

*MOVIE MAGIC:  
How the Masters Try  
Cases*

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## TABLE OF CONTENTS

1. INTRODUCTION.....	4
2. MOTION PRACTICE .....	4
<i>LESSON ONE: Start by telling the judge or jury what you want in a simple, direct way.</i> .....	6
<i>COROLLARY TO LESSON ONE: Start each segment of an argument by stating what result you seek in that segment.</i> .....	6
<i>LESSON TWO: Finish every argument by telling the judge or jury what you want.</i> .....	6
<i>COROLLARY TO LESSON TWO: End each segment of an argument by saying what you want.</i> .....	6
<i>LESSON THREE: When possible, keep a derivative argument or fact in reserve for rebuttal.</i> .....	7
<i>LESSON FOUR: The job position of the employee and the content of the communication must be considered before communicating ex parte with a former or current employee of an adverse corporation.</i> .....	8
<i>LESSON FIVE: Objections and factual statements made in response to discovery requests must be based on a reasonably diligent inquiry by counsel.</i> .....	9
<i>LESSON SIX: Tell the truth.</i> .....	10
3. OPENING STATEMENT .....	10
<i>LESSON SEVEN: The strength of an opening relies on the use of facts.</i> .....	11
<i>LESSON EIGHT: Strengthen the impact of the facts by packaging them into memorable phrases, and repeat those phrases.</i> .....	11
4. EXAMINATION OF WITNESSES .....	12
<i>LESSON NINE: To maintain the jury’s interest during direct examination, shift back and forth between permissible leading questions and nonleading questions.</i> .....	13
<i>LESSON TEN: After obtaining the answer you want, stop.</i> .....	14
<i>LESSON ELEVEN: Thoroughly investigate your own clients and witnesses.</i> .....	17
<i>COROLLARY TO LESSON ELEVEN: Your opponents have most likely failed to thoroughly investigate their own clients and witnesses.</i> .....	17
5. WITNESS PREPARATION.....	17
<i>LESSON TWELVE: The attorney may never suggest new facts to the witness.</i> .....	20
6. INSTRUCTIONS FROM THE CLIENT .....	20

7. CLOSING ARGUMENT.....	22
<i>LESSON THIRTEEN: Argue the essential, hard issues in a case.....</i>	<i>24</i>
8. CONCLUSION.....	24
<i>LESSON FOURTEEN: You don't have to be Gregory Peck to     succeed.....</i>	<i>24</i>
Some suggested reading.....	25
Steven Rosen biographical information.....	26

# ***MOVIE MAGIC: How the Masters Try Cases***

*By Steven O. Rosen*

## **1. INTRODUCTION**

Trial lawyers can learn many lessons by studying courtroom procedures as depicted in the movies. Films can show 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 potential 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 sometimes 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. The plaintiff's wife was a passenger in his Meridian. Following a collision, the car burst into flames and the wife was killed. According to the plaintiff, the fire resulted from a defectively designed-electrical circuit. The plaintiff's counsel has a discovery motion before the court. (A fanciful plot hook is that the opposing attorneys are an estranged father and daughter; hence, they are both named Ward in the excerpt below.)

Let's follow the argument on the 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.

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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.

A lesson on oral argument is found at the very start of this exchange. The 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 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 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*, the 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 every 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, one should 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 or jury 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 Ms. Ward and she acquiesces and agrees to supply a list of names. Mr. Ward 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 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 matter of litigation with a person the lawyer knows is represented by another lawyer. The comment to Rule

4.2 explains that when the opposing party 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 cmt. [7].

Most courts follow the rule that opposing counsel may not communicate with current employees who have the authority to bind the corporation. *See* Laws Man on Prof Conduct (ABA/BNA) 71:303-04; *see also* ABA Comm on Ethics and Professional Responsibility, Informal Op 1410 (1978). Some jurisdictions, however, completely prohibit contact with current corporate employees. *See* Laws Man on Prof Conduct at 71:304.

Contact with a person having managerial responsibility is thus prohibited. In addition, contact with a person whose act or omission may impute civil or criminal liability to the organization or whose statement may constitute an omission on the part of 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, according to the majority interpretation.

