A Tragic Case Study

There is an English common law maxim that “Bad facts make for bad law.” To this, I would add something of a corollary: “Extreme cases evoke extreme responses.”

Consistent with this, I have found that if you want to understand how jurors deliberate, there is no better way to do so than by observing how they respond in extreme cases. Extreme cases trigger extreme responses in jurors (in both mock and actual trials), and these extreme responses often reveal subtleties in the jury process that, while they exist in all cases, are not so easily observable in less dramatic and unusual circumstances.

Let me show you what I mean.

I once worked with a team of highly dedicated public defenders on a case involving a 22-year-old mother who drowned her three children, ages six, four, and two. At precisely 5:00 PM—the voice she heard in her head had warned her not to be even one minute late—she lovingly undressed her sons and threw each of them into the cold water off one of San Francisco Bay’s most picturesque piers.

Only one of the bodies was ever recovered.

According to the mother, the voice she heard—which she knew with absolute and complete moral certainty belonged to God—repeatedly promised that if she threw her children into the bay, each of them would instantly become “part of His [God’s] team in heaven” and they would have a much better place to live and grow up than the homeless shelter where they had been staying. The voice further assured her that she need not worry about missing her sons because she was always welcome to visit them in heaven anytime she wanted, merely by taking a San Francisco Muni bus there.

When she finished her appointed task, she made no effort to flee from the scene. Instead, she sat down and waited, convinced that the voice would return to tell her what to do next. Shortly after her arrest, the San Francisco
police department tested her for drugs and found none, neither illegal ones nor the prescription medication she should have been taking for her severe schizophrenia.

The police recorded an interview with her a few hours after she was taken into custody. The videotape shows an unfocused and disheveled woman rambling on and on, often unable to concentrate on the questions posed to her. Sometimes she seems almost proud or honored (neither of those words accurately describes exactly what I observed on the tape but, in all candor, I am not sure I can better articulate her affect) that God had chosen her sons to grow up (for I am sure she never thought they had physically died) in such a wonderful place as heaven. Often she seemed confused as to why the police were detaining her—after all, she knew she was following an authority much higher than that which employed the two homicide detectives.

It was clear to anyone who observed her before, during, or after the incident that she truly loved her sons. Nowhere was this more evident than in the letters she sent to heaven pending her murder trial. Sometimes she sent the letters to God and sometimes directly to the boys themselves. She lovingly wrote messages and carefully illustrated them with crayon drawings of flowers, hearts, and rainbows. When she had finished each letter, she asked her lawyers to make sure that the letter was delivered to Heaven by way of one of the many airplanes that she believed routinely flew there.

For me, one of the most tragic aspects of this case was how easily this profoundly schizophrenic woman had fallen through the holes in society’s safety net. At least seven times prior to the drownings, she had been involuntarily committed to a mental health facility because she was judged to be a likely threat to herself and others. Despite this, no one in authority ever bothered to take the children away from her and place them into some form of protective custody, nor did anyone seek to have her detained for more than three days for psychiatric treatment.

The focus of the defense’s efforts were threefold: (1) to convince a jury not to convict the defendant of first-degree murder (which is how the district attorney charged her), (2) to keep this tragically schizophrenic woman out of a regular prison (which was where the district attorney was intent on sending her), and (3) to make sure that when the judicial process was over, she would be confined to a facility where she would receive the long-term psychiatric treatment she desperately needed.

After a trial that lasted several weeks, she was found to be insane. As of this writing, she remains confined in a center for the mentally ill and is responding well to treatment.

It probably goes without saying that this was an extreme case and, consistent with the corollary with which I started this chapter, it evoked extreme responses—responses from which I learned a lot about how individual jurors make their decisions.

As we prepared for trial, I told a variety of people a short version of the case background. I privately referred to these folks as my “mock mock-jurors.” There was nothing scientific about my approach; my only concern was to
find people similar to those who I anticipated would eventually be on the real jury.

Almost everyone I spoke with ultimately concluded that the defendant was insane. Frankly, this by itself neither fully surprised nor completely encouraged me. While I always tried to be factually accurate when I described the case, I was part of the defense team and I was convinced that, despite my best efforts to the contrary, at least some of my prejudice and advocacy naturally seeped through whenever I discussed the case with someone, including my mock mock-jurors.

