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Trial's Life Lessons

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TRIAL'S LIFE LESSONS

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I am flattered that Tiffany asked me to speak at this year's seminar. My assigned topic suggests that, after 68 years of life and – as of Pearl Harbor Day, 2015 – 43 years before the Bar, I must have learned something of use to younger lawyers. Hmmm. I'll try. Like all CLE programs, this one requires written materials. TTLA says that they should be "high-quality" and suitable for future reference. Well, I'll try.

It is hard to distill all of the lessons of a forty year trial practice into a short presentation. However, what I have decided to do is focus on a Dozen lessons from three key mentors in my law practice. The first was Chief Judge John R. Brown of the Fifth Circuit. I clerked for the Judge from 1972 to 1973, and frankly learned more in one year there than three in law school. He was colorful in both attire and language. He was also the smartest, most legally analytical man that I ever met. Credit will be given to a few of the Life Lessons I learned from him.

The second was my dearest friend and bestest law partner, your 2008 President of TTLA, Paul Waldner. We were law partners from 1994 until his death on the Friday after Easter in 2015, although he spent the last 6 and a half years of it in a nursing home. He was, far and away, the funniest humanoid who ever lived. AND, the best lawyer I ever knew. Credit will be given to Pablo for some of his lessons.

The third is my dear friend and great Mentor Gerry Spence. We Texas Trial Lawyers take great and justifiable pride in the caliber of our trial bar. And, in 2002, at the age of 54, I have to confess that I frequently felt like I had learned all that there was to learn in the category of Trial's Life Lessons. Not! My three weeks in Trial Lawyer's College at Gerry's Thunderhead Ranch that summer enriched my life in many ways, and he certainly deserves a huge amount of credit for several of the "Life Lessons" in this paper. For those who have not attended a TLC regional seminar, I encourage you to try it out. It is NOT a competitor of TTLA; it is a complement – like peanut butter and chocolate. Now, on to the lessons.

I. LESSON #1. BE CREATIVE. Astounding creativity is a common denominator of all three of my Mentors, and, in my judgment, essential for a successful trial lawyer. But, for the paper portion of this presentation, I will focus on Judge Brown's creativity. When I was clerking for the Judge, we had a case involving federal preemption and a Dade County soap ordinance. **Boring!** Until the Judge sent my coclerk, Bernie Fischman to the grocery store and then penned a jurisprudential work of art. The other two judges "concurred in the result," so the Chief tasked me with rewriting his one opinion into two: an analytical "per curiam" for the Court, and a characteristically colorful JRB concurrence. Here is a short example of his creative writing:

> As soap, now displaced by latter day detergents is the grist of Madison Avenue, I add these few comments in the style of that street to indicate my full agreement with the opinion of the Court and to keep the legal waters clear and phosphate-free.
>
> As Proctor of this dispute between the representative of many manufacturers of household detergents and the Board of Commissioners of Metropolitan Dade County, Florida, who have promulgated regulations which seek to control the labeling of such products sold within their jurisdiction (largely to discourage use which pollutes their waters), the Court holds that Congress has specifically preempted regulatory action by Dade County. Clearly, the decision represents a Gamble since we risk a Cascade of criticism from an increasing Tide of ecology-

minded citizens. Yet, a contrary decision would most likely have precipitated a Niagara of complaints from an industry which justifiably seeks uniformity in the laws with which it must comply. Inspired by the legendary valor of Ajax, who withstood Hector's lance, we have Boldly chosen the course of uniformity in reversing the lower Court's decision upholding Dade County's local labeling laws. And, having done so, we are Cheered by the thought that striking down the regulation by the local jurisdiction does not create a void which is detrimental to consumers, but rather merely acknowledges that federal legislation has preempted this field with adequate labeling rules.

Congress, of course, has the Cold Power to preempt. Of the three situations discussed by the Court, the first (direct conflict) is easy, for it is Crystal Clear that the state law must yield. The third, in which the ordinance may supplement the federal law and thereby extend or increase the degree of regulation, is more troublesome. For where Congress has chosen to fashion a regulatory scheme that is only the Head and Shoulders, but has not opted to regulate every aspect of the area, the states have implied power to flesh out the body. It is where Congress fails to clearly signify, with an appropriate preemption clause, its intent to fully occupy the area regulated that the problem arises. With some Joy, the Court finds there is such a clause.

Concerning the precautionary labeling aspect, this is SOS to consumers. If we Dash to the heart of the question, it is apparent, as the Court points out, that the 1966 Amendments to FHSA (see note 4, supra) indicate an explicit congressional purpose to preempt state regulation of the labeling of these substances. Undoubtedly, this unequivocal congressional Salvo was directed at such *329 already existing regulations as those of the Fire Department of New York City relating to pressurized containers. See Chemical Specialties Manufacturers Association v. Lowery, supra.

> Indeed, Congress intended to wield its Arm and Hammer to Wisk away such local regulations and further, to preclude the growing Trend toward this proliferation of individual community supervision. Its purpose was at least two-fold: (i) to put day-to-day responsibility in the hands of local government, but (ii) at the same time to impose detailed identical standards to eliminate confusion or overlapping.
>
> With this clear expression of congressional intent to create some form of preemption, the only thing remaining was whether the meaning of the term "precautionary labeling" is sufficiently broad to embrace the words of the Dade County ordinance, Vel non. In making this determination, the Court is furnished with a Lever by our Brothers of the Second Circuit. Chemical Specialties Manufacturers Association v. Lowery, supra. And so we hold. This is all that need be said. It is as plain as Mr. Clean the proper Action is that the Dade County Ordinance must be superseded, as All comes out in the wash.

