

Trial Lawyers Need Principles of Life and Action

Losing Our Way and Finding It Again

We are in danger of losing our way—to the courthouse, to justice, to principles of living that sustain us. By “we,” I mean each of us individually, and as a profession devoted to helping people claim justice. We don’t need doomsayers and preachers. We need principles of action, in litigation and in life, to keep us on the road, to get us out of the ditch, or to guide us back out of the thicket. The signs are all around us. Jury trials, hallmarks of the adversarial system that defines our image of justice, are on the wane. The rules of civil procedure have been amended in ways that increase the pressure to settle cases, fail to limit expensive and wasteful discovery, and make litigation more and more expensive. Inadequate representation and the pressure of sentencing guidelines are among the reasons why defendants waive their right to a trial.

When we do litigate, we are tempted to delegate important tasks of case control, and even the choice of

stories and strategies, to consultants armed with sampling techniques and computer models. We forget to sit down and do the job for which we are supposed to be qualified—thinking through the case and how it should be tried. We often forget the simple truth that our job is to listen to, understand, and tell narratives about justice.

Even major corporations, sophisticated consumers of legal services, are sometimes ill-served by the counsel they hire. In case after case, one sees that litigation counsel treat cases in a routinized way, delegating tasks piecemeal while the case as a whole spins out of control. Then, if there is a trial, the failures of organization, of theme-building and team-building, become painfully clear. In this book, you will find examples of this sort of thing. Then, too, treating any case as simply routine—even in a busy practice—takes a lot of the fun out of practicing law, and that is another theme you will find in these pages.

As we read of young lawyer dissatisfaction with the profession, of poor people not having access to justice, of partner salaries heading toward the stratosphere while firms ignore the obligations of community service, we can see another method of losing one's way. Who are the lawyers whose example we should follow, and how did they unite ideas of life and of work?

I have therefore set out to write a book about trying cases, but along the way to conjure the images of trials and trial lawyers to suggest a way of living as well as of doing. In earlier writing, I have discussed the elements of trials: opening statement, direct examination, cross-examination, and so

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on. I have stressed the need to empower jurors to see the case in a particular way, and the importance of having a coherent story. I have addressed the crisis of democratic governance, the challenges to our professional lives and livelihood, and have even shared some of my life experiences.

In this book, I want to unite these fields of thought. This is not a “lifestyle” book, nor a trial advocacy handbook. It is based on the idea that saying, “I try cases,” means that one has decided that fair and open presentation of claims and defenses is not simply a good idea, but a way of living in the world. You will not, therefore, find detailed prescriptions about living. The great trial lawyers of this and all other times have defined themselves as seekers for justice. I therefore believe that if you seek out principles about how, why, and for whom to seek justice, that voyage will lead you to discover how to live your life. The nine principles that are chapter headings, and listed at the end of this introductory chapter, resonate in life as well as in litigation.

It may seem a bold claim that principles of litigation can also be those of life. Think about it. We like jurors who are open-minded. We want them to set aside their prejudices, to listen to both sides, to respect principles of justice, and to have the courage to give us a “ver-dict,” literally, their “truth speaking.” We hope they will not be tossed this way or that by the winds of public passion. We expect judges who listen carefully and rule without bias. In short, we want the rules of reason, justice, and compassion that we hope to find in our personal and professional lives to be at work in the arena where we have chosen to work. This book may convince you

that this is so, but, if not, you at least may gain a few ideas about trying cases.

This book is for all trial lawyers. I draw on what I have already written and said. But this book is not “recycled material.” I have taken ideas from times past and tried to burnish them in light of my own and my vicarious experience. I prefer the image of an upward spiral, passing over the same point but from a better perspective. When we think about the same old tasks from different perspectives, we gain new insights. The wise and skillful editor who took this manuscript in hand wondered if some, maybe most lawyers, have no need of a “fresh and creative approach to the practice.” Oh, yes, they do, I would respond, and especially those who wonder if they do.

