

*ETHICAL LESSONS
FROM COURTROOM
LAWYERS IN THE
MOVIES*

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LESSONS FROM THE MOVIES

By Steven O. Rosen

1. INTRODUCTION

Trial lawyers can learn many lessons by studying courtroom procedures as depicted in the movies. Films can show us how to argue motions, tell a compelling story in an opening statement, prepare witnesses for trial testimony, examine and cross-examine witnesses, and deliver a closing argument. Courtroom scenes in the movies also illustrate ethical issues that trial lawyers regularly encounter, and possible strategies for success.

This paper is a study guide to movies for the trial lawyer. Described below are a number of courtroom scenes from popular films and some of the lessons they illustrate. Excerpts of on-screen dialogue are included.

2. MOTION PRACTICE

The rarest of all courtroom scenes in the movies is the pretrial discovery motion.

Class Action, a 1991 Twentieth Century Fox movie starring Gene Hackman and Mary Elizabeth Mastrantonio, tells the story of a wrongful death case brought against defendant Argo Motors, manufacturer of the Meridian model automobile. Plaintiff's wife was a passenger in his Meridian. Following a collision, the car burst into flames and the plaintiff's wife was killed. According to the plaintiff, the fire resulted from a defectively-designed electrical circuit. Plaintiff's counsel has a discovery motion before the court. A plot device is that the opposing attorneys are an estranged father and daughter; hence, they are both identified as Ward in the excerpt quoted below.

Let's follow the argument of that motion:

JUDGE: Okay, what've you got for me?

MR. WARD: Your Honor, the court has before it a discovery motion compelling the defendant to supply the names, job descriptions, current addresses of all Argo employees involved in the design of the Meridian model between 1980 and 1985.

JUDGE: Response, Ms. Ward?

MS. WARD: . . . [W]hat he's asking for is completely out of the question. A number of those people haven't worked for Argo for years. They've scattered to the four winds. Generating a current address list could take thousands of hours.

[Following a skeptical look from the judge]

We will give them the names.

JUDGE: Mr. Ward?

MR. WARD: It's a start, your Honor. The job descriptions along with the names really are not of much value without the current addresses.

JUDGE: Mr. Ward, really in all fairness, I think Ms. Ward has proved that supplying the addresses would put an undue burden on the defense.

MR. WARD: I was very concerned about that too, your Honor, so I called the pension department at Argo, told them I had a former friend that I was looking for named John Smith. Did they have anybody by that name who used

to work for the company? Sure enough, they did. Called him right up on the computer and gave me his address – his current address.

JUDGE: Really?

....

MR. WARD: It seems that they keep an updated record of all former employees so they can send them their pension statements.

MS. WARD: Your Honor, if these –

MR. WARD: Then they asked me if I worked with him at Argo and where did I live, and then they sent me this current newsletter.

[Laughter in the gallery]

MR. WARD: It wasn't hard at all, your Honor. I want those addresses.

One lesson for oral argument is found at the very start of this exchange. Plaintiff's counsel begins by succinctly telling the judge what he wants. He says:

Your Honor, the court has before it a discovery motion compelling the defendant to supply the names, job descriptions, current addresses of all Argo employees involved in the design of the Meridian model between 1980 and 1985.

Those 37 words cleanly launch the oral argument. Too often, trial lawyers leave judges and juries in the dark as to what it is they really want. Indeed, a question frequently asked by judges during oral argument, certainly a worrisome question for an advocate, is: "Now tell me, counsel, just what is it that you want?" The skilled trial lawyer figures out the goals before entering the courtroom and is prepared to state them succinctly.

LESSON ONE: *Start by telling the judge or jury what you want in a simple, direct way.*

There is a corollary to Lesson One. It is:

COROLLARY TO LESSON ONE: *Start each segment of an argument by stating what result you seek in that segment.*

For example, in arguing a multipart motion for summary judgment, start the second segment of the argument by telling the court, “Next, we show that summary judgment should be granted because plaintiff’s claims of defective design are preempted by federal law that governs electrical circuit design in automobiles.” Open the third segment with: “In the next few minutes, we explain why you should order summary judgment because plaintiff failed to comply with the three-year statute of limitations that governs wrongful death.”

In the scene from *Class Action*, plaintiff’s counsel ends his argument just as succinctly as he began it. Having obtained the concession from defense counsel that the defendant will provide the names of former employees, the plaintiff still needs the employees’ addresses. Mr. Ward concludes by saying, “I want those addresses.”