However, there were four things that very much surprised me every time I spoke with one of these mock mock-jurors. First, after hearing the facts and having the opportunity to ask a few questions, virtually everyone I talked to not only came to a “verdict,” but could also articulate why and how they had done so. This does not always happen in less extreme cases. Usually, a certain number of people who hear the facts have a hard time deciding who should win, and even those who come to such a conclusion sometimes have problems articulating how and/or why. Not so here; here, everyone seemed to have an opinion and virtually no one had a problem articulating what that opinion was and the basis for it.

Second, I was surprised how people responded to the jury instructions. Everyone I talked with wanted to know what the law was regarding insanity. However, there were two fundamental differences as to (1) when individual mock mock-jurors asked for this information and (2) how they used it once I gave it to them.

One group wanted to have the jury instructions right away; they wanted to know what the law was before they began to examine the evidence. These people treated the jury instructions as “directions.” That is, they consulted the law before they acted and let the jury instructions direct their conclusion. The law was a road map as to what facts to consider, and these people stuck closely to it. Some of these mock mock-jurors clung to the jury instructions from the outset and leaned heavily on them. It sometimes seemed as if they were using such an approach as a way of buffering themselves from what was clearly a very emotionally charged situation.

The second group did not seem to care as much about the law until after they had completed much of their analytical process. In fact, these people tended to use the jury instructions as a way of confirming the conclusion they had already drawn. People in this second group reached an initial verdict as to the defendant’s insanity with little or no reference to the law. Once they had done so, these mock mock-jurors perceived the instructions as “support” or “evidence” that their preliminary conclusion was the correct one. It was as if once they had initially reached a decision, they stepped back, looked at the jury instructions, and confirmed to themselves, “You see, even the law supports my conclusion.”

It reminded me of the way my sons, Andrew and Erich, assemble build-it-yourself furniture purchased from warehouse stores. After working for several hours, they open the instruction book for the first time and use the picture
of the finished piece as evidence that what they have already done has been done correctly. And you know what? They are usually right!

The differences between the ways these two groups used jury instructions are extremely important and will be examined again in greater detail when we review how jury instructions influence deliberations and examine Persuasion Tools, which rely heavily on jury instructions.

The third thing that surprised me about my mock mock-jurors was how many different paths they collectively took to get to the same conclusion (i.e., “She is insane.”). I encountered at least five different paths or approaches to resolving this issue. For the most part, these paths were relatively distinct; yet no two were entirely contradictory, and I am confident that while advocates for each of the paths might not completely agree with some of the others’ reasoning, none would have any problem pushing for a common result—“She is insane.” (Ill. 1-1)

The final observation that struck me after talking to the mock mock-jurors was how amazingly transparent their various paths were and, thus, how easy these paths were to observe and follow. Again, I attribute this to the extreme nature of this case.

Let me give you some examples that outline the five different paths that my mock mock-jurors articulated.

The first path was heavily lined with emotion. To the people who followed this path, the drownings were part of a profound human crisis. It was Euripides’s Medea, but even more tragic because this was a real life tragedy with honest-to-goodness dead children and a wholly irrational mother who, after listening to what she truly believed to be God, had caused her own children’s deaths. The people who traveled on this first path to their ultimate conclusion (and I admit to being one of them when I was first asked to work on the case) reviewed a chronology of the defendant’s life (first pregnant at 15, dropped out of school shortly thereafter, years of voices in her head lecturing to her about “spiritual warfare,” tragic event compounding upon tragic event) and concluded their analysis with some kind of statement like, “Of course she is insane, how could any person feel otherwise?”

My friend and partner at The Focal Point, Scott Hilton, reached the same conclusion regarding the defendant’s insanity, but he got there by a wholly different route. He wanted none of the “touchy-feely emotional stuff.” It was not that he was unsympathetic; he had two children of similar ages to those the defendant had drowned, and was as disturbed by the story as any of the others who had heard it. But Scott was far more analytical in his approach to answering the question of whether the mother was insane. “Sure, this was a tragic situation,” he would argue, “but that is not the question I am being asked to decide. I am being asked to resolve a far more precise issue, whether the defense has established, by a preponderance of the evidence, every element necessary to prove insanity.”

