

Fall 1993

Keynote Address (Improving Communications in the Courtroom Symposium)

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Recommended Citation

Saylor, Robert N. (1993) "Keynote Address (Improving Communications in the Courtroom Symposium)," *Indiana Law Journal*: Vol. 68 : Iss. 4 , Article 5.

Available at: <https://www.repository.law.indiana.edu/ilj/vol68/iss4/5>

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Keynote Address

ROBERT N. SAYLER, ESQ.*

Thank you for having me. The discussion this morning about miscommunication between judges and juries gives me a perfect excuse to tell my favorite story about that subject, and it happens to be a true one.

It was in the beginning of the nineteenth century in South Wales. A jury heard a case about a man accused of stealing cows—a highly regarded, well-respected man in the community. The case was heard, and the defendant put on his case, stating, “I don’t like cows, I don’t have any cows, I have never seen those cows, I didn’t do it.” My lord charged the jury, “You have heard the evidence. Go decide if the man stole the cows or not. Let me know when you are ready with a verdict.” Well, they did that an hour later. The lord asked, “Do you have a verdict?” The jury replied, “Yes, my lord, we do.” “Well,” the lord said, “give it to us.” The foreman declared, “We find the defendant not guilty, but he has to give the cows back.”

Well, the judge exploded. “You swore to the Queen that you would faithfully apply the law, and now you come in with a verdict that is preposterous on its face. It is a nonsense verdict. I won’t accept it. Go back. Deliberate some more.” Well, the jury did exactly that. They came back half an hour later. My lord asked the foreman, “Do you have a verdict?” “Yup, I’ve got a verdict.” “Good verdict this time?” “Yup, good verdict this time.” “Tell me what the verdict is.” The foreman declared, “We find the defendant not guilty, my lord—and he doesn’t have to give the cows back.”

(Laughter.)

I am going to get at my subject, effective communication with juries, exactly backwards. I am going to speak from a thesis that a lot of trial lawyers seriously and disastrously miscommunicate with juries. How can that be? These people make their living trying cases. I thought about that. I think the answer is that a lot of trial lawyers, certainly not all, proceed on the basis of a widely shared set of misperceptions about what makes juries tick. Most of these misperceptions are not written down anywhere; they are passed by word of mouth. I think they are all wrong. I think they shape, though, the way that lawyers try to communicate with juries, and at the end of the day, like the proverbial ships, they pass in the dark. That is my thesis.

Here is my list of the pernicious perceptions that I say affect a lot of trial lawyer-jury communication.

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(1) In communicating with the jury, pay no attention to whether they like you or respect you. It doesn't matter whether they do or not, and a trial lawyer cannot make a juror like them anyway. Nobody likes trial lawyers.

(2) Civility, courtesy, and calm ill-befit the true lawyer. Juries come to see war between warriors, they want to see combatants. All that other stuff is for wimps.

(3) First and foremost, juries want to be, expect to be, and need to be entertained.

(4) Juries tend to come to lightning-quick judgments most of the time. By the end of voir dire and opening statements, so it is said, most jurors have decided what they're going to do.

(5) Jurors are fundamentally driven by emotion. They like having their emotions played to, and they will credit the lawyer and the witnesses who reveal a lot of their own emotion. That's a real good thing. It gets you a lot of points.

(6) When it comes to evaluating the credibility of lawyers and witnesses, juries exalt the style of the presentation over the power of the evidence itself.

(7) Juries love the extemporaneous. So, whatever you do, don't over-prepare yourself or your witnesses—it might sound canned.

(8) And finally, don't worry much about the judge. The judge can't hurt you. After all, we're going right to the jury, right around him, over his head, whatever it takes. Don't worry about it.

