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Trial Advocacy: The Art of Storytelling

Trial Advocacy: The Art of Storytelling

Strategies for Winning a Trial
in New York State Court

Jared J. Hatcliffe

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This book is dedicated to Lois J. Hatcliffe and James F. Hatcliffe.

I miss my Mom. I miss my Dad.

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Foreword

By Louis V. Fasulo*

After trying cases for over thirty years, I've learned the best lessons from the unsung warriors of the courtroom—trial attorneys dedicated to the art of representing clients by seeking justice and fairness. Their unwavering work ethic represents the strength of our democracy and the Constitution. Jared Hatcliffe is one of these skilled and inspirational trial attorneys. I remain inspired by his grit, his attention to detail, and his approach to the courtroom, all which has served the New York City Law Department so well throughout his career.

I first met Jared when as we taught aspiring young lawyers interested in learning the art of trial advocacy. In just our first session, I was immediately impressed by his ability to simply deliver the necessary teaching tools to young courtroom lawyers. His theories and methodologies were well thought-out. He presented them in a practical way. He shared a deep understanding of the balance of simplicity and persuasion and conveyed a sense of humanity, realism, and practicality. Watching the participants respond to him and perform in simulations, it was clear that Jared was more than a great trial attorney, he was a great teacher. His words had meaning, his method was direct, and his respect for the individualized approach empowered the entire group. He was a Master of Advocacy. To this day, Jared Hatcliffe is a Master of Advocacy and his book was not only flawlessly written, but it was flawlessly written by the perfect person.

As the Director of Advocacy at the Elisabeth Haub School of Law at Pace University and a partner in a white-collar defense trial firm in New York City, I immediately knew that Jared had to join my faculty and become an

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integral component of our trial skills program. Our students needed his wisdom—wisdom based on life experience. Since joining us, hundreds of students have gained a deeper understanding of the ingredients necessary to mesmerize juries, humanize clients, and favorably act on behalf of clients. Our students who have had the pleasure of learning from Jared have all gone on to do powerful things in the legal world, and this would not have been possible without his ability to teach and captivate his class in the way that he does. He not only cares enough to teach his students about the skills of advocacy, but in turn, he teaches them life outside the classroom. Jared has always gone above and beyond the classroom, to teach students how to be confident advocates and people. He treats every student as their own—his mantra is that every student has their own voice, they have to be who they are, and no one can change that. He empowers our students to find their own voice and that will make them a better advocate and human. The humility and confidence he displays allows the student to understand the role of human condition in trial work. His read of the classroom mirrors his perceptiveness of the jury.

Jared, by his teaching, and now by this book, captures the energy of the courtroom and allows for a creative approach inside the courtroom by its readers. Many books have been written on trial techniques. And many suffer from being too rigid and robotic, and in turn, failing to connect to the reader. Few have been able to give a true voice to the advocates as they hone their skills, develop their techniques, and become the most persuasive advocate they can be. This book does all the things that others lack—it recognizes the individuality of the presenter, something Jared has always recognized. Furthermore, it gives real-life experiences and relatable scenarios that capture the trials that aspiring advocates are likely to confront early in their careers. It focuses on simple steps that any new trial attorney can immediately include in their presentation. It is powerful, relevant, and enlightening, mostly because it is understandable. Just as in a great trial, it speaks to its audience by empowering them. It is direct and to the point.

Passion, trust, and relatability are three critical components to success in the courtroom but are difficult to teach through the written word. These concepts are ever-present in this writing. His selection of words is that of a true wordsmith. Jared's ability to convey passion through his writing shows his own passion towards advocating and teaching.