Scott’s approach was what I call “analysis by checklist.” Scott is not a lawyer, but the path he took is a very common way for lawyers to analyze problems. Scott relied on the jury instructions early and repeatedly in his
analytical process. The jury instructions provided him with a checklist of the necessary elements he would need to check off if he were to find the defendant legally insane. You could almost see his brain systematically and logically going through the process, “Give me the checklist of what the law requires in order for a person to be found insane. What are the elements? OK, she meets that one and that one and that one. She meets all of these criteria; ergo I think she is clearly insane!”

To someone like me who was moved by emotions, Scott’s methodical approach initially seemed unduly impersonal and analytical. Nevertheless, I agreed with (and welcomed) his final conclusion, which was the same as mine—“She is insane.” If we had been on the same jury, we would have been advocating for the same side, but for different reasons—and frankly, this difference would have been of little consequence to me and would not have
mattered to either of us in the long run, since we both ultimately would have been on the same team and would have been actively pushing for the same conclusion: “She is insane.”

There was a third group of mock mock-jurors who wanted to confirm objectively that an insanity plea was not an elaborate hoax or excuse being enacted by the mother. This group wanted to know that the mother’s mental illness was legitimate and that there was scientific evidence to support that conclusion. It was as if they wanted to look into her brain and see objective proof that something had gone haywire.

At its core, such skepticism is related to the common problem that mental health professionals complain about when they encounter people who do not readily accept the fact that mental illness is as much a “real” medical problem as more familiar and visible physical ailments.

Fortunately, during our preparation for trial, one of the expert witnesses we were working with mentioned in passing that schizophrenia and Parkinson’s disease were “related conditions.” It turns out that while much remains undiscovered, scientists understand a bit about what causes schizophrenia. The principal culprits are two naturally occurring chemicals found in the brain; one is called acetylcholine and the other is dopamine.

According to our expert witness, these two chemicals are properly balanced in healthy brains. In abnormal brains, the imbalance of these two chemicals causes profound but strangely different symptoms. Too much acetylcholine and a corresponding deficiency in dopamine causes Parkinson’s disease, the illness characterized by uncontrollable tremors. The opposite situation, that is, too much dopamine and too little acetylcholine, causes a profoundly different problem—schizophrenia.

The same two naturally occurring chemicals yield two entirely different results, depending on the relative concentrations of each chemical in an individual’s brain. As one mock mock-juror pointed out, “Isn’t it ironic that we accept without question that people with Parkinson’s—people like Michael J. Fox and Mohammad Ali—have a disease, but we see schizophrenia as something less real and somehow not an actual illness.” With this knowledge my mock mock-juror navigated a third route—a scientifically based route—through which he, too, objectively concluded that the defendant was insane.

As I previously mentioned, I consider one of the most tragic facts in the case to be the multitude of times this schizophrenic mother had been involuntarily hospitalized for her mental illness and the repeated failure of state and local agencies to protect her children from harm. As it turned out, I was not the only one who felt this way. The fact that “they” (as in, the unnamed people who are supposedly in charge of the world) had let this tragedy occur was enough to convince some of my mock mock-jurors to take a fourth route to the conclusion that the defendant was insane. If they could do anything about it, this group of mock mock-jurors was going to make darn sure the defendant would go to a mental health facility and not to a regular prison.

There were at least two interesting elements in what I could glean from the people in this group. First, there was an undercurrent of rebellion in their decision, a kind of feeling that I would characterize as a form of protest that
stemmed from the idea that since “they” (again, this nebulous collection of people charged with responsibility) had failed to protect the defendant and her children, these mock mock-jurors were not afraid of taking action on the mother’s behalf. Not exactly an example of “jury nullification,” but it had that same feel to it.

Second, some of these mock mock-jurors seemed to be motivated more by doing what they thought was “right” than by any detailed analysis of what constituted legal insanity. Let me be perfectly clear on an important point—I am convinced that these folks absolutely believed the defendant was legally insane, but they came to that decision without much detailed analysis of the law. Instead, their process evolved through their innate sense of justice (flavored by anger at and distrust of those who they believed could have prevented this tragedy, but had failed to do so).