LESSON TWO: *Finish each argument by telling the judge or jury what you want.*

COROLLARY TO LESSON TWO: *End each segment of an argument by saying what you want.*

For example, end a segment of the oral argument of a motion for summary judgment by saying, “Summary judgment should therefore be granted because plaintiff’s claim is preempted, leaving no claim.”

These two lessons rely on the rules of primacy and recency in obtaining a result. But there is something else: They also rely on simplicity and directness. *Class Action* teaches lawyers to leave the lawyer talk at home and speak simply and directly.

Class Action’s discovery motion illustrates a third tactic for successful oral argument. Apparently confident of an opportunity to respond, Mr. Ward does not immediately argue that he found it easy

to obtain the names and addresses of former Argo employees. Rather, he bides his time and holds those facts for rebuttal. Thus, he permits defense counsel to trap herself in her own argument and strengthens his own argument by sharply rebutting Argo's assertions and credibility.

LESSON THREE: *When possible, keep a derivative argument or fact in reserve for rebuttal.*

The held-back arguments or facts must be derivative, not wholly new to the argument. Holding back new facts is sandbagging and is not acceptable because, apart from the un-professionalism of raising wholly new arguments or facts in rebuttal, counsel risks undermining the long-term confidence of the court by sandbagging an opponent. But if the argument or facts are derivative – *i.e.*, if they add to or explain something that was raised by an opponent – the chances of successful rebuttal are increased.

This discovery motion also raises ethical issues. Argo's counsel initially argues that the discovery request is burdensome, requiring "thousands of hours" for compliance. But the judge looks skeptically at Argo's counsel and she acquiesces and agrees to supply a list of names. Plaintiff's counsel is not content with this concession, however, and tells the judge that he contacted an employee at Argo's pension department and requested the address of a certain John Smith.

One ethical issue raised by this scene is whether plaintiff's counsel was permitted to contact an employee of the defendant in the litigation. This and other ethical issues are analyzed under the American Bar Association's Model Rules of Professional Conduct ("Rule"). All ethical Rule citations in this study guide refer to those rules. The pertinent state's rules should be consulted for guidance on particular ethical issues, of course.

American Bar Association Model Rule of Professional Conduct 4.2 forbids a lawyer from communicating about the subject of the representation with a person the lawyer knows is represented by another lawyer in the matter. The Comment to Rule 4.2 explains that when that person is an organization, Rule 4.2 prohibits:

communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Rule 4.2, Comment [7].

Contact with a person who supervises, directs or regularly consults with the organization's lawyer concerning the matter is thus prohibited. In addition, communicating with a person who has the authority to obligate the organization regarding the matter or with a person whose act or omission may impute civil or criminal liability to the organization is prohibited. Because Mr. Ward contacted a low-level clerical employee who apparently did not have authority to obligate the corporation with respect to the matter, he did not violate Rule 4.2.

LESSON FOUR: *The job position of the employee and the content of the communication must be considered before communicating ex parte with a current employee of an adverse corporation.*

Although not a concern in the movie clip, the question often arises as to whether contact is permitted with former employees of a corporation. Rule 4.2, Comment [7] states that “[c]onsent of the organization's lawyer is not required for communication with a former constituent.” For a state-by-state analysis of this issue, see *Ex Parte Contacts with Former Employees* (John M. Barkett ed., ABA Section of Litigation 2002).

Even if contact is permitted, any contact with a current or former employee of an adverse corporation is limited by Rule 4.4, which prohibits a lawyer from using “means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights” of the person from whom evidence is sought. To that end, a lawyer should not ask questions solely for the purpose of harassing or embarrassing a person. In addition, the lawyer may not seek disclosure of

information that is protected by the attorney-client privilege.

A second ethical issue is whether Argo's counsel violated any duties in objecting to the production of addresses of employees as burdensome when, as became apparent later in the argument, it would be easy to provide the addresses.

The Model Rules prescribe that “[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal. . . .” Rule 3.3(a)(1). The Comment goes on:

[A]n assertion purporting to be on the lawyer's own knowledge, as in . . . a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.

Rule 3.3, Comment [3].

Argo's counsel was thus obligated to make a reasonably diligent inquiry into how long it would take to comply with plaintiff's discovery request before representing to the court that it was burdensome. If plaintiff's counsel was correct in arguing that it was simple to comply with the discovery request, Ms. Ward violated Rule 3.3 by making a statement to the tribunal that a reasonably diligent inquiry would have revealed to be false.

Moreover, Rule 3.4(d) states in relevant part that “[a] lawyer shall not . . . in pretrial procedure . . . fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.” Ms. Ward apparently violated Rule 3.4(d) by failing to comply with a reasonable discovery request.