New York City, unlike many other jurisdictions, provides unique challenges for courtroom success. The diversity of the jury pool, the pace of our court system, and the intellectual wisdom of the players are a challenge for all entering

the courthouse. The abilities necessary for success require great listening skills, a solid foundation, and a confidence to believe in your client's case. The pace of the trial reflects the pace of our city, which adds yet another dimension to the trial lawyer's presentation. It is this understanding of the community gained through his real-life trial experience that differentiates this book from others. Jared understands the jury's community and consciousness, and shares with the reader the importance of respecting the jurors as you persuade, of appealing to the uniqueness of the jury and hitting both their moral and emotional chords. The candor and respect for the jury are lessons for lawyers from any jurisdiction.

I have always believed as trial attorneys we must constantly improve our craft. We are adapting to the times and must be current in all we do. The basic skill of listening must be respected, and our choice of words must be powerful. However, we must be practical and worldly as we shoulder the responsibility of our client's matter. We strive to win and love the feeling of a favorable verdict. This book captures our journey, one which not only requires endless preparation but respects the thirst for learning. The skills will come with experience, but the wisdom is learned through our mentors. As you will see through this book, Jared is one of those true professionals and mentors. The advice and lessons he conveys in this book will make you better equipped to face the challenges of trial work and make you love it. There is no better or more noble a journey and no better a mentor.

Acknowledgments

Creating a book from scratch is an enormous undertaking that cannot be done without the help of more people than can be mentioned. Every author knows that their final product is actually the result of a larger team effort and this work is no exception.

I'd like to take a moment to thank the many people from the many different areas of my life who have helped make this text a reality. To my family and close friends who continue to find ways to motivate me: James, Kerri, Patti, Jaime, Dorothy, Sami and Cooper Hatcliffe, Dylan and Casey Brown, William Bardavid, Michael Froese, and Scott King.

To the trial advocacy team at the Elisabeth Haub School of Law at Pace University who supported this work in numerous ways: Loretta Musial, Betty Lawrence Lewis, Robert Altchiler, Steven Epstein, Keith Sullivan, Jill Gross and most importantly, my friend, Louis V. Fasulo. Little did I know the incredible educational journey I would begin the day I met him.

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To those in the larger sphere of law and academia who have influenced my trial advocacy philosophy: Charlie Rose, Natale Corsi, AJ Muller, Jared Rosenblatt, Christopher Morse, Gillian More, Gwen Stern, Abbie Heller, Adam Shlahet and the great Terence MacCarthy.

The fierce trial adversaries I have faced in the courtroom over the past twenty-three years, specifically Peter Thomas, Ben Rubinowitz and Mike Ronemus. Adversaries in the courtroom, friends outside it.

Perhaps most importantly, to the many students at The Elisabeth Haub School of Law at Pace University, for their advice and encouragement along the way, especially Bryan Conway, Ellie Laloudakis, Nisha Desai, Samantha Tighe, Nicolette Brusco, Marlene Geerinck, Dounea Elbroji, Aziza Hawthorne, Angelo Spedafino, Justin Bennion and Hannah Stone. I hope I have taught you as much as you have taught me.

Specifically, for their work on this book and their incredible friendship, Mattison Stewart and Katelyn Rauh.

Lastly, Michaela Petersen, not only for her commitment to making this text the best it could be, but also for her dedication and leadership to our trial teams, and her unyielding loyalty and friendship.

Non scholae, sed vitae.

Introduction

Jurors go with the narrative that makes sense. We're here to tell a story. Our job is to tell that story better than the other side tells theirs.

—Johnny Cochrane

Direct and to the point—it is how we New Yorkers are and how this book is written.

I am a trial attorney. It is not only my job title, but also a part of my identity. This book is written based on real-life experiences after trying hundreds of cases in New York State courts. It is not a theoretical conversation on what may happen in a courtroom. It is a practical discussion about what does—and what will—happen in a New York State courtroom.

I am also an educator. I have taught trial advocacy to law students in the classroom setting and practicing attorneys for over twenty years. Trial advocacy is a passion of mine, as is helping the next generation of trial advocates. This book is written for everyone who wants to practice the art of trial advocacy in the hopes it will reach the broadest of audiences.