Chem. Specialties Mfrs.' Ass'n, Inc. v. Clark, 482 F.2d 325, 328-29 (5th Cir. 1973). Paul and Gerry, my other Mentors, were both equally creative, in both the written and the spoken word, . . . and gestures. Neither would ever bore you. *See e.g.* Gerry Spence, BLOODTHIRSTY BITCHES AND THE PIOUS PIMPS OF POWER: THE RISE AND RISKS OF THE NEW CONSERVATIVE HATE CULTURE (2007).

None of us are Chief Judge Brown, or Paul Waldner, or Gerry Spence. But that is the point. Each lawyer has it within his or

her own power to be individual, spontaneous, and creative. The creativity will hold the audience, be it judge or jury.

In the mid-90's Paul and I took on Eli Lilly over the issue of Prozac and suicide. A reporter from the Indianapolis Star came to Houston to interview me. We feared a hatchet job. But the resulting front page article on Lilly's "colorful foe" was a thumb in Lilly's eye. Commenting on my pleading writing style, the author wrote: "'He crowds it, he's right up on it,'" say Waldner, a past president of Houston Trial Lawyers Assoication, who remembers Vickery beginning one legal document by quoting lyrics to a B.B. King Song." Swiatek, Indianapolis Star (April 24, 2000).

II. LESSON #2. BE FUNNY. OK. The Judge was funny. And Gerry is a riot. But, trust me on this, there has never been a funnier humanoid that Paul F. Waldner, 2008 President of TTLA. Of the numerous hilarious things he said and did, none was more reliably funny than his famous "out of office" messages. Here, for your reading pleasure, is one of his best.

From: Paul Waldner
Sent: Tuesday, September 23, 2008 8:20PM
Subject: Out of Office Reply: TTLA Annual Meeting – Hyatt Regency Austin

> The good news is that we are back in our office .... finally. The bad news is that we're on generator power and will be operating at about

> 50% efficiency .... which isn't that bad a deal when you think of it. ... since before Hurricane Ike we only operated at about 60% efficiency. If you're a claims adjuster and are trying to get in touch with us to point out the deficiencies in our cases, please go suck an egg. If you're a defense lawyer calling to whine about discovery responses that are overdue, please go suck what's left of the egg the claims adjuster was sucking on. If you're a client, please be patient and understand that the priority of our response to your request for information will bear a direct relationship to the size of your case and your attitude. If you 're a judge, state rep, or U.S. Congressman calling for a campaign donation, please check with your respective campaign managers and find out whether you can accept FEMA vouchers

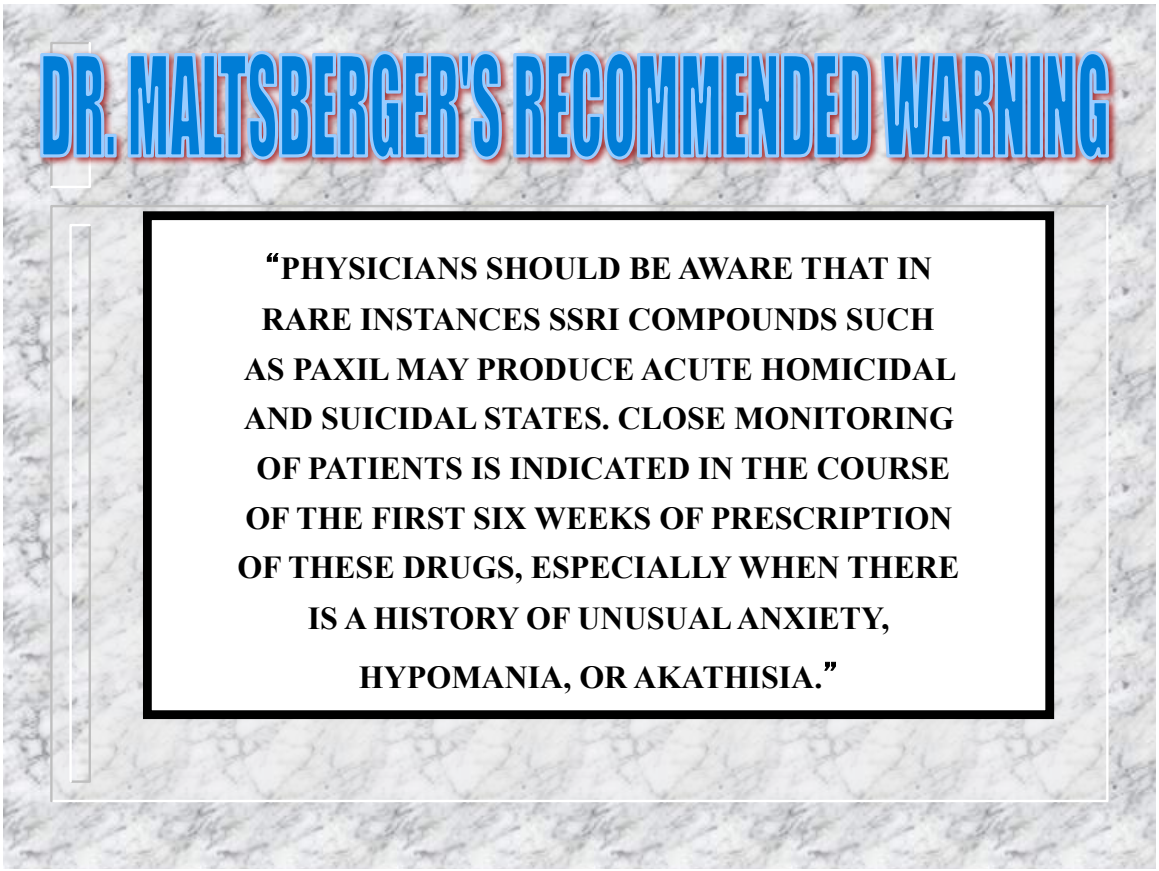
There are, of course, times when humor is appropriate, and times when it is not. But, maintaining a good sense of humor, and actually using it at appropriate times in a jury trial, can be an extremely effective weapon.