Note that an attorney who fails to make a reasonably diligent effort to comply with proper discovery requests may be found guilty of dilatory practices in violation of Rule 3.2 (“A lawyer shall make reasonable efforts to expedite litigation . . .”).

LESSON FIVE: *Objections and factual statements made in response to discovery requests must be based on a reasonably diligent inquiry by counsel.*

There is a third ethical issue raised in this scene: What obligation was the plaintiff's counsel under to tell the truth when the defendant corporation's employee asked him if he had worked with John Smith at defendant corporation?

Rule 4.1(a) provides that "a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person." Rule 8.4(c) adds that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Comment [1] to Rule 4.1 explains: "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts." Thus, unless Mr. Ward actually had a friend named John Smith who worked at Argo, he violated the rules by being dishonest and making a misrepresentation.

In addition, Mr. Ward apparently violated Rule 4.3 during his conversation with the pension clerk. Rule 4.3 prohibits an attorney communicating with an unrepresented person on behalf of a client from stating or even implying to the unrepresented person that the lawyer is disinterested. This rule further requires that when the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, "the lawyer shall make reasonable efforts to correct the misunderstanding." In the movie clip, by misrepresenting his identity as well as the reason for his inquiry, Mr. Ward portrayed himself to the Argo employee as a completely disinterested person. He made no effort to correct this misunderstanding and, in fact, perpetuated it. Here, Mr. Ward's conduct violated Rule 4.3.

LESSON SIX: *Tell the truth.*

3. OPENING STATEMENT

Nothing works as consistently well in an opening statement as telling a story from your client's point of view. The master lawyer

uses explicit facts to give the story substance and holds the listener's interest along the way.

My Cousin Vinny, a wonderful 1992 comedy from Twentieth Century Fox, contains one of Hollywood's very best examples of telling a story in an opening statement. This movie features Joe Pesci, Marisa Tomei, and Lane Smith. Tomei won an Academy Award for Best Supporting Actress for her role in this movie.

In the movie, New Yorkers Bill Gambini and Stanley Rothenstein are driving through Wahzoo City, Alabama, when they stop to pick up snacks at a convenience store. After they leave the store, it is held up, the clerk is murdered, and Gambini and Rothenstein are charged with murder in the first degree and accessory to murder, respectively.

The prosecutor, played by Lane Smith, delivers the following as part of his opening statement to the jury.

PROSECUTOR: Your Honor, counsel members of the jury, the evidence in this case is gonna show that at 9:30 in the morning of January 4th both defendants, Stanley Rothenstein and William Gambini, were seen getting out of their metallic green 1964 Buick Skylark convertible with a white top. The evidence is gonna show that they were seen entering the Sack of Suds convenience store in Wahzoo City. The evidence is gonna show that minutes after they entered the Sack of Suds a gunshot was heard by three eyewitnesses.

You gonna then hear the testimony of the three eye-witnesses who saw the defendants running out of the Sack of Suds a moment after the shots were heard – getting into their faded metallic green 1964 Buick Skylark and driving off with great haste.

Finally, the State is gonna prove that the defendants, Gambini and Rothenstein, admitted, then recanted, their testimony to the sheriff of Beecham County. . . .

Now, we gonna be askin' you to return a verdict of murder in the first degree for William Gambini and a verdict of accessory to murder in the first degree for Stanley Rothenstein for helping Gambini commit this heinous crime.

As an exercise, go back and underscore each fact the prosecutor relies on in his opening. See how the underscoring dominates the opening?

LESSON SEVEN: *The strength of an opening relies on the use of facts.*

But Dale Launer, the screenwriter, goes beyond just using facts. He gives us the following lesson:

LESSON EIGHT: *Strengthen the impact of the facts by packaging them into memorable phrases, and repeat those phrases.*

The prosecutor said:

- (1) At 9:30 in the morning of January 4th both defendants, Stanley Rothenstein and William Gambini, were seen getting out of their metallic green 1964 Buick Skylark convertible with a white top.
- (2) Minutes after they entered the Sack of Suds a gunshot was heard by three eyewitnesses.
- (3) Three eyewitnesses . . . saw the defendants running out of the Sack of Suds a moment after the shots were heard—getting into their faded metallic green 1964 Buick Skylark and driving off with great haste.

The writer linked sentence 1 to sentence 3 by packaging and repeating “metallic green 1964 Buick Skylark” in sentence 3. He also linked sentence 2 to sentence 3 by repeating “three eyewitnesses” in sentence 3. That repetition adds impact.