I showed a copy of the interrogation tape to my mother who, prior to retiring, had spent many years as a highly skilled pediatric nurse. She had watched an entire generation of children grow up, have children of their own, and bring another set of patients into the doctor’s office. Over the years, she had developed a reputation of not only caring a great deal for children, but also of having a very commonsense way of dealing with hysterical parents who were convinced that their precious bundles of joy had contracted the bubonic plague at 2:00 AM (trust me, it always seemed to be 2:00 AM) on what inevitably was either on a Saturday or Sunday.

Prior to watching the interrogation tape, my mother was rather skeptical about my suggestion that the defendant was insane. My mother has a strong belief that people should be responsible for their behavior. She also strongly sympathized with the dead children and instinctively believed that anyone who hurt children should be severely punished—something she was fully willing to do in this case.

About ten minutes into the tape, after silently watching the defendant’s erratic behavior, my mother suddenly turned to me and we had the following conversation:

“Is she on [illegal] drugs?” my mother asked.
“No,” I replied.
“You sure?” she asked.
“Absolutely!” I replied. “That was the first thing the cops did—tested her for drugs. There weren’t any.”

Then, she is clearly insane,” said my mother conclusively and without a hint of doubt in her voice.

“How do you know?” I asked, somewhat taken aback with the certainty and relative speed with which she made her decision, particularly because of her prior assertion that anyone who hurt children was evil and deserved the worst possible punishment.

“Common sense!” she replied. “No one who is not on [illegal] drugs behaves that way unless they’re insane!”

Common sense, oh yeah . . . common sense—that thing that most of us lost around the third week of law school. Common sense. Another mystery solved by my mother using common sense.
I tell you this story about my mother because this form of reasoning was the fifth path that I noticed my mock mock-jurors took to resolve the issue of whether the defendant was insane—these people used what they would characterize as their common sense.

So, at the conclusion of my limited study of potential juror types, I had found five different groups; each had a different reason for doing so, but all agreed on the fact that the defendant was insane.\(^1\) If all of my mock mock-jurors had been brought together in a single room, I have no doubt that they would have easily banded together to support the same conclusion—“She is insane!” I am further convinced that none would have had any problem doing so, despite the fact that they might not agree as to exactly why.

### A Tribute to Jurors and Juries

It is an odd system we have. In fact, it sometimes appears that Alexis de Tocqueville got it right when he observed as early as the 1800s that virtually every issue in American life eventually makes its way into court. And, once those issues get there—the intimate, the mundane, the complicated, the terrible, sometimes even the trivial—all of these disputes are resolved by a collection of common folk, evaluating conflicting versions of historical events presented by professionally trained partisan adversaries, in the highly stylized and artificial manner that is the jury trial.

When you describe the process this way, it is easy to see why many of our colleagues from other countries rank the American jury system somewhere between quaintly ridiculous and fatally flawed. It is a system all but abandoned by its creators (the English) in civil cases. It is a system whose primary beneficiaries (i.e., the people who are likely reading this book) often have no trouble criticizing.

None of this changes the fact that it is a system that generally works!

It is easy for me to be cynical about a lot of things, but the jury system is not one of them. I have considerable faith in the ability of twelve ordinary people to come to the right decision after pondering the evidence. Do I think that jurors are infallible, that they get it right all the time? Of course not! No system, including one where “well-educated professionals” make such decisions, always gets it right. If you need proof of this, just remind yourself of the last time one of your well-taken motions or objections was denied.

Do I have faith that the jurors get it right the majority of the time, even in relatively complex cases? Yes, I genuinely do—and I have had to admit this

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\(^1\) I am not suggesting that there were only five such paths. In fact, I suspect that there were more. What is crucial is not the exact number of different paths but that (1) there were a multitude of such paths, (2) the jurors could agree on the conclusion—"She is insane"—even if they could not agree on why or how they got to that decision, and (3) any lawyer who tried to force all of his jurors down a single path (i.e., the one he was most comfortable with) would not likely have been able to prevail with this group.
fact on more than one occasion (privately, of course, but I have had to admit it), when my client has lost his case.

