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Basic Trial Advocacy

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BOOK REVIEW

BASIC TRIAL ADVOCACY
by Peter L. Murray*
(Little, Brown and Company, 1995; pp. 386, $22.95)

*Reviewed by Michael W. Mullane***

Mary Crates taught me to "begin as you mean to go on."[1] Peter Murray's book is a good place to begin for those embarking on a life of trial advocacy. For those of us whose beginnings are distant and often painful memories, it is an excellent reminder of where we meant to go.

Trial advocacy is an infinitely complex task. This simple fact is both its joy and curse. Teaching trial advocacy is equally difficult. There is no "never" and no "always." There is a host of commonly accepted maxims, many of which are contradictory on their face and all of which are frequently dead wrong in specific application. The complexity of the task is a siren call, luring both teacher and student into a maze of abstract categorization and ephemeral "what if's." Each is ever more divorced from the reality of persuading someone to adopt your perspective of a historical event and its significance. Roles and goals proliferate faster than mosquitos in a spring rain. Story teller, scholar, zealous believer, professional sceptic, officer of the court, counselor, impresario, teacher, naysayer, predictor, and spin doctor are all part of the trial lawyer's job description. Credibility of message and messenger, the mandate of law and policy, conversion of information into evidence, the exclusion of adverse evidence, procedural mandates and discretion, and the rules of law all are concerns of the trial lawyer. As if the job were not difficult enough, every role is played out in the presence of the ultimate heckler. Every plan also must anticipate the arguments and stratagems of a skilled opponent. The adversarial environment is inherently chaotic. Simplicity and clarity often are the first casualties of any attempt to impose academic discipline on the subject.

Basic Trial Advocacy[2] is a clear, simple guide to the major problems confronting the trial lawyer. The book is both brief and, with one omission, complete. *Basic Trial Advocacy* is exceptional

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1. Mary is my mother-in-law. She grew up on a farm in South Wales where Welsh was the language of hearth, village, and chapel. English was the language of outsiders. She breathes a millennium of Celtic family tradition and cultural wisdom.

2. PETER L. MURRAY, BASIC TRIAL ADVOCACY (1995).

among its peers, however, in how it begins. The first quarter of the book is devoted to matters beyond the mechanics of opening statements, presentation of evidence, and summations. The discussion begins with an exploration of the societal, professional, and personal environment of a trial attorney. This material is not an overdrawn introduction. The author's purpose is clear. He begins by challenging the reader to think about how she will reconcile her personal values with the demands of the profession.

The author begins by reducing the plethora of perspectives to an essential few. The opening chapters describe the trial lawyer as storyteller,[3] teacher,[4] and persuader.[5] These three perspectives are then synthesized into three specific tasks.

> [T]he lawyer analyzes the available raw information to see whether there is a potential fact picture that will fit a legal rule with consequences favorable to the client. . . . Taking into account the opponent's anticipated presentation, the lawyer chooses from among the potential scenarios the version that (1) fits a rule favoring the interests of the client and (2) would likely be accepted by the finders of fact.[6]

Having selected a factual theory, the second task is to "recreate this fact image in the minds of the jury at the trial."[7] What follows is a superb short description of the balance between detail and brevity, controlling the flow of evidentiary information, and selection of the most effective media for presentation of the information.

In less than ten pages, the author establishes a concise structure for both the book and the art of trial advocacy. This accomplishment alone raises the text beyond many of its genre. It derives from the author's clear vision of who and what the trial lawyer should be. It is the *should be* that sets the book apart. The essence of Peter Murray's vision is found in the third chapter: "Trial Lawyers' Ethics."[8] My book shelves are burdened by most currently available trial advocacy texts. Many contain excellent discussions of the ethical constraints on the trial lawyer. The subject is, however, often given less than complete treatment. One trial advocacy text on my shelf is almost nine hundred pages long. It devotes less than two pages to the subject of ethics. In several others, including one of the most well known, the word "ethics" does not appear in the tables of contents or indices. Among those that address the subject, some refer to ethics only episodically as a consideration that may arise in the application of a specific skill or in the context of a certain activ-

3. *Id.* at 9.
4. *Id.* at 11.
5. *Id.*
6. *Id.* at 12.
7. *Id.*
8. *Id.* at 19-51.

ity during a trial. Among this eclectic, not entirely random, and certainly unscientific sampling, *Basic Trial Advocacy* is unique in its coherent treatment of ethics as a primary component of the trial lawyer's skill training.[9]

If the subject of trial advocacy tends to shatter into fragments under the stroke of abstract analysis, trial ethics crumbles to a powder that scatters on the zephyr of every whisper. *Basic Trial Advocacy* starts by identifying the ethical tension inherent in the adversary system of fact determination.