Actor Lane Smith also punctuates the content of his opening by delivering it in a visually compelling manner. Pick up this movie and watch and rewatch the scene. Mr. Smith grabs and keeps the jury’s interest by:

- Holding up photographs of the scene of the crime while saying “The evidence is gonna show that”
- Pointing to the defendants, Rothenstein and Gambini, when he first identifies them to the jury.
- Pointing for emphasis when he says “with a white top.”
- Varying the volume and speed of his voice.
- Maintaining eye contact with the jury.
- Moving about the courtroom.
- Concluding the opening by clearly setting forth how he wants the jury to decide.

Yes, it helps to hear a clap of thunder at a dramatic moment in one’s opening, but Mr. Smith delivers the opening in a manner worth studying and borrowing. Also note the brevity of this opening statement. The screenwriter undoubtedly tailored the length so that it would have a dramatic effect on the movie audience. Given the risk of a short attention span by a juror, it makes good sense to develop the mindset of a screenwriter.

4. EXAMINATION OF WITNESSES

The direct examination of witnesses at trial is an art. It is arguably more difficult than cross-examination and its importance is probably underestimated more often than that of other trial skills.

Judgment at Nuremberg, a 1961 MGM/United Artists movie, provides an excellent illustration of effective direct examination. This movie is based on the second set of Nuremberg trials in 1948, in which German judges were charged with crimes against humanity for applying laws that were used to persecute and kill people because of their political beliefs, race, or religion. In the movie, four judges are tried. The story focuses on the prosecution of Ernst Janning, one of the four judges. Janning is a fictional composite of several defendants at the historic trial. He is portrayed as a judge, well-known law professor, prolific writer of law books, and a drafter of the Weimar Constitution. Janning refuses to enter a plea at the trial or testify on his own behalf because he does not recognize the jurisdiction of the court.

Judgment at Nuremberg was one of the celebrated movies of 1961. It starred Spencer Tracy, Burt Lancaster, Richard Widmark, Marlene Dietrich, Maximilian Schell, Judy Garland, Montgomery Clift, and William Shatner. It and its actors received six Academy Award nominations, with Maximilian Schell winning the Academy Award for Best Actor and Abby Mann winning for Best Screenplay.

The prosecutor, played by Richard Widmark, examines Dr. Wieck, a former German judge, with the following questions:

PROSECUTOR: Dr. Wieck, you know the defendant, Ernst Janning?

Will you tell us in what capacity?

Did you know him before that?

Did you know him well?

What he a protégé of yours?

Why?

Dr. Wieck, would you tell us from your own experience the position of the judge in Germany prior to the advent of Adolf Hitler?

Now, would you describe the contrast, if any, after the coming to power of National Socialism in 1933.

These questions provide a beautiful model for direct examination. The first six questions are short and simple. The preliminary foundation questions (“Do you know the defendant?”; “Did you know him before that?”; “Did you know him well?”; and “Was he a protégé of yours?”) are permissibly leading and require no more than a yes-or-no answer. Each succeeding question follows up on the prior answer. The questions follow a logical order.

The seventh question provides a break in the sequence, moving from short questions to a longer question that invites a narrative. By changing the pace, the prosecutor renews the attention and interest of the fact finders. The last question in this sequence continues the narrative form. Later in the direct examination, the prosecutor shifts back to permissible leading questions. The writer knew a basic truth: Repeating the same style and form of question, over and over again, becomes dull to listeners.

LESSON NINE: *To maintain the jury’s interest during direct examination, shift back and forth between permissible leading questions and nonleading questions.*

The scene also illustrates a fundamental precept on direct examination: The witness is the star. The questions, like the lawyer, blend into the background.

No matter whether the task is direct examination or cross-examination, a principal challenge for the examiner is knowing when to stop. The prosecutor in the 1947 Twentieth Century Fox movie *Miracle on 34th Street* has it down pat.

In that classic film, a man named Kris Kringle is hired by Macy’s Department Store on 34th Street in New York City to play Santa Claus in its annual Thanksgiving Day parade. Kringle is then hired to be the in-store Santa at Macy’s. Actor Edmund Gwenn won the Academy Award as Best Supporting Actor for his role as Kris

Kringle in this movie. The movie won Academy Awards for Best Screenplay and Best Original Story, and was nominated for Best Picture.

Kringle believes that he actually is Santa Claus, and the Macy's store psychologist wants him committed. At a pretrial commitment hearing, the prosecutor asks the following:

PROSECUTOR: What is your name?

KRINGLE: Kris Kringle

PROSECUTOR: Where do you live?

KRINGLE: That's what this hearing will decide.