Sadly, I often find that it is the lawyers who frustrate the jurors and prevent them from doing their job. In such instances, I am particularly discouraged by two types of lawyers. The first are those (usually the ones who have lost) who immediately blame the judge and jurors for whatever went wrong in the case and fail to see their own potential shortcomings at the trial.

These are the lawyers who categorically assert that ordinary citizens are incapable of deciding complex issues. They boldly tell anyone who will listen (and there are a lot of people who will) that the jurors “just never got it!” and how these finders of fact could neither remember large portions of the facts nor deal with any of the important subtleties raised by those facts. Ironically, sometimes the jurors these lawyers criticize most are the very ones that they worked so hard to keep on the jury during voir dire.

For these lawyers, saying that the jury “never got it” is sometimes more of an indictment of the lawyers’ skills than it is of the jurors’ abilities. Does that mean that jurors will always get it? No, but I am suggesting that lawyers owe it to the jury system, the profession, and themselves to try really hard to simplify their case and present it in a well-structured and orderly manner before offering such a blanket condemnation of jurors.

The second group that is often too quick to criticize the jury system is made up of those lawyers who take the concept of a “jury of their peers” to the extreme and insist that the law should provide them with a “jury of their clones.” (Ill. 1-2) More specifically, these lawyers generally feel that the way they do things is the same way everyone does or should do things and, as such, these lawyers specifically believe that the way they learn and reason is the way that everyone learns and reasons. These lawyers are then completely flummoxed when their personal style resonates with only a handful of jurors—which is never enough to win the case.

Remember, your jurors are:

ILLUSTRATION 1-2  A Jury of Your Peers, Not Your Clones
An inexperienced lawyer assumes everyone does things the same way—his way. These lawyers are then completely flummoxed when their personal style resonates with only a handful of jurors.
The problem, of course, is severe myopia, which prevents these lawyers from fully appreciating and successfully using a variety of different Persuasion Tools—tools that these particular lawyers themselves might not have personally used to learn about their case but, nonetheless, tools that will appeal to the broad range of different learning and reasoning styles reflected in the various people on the jury. These are tools that the different jurors will then use in the deliberation room to help persuade their colleagues that the lawyer’s position is the right one. As we will see throughout this book, providing these tools to the jury is an important first step in allowing the necessary coalitions of jurors to form.

I did not develop my respect for the jury system because I think jurors carefully study the law, comprehend its nuances, and apply it strictly. Nor do I support the jury system because I think jurors have the analytical skills necessary to peer-review testimony from highly skilled expert witnesses. I champion the jury system for very practical reasons: because I have observed that most jurors believe there is a right answer, they work very hard to find it, and, more often than not (which is the best you can expect from a human-based system), they succeed.

Jurors genuinely believe that the Truth is out there. They also are confident that, with sufficient assistance from one or both sets of the lawyers, they will find it. The ongoing challenge of uncovering the Truth is often what keeps jurors motivated during an otherwise boring trial. In fact, many jurors admit that the most rewarding aspect of jury service is concluding that they did the right thing. Imagine how discouraging it must be to sit through a trial, aware that work is piling up at your office, eating crummy courthouse cafeteria food, and, when it is all over, concluding that you and your fellow jurors have failed to come up with the right answer.

Most jurors take the role very seriously. Of course they complain about jury duty and, admittedly, there is still much to dislike and complain about in the way some courts and lawyers treat jurors. However, most jurors understand that they have a personal stake in ensuring that the system works. As a result, they do an admirable job of applying the law as best they can interpret it to the facts, as best as they are able to understand them.

This is particularly impressive because it is basic human nature to instinctively want to avoid a situation like that which we force them to confront while on jury duty. Most people find it very difficult to make crucial decisions concerning complicated issues about topics of which they initially know very little, decisions that will have a profound impact on the lives of real people. (Just describing it that way gives me a moment of pause.) The fact that jurors have to do this for people they do not know and will likely never see again (as opposed to close family or friends) may make the process a bit easier—but let us not kid ourselves, it is still a very hard process to go through. In fact, I do not believe many people would fault jurors for wanting to run away as quickly as possible from such a responsibility. Fortunately for us, abandoning their posts is not an option and, as such, they are forced to decide difficult
issues on our behalf. Even more fortunately for us, they generally get to the right answer.