I have two disclaimers before I "have at" these common misperceptions. One, there are an awful lot of good trial lawyers out there who don't swallow any of that, certainly not all of it. And two, as you can tell from this morning's discussion, I cannot possibly stand here—nobody can stand up here—and objectively prove that these propositions are wrong. By and large, the communication between lawyer and jury is a one-way street. We talk a lot. All we get back is a verdict. We can do a lot of simulations and we can do a lot of post-verdict interviewing to try to get behind verdicts, but it's a very imperfect and undocumented science. So most of us are guessing. But it has led to perceptions and actions based on principles like the ones I just read.

Let me just say a few words about why I think each one of these perceptions is wrong.

* Let's start with the first myth: It doesn't matter if the jury likes you. I mean "like" in the broadest sense: someone respects your judgment and your common sense and generally feels that you're the kind of person he would like to meet at a cocktail party. A lawyer was quoted not long ago in the

American Bar Association Journal as stating, "In personal relationships, I do care very much if people like me [But trial] is not a personality contest. You're not in this to be liked. In this context I really don't care."¹ Others have said much the same thing.

There are two premises at work here. One is that jurors are not going to like trial lawyers no matter what. And two is that it doesn't matter. Both premises are wrong. Jurors can be made to like trial lawyers. Recent studies, the Metricus study,² for example, disturbingly reveal that two-thirds of potential jurors believe trial lawyers will lie to them. But read on in the study. The potential jurors were asked, "But what do you think about your own lawyer?" The answer? They like them—they like their own lawyer. Micro, they like lawyers; macro, they say they don't.

Paradoxically, it works to your advantage to have a jury come to court thinking they don't like trial lawyers, because when a light goes on and they finally say—"Holy cow, this is a nice guy, this guy is not sleazy"—there is a boomerang effect, a trampoline effect, and you profit from it. And it is very easy to profit from it and make a juror like you if opposing counsel is mean-spirited, sleazy, and Rambo.

Then you've got a big morality play going on between the goods and the bads, and it can matter. Can I prove with a computer that it matters when jurors like trial lawyers? No, once again, I cannot do it, but you all know it from common experience. In any form of persuasion, from the pulpit to sales to public relations, it matters that you like the message giver. You will buy from the message giver you like. You will marry the message giver you like. You are moved by liking people.

Try it. Think about your own colleagues in your own business setting. If the exact same message is brought to you by a person whose values you trust and whom you believe is a straight shooter and not on emotional jags all the time, and another message is brought an hour later from the opposite sort, who are you going to believe? You are going to believe the first one. Trial lawyers are not acting on the basis of that.

How do you do it? How do you make a jury like you? I say it's easy. Allow your desirable, attractive human qualities to come out. Take them to court with you. Don't try to trample on whatever it is that makes you powerful and effective. Whether it's your basic common decency, your warmth, or your humor, look for ways to be yourself rather than to trample your basic self. That's all there is to it.

1. Stephanie B. Goldberg, *Playing Hardball*, A.B.A. J., July 1, 1987, at 50.

2. See Donna Gill & Ed Finkel, *People: Split Creates New Firm*, CHICAGO LAW., April 1992, at

* The second perception is closely tied to the first—I want to see a warrior, I want to see a fight. Now, this means that trial lawyers should always be pretty tough in cross-examination, sometimes mean. This means they should always project to the jury that the lawyer on the other side is a scumbag. He's a terrible fellow Yell at him a little bit. That's what Rambos do in court. I have written an article all about Rambo, warrior techniques.³ I won't go through the case, but it comes down to three big flaws.

First of all, it's a credibility smasher to always be on the attack. Why? Juries will not believe that every witness is a liar. Juries will not always believe that opposing counsel is a sleaze ball. But if you're projecting that all the time, if you're always insinuating that everybody out there is a liar and a cheat, they're going to come to identify that with you, the message giver. It will happen every time.

The second problem with the constant Rambo attack is that you are—when Rambo-ing a witness on the other side, when being mean to that person and every other witness on the other side—at that moment foregoing your *best* opportunity to show the attractive human qualities, the fairness that the jury is right at that moment looking for. They don't care how you behave with your witness. They care how you behave with the witness on the other side, and they are waiting to see who you are. If nineteen times in a row, you blast away and scream at them, they are going to form a judgment, a bad one.