[Laughter]

JUDGE: A very sound answer, Mr. Kringle.

PROSECUTOR: Do you believe that you're Santa Claus?

KRINGLE: Of course.

PROSECUTOR: The State rests, your Honor.

LESSON TEN: *After obtaining the answer you want, stop.*

Another challenge is cross-examination of a witness who is sympathetic to the jury. That witness might be the victim of a crime, a widow or widower who seeks to recover for a spouse's wrongful death, or a child. Cross-examination of a sympathetic witness was the task of the defense counsel in *The Accused*, a 1988 Paramount Pictures movie.

The Accused was inspired by the assault of a New Bedford, Massachusetts, woman who was gang-raped on a pool table. In the movie, the three men who raped character Sarah Tobias pled guilty. On trial are three other men who egged on the assaulters and are charged with aiding and abetting a crime. In the following scene, the

defense attorney, played by Scott Paulin, cross-examines the victim, played by Jodie Foster. Ms. Foster won the Academy Award for Best Actress for her work in this movie.

DEFENSE: Ms. Tobias, my name is Ben Wainwright. Now I know this isn't easy for you, so I'm gonna ask you only a handful of questions. Now, you have testified that all the men present were strangers to you. And you've also testified that while you were on the pinball machine that you mostly kept your eyes closed. Is that right – your eyes were closed?

TOBIAS: Yes. Sometimes.

DEFENSE: Is it fair to say that you can't tell us who applauded or who shouted? Is that fair?

TOBIAS: Well, I –

DEFENSE: Okay, is it possible that only one person shouted?

TOBIAS: No. There were different voices.

DEFENSE: So, at least two then? Could it have been only two?

TOBIAS: No. They overlapped.

DEFENSE: Ms. Tobias, you testified that you were assaulted by three men. Is that right?

TOBIAS: Yes.

DEFENSE: Okay. Is it possible – and I'm just saying possible – that the only ones who shouted were among your assaulters?

TOBIAS: No. No. The voices were coming from further away.

DEFENSE: Okay. Ms. Tobias, you had had several drinks. You had smoked marijuana. The TV was playing. The jukebox was playing. You were in a room full of noisy video games and pinball machines. You had your eyes closed – sometimes – and you were being assaulted. Now, given these conditions, can you truly say how many voices you heard and where those voices were coming from?

TOBIAS: No.

DEFENSE: Is it fair to say, then, that you can't tell us who applauded or who shouted? Is that fair?

TOBIAS: Yes. That's fair.

DEFENSE: Okay. Thank you.

Counsel employs many exquisite techniques in this cross-examination.

First, the defense attorney uses a soft, respectful style. That style is the product of the skill of the writer, the director, and the actor. The key is his soft, restrained voice and the respectful manner in which he asks the questions.

Second, he opens the door to reasonable doubt, asking "Is it possible" His soft style and simple questions increase the attorney's likelihood of obtaining the answers he wants.

Third, he cross-examines without documents, depositions, or statements. While any of those pieces of evidence could be of assistance, the attorney's logic and planning make the day in this scene.

Fourth, while maintaining a soft style, counsel uses leading questions to keep Ms. Tobias's answers short and under his control. By doing so, he becomes the star of the scene. In contrast, consider the expansive narrative answers of Dr. Wieck in response to the prosecutor's questions in *Judgment at Nuremberg*. Notice just how invisible Richard Widmark, who plays the prosecutor, becomes during his direct examination of Dr. Wieck.

Another well-constructed scene of cross-examination is that of eyewitness Kramer in *My Cousin Vinny*. In that scene, defense attorney Vinny Gambini, played by Joe Pesci, cross-examines eyewitness Kramer. Kramer has just testified on direct that he saw the two defendants run to a green convertible automobile from the convenience store in which the clerk was murdered. Defense counsel shows Kramer photograph after photograph that counsel took at the scene after he interviewed Kramer. Through incremental questioning, defense counsel establishes that Kramer had to look through a dirty window, an encrusted screen, trees with leaves, and seven bushes to catch a glimpse of whoever left the store.

That scene shows how to effectively use photographic exhibits effectively to cross-examine a witness. It also shows something else: The prosecutor failed to thoroughly investigate his own witness and thus failed to prepare for the coming attack.