The Lawyer’s Role at Trial—Great Trial Lawyers All Share Certain Characteristics

It is always flattering during post-verdict jury interviews to hear that the jurors liked you and your witnesses the best. Likewise, it is exciting to know that the jury thought you were the more articulate and able of the two advocates. Nevertheless, if you have tried more than a handful of cases, I suspect you know that such flattery often does not matter a whole heck of a lot because you often receive it while you are packing up exhibit boxes after having lost the case.²

In reality, the best possible compliment (other than winning)—the one that really matters—is that the jurors found you and your witnesses to be the most helpful.

For those of you (like me) who cringe when you hear the word “helpful” because it has, over the years, been so devalued by insincerity, please bear with me for a few minutes. I am not talking about the feigned helpfulness that seems to surround us in modern life. The great trial lawyers are the ones who help their jurors by providing them with the tools with which to reach the right verdict.

Despite this, it is rare during witness preparation to hear lawyers encouraging witnesses to be “helpful.” It is even rarer during the trial to hear lawyers reminding themselves to behave in this same manner. But this is precisely what jurors are looking for and need. In fact, jurors often reward the lawyers and witnesses that they believe are the most helpful in assisting them to uncover the truth.

Jurors want you to provide them with meaningful information without feeling that you are wasting their time. They want to understand what is going on in the case and in the courtroom. This understanding not only helps them decide, but it also keeps them interested, and someone who is interested is much more likely to listen to what it is that you are trying to sell.

Unfortunately, some lawyers are concerned that being helpful will be perceived as either a sign of weakness (as in, “when you are explaining, you aren’t winning”) or as condescending (as in, “I don’t want to be seen as talking down to the jurors”).

². OK, let’s admit it. Don’t you hate it when this happens after you lost the case: jurors coming up to you after the trial, complimenting you on how great you were but admitting they just could not vote for your client? It has the same sting as “No, I am not interested in a romantic relationship with you, but I hope we can be friends.”
I must confess that in many ways I am always initially sympathetic to these concerns. When I ask myself why, I conclude it has as much to do with the word “helpful” itself as it does with anything else. It is so easy when you first hear the word to be overwhelmed by the vision of an anxious Boy Scout promising to “help other people at all times; to keep myself physically strong, mentally awake, and morally straight” or that of a saccharine-sweet hotel desk clerk who smiles at you as he tries to help you by explaining why “We have a problem with our reservation.”

That is not what I mean by helpful!

It should go without saying that nothing done badly, insincerely, or to the extreme will help you, your jury, or your case. Likewise, explanations that are seen as back-peddling are rarely helpful. But genuine and well-thought-out efforts at helping jurors through the difficult process of being part of a jury will likely yield considerable benefits.

There are multiple ways of being helpful during trial. I believe that five are particularly worth discussing here because I will be repeatedly raising them both in this chapter and throughout the balance of this book. These methods include (1) not being afraid to be an advocate who teaches; (2) not behaving like a “mad dog” in court; (3) respecting your jury by limiting your case to what really matters; (4) identifying which key topics need extra explanation and devoting the necessary time to providing it; and (5) taking the time to learn and fully understand your case before you ever appear before the jury. (Ill. 1-3)

**YOU CAN BE HELPFUL BY NOT BEING AFRAID TO BE AN ADVOCATE WHO IS ALSO AN EFFECTIVE TEACHER**

Perhaps the single most important thing you and your witnesses can do to be helpful is to understand what it means to be an effective advocate in the courtroom.

So, what is the proper role of a lawyer at trial? The obvious answer is that the proper role is one of an advocate. OK, but exactly what kind of advocate? My immediate response is always the same—“a good one.” My more thoughtful reply is “the best advocates are the ones who take the time to educate their jurors about those issues that really matter.” In short, the best advocates know when and how to be effective teachers.