III. LESSON #3: BE BRIEF. "Jesus Wept." John 11:35. Shortest verse in the Bible. "For Sale. Baby Shoes. Never Worn." Six word novel by Ernest Hemingway. During the presentation of this paper I intend to preview a 3 minute Opening Statement that I plan on giving in a trial in Cheyenne, Wyoming, on February 29, 2016. Don't be afraid to have the courage to be brief.

One of my favorite TLC stories is about my Warrior Sister Lilka Martinez from California. I was a teacher when she was at the Ranch, and, observing her non-verbal communication skills, said "Lilka, you can give a closing statement in 25 words or less." She took the challenge, and three days later, gave a 27 word closing that brought down the house. Be Brief. 'Nuff said.

IV. LESSON #4: BE VISUAL. In the Summer of 1987, at the ripe old age of 40, I thought that I knew all there was to know about trial practice and jury trials. And then, my two female partners, Bj Kilbride and Vanessa Gilmore (yes, <u>that</u> "Honorable" Vanessa Gilmore) told me that we needed to hire a "communications specialist" for a major upcoming trial. The main lesson I learned from Margaret Keys was that 70% of all communication received is *visual*. 70%. Gestures. Exhibits. Demonstratives. Body Language.

My pet peeve is wordy Power Point slides. I first used Power Point in a 2001 trial in Cheyenne, Wyoming. My daughter Christie created the following simple but powerful slide, that, with some animation, made our central point in spades:



Power Point is great. BUT, use it carefully and advisedly.

V. LESSON #5: BE PROUD TO BE A "TRIAL LAWYER"

When Paul Waldner gave his acceptance speech as President of TTLA, he said that he was extremely proud to be a "trial lawyer." Gerry Spence founded a college for "Trial Lawyers." John Adams was a helluva "trial lawyer" before he became our second President. He even represented a British Officer in a trial over the Boston Massacre. If I can lay hands on it, I will include federal Judge

Mark W. Bennett's recent "Obituary: The American Trial Lawyer" in my written submission with this paper. If I can't find it, please, go find it yourself. We are a dying breed. We must support one another, and be proud to be what we have chosen to be.

VI. LESSON #6: BE YOURSELF. On the first night of TLC, Gerry Spence always stands in front of the group of 50 novitiates and booms: "look at your thumbs. There are no other thumbs in the world like those thumbs." And then, he challenges the crowd. Who among you thinks he can beat me in trial? We all sit on our hands. And then Gerry picks out some poor, hapless, nervous, young lawyer – frequently a woman – and calls them forward. "Look at her" he booms. "She's nervous as hell. She's scared to death. She is REAL. She is genuine. And every single one of you wants her to whip my ass!" And we do.

His point, of course, is that the only way to win is to be yourself. Not that "other you" with the mask that you wear when you become lawyer-man. But the real you.

Being yourself is particularly hard in this day and time. Some of us want to be Don Keenan, and perfect the "Reptile." Others covet Rick Friedman's "Rules of the Road." Still others –

those in my own particular Tribe – are more attuned to Gerry Spence and his focus on the power of the "betrayal story." And, in more recent times, the books "Twelve Heroes, One Voice" by my TLC classmate Carl Bettinger has provided yet a fourth "trial lawyer" paradigm for the 21st Century. I will attach a copy of an article I wrote, entitled *How I Trained My Reptile to Sing the Betrayal Song Without Breaking the Rules of the Road* for the TLC Warrior magazine to this paper.

My friend and fellow Christ Church Cathedral parishioner Brene Brown has become a national celebrity because of an 18 minute "Ted Talk" that she gave about "Shame and Vulnerability." IF you really, REALLY want to learn how to be your most powerful self, invest 18 minutes in watching Brene's talk, and then have the courage to be yourself. You will be astounded.

VII. LESSON #7: BE VULNERABLE. This is a corollary of Lesson #6. You see, for some people, being "themselves" means portraying *in*vulnerability, not vulnerability. Dick Deguerin talks about "embracing the ugly baby." Spence talks about sharing your worst fears about a case, up front, first thing in voir dire, with the Jury. And Brene's talk provides you with the hard, scientific data

on just how well vulnerable works. It is hard to be that honest and that real. But it really works.

VIII. LESSON #8: REVERSE ROLES. OK. "Role reversal" is a psychodramatic technique, and the stock and trade of TLC Warriors. So, to put it into Gerry-speak, try to "crawl into the hyde" of others. Your client. Your adversary. The Judge. The Jurors. Think like they think. Feel what they feel. Really experience it.

The first step in this process is to learn to listen. We have an exercise at TLC called the "Listening Exercise." It is specifically designed to train us "great communicators" who love to hear ourselves talk to LISTEN.

Of the many parts of the trial to which this applies, none is more important in my estimation than that trial skill which most people call "Cross Examination" but which I now insist on calling a "Conversation with an Opposing Witness."

My former Jim Perdue Jr. and I tried a case together in Chicago in the Spring of 2013. Jim assigned the cross of a key expert for the other side to me. I worked hard to "role reverse" with the guy. To see what made him tick. And, having done so, I

did a "soft" cross that illustrated graphically for the Judge and Jury just how evasive and biased the witness was. I don't think that Jim liked the cross. And the Judge said privately that he thought the guy was really evasive, and that "if you wanted to jump him, I would have backed you up." Hmmmm. The **Judge** thought the witness was evasive and biased. Don'tcha think the Jurors did, too? The verdict, and the post-verdict jury research indicated that they most certainly did.