LESSON ELEVEN: *Thoroughly investigate your own clients and witnesses.*

COROLLARY TO LESSON ELEVEN: *Your opponents have most likely failed to thoroughly investigate their own clients and witnesses.*

5. WITNESS PREPARATION

An interesting example of witness preparation is found in *The Verdict*, a 1982 Twentieth Century Fox movie. In this movie, Paul Newman plays plaintiff's attorney. He represents a woman who he claims was given the wrong anesthesia and who, as a result, slipped into a permanent coma. He names the hospital and the anesthesiologist, Dr. Towler, as defendants in medical malpractice claims. This movie received Academy Award nominations for Best

Picture, Best Actor (Paul Newman), Best Supporting Actor (James Mason), Best Director, and Best Screenplay.

In a scene from *The Verdict*, the defense attorney, played by James Mason, prepares Dr. Towler for trial testimony. The preparation takes the form of courtroom role-playing in counsel's office. Defense counsel practices direct examination with Dr. Towler about his patient, plaintiff Deborah Ann Kaye.

COUNSEL: What is your name, please?

TOWLER: Dr. Robert Towler.

COUNSEL: You were Deborah Ann Kaye's doctor?

TOWLER: No. Actually, she was referred to me. She was Dr. Hangman's patient.

COUNSEL: Don't equivocate. Be positive. Just tell the truth. Whatever the truth is, just tell that. You were her doctor?

TOWLER: Yes.

COUNSEL: Say it.

TOWLER: I was her doctor.

COUNSEL: You were her anesthesiologist at the delivery on May the 12th, 1976?

TOWLER: Well, I was one of a group of medical...

COUNSEL: Now answer affirmatively and simply, please. And try to keep your answers down to three words. You were not part of a group. You were her anesthesiologist. Isn't that so?

TOWLER: Yes.

COUNSEL: You were there to help Dr. Marks deliver the child?

TOWLER: Yes

COUNSEL: Why wasn't she getting oxygen?

TOWLER: Well, many reasons really.

COUNSEL: Tell me one.

TOWLER: She'd aspirated vomitus into her mask.

COUNSEL: She'd thrown up in her mask... Just say it. She threw up in her mask.

TOWLER: She threw up in her mask.

COUNSEL: Therefore, she wasn't getting any oxygen and her heart stopped?

TOWLER: That's right.

COUNSEL: And what did your team do then?

TOWLER: Well...

COUNSEL: You brought 30 years of medical experience to bear, isn't that what you did? And...

TOWLER: Yes!

COUNSEL: A patient riddled with complications, with questionable information on her medical charts...

TOWLER: We did everything we could.

COUNSEL: To save her and to save the child?

TOWLER: Yes!

COUNSEL: You reached down into death...

TOWLER: My God, we tried to save her! You can't know! You can't know!

COUNSEL: [Laughing and patting Dr. Towler on the cheek] Good! Good! Now tell us.

This scene raises three rules of ethics.

First, according to Rule 1.1 of the Model Rules, a lawyer has an ethical duty to provide competent representation. Competence requires inquiry into the factual and legal elements of the case, as well as use of methods equivalent to those of other competent practitioners. "It also includes adequate preparation." Rule 1.1, Comment [5].

Second, Rule 1.3 requires attorneys to represent their clients with reasonable diligence. "A lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Rule 1.3, Comment [1].

Finally, Rule 3.3 requires attorneys to be candid with the court. False statements of fact or law by a lawyer are specifically prohibited, as is offering evidence that the attorney knows to be false. Rule 3.3(a)(1) and (3).

Thus, if the defense attorney in *The Verdict* had not prepared his client and participated in this role-playing, he might have violated the rules requiring diligence and competence. But, the attorney "tells" the doctor what to say regarding the death of the patient. Because the attorney's suggested comments are apparently thoughts originally professed by the doctor, there appears to be no violation. But if the attorney is suggesting that the doctor testify as fact something he does not actually know, even if true, he is violating the rules.

LESSON TWELVE: *The attorney may never suggest new facts to the witness.*

It goes without saying, of course, but will be said anyway: An attorney may also never suggest to a witness or client that he or she testify to anything other than the truth.

For another interesting scene that raises some of these same ethical issues, view *Anatomy of a Murder*, a 1959 drama from Columbia Pictures. James Stewart plays defense counsel to defendant Frederick Manion, played by Ben Gazzara. Manion is accused of murdering a hotel owner, and defense counsel helps suggest to Manion that he had an irresistible impulse to kill the hotel owner as the result of his belief that the man had raped Manion's wife. If so, Manion is legally insane and not guilty by reason of insanity. *Anatomy of a Murder* stars Stewart, Gazzara, Lee Remick, and George C. Scott and is well worth viewing, not only for testing of the ethical issues of this scene, but also for the terrific trial work of Stewart and Scott.

6. INSTRUCTIONS FROM THE CLIENT

An important question for the trial lawyer is which instructions from a client must be followed in trial of the client's case.