When I was a law student at Boalt Hall, the law review editor-in-chief several years ahead of me had joined a prominent Los Angeles law firm. Believing in the right of every person to legal representation, he accepted appointment as counsel in a criminal case. He rose to cross-examine the prosecution’s leading witness, and realized that he did not know how to get the impeaching document into evidence before the jury. The jury found his client guilty. He then moved for a new trial, confessing his difficulty, on the basis that the client had received ineffective assistance of counsel. The trial court granted the motion. The law firm was not pleased, but they got over it.

This lawyer had the will to serve. He understood a basic principle about advocacy—accepting responsibility. That principle served him well beyond its application to trial prac-

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tice. This lawyer simply lacked the skill to get the job done as he knew it should be done. In this book, I address both will and skill.

Principles in Action—A Story

Let me tell you the story of a story. As you read, put yourself in the position of lawyers called to defend this woman, accused of killing her husband. Imagine yourself in that community, in that time, about to face a jury of your neighbors. On Dec. 2, 1900, John Hossack of Warren County, Iowa, was killed in his bed by two blows to his head. One of these was with a sharp object that opened up a five-inch gash. The other was with a blunt object that crushed his skull. John's wife of thirty-three years, Margaret Hossack, was at home, as were five of the Hossacks' nine children. Margaret was charged with murder and went to trial in April 1901.

The evidence that Margaret Hossack killed John Hossack was strong. Almost everyone in the small community knew that John Hossack had for many years behaved violently toward his wife and children. In 1900, the community sentiment was also firmly that such matters should be kept "within the family." The all-male jury—most of whom were married—convicted Margaret Hossack of first-degree murder. The jury recommended "mercy," meaning life imprisonment instead of a death penalty. The defense won a new trial based on error in the jury instructions, the Iowa Supreme Court no doubt influenced by evidence that even if Mrs. Hossack had killed her husband there were perhaps good rea-

sons why. The state retried Mrs. Hossack, but the defense won a change of venue. The jury was unable to reach a verdict and the Warren County Board of Supervisors voted that no more money would be spent on the case. Mrs. Hossack lived on for thirteen years with her family.

Susan Glaspell was a journalist who covered the first trial. In 1917 she published a short story titled “A Jury of Her Peers,” about a farmer killed in his bed, whose wife was charged with the murder. She later wrote a play, *Trifles*, based on the story. The story and the play have spawned studies and comments by lawyers and law professors concerned with story-telling in trials and with the ways in which legal categories do or do not permit expression of claims for justice.

For this moment, however, imagine that you were called upon to represent Mrs. Hossack. In “real life,” she was represented by two well-known defense counsel. A few hours’ investigation would reveal that community sentiment was arrayed against Mrs. Hossack. She and her children had let people know how abusive and dangerous Mr. Hossack had been. There had been talk of divorce and splitting their assets. To the extent that people spoke of these events, it was with a sense that revealing such things in public was somehow shameful.

There is no sign in the literature of the Hossack case that the women’s movement had reached that part of Iowa. There had been no organized effort to attack the stereotypes of woman’s role. In the major cities, by contrast, women were campaigning for the vote, for the right to enter learned pro-

fessions, and for other aspects of equality. Their leaders were being arrested for public demonstrations. In some instances, these struggles were linked to the temperance movement. In 1910, a few years after the Hossack case, temperance leader Carry Nation was arrested for using her axe to bust up the saloon at Washington, D.C.'s Union Station. The lawyers in those big cities, representing those women, had a different narrative to understand and tell.

Defense counsel for Mrs. Hossack would also look at Iowa criminal law in 1901. Murder was the unlawful killing of another with malice aforethought. First-degree murder had the additional elements of premeditation and deliberation. An intentional killing would be reduced to voluntary manslaughter if done in heat of passion arising from an adequate cause. At that time, past spousal abuse might well not have been considered adequate cause, and a delay in acting on provocation would in any case preclude a claim of voluntary manslaughter. The criminal law, it was said, did not like "brooders."

The law of self-defense was similarly unavailing. One had, then as now, the right to use deadly force to repel a threat of such force. The situation is looked at from the killer's viewpoint, taking the killer as a "reasonable man."

It would therefore be clear to defense counsel that the judge would probably not give a jury instruction that gave the options of manslaughter or self-defense. In the intervening years, lawyers and judges have reshaped the law of homicide and justification to take account of situations such as Mrs. Hossack's.