IX. LESSON #9. TRUST THE JURY. No lawyer in America trusts a jury more than Gerry Spence. Not tells them he trusts them, really trusts them. Trusts them enough to tell them the weakest part of his case. Trusts them enough to share his own fears. It is an incredibly hard thing to do. But it reaps its own rewards.

Part of trusting the jury, of course, is empowering them in your closing argument. I remember clearly, more than two decades ago, when Paul Waldner was appointed as an ad litem for a brain damaged baby case being tried by the great Jim Perdue, Sr. He came back to the office and said, "man, you aren't going to

believe how Perdue ended that trial. He made the jurors feel like the most important and powerful people in the world."

In our recent Chicago trial, I ended the rebuttal argument with the following empowerment speech:

> We've been on a journey, you and I, for nearly three weeks now. And I'd like to reflect on the journey we've been on together. I'd like for you to think back on how you began that journey. Something arrived in the mail; you're cutting the grass, doing the dishes, enjoying whatever it is you do in your normal lives, and it says: Jury duty, jury summons, come down here. And you come down, and Jeff, who I think likes to pretend to be more crusty than he really is, gave you a number, and he said, sit here, sit there; you, up here, now. And you did. And you did.
>
> And then something extraordinary happened. Then you were chosen to be the jury, to be the jury, and everything changed. And you didn't have a number anymore, and Jeff didn't tell you where to sit anymore. In fact, you know, lawyers -- I've been doing this 40 years, and one of the things you do is you make little seating charts, and you say, well, I want to remember what this person seemed to be interested in. And you all blow it out of the way. You sit wherever you want to. Every time you go back, you come back and about half of you sit in a different place, and that's fine.
>
> And you notice what else happens every time you go out and every time come back? We stand. We stand when you go out and we stand when you come back. Even Judge Haddad stands when you go out and when you come back. Why? Because we've summoned you to do something, we summoned you from your ordinary lives to do something on behalf of society that is nothing short of heroic. It is a heroic quest for truth and for justice, not just for Delores, but for every other person who takes Humira, for every other doctor who struggles to diagnose a disease.
>
> Because we've only seen the tip of the iceberg, folks. Those 16 cases that were reported, it's at least 160 real people; if there were really 36, it is at least 360, and it could be ten times that much. We've only seen the tip of the iceberg.
>
> And so you're summoned because society -- I mean, this goes back to 1776. This goes back to the framers. And thank you for the Law Day, your Honor. Thank you. It made me proud to be a lawyer, Francis Scott Key was a lawyer. The framers said that the guardians of justice, the people that discern the truth, that listened to it all and decide the wheat from the chaff and who forge justice out of a situation, are people just like you, summoned from ordinary life to do that; and then when your job is done, you're gone.

> You're not like a politician running for reelection or anything else. You do the most important civic duty in America and you do it well and then you're gone. And I thank you for it. I thank you for it.

It was pulled in large measure from my classmate Carl Bettinger's book. It worked well enough that the Judge echoed the "quest for truth and justice" portion in his Jury Charge.

X. LESSON #10: TELL STORIES. Every one of my Mentors was a great story-teller. But the King of all Story Tellers is Jim Perdue, Sr. His two books, I REMEMBER ATTICUS and WINNING WITH STORIES are a must for every trial lawyer. In the foreword to the latter, Jim recounts the story from the dawn of creation, when the immortals *Truth* and *Story* had an important encounter. *Truth*, it seems, had been down on the Earth and lived among men. But he was scorned by them. Dejected, he returned to the Heavens. When *Story* looked upon him, she said, "no wonder. Look at you. All tattered in rags. Let me lend you one of my soft, silky colorful robes. I promise you. When they see you robed in one of these, they will pay attention." And so it has ever been.

XI. LESSON #11. CHOOSE YOUR FORUM. Somewhere, along the way, someone gave "forum shopping" a bad name. But the Fifth Circuit says that selecting the best forum for our clients' cases is our solemn obligation! Read and remember:

> Forum-shopping is sanctioned by our judicial system. It is as American as the Constitution, peremptory challenges to jurors, and our dual system of state and federal courts. The extension in Article III of federal judicial power to "controversies between citizens of different states," implemented by statute continuously since 1789,12 permits a plaintiff who might sue in a state court to select a federal forum for the claim. The statutory provision for removal to federal courts of such diversity cases filed in state court permits the defendant to opt for a federal forum.13 Virtually all causes of action created by federal law may be asserted in either a state or a federal court.14 Many claims that may be asserted in the courts of one state may also be asserted in the courts of another. Not only may a litigant frequently select among several jurisdictions, he may, within a jurisdiction, lay venue in more than one court.15
>
> The existence of these choices not only permits but indeed invites counsel in an adversary system, seeking to serve his client's interests, to select the forum that he considers most receptive to his cause. The motive of the suitor in making this choice is ordinarily of no moment: a court may be selected because its docket moves rapidly, its discovery procedures are liberal, its jurors are generous, the rules of law applied are more favorable, or the judge who presides *1262 in that forum is thought more likely to rule in the litigant's favor.

* * *

> In a perfect judicial system forum-shopping would be paradoxical. The same results would obtain in every forum and after every type of trial. But the actual litigation process is not a laboratory in which the same result is obtained after every test. In some situations, such as when a statute of limitations is involved, the choice of forum may determine the rule of law that will be applied. Even when legal rules are identical, justice can be obtained only through human beings, and neither judges nor jurors are fungible. In recognition both of this and of the nature of the adversary, client-serving process, we tolerate a certain amount of manipulation without inquiry into motive.