Finally and importantly, if you Rambo all the time, you are foregoing one of the most important trial tools a trial lawyer has. There does come a time when a trial lawyer needs to be able to communicate to a jury that a particular witness is now lying. If you Rambo all the time, you have no way to signal them. Yet if you are nice and pleasant and decent most of the time and then for one half hour, "Let's have at it, Mr. Liar," the jurors are all nudging each other. They're saying to themselves, "This lawyer is usually a nice, pleasant fellow Now he's on the attack. We'd better listen, we must have a real liar here." That's the way you do it, and you lose it all if you play Rambo all the time.

* The third misperception has to do with the notion of entertainment. The jurors exist in a television milieu, they want you to entertain them all the time, so you had better do that. You'd better be a Shakespearean actor. The jury box, that's your stage, and you, Mr. Trial Lawyer, you are the star, rather than your client or his cause. It's that notion of the courtroom-theater that leads to the belief that juries must be constantly entertained. There is nothing

3. Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1, 1988, at 78.

wrong with some theater. There is nothing wrong with great demonstrative exhibits. In fact, there is a lot right with great demonstrative exhibits. There is nothing wrong with wonderful speaking power.

The problem, the mischief, is if that becomes *the end*, if that's what the trial lawyer thinks about all the time and then lets his desire for center stage dominate his case—rather than merely a means to persuasion and winning the case. There is the mischief. There are four reasons why constant entertainment is a bad goal. One of them is that the theater, if that's going to be your trump card, eclipses the power of your evidence. You will spend more time working on the drama, and the jury will get preoccupied with your theatrical bouncing around the stage. Second, it does communicate to a jury, particularly if the opposing lawyer is good, that "this guy has an awful lot of theater—so much that he must not have a case." It's easy to dismiss Mr. Constant Theater. Third, it's dangerous. What if a couple jurors don't like your play or don't like your kind of theater? And finally, it grows old. How does that stuff play in week six, the constant bombardment of flash and theater? It doesn't work.

* Next: the thesis that you should worry most about the beginning of the case. Don't worry too much about the middle and the end, because everybody knows that juries decide cases by the end of opening statements. There used to be some statistical evidence that seemed to support that. Well, it was wrong. The statistical evidence now does not support that proposition. In fact, it can show that first impressions don't last. I mentioned at lunch that we did a mock trial last week in Washington. At the end of opening statements, the jurors were fourteen to nothing for the defendant; three hours later, they were fourteen to nothing for the plaintiff—and there were no smoking guns during that three-hour trial. Every single juror flipped just because the defendant didn't put on as good a case as he should have.

Another subset of this proposition is that if you believe you have to win the case early, you go wild on voir dire and argue your case rather than use voir dire merely to exclude bias. It's a big mistake. Judges don't like it, and they will often stop you. Jurors don't like it. The studies show that jurors resent the arguing of the case, the exacting of commitments at this stage. That's what's being shown. But that's what lawyers who buy the premise do. They think: "I have to win this baby in the first hour." They get impatient and they start arguing their case on voir dire.

* Next proposition: preparation kills. That's exactly upside down. Preparation with a witness never kills. There is almost no such thing as an over-prepared witness. Witnesses want to know exactly what's going to happen. They want to know what your questions are going to be. They want to know what the likely questions are going to be on cross. They want to rehearse their answers, and they want to come back the second day and

rehearse them again. Does that produce canned, stilted, stuffy answers? Just the opposite.

A prepared witness relaxes. Physically relaxes. The voice box unlocks as the witness thinks, "I have been through it all. I know the questions I'm going to get, I know my answers, and I've got a good lawyer who has probably asked me sixteen times as many questions as I'm really going to get. I'm comfortable with my answers." That witness is the power witness. That witness relaxes and doesn't come off as canned.