> The trial lawyer's special function, representing a client in a formal proceeding to determine the objective truth, often creates ethical dilemmas. On the one hand, the lawyer must be a faithful and effective exponent for the client. Our complex legal system requires that parties involved with the law have trained and dedicated representatives to protect their interests and preserve their autonomy. On the other hand, the purpose of the system is to find the truth. The role of the lawyer is an integral part of that system. Most people have a positive regard for truthfulness and an abhorrence of deliberate falsehood. These values are important in our culture.
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> Many ethical issues are either created or exacerbated by the potential for conflict between the roles of the lawyer as client representative on the one hand and as an independent human being and officer of the court on the other.[10]

What follows this description of the systemic ethical tension is a wonderful essay in its own right. The author makes no attempt to divorce either himself or the reader from the subject. He does not sugarcoat the issue with objective gloss or academic distance. On the contrary, he invites the student to come down from the tower, stand in the arena, and experience the dilemma as a working advocate. He describes the competing systemic demands and their effects on the human agent—the trial lawyer. The discussion is blunt, to the point, and worth quoting at some length.

> Is the image the trial lawyer seeks to recreate only an illusion? Does the trial lawyer have any obligation to pursue objective "truth" in that which she presents to the factfinders? Is the standard of accountability limited to what the lawyer can "get away with" without offending either judge or factfinder?
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> Our adversary trial system, which gives the lawyers almost the entire responsibility for presenting the fact image in court, also puts them under great pressure to win for their clients.

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9. Clearly the scope and depth of trial ethics requires treatment far beyond what is possible in a primary text on trial advocacy. There are excellent volumes devoted solely to the treatment of the issue within a single jurisdiction. *See, e.g.*, GARY L. STUART, THE ETHICAL TRIAL LAWYER (1994). Nevertheless, a serious discussion of the subject is an appropriate, if not mandatory, part of training in trial advocacy.

10. MURRAY, *supra* note 2, at 19.

> Trial lawyers also want to win for themselves. Sometimes the lawyers, as they seek to represent their clients effectively, seem more like sporting contestants, or even combatants, than serious seekers after truth.
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> . . . .
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> Another difficulty with trial lawyer ethics is that there is some variation and disagreement among the trial lawyers themselves as to what is and what is not ethically permissible. . . . This lack of unanimity among sincere and conscientious scholars and practitioners on what is ethically required means that some trial lawyers ultimately fashion their own ethical codes within the overall bounds of the formal rules.
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> It should be also kept in mind that trial lawyers are confronted with difficult ethical issues not in the comfort of their offices and libraries but in the heat of battle, the give and take of the courtroom. Under these conditions of fierce competition, if not combat, deliberate and detached consideration of reason and policy is sometimes difficult, and it can be easy to do something impulsive that is later regretted.[11]

The author makes it clear that a lawyer's lack of certainty does not excuse resolution of these issues by the default of neglect. Their resolution is essential to becoming a trial lawyer. He also suggests a number of resources from which the individual lawyer might draw his answers. "An understanding of the ethical quandaries faced by participants in the trial process and how those quandaries are resolved—whether by formal rule, by unwritten custom, or by the lawyer's own sense of honor and integrity, is an indispensable prerequisite to basic trial advocacy."[12]

The discussion turns to a survey of the minimal demands imposed by the various formal codes of professional ethics. The heart of this section is the discussion of the obligations of candor and truthfulness. The mandates of Disciplinary Rule 7-102 of the Model Code of Professional Responsibility[13] and Model Rule 3.3 of the Model Rules of Professional Conduct[14] are both described, and a sampling of the dilemmas arising in their application are surveyed. The author frankly admits: "These and other provisions of the rules that relate to the candor and integrity of the lawyer's presentation have been interpreted and reinterpreted by lawyers, judges, and scholars over and over again. No final answer has been found."[15]

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11. *Id.* at 20-21.