McCuin v. Tex. Power & Light Co., 714 F.2d 1255, 1261–62 (5th Cir.1983) quoted and reiterated in *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 321 (5th Cir. 2008).

XII. LESSON #12. CHOOSE YOUR THEORY.

Law school teaches us to look at a fact situation and then think of every possible legal theory into which we can pigeon-hole it. And I, at least, have been guilty of trying cases on so many different, and sometimes conflicting theories, that the Jury gets confused. And then I lose.

When I started practicing law in 1972, we were all excited about "strict liability." You could win without proving "fault." Let

me tell you what I now think of that. Bullshit! Pure, bullshit. Our Chicago verdict is illustrative. We lost the strict products liability case, but won on negligence. Twenty first century jurors want to see if someone has done something wrong. So, if you want to win your case, choose your best theory, or two at most, and focus your evidence and your arguments on what you have to prove to win under that theory.

How I Trained My Reptile to Sing the Betrayal Song Without Breaking the Rules of the Road

Tips, Topics & Techniques for a TLC Closing

Andy Vickery, TLC '02

*"I gotta be **me**, I gotta be me, . . .*
I can't be right for somebody else if I'm not right for me"

Walter Marks' lyrics and tune for the famous Sammy Davis Jr. hit just won't leave me alone. My mind is awhirl with them. Tomorrow is the day. I have to give a good Closing Argument in my most important case. Creativity is critical. And passion. And professionalism. But more than these, I am just dying to be *real*.

You see, I've been to The Ranch. I've learned at the feet of the Master. I've looked at my thumbs. I've heard the John Johnson mantra: "work on the horse." Just like Richard Harris, I *am* the horse. To be persuasive—to be "right for somebody else (my client)"—I've gotta be ME.

My TLC '02 classmate Pat Montes set the standard for *me*-ness right after we graduated. Representing a Spanish-speaking Mexican brick-layer, she actually sang a portion of her Closing. It was Sinatra's *My Way*. Can I be that real?

But wait a minute. Do I really want to be me? There is a part of me that really wants to be Gerry Spence. I want to mesmerize the Jury with my own rendition of the Betrayal Story. Find the villain. Figure out his role in the betrayal. Sequence the Closing so that this is first, just like Fitzgerald taught you. And then recreate it with TLC techniques so that the Jury will actually experience it and be moved to "do justice" as a result of it.

Yet another part wants to be Rick Friedman. That *Rules of the Road* stuff is pretty powerful. Common sense notions taken from everyday life. Simple principles for conduct and personal accountability that the defense cannot challenge. Rick wins cases. I want to win my case, too.

But, hang on. If I *really* want to win my case, then everyone now seems to agree that I must be "on the Ball," which is to say, the David Ball/Don Keegan *Reptile* approach.[1] Twenty First Century jurors, they say, are not moved by sympathy for the plaintiff or anger towards the defendant who might, indeed, have broken those *Rules of the Road*. They are subconsciously motivated by a reptilian instinct for self-preservation. To really get justice from them, I must appeal to their own fears and priorities.

How can I possibly assimilate all of this and incorporate it into a well-planned, TLC style, Closing argument? Who knows. But, for what it is worth, after serving on the staff for the February 2011 Florida "Fruitland" Regional on Closing Argument, from whence I admittedly and unapologetically borrowed extensively other people's creativity, here are this aging Warrior's current thoughts for three Topics and several Techniques and Tips for getting the job done.

I. Three Topics for the Civil Closing Argument

A. The Betrayal Story. There are norms of civilized behavior. Friedman calls them the *Rules of the Road*. But here at TLC, we focus on the bad guys who have violated those simple principles and, by so doing, have *betrayed* us all. Not just the Plaintiff. But you, and me, and, most importantly, each and every member of the Jury and those that they love and protect.

It is important to start the Closing by focusing on the villain

betrayer. Jim Fitzgerald taught me this lesson a decade ago.

> *It is May, 2001, and we are in Cheyenne, Wyoming for the pretrial conference in Tobin v. SmithKline Beecham, the Paxil homicide/suicide wrongful death case that will change my life. After the hearing, we go to Jim's office so that I can rehearse my Opening Statement for him and his staff.*
>
> *I am pretty proud of myself. Over ten years ago, I learned from a wonderful communications consultant named Margaret Keys that 70% of communication is visual, and next week, for the first time ever, I am going to use the most amazing visual presentation tool I have ever seen. It is called "Power Point." My daughter Christie has helped design my presentation, and it has some really cool, creative graphics with animation. I am sure that it will wow them.*
>
> *Jim's staff is highly complimentary of my run-through. But Jim is taciturn, even by Jim standards. "I know you have worked hard on it, and we only have a week to go before trial," he says, "but remember what I told you about sequencing? You are starting by focusing on our client[2] rather than telling the jury how this company knew that this billion dollar pill could cause homicides and suicides, and how they kept that knowledge from the medical profession and the public."*

When I got home, I rearranged the Power Point slides, and focused first on SmithKline's betrayal of the public trust. I didn't know about TLC at the time,[3] and probably wouldn't have used the word "betrayal," but the theme was clearly there. Our winning verdict in this Wyoming wrongful death case was a testament to the wisdom of Jim's strategy.

The Betrayal Story inspires the Jury with a strong sense of WHY we are here to ask them for Justice. It must be told first.