Your job at trial is to teach your jurors what they need to know so that they will not only vote in your favor, but so that they will also be willing to advocate on your behalf during deliberations. Never underestimate the necessity to educate the finders of facts. Virtually everything that your jurors will learn about the case will, in one way or another, come through you or your opposing counsel. Even if you do not take the time to educate your jury, I can guarantee that the other side will. If only one side takes the time to explain a difficult or key concept to the jurors, the only image those jurors will have of that concept will be that which was unilaterally presented during trial. When
that happens, it is easy to predict which side is more likely to prevail on that point. If neither side makes an effort to teach, you will (in all but the simplest cases) end up with a horribly muddled and angry jury.

Some lawyers have a difficult time understanding the concept of effective teaching; they ask, “Isn’t everything we do in the courtroom teaching?” My answer to that is, “No, not necessarily.”

There is a difference between knowledge, understanding, and perspective. To be an effective teacher, you need to master and then convey all three of these elements to your jury. (Ill. 1-4)

Developing knowledge is a fact-centered process. There may be hundreds of individual facts, but the learning process is essentially memorization (even if the information is only stored in your working memory for the duration of the trial).

Developing understanding is an organization-centered process. It is the process that allows you to organize your individual facts into groups, subgroups, categories, and subcategories. While it is possible to have knowledge without understanding, the opposite is not true; that is, it is not possible to have understanding without knowledge.

If I could rank information based on potential power, perspective would be at the top of the scale (or at least very close to it). Developing perspective is a connection-centered process; it allows you to draw connections between

The Characteristics of Great Trial Lawyers

All great trial lawyers share five characteristics:

- Great trial lawyers are advocates who teach.
- Great trial lawyers do not behave like “mad dogs” in court.
- Great trial lawyers limit their case to what really matters.
- Great trial lawyers identify and spend their time on the key topics.
- Great trial lawyers take the time and make the effort to thoroughly learn their case.

Despite different surface styles, great trial lawyers generally share five characteristics.
certain of the facts or group of facts. Knowledge and understanding each increase the power of individual facts arithmetically. By contrast, perspective increases their power geometrically.

Effective teaching, which is what you are trying to accomplish during trial, involves the use of all three of these elements—knowledge, understanding, and perspective—so that you create a series of coherent and persuasive stories and supporting materials, which jurors then use to reach their verdict.

When you teach, do not teach like an arrogant professor whose desire to transmit knowledge has been dulled by years of tenure. Instead, teach like that special teacher we all remember—the kind of teacher that unfortunately comes along all too infrequently in our lives. Teach like the teacher who loves teaching. Such teachers possess many of the same characteristics that are needed to be a successful trial lawyer, including enthusiasm for the subject, a willingness to take the time to explain, respect for students, self-confidence, and the dedication to spend hours upon hours preparing and refining their message.

You should use some of the same teaching techniques that gifted teachers use to capture their students’ attention and stimulate their imagination. For example, create a sense of reality around what you teach by providing (but not over-providing) details. Likewise, create visual pictures in your descriptions.
One of the benefits of teaching is that it lets you take advantage of what I call the “recirculating process.” As the Romans would say, *qui docet discit,* “he who teaches learns.” Throughout the teaching process, you will likely have insights and inspiration that you would not otherwise have. Recirculate this newly learned material back into your teaching. Your presentation will undoubtedly be the better for it. (Ill. 1-5)

There is nothing wimpy about being an advocate who takes the time to be helpful by teaching the jury. After all, the ultimate goal of the advocate is, within the confines of law and ethical restrictions, to win the case for his client. Successful politicking—and that is much of what is going on among jurors during deliberations—always involves three steps: education, persuasion, and consensus building. Of the three, education is the most important since neither persuasion nor consensus building can occur without it. The bottom line is that you should not be afraid to teach; I am confident that your client will benefit greatly from such efforts.

**You can be helpful by not behaving like a “Mad Dog” in Court**

There is a common perception that “trial is war, and war is hell!” Because of this belief, too many of our courtrooms are filled with lawyers behaving badly, seemingly unaware that such behavior rarely serves them well during a trial. To be fair, I must admit that adversarial activities outside the view of the jury may very well resemble war. In fact, if you really feel the need to do so, this is the safest place to assert your “inner mad-dog, mercenary self.” But if you do, remember that sound and fury rarely generate much light, at least for jurors.