12. *Id.* at 21.

13. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 7-102 (1980) (requiring compliance with procedural and substantive disclosure requirements and prohibiting a lawyer from counseling or assisting a client in illegal or fraudulent activities).

14. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.3 (1994) (requiring the lawyer to disclose a material fact to the tribunal if necessary to prevent assisting the client in consummating a criminal or fraudulent act).

15. MURRAY, *supra* note 2, at 24.

Notwithstanding the absence of a final answer, the author enjoins comprehension and adherence with the minimal ethical mandates.[16] He makes it clear that, although the area is fraught with uncertainty, there are known boundaries.

The focus is on three aspects of "The Obligation to Present the Truth:"[17] "Questions of Law,"[18] "False Testimony and Evidence,"[19] and "False Inferences and Arguments."[20] The latter two involve issues of particular difficulty. The problems swirling about the presentation of false evidence are particularly acute in criminal cases.

> The predominant view is that knowing presentation of perjured testimony of a criminal defendant . . . is clearly unethical and improper. On the other hand, there are respected scholars and practitioners who argue that the defendant's right to effective assistance of counsel requires that a criminal defense lawyer be permitted to offer the defendant's own testimony, regardless of whether it is known to be true or false.[21]

Professor Murray explains some of the ways that trial lawyers try to avoid the clash. These include what can be called the Sergeant Schultz school of reality avoidance.[22] Another approach is to warn the client about the consequences of saying one thing in the interview and another at trial. As Professor Murray points out: "Such 'Miranda warnings' can be confusing to the client at best, and, at worst, invite the client to make up the 'official' story before telling anything to the lawyer."[23] Other lawyers try a preemptive educational strike. Before asking "what happened?" they provide advice about the legal consequences likely to flow from various alternative factual scenarios. Each of these approaches raises almost as many difficulties as it solves. Nevertheless, they are the most frequently advocated and used solutions. The author of *Basic Trial Advocacy* then provides "the black letter rules [that] establish a meaningful minimum level of lawyer integrity in the fact presentation process."[24]

The last topic in the discussion of "The Obligation to Present the Truth" is even more difficult. The section entitled "False Inferences

16. "These rules provide the profession's most authoritative articulation of the trial lawyer's obligation of candor in the representation of clients in court. Understanding the requirements of these rules and obeying them scrupulously is a basic necessity to effective trial advocacy." *Id.*

17. *Id.* at 25.

18. *Id.*

19. *Id.* at 26.

20. *Id.* at 29.

21. *Id.* at 26.

22. Sergeant Schultz was a character in the Hogan's Heroes television show who avoided a similar ethical crisis by firmly adhering to the principle: "I see nothing, I hear nothing, I know nothing."

23. MURRAY, *supra* note 2, at 27.

24. *Id.* at 29.

and Arguments" does not benefit from even the dubious benefit of being directly addressed by the Model Code of Professional Conduct and Model Rules of Professional Responsibility. "By negative inference as well as by long-established professional consensus, generating and arguing false inferences or conclusions from true proven facts is not unethical."[25] Can a lawyer attempt to impugn the credibility of a witness whose testimony she knows is accurate? May the lawyer call a witness to testify truthfully for the purpose of leading the fact finder to a false conclusion? May the advocate elicit testimony that a witness believes to be true, even if the lawyer thinks the witness is mistaken? May counsel argue to a false conclusion? The answers, at least in the defense of a client accused of crime, are in the affirmative. All of which leads to the most troubling question of all. If the lawyer ethically can do it, must she do it?