B. Asking for Justice. If you want Justice, you have to have the guts to *ask* for it. And I do mean ask. Don't demand it, but don't beg either. No one who was present at the 2010 direct examination Regional in Round Top, Texas, will ever forget Gerry making Rafe's young female client ask for justice during her direct, and then trade him her prosthetic leg in exchange for it. You want justice? Have the courage to ask for it.

Gerry's Outline on Closings says it this way:

> "Let me tell you what the final argument is not. It is not a time to beg. On any day in any city, we can walk past beggars on the street who hold out empty hats. Often, we feel nothing but disdain. Thus, our final argument cannot be a time to cry and whimper. . . It is not a time to rant and rail. The crazy houses are full of wild-eyed hysterics. They repel us."

To ask for Justice from the Jury during your Closing argument, you have to know what *form* Justice will take. In most civil cases, the Verdict Form consists of the Jury's answers to a series of specific questions about the facts. In Texas, we used to call them "special issues." In federal court, they are called "special interrogatories." My first mentor, Chief Judge John R. Brown of the Fifth Circuit, was a big fan of this format, branding this verdict form as *The Doubt Eliminator*.[4]

If you have prepared your case properly, your first draft of this verdict form was prepared before you even filed your lawsuit and began discovery. Lawyers who are oblivious to the verdict form are, despite contrary appearances, woefully unprepared.

My clearest recollection of this comes from over a quarter of a century ago, during the brief stint that I wore the Black Hat and worked on the Dark Side. As a result of a *Mary Carter* settlement,[5] my firm has aligned itself with the Plaintiff, represented in this case by the highly successful Houston trial lawyer Joe Jamail and his partner Gus Kolius. My job, as the second chair lawyer for the settling defendant, is to sit quietly, learn what I can, and do anything I can to help the plaintiff beat the living dog-shit out of the non-settling defendant. Jamail and Kolius do *not* need my help.

The defense in this security guard shooting case is represented by a guy named John Berke. He is a highly disciplined, militaristic guy with huge muscles and a penchant for confrontation and organization. It is my first glimpse of a "trial notebook" replete with color coded tabs. By all appearances, Berke is the most thoroughly prepared lawyer I have ever seen. Until we get to the Charge Conference. Then I see that this guy has tried the entire case with no clue whatsoever about the questions that the Jury will be asked to answer.

It is important, not only to know what's on the verdict form, but to *show* it to the Jury. The first time that I saw a defense lawyer come to the Closings with blow ups of the verdict form, and read them during his closing, and write the answers that he wanted to the jury to give in the blanks on the boards, I thought, "how pedestrian." And then I noticed that the Jury was taking *notes*. Since that time, I have made it a practice, in every case, to show the Jury the verdict form, and to ask them specifically to render Justice by answering the questions in a certain preferred way. This is especially important in those jurisdictions that do not trust their citizens enough to actually tell jurors the effects of their answers.

Although some might argue that this is "not TLC," I disagree. We are the "don't tell me, show me" tribe of people, and showing the Jury what you want them to do on the Verdict Form makes common sense. This is particularly true in light of the fact that, as Margaret Keys taught me, communication is 70% visual.

C. Empowering the Jury. Most trial lawyers are perceived in the courtroom as powerful people. To get justice from the Jury, you have to release that power—to transfer it to them, just as surely as Obi-Wan transferred his life Force to Luke Skywalker.

Houston. Early this Century. My partner Paul Waldner has been appointed as attorney *ad litem* for a brain damaged child and is attending the medical malpractice trial. The child is represented by the consummate story-teller and great Texas trial lawyer Jim Perdue, Sr.[6] Paul comes back to the office after the Closings and says, "you aren't going to believe what Perdue just did. He reminded them that, when they first showed up for jury duty, they were given a number, herded like cattle, and told where to sit. 'Now, however, you are Judges in this Court.

Exclusive judges of the facts. When you come in and out, we all stand.'" With this and other comments Perdue made the people on that Jury feel like they were hand-picked to represent all of society and to "do justice." He inspired and empowered them. He *trusted* them with the task of justice, and then surrendered absolutely all of his own power to them. Their verdict brought justice to a brain injured child, and correspondingly, to the negligent doctors and nurses who had caused that injury.

We have all heard Gerry say, time and again, that to win we must be able to truly trust the Jury. Not *pretend* to trust them. Really trust them.

Each Warrior will have to relinquish the power in his/her own way. But one way that I particularly enjoy is with a story. Perdue's book, *I Remember Atticus,*[7] contains one of my favorites. Jim recounts the English trial of William Penn. Here is the way that I told that story to a South Carolina jury in a murder trial a few years ago:

MR. VICKERY: Thank you, Your Honor.

I want to tell you a story, it's true story. It's about jury service. On August the 14th, 1670 right about the time that Charleston was being settled, a young man went into church one morning to preach. He was a nonviolent young man who didn't believe in military service. He was a Quaker. His name was William Penn. That was threatening to the King of England because he needed people to serve in military service and he didn't want nonviolent people encouraging folks not to, so he arrested him and charged William Penn with treason and he was tried in a court of law.

And they summoned jurors. You knowhow they got them? They didn't get them like we got you all, they just sent the out and they grabbed whoever they could find. And, ladies, they didn't grab any ladies, it was all men. But that jury included a fellow named Thomas Veer who was the foreman, an aristocrat from a well established family, it included a man named Edward Bushel, a merchant widower who had remarried and who had a pregnant wife and it included other people from all walks of life. It included a dockside worker, it included a baker who had a new wife, it even included a black man in 1670 in England on the jury.