There is an old adage that a trial is a search for the truth. From the court's perspective, that is true. But from the attorney's standpoint, it is not. For the attorney trying the case, your ethical obligation is to advocate zealously on behalf of your client. That means convincing the jury of only one truth—*yours*.

A trial is a *story*. It is your version of the truth—what your client has told you occurred. To succeed, your *story* must mesmerize, entertain, and persuade the jury. Only then do you have a chance to win the trial.

This book discusses and teaches the techniques used by the most successful New York civil and criminal attorneys to win their cases. We examine the different stages of a trial and discuss how to convince the trier of fact, the jury in

most cases, of your *story* and your version of the truth. We do this by reviewing the *methods* that make a trial attorney successful and the *art* of storytelling throughout *every* phase of trial.

The prelude to the trial begins in jury selection, where you introduce the case and indoctrinate your case theory to the jury. Opening statements, like the first chapter of a story, introduce the important characters (the witnesses) and set the scene for your audience. Here, you must establish your narrative and capture the jury's attention by informing them of what they will see and hear throughout the trial.

Next, you turn to direct examination, where you tell your story by having a *conversation* with the witnesses and the jury about what really happened and why everyone is sitting in the courtroom. During cross-examination, you must control the narrative of the story by controlling the witness. Only then can you convince the jury that what you're telling them is the truth, as opposed to the distorted version told by opposing counsel. When we reach the final chapter of the trial, summations, it is your time to shine by arguing and persuading the jury of *your truth* and by bringing your story all together.

Throughout this book, we explore the right way to conduct each stage of the trial because, make no mistake, there are improper ways that must be identified and avoided. We will also discuss expert testimony, evidence, and the law of trial advocacy in New York, which will help you win your case.

How This Book Differs from Others

There are several nationally known and well-respected trial advocacy textbooks written by accomplished authors.¹ There will inevitably be some overlap in content between this book and those texts. This book may act as a supplement to those but absolutely stands on its own as it provides a detailed guide for trying a case in New York State Court, gives a concise overview of the stages of a trial, reviews the evidentiary rules specific to our state, and explains how to best tell your story to New Yorkers.

There are many differences between trying a case in New York State court and in federal court. Federal and state courts are two completely different forums with distinct sets of rules. For example, federal courts' stringent and dogmatic rules of decorum tie the advocate to the podium and control the trial attorney, in essence taking much of their personality out of the case. Federal

courts, rightly or wrongly, try to level the proverbial playing field by emphasizing the facts of the case, not the abilities of the advocates.

New York State courts, and their procedural and evidentiary rules, are vastly different. New York State's liberal courtroom rules generally allow advocates to zealously argue their point of view and inject their personality into the trial itself, many times impacting the outcome of the case.

New York State Law

Evidence decides trials. Like a good chess player manipulates the pieces of a chess board, a good trial attorney manipulates the evidence that the jury will see. If there is a piece of evidence that can help you win but it is ultimately inadmissible, it is wasted evidence. The jury will never view or hear it. On the other hand, if you can preclude a piece of potentially harmful evidence, it need not concern you since the jury never will see or hear about it. No matter how good of an attorney you are, if the evidence does not support your case, you are unlikely to win. That is why you must understand the rules of evidence in New York, which are based in both common law and statutory rules that differ greatly from the Federal Rules of Evidence ("FRE").

As we learn the correct way to try a case, we will refer to several different statutes and texts that govern trial practice. The Civil Practice Law and Rules ("CPLR") and the Criminal Procedure Law ("CPL") contain specific procedural rules (and a few evidentiary) that you must become familiar with. The Pattern Jury Instructions ("PJI") in civil actions and the Criminal Jury Instructions ("CJI") in criminal cases are excellent sources of substantive law that can guide you from the very beginning of preparing for trial.

The Stages of a Trial

In a world ruled by media, most ordinary people can probably list the different stages of a trial. After all, trial lawyers are the subject of movies, written about in books, and constantly discussed in print, television, and online media.