Although not a concern in this situation, the question often arises as to whether contact is permitted with former employees of a corporation. 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 an 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.

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

A second ethical issue is whether Argo’s counsel violated any duties in opposing 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 comments go 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 cmt. [3].

Argo’s counsel was thus obligated to make a reasonably diligent inquiry into how long it would take to comply with the plaintiff’s discovery request before representing to the court that it was burdensome. The level of investigation necessary for a reasonably diligent inquiry is undefined but certainly contemplates that the attorney must make some inquiry prior to making any representation to the court. If the 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 she should have known 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. 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. Also, while counsel had no affirmative duty to tell Argo’s employee that he was an attorney representing a party adverse to Argo, if in response to a question from the employee he lied by representing that he *had* worked with Mr. Smith at Argo, he violated the rules.

Moreover, Rule 4.3 prohibits an attorney who is communicating with an unrepresented person on behalf of a client from stating or even implying to the unrepresented person that the lawyer is disinterested. The 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." Rule 4.3. 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 party. He made no effort to correct such misunderstanding, and in fact perpetuated it. Mr. Ward's conduct clearly 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 the two young men 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 4<sup>th</sup> 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 eyewitnesses 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 each sentence. He also linked sentence 2 to sentence 3 by repeating “three eyewitnesses.” That repetition adds impact.

Actor Lane Smith punctuates the content of the opening by delivering it in a visually compelling manner. Pick up a copy of this movie 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 emulating. Also note the brevity of Smith’s opening statement. The screenwriter undoubtedly tailored the length so that it would have a dramatic effect on the movie audience. Given the risk of jurors’ short attention spans resulting from heavy television- and movie-watching, it makes good sense to step into 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 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. Janning is a fictional composite of several defendants at the historic trial. Played by Burt Lancaster, he is portrayed as a judge, respected law professor, prolific writer of law books, and a drafter of the Weimar constitution. The defendant 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 Lancaster, Spencer Tracy, Richard Widmark, Marlene Dietrich, Maximilian Schell, Judy Garland, Montgomery Clift, and William Shatner. The movie 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?

Was 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 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 need no more than a yes-or-no answer. Each question follows up on the preceding answer. The questions follow a logical order.

The seventh question provides a break in the sequence, shifting from short questions to a longer question that seeks 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: Repetition of 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, should 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 this 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 is the task of the defense counsel in *The Accused*, a 1988 Paramount Pictures movie.

*The Accused* was inspired by the case of a New Bedford, Massachusetts, woman who was gang-raped on a pool table. In the movie, the three men who

raped Sarah Tobias plead guilty to reckless endangerment. On trial in the movie are three other men who egged the assaulters on and who 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 lawyer is never too pushy as he adds fact after fact to his questions. But 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 great 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, review 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 examination of Dr. Wieck.

Fifth, defense counsel cleverly positions himself in the courtroom. He begins by standing next to the witness in a consoling posture while listening thoughtfully. Once he has established his rapport with her, he moves to the jury box and asks the questions that challenge her recall. He does not look at her accusingly but looks at the jury in a way that sets forth this damaging evidence matter-of-factly. He then ends the cross-examination by approaching the witness, lowering his voice and gently urging her to admit that she could not identify who did what.

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 the witness. 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. Gambini shows Kramer photograph after photograph that counsel took at the scene after he first interviewed Kramer. The attorney 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 use photographic exhibits effectively to cross-examine a witness. It also shows something else: The prosecutor failed to investigate his own witness and was thus prepared 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

A few movies contain examples of preparing a witness for testimony.

An interesting one appears in *The Verdict*, a 1982 Twentieth Century Fox movie. In this film, Paul Newman plays a plaintiff's attorney. He represents a woman who he claims was given the wrong anaesthesia and who, as a result, slipped into a permanent coma. He names the hospital and the anaesthesiologist, 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. The defense attorney first play-acts with Dr. Towler about his patient, 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 anaesthesiologist at the delivery on May the 12<sup>th</sup>, 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 anaesthesiologist. 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 ethical issues.