An example of this problem is depicted in a scene from *Inherit the Wind*. This 1960 movie from MGM/United Artists won four Academy Award nominations. It is based on the famous 1925 Scopes "monkey trial" in Dayton, Tennessee. In the actual trial, teacher John Scopes was charged with violating a Tennessee statute that made it unlawful to teach any theory that denied the story of the Divine creation of man as taught in the Bible and to teach instead that man and woman have descended from a lower order of animals.

In this filmed version of the clash between religion and science in the public schools, teacher Bert Cates has been charged with violating Tennessee law by teaching evolution in his high school biology class. Defense counsel Henry Drummond, played by Spencer Tracy, resembles Clarence Darrow, and prosecutor Matthew Harrison Brady, played by Fredric March, resembles William Jennings Bryan – the actual attorneys in the historic case.

In a fictional scene from *Inherit the Wind*, the judge, played by Harry Morgan, asks whether the defense wishes to cross-examine defendant's fiancée. (For dramatic tension, the wholly fictional character of the fiancée is said to be the daughter of the town's minister.) Drummond prepares to do so, but his client instructs him not to. Taken aback by the instruction, Drummond attempts to explain to the defendant the advantages of conducting the cross-examination and the harm to his case that could be done if the cross-examination is dropped. The defendant ends all discussion by declaring his intent to change his plea to guilty if his counsel does not follow his instruction and abandon the cross-examination.

Rule 1.2 of the Model Rules of Professional Conduct states that a lawyer must abide by the client's decisions regarding the objectives of the representation and must consult with the client as to the means by which the objectives are to be pursued. Thus, Rule 1.2 requires that a lawyer must abide by the client's decision to accept or reject an offer of settlement in civil cases or to plead "innocent" or "guilty" in criminal cases. Comment [2] to Rule 1.2 recognizes that a lawyer and client may disagree about the means to accomplish the client's objectives, and states that "[c]lients normally defer to the special knowledge and skill of their lawyer. . . with respect to technical, legal and tactical matters," and that "lawyers usually defer to the client regarding. . . concern for third persons who might be adversely affected." The comment does not provide guidance on how to resolve these types of disagreements, but suggests that the lawyer should attempt a "mutually acceptable resolution" with the client, and if that is unsuccessful, the attorney-client relationship can be terminated by either person. Rule 1.2, Comment [2].

Applying these rules, Drummond had several alternatives from which to choose.

One alternative was to proceed to cross-examine the fiancée, despite his client's instruction to the contrary. But, because Cates's concern for his fiancée involved a tactical issue that might have adversely affected a third party, the comments to the rule provides that Drummond, as an attorney, would "usually defer" to the client's instruction. *See* Rule 1.2, Comment [2].

A second alternative, which is the path Drummond chose, was to waive cross-examination of the fiancée. Rule 1.3 requires diligence by Drummond, but not that he press for every advantage. *See* Rule 1.3, Comment [1]. Thus, so long as Drummond was justified in concluding that he could diligently represent Cates without cross-examining the fiancée, Drummond could properly waive the cross-examination.

A third alternative, not reached in the movie, was for Drummond to withdraw as Cates’s counsel. Two rules provide guidance on withdrawal. Rule 1.16(a)(1) is a rule of mandatory withdrawal. It requires withdrawal if “the representation will result in violation of the rules of professional conduct” Accepting that Drummond could continue to represent Cates with reasonable diligence, *see* Rule 1.3, and not cross-examine the fiancée, withdrawal was not required. Rule 1.16(b) is a rule of permissive withdrawal. It provides that a lawyer may withdraw from representing a client if the client “insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.” Rule 1.16(b)(4). Even if Drummond had concluded that his client’s instruction constituted a “repugnant” objective or had a fundamental disagreement with it, withdrawal during trial would apparently have materially prejudiced Cates’s defense.

In sum, Drummond made the correct choice in deferring to Cates’s instruction not to cross-examine the fiancée. This should come as no surprise, really, since the fictional Drummond is modeled upon the great Clarence Darrow and played by Spencer Tracey. But no matter what alternative Drummond chose, he would have been well-advised to make a complete and permanent record of his discussions with his client.

7. CLOSING ARGUMENT

An eloquent example of a closing argument may be seen in *To Kill a Mockingbird*, a 1962 Universal Studios movie.

An adaptation of Harper Lee’s Pulitzer Prize-winning novel, this classic movie tells the story of a trial in a small Southern town. In the movie, a black man, Tom Robinson, is charged with raping a white woman, Mayella Ewell. Ewell testifies at trial that she asked

Robinson to come to her house to help out with some chores and that while he was there, Robinson attacked her. Her testimony is supported by testimony of her father, who says that when he came home, he found Robinson on top of his daughter.