In his well-known civil legal treatise, *New York Practice*, Professor David Siegel states that the normal sequence of trial is so well known that the CPLR does not even describe it. It merely states that the court may determine the

sequence in which the issues shall be tried and control the conduct of the trial in order to achieve a speedy and unprejudiced result.²

Doesn't sound like much to go on, right? Thankfully the New York State criminal law is more specific.

The CPL³ gives much more detail and states:

The order of a jury trial generally proceeds in this way:

1. The jury must be selected and sworn.
2. The court must deliver preliminary instructions to the jury.
3. The people must deliver an opening address to the jury.
4. The defendant may deliver an opening address to the jury.
5. The people must offer evidence in support of the indictment.
6. The defendant may offer evidence in his defense.
7. The people may offer evidence in rebuttal of the defense evidence, and the defendant may then offer evidence in rebuttal of the people's rebuttal evidence. The court may in its discretion permit the parties to offer further rebuttal or surrebuttal evidence in this pattern. In the interest of justice, the court may permit either party to offer evidence upon rebuttal which is not technically of a rebuttal nature but more properly a part of the offering party's original case.
8. At the conclusion of the evidence, the defendant may deliver a summation to the jury.
9. The people may then deliver a summation to the jury.
10. The court must then deliver a charge to the jury.
11. The jury must then retire to deliberate and, if possible, render a verdict.

These stages, as outlined in the New York CPL, are also followed in civil cases. Just substitute the word "plaintiff" for "People."

If you are starting to see an overriding theme, it is because there is one. The "People" (the prosecution) in criminal matters and the plaintiff (the person suing) in civil matters, always go first except for closing arguments, where they go last. They get the first word and the last word.

The reason for this order is that those parties have the burden of proof. They must prove their case beyond a reasonable doubt in a criminal action and by a preponderance of the evidence in a civil action. In criminal cases, this burden

never shifts. In civil actions, the burden may shift depending on the cause of action and whether there are counterclaims or affirmative defenses. But don't get bogged down in the specifics of that right now. We will get into it more later.

How Does One Get Good at Trying Cases?

Talent is important, but preparation is key. Trial advocacy is both an art and a science. It is an art, and like all things, some people are more naturally talented than others. But it is also a science, and that means it can be learned. To learn trial advocacy, the only things you need are desire, a good teacher, and the opportunity to hone your skills. You would not be reading this book and taking trial advocacy if you didn't have desire. You will learn what you need by reading it and from your trial advocacy professors. But learning only makes you good, and you must practice to be great. Preparation and practice are the equalizers against those that may be more naturally gifted or more experienced.

Many of the practices that I teach in this book were learned from trial and error (no pun intended). I have won more than I have lost, but have learned more from my losses. Some of the techniques we discuss I created on my own, but many were adopted from other great trial attorneys. Even today, I go to courtrooms and watch when an interesting case is being tried, as I suggest you do. I have learned from many sources, including brilliant young students I have taught over the years. Honing your craft requires never being so closed-minded that you can't learn something new.

How I Wrote This Book

This book is your guide to successfully trying a case in New York State courts. It follows the above stages of trial in an easy-to-digest text. It is deliberately brief to avoid the boredom that causes students to throw books aside. This book contains specific methods that, when applied correctly, will help you win at trial. Instead of just telling you what to do, this book contains specific examples that illustrate how to implement the recommended techniques in both civil and criminal cases. I wrote this book in a conversational tone—the same tone you should use for a direct examination. Direct and to the point—it is how we New Yorkers are and how this book is written. So let's begin.

Endnotes

1. CHARLES H. ROSE III, *FUNDAMENTAL TRIAL ADVOCACY* (3d ed. 2015); THOMAS A. MAUET, *TRIAL TECHNIQUES AND TRIALS* (10th ed. 2017); STEVEN LUBET, *MODERN TRIAL ADVOCACY* (5th ed. 2015).
2. *See* CPLR § 4011.
3. CPL § 260.30.