> The blurring of the official rules standard and the absence of agreement among scholars, judges, and practitioners give rise to the risk that the externally imposed standards of candor for in-court presentation will be set at the lowest common denominator. It is not surprising that some experienced trial lawyers counsel law students to do "what you can get away with" in the courtroom and tell them that it is okay to play fast and loose with the truth so long as one is not obviously putting on blatant perjury.[26]

Peter Murray goes on to acknowledge the social value of personal honesty and affirm that "[t]here is nothing about being a lawyer that should prevent a person from prizing, and telling, the truth."[27] He goes further. He points out that many practicing lawyers "formulat[e] and follow[ ] their own personal codes of ethics."[28] He suggests these personal codes are not committed to writing, but offers the following as a sample:

- I will not represent any fact that I do not believe to be true.
- I will not seek to generate an inference that I do not believe in.
- I will not seek to convince other than by logic, reason, and public policy.
- I will not use trickery to confuse or distort what I know to be fact.
- I will not seek to circumvent the requirements of procedural or evidentiary rules.[29]

I find this passage troubling. He speaks truth but misses an opportunity. Most trial lawyers do develop their own personal codes of ethics, which are usually well within the outer limits of mandated

25. *Id.*
26. *Id.* at 32.
27. *Id.* at 33.
28. *Id.* at 32.
29. *Id.* at 32-33.

behavior. It is also correct to suggest that most of us do not commit these personal codes to writing. Why not encourage the practice? Inspired by the internal conflicts it awakened within me, I was moved to attempt a written statement of my personal ethical code. The attempt was more difficult than I might have wished, but more fruitful than I had imagined. I recommend it for both the beginner and the experienced practitioner.

Turning from process to substance, I cannot agree with some of the specific suggestions set out in the proffered list, although I suspect the author and I are separated more by semantics than substance. For example, the first item is troubling. It suggests the trial lawyer must decide what is true, and then conform her advocacy to that vision of truth. My approach proceeds in exactly the opposite direction. Experience has taught me to be very slow to decide where the truth lies. The lawyer's belief in what is and is not fact is largely irrelevant, and is often an obstacle to effective representation. The advocate's job description does not include truth finder. It does require her to predict what the fact finder will decide is the truth. It also requires her to persuade the fact finder of what it can and should decide is true. In both tasks, personal belief is more an obstacle than a help. Once we have reached a decision, most of us have a hard time viewing new information objectively. The strong tendency is to overvalue information that reinforces the wisdom of our decision, and discount information that suggests we are wrong. Not deciding is helpful in predicting how another person will view the evidence. It is also helpful when formulating a plan of persuasion. Indeed, one of the few ethical certainties is the rule against an advocate's trying to persuade by stating her personal belief or opinion.[30]

The remaining points in the suggested list raise similar problems for me. The point, however, is not my divergence of opinion. It is the call to personal inquiry and decision.

Finally, assuming the reader has adopted a personal code of adversarial conduct, the author addresses the question of what to tell the client about these personal predilections. He suggests the need to advise the client early in the representation that the lawyer is "adhering to standards of candor and integrity more stringent than are demanded by the official rules."[31] The lawyer should explain

30. Rule 3.4 of the ABA Model Rules of Professional Conduct provides in part:

> A lawyer shall not:
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> . . . .
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> (e) in trial, . . . assert personal knowledge of facts in issue . . . , or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;
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> . . . .

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1994).

31. MURRAY, *supra* note 2, at 34.

how her personal standards might affect the representation, leaving the client to make an informed decision about continuing the relationship, or seeking "assistance from a lawyer who works closer to the official line."[32]

There are three other topics included in the discussion of ethics. The first is a very practical exposition of the "Unwritten Rules of Legal Ethics,"[33] followed by a brief survey of "How Ethical Issues Arise."[34] The final topic, "Ethical Lapses in Court,"[35] is dealt with in more detail, including sections on: (1) improving the testimony, (2) leading and prompting witnesses on direct examination, (3) good faith questions on cross-examination, (4) tricks in court, (5) ethical problems with objections, (6) misuse of [evidentiary] voir dire, and (7) lawyer commentary and expressions of personal belief.[36]

The balance of the book embarks on an equally thorough yet concise discussion of the basic advocacy skills. It begins with the problem of developing an appropriate fact theory, proceeds through the highly parochial and arcane rules of courtroom etiquette, to the basics of blocking, body language, and vocabulary selection.[37] Following this discussion, the text considers each aspect of the standard trial. In each section, the author displays his remarkable discipline and skill as a reductionist. The discussion is illuminated by examples drawn from two cases that the author has used for years as the basis for mock trials. Consequently, the examples are well thought out, to the point, and tend not to raise more issues than they answer.