Gregory Peck plays the defense counsel, Atticus Finch. Other stars are Mary Badham as Finch's daughter, Brock Peters as Robinson, and Robert Duvall as neighborhood resident Boo Radley. *To Kill a Mockingbird* won Academy Awards for Best Screenplay and Best Direction/Set Decoration, and Peck won Best Actor for his work in this movie. The movie also received Academy Award nominations in five other categories.

Finch's memorable closing in the movie, which differs little from the text of the novel, includes:

FINCH: The State has not produced one iota of medical evidence that the crime Tom Robinson is charged with ever took place.

It has relied, instead, upon the testimony of two witnesses whose evidence has not only been called into serious question on cross-examination but has been flatly contradicted by the defendant. There is circumstantial evidence to indicate that Mayella Ewell was beaten—savagely—by someone who led, most exclusively, with his left. And Tom Robinson now sits before you, having taken the oath with the only good hand he possesses—his right.

I have nothing but pity in my heart for the chief witness for the State. She is the victim of cruel poverty and ignorance. But my pity does not extend so far as to her putting a man's life at stake, which she has done in an effort to get rid of her own guilt. Now, I say guilty, gentlemen, because it was guilt that motivated her. She's committed no crime. She has merely broken a rigid and time-

honored code of our society—a code so severe that whoever breaks it is hounded from our midst as unfit to live with. She must destroy the evidence of her offense. But what was the evidence of her offense? Tom Robinson—a human being. She must put Tom Robinson away from her. . . .

The witnesses for the State, with the exception of the sheriff of Maycomb County, represented themselves to you, gentlemen—to this court—in a cynical confidence that their testimony would not be doubted—confident that you, gentlemen, would go along with them on the assumption—the evil assumption that all Negroes lie, that all Negroes are basically immoral beings, all Negro men are not to be trusted around our women—an assumption that one associates with minds of their caliber and which is in itself, gentlemen, a lie—which I do not need to point out to you . . . Now I am confident that you gentlemen will review without passion the evidence that you have heard, come to a decision, and restore this man to his family.

In the name of God, do your duty.

In the name of God, believe Tom Robinson.

Mr. Finch thus addresses the core issue of the case without flinching: whether a black man's testimony will be believed by this all-white jury. Finch directly argues the issue, even arguing that the prosecutor's witnesses rely on the "cynical confidence" that they would not be doubted because they are white. That is a lesson worth noting.

LESSON THIRTEEN: *Argue the essential, hard issues in a case.*

In defending a large corporation in a breach of contract case, an essential, hard issue is whether the corporation is liable because it is large or apparently has the money to pay. Every case has hard issues. The master trial attorney will find and argue them.

Also notice that Peck's delivery of those lines adds to the power. Replay the scene a few times and watch his delivery. He takes his time, speaking slowly. He pauses for effect. He varies the pitch of his voice, and he moves around the courtroom, even facing away from the jury to give them a bit of relief from his argument. He retells the facts of the case, mixing them with his argument. He impresses upon the jurors their duty and gives the jury the opportunity to abandon social mores and render a decision that is right, even if unpopular.

Another excellent closing argument is presented by actor Harrison Ford in *Presumed Innocent*. In that 1990 Warner/Mirage murder movie, Ford plays Rusty Sabich, a chief deputy district attorney. Midway into the movie, Sabich delivers a closing argument in a child abuse case that is worth playing and revisiting.

8. CONCLUSION

I'm not Gregory Peck. I can't be Gregory Peck. But I – and you – can borrow a few of his techniques with success. We can take our time when we talk, we can pause for effect, and we can present ourselves and represent our clients with dignity and grace.

LESSON FOURTEEN: *You don't have to be Gregory Peck to succeed.*

After all, Gregory Peck in *To Kill a Mockingbird* lost his case, and Joe Pesci in *My Cousin Vinny* won his.

SOME SUGGESTED READING

- ★ David Ball, *Theater Tips and Strategies for Jury Trials* (Nat'l Inst. for Trial Advoc. 1994)
- ★ Susan Becker, *Discovery from Current and Former Employees* (American Bar Association 2005)
- ★ Paul Bergman & Michael Asimow, *Reel Justice: The Courtroom Goes to the Movies* (Universal Press Syndicate Co. 1996)
- ★ Sidney Lumet, *Making Movies* (First Vintage Books Edition Mar. 1996)