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 cmt. [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 cmt. [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 (4).

Thus, if the defense attorney in *The Verdict* had not prepared his client and participated in the role-playing, he might have violated the rules regarding diligence and competence. But later on, the attorney "tells" the doctor what to say regarding the death of the patient. Clearly, the attorney and the doctor have discussed the situation before. Because counsel is not learning about these events

for the first time, but rather is preparing the doctor for the rigors of trial, and the attorney's suggested comments are apparently original thoughts professed by the doctor, there appears to be no violation. But if the attorney is suggesting that these events occurred and they in fact did *not* occur, the attorney is violating Rule 3.3 by suggesting that the doctor make comments that are not truthful.

**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 the same ethical issues, study *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 his 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 could have been 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 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 earned four Academy Award nominations. It is based on the famous 1925 Scopes "monkey trial" in Dayton, Tennessee. In the real 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 has 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 scene from *Inherit the Wind* the judge, played by Harry Morgan, asks whether the defense wishes to cross-examine defendant's fiancée. Drummond

intends to do so, but the defendant instructs him not to. (For plot tension purposes, this wholly fictional fiancée is the daughter of the town’s minister.) Taken aback by the instruction, Drummond attempts to explain to his client the advantages of conducting the cross-examination and the harm that could be done if the cross-examination is passed up. 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 instruction for how to resolve of 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 could be terminated by either person. Rule 1.2 cmt. [2].

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

One alternative was to proceed to cross-examine the fiancée, despite Cates’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 rules provide that Drummond, as an attorney, would “usually defer” to the client’s instruction. *See* Rule 1.2 cmt. [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 cmt. [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.” 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. Quite apart from the written rules, therefore, Drummond should not have withdrawn since “[t]he Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.” Rule scope.

In sum, Drummond made the correct choice in deferring to Cates’s instruction not to cross-examine the fiancée.

Of course, no matter which alternative Drummond chose, he would be 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 is found in *To Kill a Mockingbird*, a 1962 Universal Studios movie.

An adaption 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 testified 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.

Master actor 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. The movie also received Academy Award nominations in five other categories.

Finch’s memorable closing in the movie, which differs from the text in the novel by only three words, 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.

Finch thus addresses the core issue of the case without flinching: whether a black man's testimony will be believed by an 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 has the money to pay. Every case has hard issues. The master trial attorney will find and argue them.

But 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 lost his case, and Joe Pesci in *My Cousin Vinny* won his.

THE END

## 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)

## **STEVEN O. ROSEN**

### ***EDUCATION***

Mr. Rosen earned his B.S. degree in Aerospace Engineering at the State University of New York at Buffalo (1970) and his M.S. degree in Systems and Control Engineering at Case Western Reserve University (1975). At Case he was awarded a National Science Foundation Traineeship. He earned his J.D. degree at Northwestern School of Law of Lewis & Clark College (1977), where he was a member of the Law Review.

### ***LAW PRACTICE***

Mr. Rosen began his law practice as an associate at Lord, Bissell and Brook, Chicago, in 1975. He joined Miller Nash, Portland, as an associate in 1977. He became a partner in 1983 and served on the firm's Executive Committee, headed its Technology Committee, and served as Chair of its Hiring Committee.

Mr. Rosen began The Rosen Law Firm in 1997. He heads the firm, which is located in Portland. Mr. Rosen's practice focuses on aviation, product liability, and insurance defense. He frequently tries cases in federal and state courts. He has also prosecuted and defended aviation matters in arbitration under American Arbitration Association rules.

### ***RELATED EXPERIENCE***

Mr. Rosen served as an Executive Intern at the Federal Communications Commission during the summer 1969. Mr. Rosen worked as an engineer for the Office of Telecommunications, U.S. Department of Commerce, Boulder, Colorado, from 1972 – 1974.

In the summer of 1975, the Office of Telecommunications Policy, Executive Office of the President, Washington, D.C, employed Mr. Rosen. While there he prepared an analysis of alternative satellite communications designs, including alternative transmitter and receiver designs.

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