that they are bored;
- (8) fumbling for exhibits and other time-wasting habits;
- (9) being blind to the strengths of the opposing parties' case; and
- (10) being too tied to written-out questions and notes for jury selection, opening statements, direct and cross-examinations, and closing arguments.

The final judgement error is well illustrated by a trial in my courtroom from several years ago. An expert witness had just been sworn in, and the lawyer asked the first question on his yellow pad: "Good morning, Dr. So-and-So, I am the lawyer for the plaintiff. . . ." Unfortunately for this plaintiffs' lawyer, we had taken the witness out of order and it was 2:45 in the afternoon. Even the jurors laughed at this lawyer who was so tied to his legal pad.

Finally, the most common and most critical judgment error is not simplifying and shortening the trial presentation. As Albert Einstein noted, "Everything should be as simple as possible, but not simpler."<sup>108</sup> In almost all jury trials, less is truly more. All great trial lawyers understand this. They also understand that one of the major reasons judges and jurors both like, admire, and are persuaded by these lawyers is that they bring a heightened measure of reasonableness to the courtroom.

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108. THE ULTIMATE QUOTABLE EINSTEIN 384-85 (Alice Calaprice ed., 2011). The quotation is commonly attributed to Einstein, but the actual, original source quotation is "a bit" different.



IX. REASONABLENESS

“I tried being reasonable—I didn’t like it.”  
—Clint Eastwood<sup>109</sup>

“Dirty” Harry Callahan, played by iconic actor Clint Eastwood, is a character from a series of movies in the ’70s and ’80s. He was not a model of reasonableness. In the 1983 film, *Sudden Impact*, Dirty Harry corners a bank robber after killing his two accomplices. When the bank robber grabs a fleeing waitress and points his gun at her, Dirty Harry aims his .44 Magnum at the robber’s head and utters one of his more famous lines: “Go ahead. Make my day.” If Dirty Harry had been a trial lawyer rather than a police inspector, I expect he would have taken Rambo lawyering tactics to new and unimaginable heights.

Inexperienced and less-than-great trial lawyers often conflate zealousness with unreasonableness (most likely driven by their personal insecurities). Great trial lawyers pride themselves on being both zealous and reasonable. Unlike their lesser adversaries, they do not see reasonableness as a sign of weakness, but instead as one of strength.

Reasonableness in the pre-trial setting takes many forms: selecting appropriate causes of actions and defenses to plead; meeting early with opposing counsel to see if issues can be voluntarily narrowed and determine the truly contested issues; discussing (sensibly) how and when to conduct discovery; agreeing on times and places for depositions; conferring with the other side in good faith before filing discovery motions; being willing to make reasonable compromises on discovery without court intervention; opposing only unreasonable requests for extensions of time; and refraining from personal attacks on opposing counsel and their clients in briefing.

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109. Eric Wiland, *Williams on Thick Ethical Concepts and Reasons for Action*, in *THICK CONCEPTS* 213 (Simon Kirchin ed., 2013) (attributing the quote to Dirty Harry); *see also* *CONSERVATIVE WIT: A DICTIONARY OF CONSERVATIVE POLITICAL HUMOR* 56 (Robert Golla ed., 2012) (collecting quotations on conservative political humor).

In trial, reasonable trial lawyers know not to waste the time and resources of the judge and jury. When the inevitable unexpected problems arise, unreasonable lawyers are the first to create additional obstacles to resolution, even for easy-to-resolve problems. Great trial lawyers are quick to suggest reasonable solutions to problems that arise in trial—the rest, including “litigators,” often create them and whine about solutions. In contrast, reasonable lawyers are quick to suggest workable solutions, no matter how difficult the problem. For example, scheduling experts and other out-of-state witnesses can be daunting for attorneys. The less skilled the opposing counsel, the more likely they are to complain if the other side needs to take a witness out of order (i.e. during the opposing party’s case), in order to accommodate the witness.<sup>110</sup>

Another example comes from a high-stakes federal death penalty prosecution in my courtroom. I was concerned that the government would unfairly load up on victim impact testimony during the penalty phase, given the staggering amount of potentially admissible victim impact testimony. Fortunately, the Assistant U.S. Attorney prosecuting the case was an extraordinarily zealous and talented trial lawyer. He was impeccably reasonable and pared down his victim impact testimony, obtained a unanimous death verdict, and avoided the risk of a reversal on that issue. A lesser trial lawyer would likely not have avoided this potential pitfall.

Thus, unlike Dirty Harry, great trial lawyers pride themselves on reasonableness, which contributes to their zealousness.

## X. CONCLUSION

Nothing in this world can take the place of persistence. Talent will not; nothing is more common than unsuccessful men with talent. Genius will not; unrewarded genius is almost a proverb. Education will not; the world is full of educated derelicts. Persistence and determination alone are omnipotent.

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110. This procedure includes a proper explanation by the judge to the jury.

The slogan “press on” has solved and always will solve the problems of the human race.<sup>111</sup>

So you want to be a great trial lawyer? It is critically important to remember they come in all shapes, sizes, genders, ages, and colors, with or without disabilities. Some have great natural talent, but most do not. A few went to top-ranked law schools and did very well; many, many more did not. All it takes to be a great trial lawyer is striving to be a gritty raconteur with unsurpassed listening skills and judgment, unfailing commitment to preparation, reasonableness and courtesy, and excellent cross-examination skills. Of course, if you are a litigator, you also must overcome your fear of going to trial. Let the immortal words of Rosa Parks, one of the grittiest individuals in American history, be your inspiration: “I have learned over the years that when one’s mind is made up, this diminishes fear; knowing what must be done does away with fear.”<sup>112</sup> So make up your mind to go try cases. That is the only way to become a great trial lawyer.

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111. THE SPEAKER’S QUOTE BOOK: OVER 5,000 ILLUSTRATIONS AND QUOTATIONS FOR ALL 382 (Roy B. Zuck ed., 2009). This quotation is from a person who never went to law school and failed his initial entrance exam to Amherst College. However, he developed a reputation as a hard-working and diligent attorney in Hampshire County, Massachusetts, where he was admitted to the bar after apprenticing with a local law firm because he could not afford law school tuition. This small-town country lawyer should know about persistence. His name was John Calvin Coolidge, Jr., and he went on to become the thirtieth President of the United States. DAVID GREENBERG, CALVIN COOLIDGE, THE AMERICAN PRESIDENTS SERIES (Times Books, 1st ed. 2006).

112. ROSA PARKS & GREGORY J. REED, QUIET STRENGTH: THE FAITH, THE HOPE, AND THE HEART OF A WOMAN WHO CHANGED A NATION 17 (1994). Parks is “nationally recognized as the mother of the modern-day civil rights movement in America . . . [who] refused to surrender her seat to a white male passenger on a Montgomery, Alabama, bus on December 1, 1955 . . .” *Id.* at 11. Parks “set in motion a chain of events that were felt throughout the United States. Her quiet, courageous act changed America and redirected the course of history.” *Id.*