At this point, let me be very clear about something: being passionate in your beliefs and being unafraid to display that passion is not the same as behaving like a mad dog. Mad dogs cannot distinguish between well-placed passionate commitment and a widespread angry diatribe. Expert advocates understand that they have a “volume button” and they know when it is appropriate to turn the volume up or down.

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3. I would go so far as to argue that it rarely benefits them anywhere, but I know it does not do so in front of the jury.
For me, this point was driven home when I heard the jurors’ insights concerning a particularly partisan advocate I worked with several years ago on a case. This particular lawyer liked to play the tough guy. He shouted. He trumpeted. He sneered at witnesses. He gave new meaning to the words “cross-examination.” In short, for him the term “civil litigation” was an oxymoron.

It was quite a performance, but not a particularly successful one. In fact, when we interviewed the jurors after the trial, they unanimously gave him negative feedback. As one juror noted:

He reminded us [the jury] of Yosemite Sam, the cartoon character that is always running around wild, swearing, and randomly shooting his pistols up into the air. Sometimes his [the lawyer’s] ranting and raving was fun to watch, but we never really took him seriously or trusted very much of what he said. No one ever learned much from Yosemite Sam!

Certain trial attorneys seem to think that acting like a mad dog in the courtroom is a good strategy. But the truth is, being overly antagonistic can do more damage than good to you, your client, and your case. Mad dogs are rarely as effective as they believe they are.4

In fact, a take-no-prisoners stance is often very ineffective in the courtroom for at least five reasons. (Ill. 1-6) First, being a mad dog makes you look inexperienced. By and large, most of the mad-dog attorneys that I have seen have not been in the courtroom enough times—and they are not yet confident enough—to see that masterful litigators are more like teachers and storytellers than professional wrestlers.

Such attorneys confuse “conflict” (on which all trials are based) with the adversarial process. That is, they miss the point that the purpose of a trial is to resolve the conflict, not make it worse by acting like a bully in the courtroom. Likewise, they fail to understand that, in order to resolve a conflict in your favor, you need to teach the jurors about your case, persuade them as to the veracity of your client’s perspective, and engage them by using good storytelling techniques, such as analogies, metaphors, and good graphics.

Second, being a mad dog turns off the jury. While a quick dust-up in the courtroom gets your jurors’ attention, constantly getting in witnesses’ faces, dressing down opposing counsel, or making tortured facial expressions can make you seem like a mad man (or dog)—and therefore not to be trusted. Most jurors question whether such a delicate object as the truth is likely to be found in the hands of a mean-as-a-snake trial lawyer.

Third, being a mad dog keeps you from telling your story. Although the media sometimes glamorizes the image of a frothing-at-the-mouth attorney (... And Justice for All with Al Pacino certainly springs to mind), the focus in

4. I want to thank Jim Stiff, who heads Trial Analysts, Inc., a litigation consulting firm in Dallas and College Station, Texas, for some of his thoughts on this topic.
your trial should be on the right way to tell your client’s story, not on adapting an angry persona as a strategy to winning your case.

Much of the art of storytelling in the courtroom involves patience, being attuned to your jurors, and being able to modulate your demeanor to match your material; all of which is hard to pull off if you are in the midst of one angry outburst after another. When I taught trial practice, I always reminded my law students, “It is a lot harder to turn down the volume than it is to turn it up.” What I meant by this was that you can get loud and confrontational in an instant, but once you do, it takes a lot of effort to get yourself and everyone who has been affected by your outburst to calm down.

I am not advocating that you never turn up the volume; instead, I am merely advising that you do it when you really need to, at a point that makes sense, and that you understand that there are always consequences in doing so.

Prior to law school, I was a teaching assistant for a professor of American constitutional law and history. Because of the large number of prelaw students in the class, the professor always cautioned us that we needed to be very careful of certain students. He warned us not to worry too much about the boisterous ones, because you could spot what they were up to a mile away. Instead, he suggested we worry about the polite ones, because “you never see it coming from them, so these students always get away with murder!” For me, this sentiment—beware of the polite ones because they always seem to

Avoid Being a Mad Dog in Court

Being a mad dog in court is ineffective because:

- It makes you look inexperienced.
- It eventually turns off the jurors.
- It prevents you from being able to tell your story effectively.
- You too often telegraph your punch.
- People don’t like mad dogs (or mad people).