
CHAPTER I

The Guide

After the verdict, a number of jurors went over to Flash Magruder. Several of them asked for his card and said that if they ever needed a lawyer, they would call him. The foreman took even greater pains.

“Mr. Magruder,” she said, “you were wonderful. You made excellent arguments. We all agreed that you were the best lawyer. The only thing was, the defense had the stronger case. If you had better facts, we would have decided in your favor.” A moment of solace that takes some of the edge off an unhappy defeat?

Certainly. But there is something else at work as well. Whenever the jury compliments the losing lawyer, there is a problem. It means that what he did and how he did it intruded on the case. The jurors were all too aware of how he tried to shape their view of the facts.

It is a problem that can trouble even very good lawyers. When the jury is too taken with the skill of one of the lawyers, it can push the case in the wrong direction.

Avoid Conspicuous Virtuosity

It usually happens when the lawyer concentrates more on persuasive techniques than on the underlying human drama being played out in the trial. It is not the product of any one particular thing that the lawyer says or does, but rather comes from a whole series of acts that reflects how the lawyer approaches the business of trying the case.

Some lawyers over-think their cases, so they have fancy answers for everything. Like a street-corner salesman with a black suitcase on collapsible legs and a roll-down banner, some lawyers seem to set up their displays right in front of the jury. And like the huckster with both forearms covered with \$20 “Rolexes,” if the jury doesn’t seem to like one argument, they are ready to roll up their sleeves to reveal another one that might look more attractive.

The mind-set of the advocate makes a tremendous difference. While positive thinking is important, the belief that you can talk the birds out of the trees or sell ice to Eskimos is the wrong approach. It produces conspicuous courtroom virtuosity—arguments that convince the jury that you are the better lawyer.

You should not care who they think is the better lawyer. You should care who they think has the better case.

Understanding that you do not want to look slick leads some lawyers to do a little creative bumbling—just so they won’t look too good. They deliberately drop things or bump into chairs so the jury will think they are “human.” It is not a particularly good idea. It certainly never helped Gerald Ford. “Bumbling” may be inconsistent with “slick,” but it does not do anything to convince the jury that you have the better case.

Be the Guide

There is another mind-set that is more likely to do the job. You are the guide who knows the territory, the one who can be trusted to steer the jury straight throughout the entire trial.

Does it work? Imagine for a moment: Suddenly you find yourself in the middle of an unknown swamp. You don’t know where you are or how you got there. All you know is that somehow you have to find your way out. You have no compass. There are no roads or trails, no signs or maps, no shadows or guiding stars. As you look around, you see two people, each saying there is only one way out. The problem is, each one is pointing in a different direction.

Which one do you follow—the one who has the suitcase with the collapsible legs, who wants to sell you one of the watches on his wrist; or the one who is pointing out landmarks and is helping you understand the terrain?

Thinking of yourself as the guide is an approach that will affect everything you do.

You will want to understand everything in the case

Edward Bennett Williams used to say, “There is no substitute for knowing everything.” He was not just talking about taking depositions and going through the motions of formal discovery. Informal discovery—immersing yourself in the business of the case and learning everything you can about it—is the key to understanding what the facts really mean. You do not have to be a pilot to try an aviation case—but it helps. Neither do you have to be a railroad engineer to try a train-crash case. But it is certainly worthwhile spending time riding in the cab of a locomotive and talking to dispatchers and conductors down at the railroad yards. You will learn things you will never even hear about in a deposition.

Look at it this way. You are not Nero Wolfe the detective. No Archie Goodwin is going to bring you all the facts as you sit in your big leather chair. It is not your job to solve the case by sitting and thinking about the facts.

You are the guide—a teacher. You are going to show the way. But before you can do that, you need to learn the territory yourself. And the right way to do that is both literally and figuratively to get out of the office and do your own investigation.

You will become dedicated to making things clear

Legal scholarship—as practiced by judges, teachers, and lawyers—assumes that precision brings clarity and minutiae produce understanding. It is an assumption that is tied to the hope that the law is actually a science, and that legal principles are best discussed as abstractions, with all of the humanity carefully removed.

It is a tradition that concentrates on teaching lawyers to talk to each other. It teaches the language of the law, and then pays no attention to whether we are capable of communicating our ideas to anyone else.

That is not enough. Good trial lawyers speak English as well as law. They are committed to the elegance of simplicity.

You will realize that your legal education did not prepare you to be the professional communicator your work requires you to be. Instead of concentrating on creative hedging, you will become the master of the declarative sentence, the advocate of clear organization, the champion of simple language.

You will care about facts

Facts win cases. Make that even stronger. Facts, not arguments, win cases.

As a general rule, the more intricate and complicated a legal argument is, the less persuasive power it has. And the more you think like a guide, the more you will be convinced that facts are the key to persuasion.

It is hard for young lawyers to believe, but there was a time when law was practiced without the photocopy machine. When you had an important point to make (and did not have time to have it typed into a brief), you sometimes took the books to court. That is what Edward Bennett Williams did one morning in the 1950s.

He was on his way to argue a motion in the federal district court in Washington, D.C. He was walking up the courthouse steps, carrying a pile of books that went all the way up his fully extended arms to his chin, with page markers in every book.

An older lawyer was walking down the stairs and saw Williams with his books. "Young man," he said to Williams, "what you need is a witness."

You will guide the jury through the facts—not through the courthouse

Some lawyers, sensing that they should assume the role of the guide, get sidetracked onto the wrong tour. Instead of taking the jury through the facts, they give them a tour of the law and courthouse procedure.

Depending on the jurisdiction, the jury has probably seen a film or a videotape about their role in the case as well as what they should expect from the lawyers and the judge. Then before you rise to give your opening statement, the judge explains what you are going to do. Why in the world should you explain it a second or a third time—to prove you know what an opening statement is? This is the time to introduce them to the facts, not to take them on the wrong trip.

You will show, not tell

Have I said this before? Well, it is still important. The difference between showing and telling is the key to the work of the guide.

Showing means making your points with facts, not with arguments. Lawyers who look for clever characterizations do not understand. Characterization is the enemy of persuasion.

Showing means letting the witness testify on direct examination instead of telling her what to say with leading questions.

Showing means helping expert witnesses become teachers whose job it is to explain, rather than advocates whose job it is to argue.

Showing means making the case come alive with demonstrative evidence so the judge and the jury can see for themselves what happened.

You will never mislead the judge or the jury

A guide worth following is someone you can trust. If the judge and the jury feel they cannot believe what you say or rely on your word, they will not pick you as their guide. They will find their own way out of the swamp.