They wouldn't let—he didn't have a lawyer, William Penn didn't, and when he tried to ask questions in his own defense they locked him in Newgate Prison—The jury was sent out to deliberate at the end and they came back in an hour and 20 minutes and the judge said "What's your verdict?" They said, "Well, he's guilty of speaking in church." Well, there's got to be more than that. I mean, didn't he do something wrong, wasn't it treasonous the King? No, he's guilty of speaking in church.

And the judge, this is true, threatened to slit their noses and cut out their tongues, the jury's, and he imprisoned them day after day without food, toilet, without water to the point that they all became emaciated and yet their friends and neighbors rallied around them and food into them and cheered them as they came into court each day refusing to bring in the verdict that was against their consciences, refusing to do the bidding of the King of England.

Ultimately they won. The unanimous verdict, "NOT GUILTY." By the time it came in, Thomas Veer, the jury foreman, was so emaciated that he said those words with his dying breath in the courtroom. The foreman of the jury died with the words "not guilty" on his lips.

And the remaining jurors were imprisoned for nine weeks in Newgate Prison. They were beaten and they were tortured and they were emaciated. When Thomas Veer died his body was carried from the courtroom by a 14-year-old boy and five others. Six men carried his body from the courtroom. That boy's name was Alexander Hamilton.

You see, we have a system where presumption in the law can be honored enforced because of the sacrifices that those who have gone before us have made. We have justice because of the willingness of people of good will and judgment to render the verdict that is just, to give heed to the law that presumes he's innocent and presumes that 12 year olds are not capable of forming criminal intent. We have the freedoms we do that because of the courage and sacrifice of those that have gone before. And no man or in South Carolina or anywhere in the United States can threaten to cut your noses or your tongues because of your verdict. There's only one person that you have to answer to for your verdict and that's the one you face in the mirror every morning.

II. TLC Techniques

At TLC we pride ourselves on using psychodramatic techniques to bring our client's stories alive for the Jury. The two which were most in focus during our Florida Regional were scene setting and first person arguments. Here are a couple of quick thoughts about each.

A. Scene Setting. There are multiple ways to set a scene for the Jury during your Closing. One, of course, is via actually moving furniture or fixtures or props, essentially reenacting something that the Jury saw during the trial itself. If you have that leeway, you should consider using it. But scenes can also be set in the *minds* of the Jury with words and gestures. Plan your scene ahead of time, and with a conscious intention to appeal to at least three, or preferably more, of the five senses. And remember: the most potent is "smell."

B. First Person. First person arguments are cool. And can be very powerful. But it is important to plan the transitions into and out of the first person. For most of us, it will be important that the witness or object that we become look and sound *different* from the lawyer. Placement in the courtroom. Posture. Gestures. Tone. Inflection. The Jury should see and hear the distinction.

Finally, it is important to remember that our TLC grab-bag of psychodramatic tools and techniques does not contain our exclusive arsenal of adversarial skills. For a really effective Clos-

ing, they should be married in tandem with the other things that we have done well throughout our careers. The best such marriage that I have ever witnessed was my TLC '02 Classmate Rafe Foreman's Closing in a §1983 case a couple of years ago. Harris County Constables had been sent to "escort" a mentally retarded patient to a treatment facility. They ended up tasering him, numerous times, and breaking his neck. When Rafe set the death scene, the Jury's attention was riveted. And then, he asked them for Justice, Texas-style. And they gave it.

III. Tips

Once again, this Article is not meant to be an exhaustive discourse on Closing. But there are two helpful hints that merit remention. First, Gerry's Outline makes a very good point by reminding us that the Closing must be *different* from the Opening. The latter is a road map or outline for the *case*; the former is an advocate's summation of the *trial*. To be sure, it is important to reiterate the theme of the case, and the general outline of points to be covered, demonstrating that you delivered on your promises from the Opening. And, for me, if I have used Power Point or other graphics in the Opening, I will usually want to use them again—but perhaps in a different sequence or with some other change—in the Closing.

But the Closing should also revitalize our shared experience with the Jury during the trial, and emphasize both the positive and the negative. Two recent examples jump to mind. First, the positive. My TLC '02 Classmate Joe Fried recently tried a case against the Metropolitan Atlanta Rapid Transit Authority that involved a badly maintained escalator that went into a free fall. His 59 year old female client had a bad break of her femur, and about $35K in specials, but had testified that "there is nothing, really, that I cannot do." The defense had made a meager offer and was expecting a low ball verdict. They were also expecting a different case to be tried by a different lawyer. Imagine their surprise when TLC Warrior Joe Fried showed up to tell the betrayal story TLC style.

One of Joe's strong points, hammered home in his Opening, was that MARTA had steadfastly refused to accept responsibility for this accident, even though their liability was clear. After Joe's Opening, the lawyer for MARTA, for the first time in the three year history of the litigation, admitted liability. Joe quickly altered his trial strategy and called the corporate representative as the first witness. His mechanic's shirt proclaimed his name to be "Carl." Joe used a classic TLC "soft cross." Carl admitted that, within three weeks of the accident, MARTA knew that it was their fault, and had no reason whatsoever to blame the injured person. When Joe showed him the Pretrial Order, signed by his company's defense counsel and filed on the Friday before trial, denying liability and blaming the plaintiff herself, Carl said "that's just wrong." His explanation: "it must just be a *lawyer thing*."

Joe finished his case in one day, then he Closed. He reminded the Jury about MARTA's "lawyer thing." Their significant verdict for the plaintiff reminded MARTA that people don't like those kinds of things.