Given its overall excellence, the greatest flaw in *Basic Trial Advocacy* is one of omission. There is no discussion of jury selection. The absence of the subject is not due to oversight.

> Despite its importance in those jurisdictions in which it is still in widespread use, jury voir dire is not discussed in this book. Trial lawyers practicing in jurisdictions where lawyer voir dire of the jury panel is permitted should consult some of the growing body of literature on that subject.[38]

The decision to exclude discussion of this topic is unfortunate.[39] The art and pseudoscience of identifying juror prejudice and pre-

32. *Id.*
33. *Id.* at 35.
34. *Id.* at 37.
35. *Id.* at 38.
36. *Id.* at 38-51.
37. *Id.* at 67-96.
38. *Id.* at 47.
39. The decision undoubtedly reflects the author's professional environment. Peter Murray has maintained a successful trial practice from offices in Portland, Maine, for many years. Under the Maine Rules of Criminal and Civil Procedure, direct inquiry by counsel is left to the discretion of the trial justice. The long-standing local practice has been to exclude or severely restrict the opportunity for lawyers to address the prospective jurors directly. *See* ME. R. CIV. P. 47 and ME. R. CRIM. P.

conception as an insight to predicting a juror's ultimate decision is well beyond the scope of any text on basic trial advocacy. Nevertheless, the impact of jury selection on advocacy is too important to ignore, even in jurisdictions where the court usurps the voir dire.

Arguably, jury selection is at least one-third of trial advocacy. The content and method of presentation of your case is clearly a prime determinant of outcome. Equally important is what your opponent will say. The stool has a third leg: the decision maker. The uncovering and exclusion of individuals unlikely to accept your client, theme, evidence, or argument is an essential part of advocacy. Furthermore, if the theory of primacy has any validity, the process by which jurors are selected will impact their perception of both parties' presentations. The fact that the judge asks the questions can only serve to enhance that effect.

The opportunity for advocacy during winnowing of the panel survives judicial control. The minimum threshold of subtlety is undoubtedly higher. The opportunity to abuse the process is lessened. Nevertheless, the jurors will answer questions. Their answers will disclose something about how they are likely to react to your case. Those who survive to hear the case will be influenced by the questions asked of them. Their perceptions of the case also will be influenced by the answers to those questions—both their own and those of others. A friend of mine used to say: "Trial advocacy starts in the parking lot." I can remember practicing my summation while waiting for a red light on the way to work one morning, only to realize a juror was in the car next to mine. Wherever the day's trial starts, it is well underway by the time the jury is sworn.

Basic Trial Advocacy is simple, thorough, and concise. The author's intellect and engaging personality are evident throughout the book. He is a skilled trial lawyer who has spent years thinking about his trade. Like many of the breed, he holds strong opinions. He is not shy about stating what he believes and why. Peter Murray is also a skilled teacher. He does not attempt to demonstrate his own knowledge by displaying complexity, he uses it to achieve simplicity and clarity. Peter Murray avoids the temptation to tell every-

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24(a). The practice is the same in the United States District Court for the District of Maine. D. ME. LOCAL R. 23. The leading case on the issue is State v. Moody, 486 A.2d 122 (Me. 1984).

> As we have previously observed, the presiding justice, "above all others, is the immediate custodian and steward of justice in the circumstances and exigencies of the particular case." In the conduct of voir dire, therefore, it is his responsibility to balance the competing considerations of fairness to the defendant, judicial economy, and avoidance of embarrassment to potential jurors.
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> We have recognized the special role of the justice's expertise in the conduct of voir dire and have repeatedly stated that the presiding justice is afforded considerable discretion in determining the scope of voir dire.

Id. at 125-26 (citations omitted).

thing he knows and tries to cover what the reader needs to know. The initial focus on ethics is typical. He does not shy away from difficult issues or gloss over areas of academic and professional uncertainty. His presentation acknowledges divergent opinions and fairly presents the arguments in their support. The reader is encouraged to reach her own synthesis of professional obligations and personal values.

Basic Trial Advocacy is worth reading. It is worth keeping. It is worth reading again several years down the road at that point when we all seem to forget how we meant to go on at the beginning.