And preparation for the lawyer is even more important. The notion that the trial lawyer who merely scribbles a couple of notes in the cab on the way down before opening statement and closing argument is the winning trial lawyer is bonkers. He's going to have to give a lot more complicated and thoughtful speech the next day to his client to explain what happened when Mr. Yellow Pad did that performance with no thought ahead of time.

* The notion that jurors are more emotional than they are rational—that they will always exalt the style with which evidence is presented over its substance—just doesn't stand up under any statistics or survey that I am aware of. But, boy, do trial lawyers believe it. Of course jurors have emotions. Of course emotions sometimes produce results. And of course style is important. Again, though, the problem with the thesis is that lawyers tend to over-accept it and push it too far.

"Evidence matters most" is the lesson from any study of juror responses ever conducted to my knowledge. It is often said that the three most important things in a trial are evidence, evidence, and evidence. And the trial lawyer can present that in a very powerful way or in a very bad way. But the trial lawyer who doesn't understand that it comes down to evidence is, at the end of the day, going to be the losing lawyer. I never heard a juror say on debriefing, "Gee, I voted for the plaintiff because their charts were the flashiest" or "I voted for the plaintiff because their lawyer bounced around the stage more." They never say that. What they say is, "What troubled me was X" or "What troubled me was Y"

* The final proposition—I kind of let the cat out of the bag in a question this morning to the first panel—is the notion that the trial judge doesn't matter much. "Don't worry about credibility with the trial judge in pretrial or in other confrontations or encounters you have with him. He doesn't matter; we're going to twelve men and women, good and true, at the end of the day." This is just crazy. The trial judge has eighty million ways to hurt you at trial and to let his emotions show. I don't think trial judges often actually roll their eyes when they charge. I do know that trial judges roll their eyes when a closing argument goes for an hour and a half when he thinks it should be done in ten minutes. You see it.

You also see trial judges sustain objections before you can even get on your feet if they don't like the lawyer on the other side. That tells the jury a great deal. So this is a battle of the good guy lawyer and the judge against the bad guy lawyer. The good guys are on one side. The clowns are on the other. Any time a jury gains that perception, if you are not 100% home, you are close enough.

End of my argument except for my conclusion, which is what I think it comes down to: Trial lawyers fail when they decide that jurors are essentially and basically different from other people. That is where the problem starts. It leads trial lawyers to do two things. One, to say to themselves, "I need to adopt a new persona. I cannot use the one I use at cocktail parties or with my partners or with my spouse. I've got to get something new because these are very different people." That's the first thing they say to themselves.

The second thing is that, in adopting this new persona, they say to themselves, "I'd better get more war-like because that's where we're going, we're going to war. It will be conducted in theater format, but it is going to be a war. I get to be king. I get to run the show. It is my case rather than my client's cause."

The winners as trial lawyers, in my judgment, are the straight shooters. They are the lawyers whose power comes from communicating to the jury a sense of fair play, a sense that they believe in their client's cause, from carefully explaining the evidence that forms a rational basis for that belief in the client's cause, and from giving the jury a reason to listen to and to like the lawyer presenting the case.

* * * * *

I have been beating up on some of my peers in the trial bar, and I now want to compound the felony by telling the all-time lawyer bashing story, as I see it. A man named Humble tried a jury case and lost it. The next morning his client called and got hold of the secretary, "I want to talk to Humble, I want to talk to him right now." Long pause. The secretary finally replied, "I am sorry I have to tell you this, but after the jury came in, Mr. Humble went upstairs to the top of the building, sat there on the ledge for a while, and jumped off. He is dead. You can't talk to him." Long pause again. "Gee, I am sorry to hear that. My best to the family"

The client repeated that phone call seven straight days. The seventh day the secretary exploded, "I have told you for seven straight days the man is dead. Why in the world do you make me repeat that day after day after day?" Another long pause. "I just like to hear it."

(Laughter.)

End of speech. If anybody wants to ask questions, I am here. If that speech isn't clear enough, I will try to make it more clear. God knows there are people that disagree with everything that I have said, but that is my view of the world. So there.

(Whereupon the conference was adjourned.)