The shared negative example is my partner Mike Mallia's (TLC '07) Closing in our *Clear Value* patent infringement[8] trial in East Texas a couple of years ago. Like Joe, we jumped into the case at the last minute, i.e. thirty days before trial, and after the Pretrial Order, listing over 600 exhibits for each side, had been filed. It was impossible to read them all. Near the end of the trial, the defense crossed our client on a letter that he had sent to a city's water department, more than a year before he filed his patent application. The letter discussed his pricing for his water clarification products and process. It sure looked like a "commercial use" and a commercial use more than a year before the application was filed would *invalidate* the patent. We had some anxious minutes.

In Closing, Mike relived those moments with the Jurors. The following excerpts from the cold transcript will not fully convey the powerful manner in which Mike's argument was made, i.e. by pounding on his chest as if he had been shot, slumping down—nearly to the floor—as if he might die, and then slowly rising as he explained in a soft voice that Richard's letter was sent after an *experimental* use and was referring to possible future pricing IF as and when the products were registered with the NSF and actually put into commercial production:

> *And so then they tried to come in and say the patent is invalid. The patent is invalid. Some of their evidence at first glance looks real. I can remember what I felt like when that letter came up about we have been trying to sell for 6 years. I felt like—I am sure you have seen this scene in movies dozens of times, repeated in several different movies that this guy walks around this corner and no one is expecting and out jumps someone [makes noise] clutches his chest and falls to the ground. That's literally how I felt. Is this how they are going to win this case on this letter?*
>
> *And then you see, what, it couldn't have been before the first batch. They know the day that it was made. They made the first batch. They know that Richard couldn't sell this product until he got his clearance from the NSF. I get those—NSF. And he didn't do that until that was next—the first part of next year he got a certificate without nothing.*
>
> *But it sounded good. It scared me. I had never seen that letter before. I am not telling you I should not have seen it before, but I hadn't.*

Mike trusted the Jury enough to share with them that he had been "scared" by that piece of evidence. They rewarded that trust with a verdict in our favor.

The second tip is to always remember what Margaret Keys taught me over twenty years ago, and what TLC Warriors reiterate to one another time after time after time. Communication is 70% visual[9]. Don't tell me; *show* me."

Conclusion

Be passionate. Be creative. Be visual. But, most of all, be *real*.

Endnotes

1. Interestingly, while this Article was still in draft, Keenan (who visited the Ranch during the 2010 July TLC class) posted a blog entitled "Betrayal, the Ultimate Reptilian Button." It should still be available on his blog-site: http://www.keenantrialblog.com/2011/03/betrayal-the-ultimate-reptilian-button/
   In one well written sentence, Don weaves the Betrayal, Reptile, and Rules approaches into a wonderfully balanced, three legged stool: "When tractor-trailer drivers and companies violate safety rules on the highway and a collision occurs, our trust is shattered and we feel betrayed."
   His colleague David Ball wrote a blog comment cautioning that we must be careful not to portray our clients as poor, pitiful patsies who were stupid to trust in the first place. At TLC we are always mindful that "trust" is the yin to betrayal's yan.
2. This is what Gerry calls the "Mommy, Mommy" argument. It don't work no more. The tort deformers have sucked the milk of human-kindness from the breast of humanity, and our jurors no longer have much empathy for their fellow man's suffering.
3. Nor did I know anything about psychodramatic scene setting. That lesson came during the trial via Jim's direct examination of our client's mom, Penny Durante, and has been told in another *Warrior* article some time ago. "Penny's Remembrance", *The Warrior*, Fall 2003.
4. John R. Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338 (1968).
5. The term derives from an old Florida case involving the Mary Carter Paint Store. Under one version of this scenario, which has now been held by some courts to be contrary to public policy (especially if it is not disclosed to the Jury), the settling defendant "loans" money to the Plaintiff which is then paid back, if at all, at the rate of 50 cents/dollar from the monies collected from the non-settling defendant. A good discussion of their merits/demerits, and the procedural implications of having one, is contained in *Robertson v. White,* 113 F.R.D. 20, 25 (W.D. Ark. 1986)("For good or ill, they do have some utility, since by eliminating parties, one promotes the conservation of judicial resources."). See generally Lisa Bernstein and Daniel Klerman, *An Economic Analysis of Mary Carter Settlement Agreements*, 83 Geo. L.J. 2215 (1995).
6. After my partner Paul's disabling brain injury in 2008, I partnered up with Perdue's son, Jim Perdue, Jr. and his long time friend and partner Don Kidd. Our office in Houston has the "Jim Mac Perdue, Senior Courtroom. We have already done several psychodramas in the well of that court. http://www.justiceseekers.com.
7. Perdue is a prolific author. Most of his books are available on Amazon and also through the website of the Texas Bar Press, http://texasbarbooks.net/books. Three "must haves" for every Warrior are (a) *Who Will Speak for the Victim? A Practical Treatise on Plaintiff's Jury Argument* (1989); *I Remember Atticus: Inspiring Stories Every Trial Lawyer Should Know* (2004); and his 2007 masterpiece, *Winning with Stories: Using the Narrative to Persuade in Trials, Speeches & Lectures*.
8. If you think that one cannot find a betrayal story in a patent infringement case, you are wrong. Our client, Richard, had entrusted his method for water clarification to his polymer supplier even before his patent was issued, and they breached that trust quite wickedly. The first substantive Power Point slide in my Opening and Closing was titled "TRUST AND BETRAYAL."
9. At the Florida Regional our great wizard Joshua Karton reminded us all again of the words of wisdom from our President Jude Basile: "communications is a full contact sport."

Andy lives in Houston with his wife Carol, where they are very active in their Episcopal church, i.e. Christ Church Cathedral. He took a year off from TLC duties in 2012 to serve as "Senior Warden" of that church. He practices law with two partners, Jim Perdue, Jr. and Don Kidd. Andy's practice for the last 18 years has primarily been focused on pharmaceutical products liability cases.