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Dana K. Cole - TLC '95

What is a trial lawyer? What image or concept comes to mind? The trial lawyer is referred to as an advocate, a storyteller, a champion, a salesman. All of these concepts are useful and serve to explain different aspects of what we do as trial lawyers. But the metaphor that is most prominent at the Trial Lawyers College is that the trial lawyer is a warrior. This magazine is named *The Warrior* for that very reason. The warrior metaphor matters. I'll explain.

Our friend and colleague R. Rex Parris has introduced us to the importance of metaphor and how the metaphors we live by structure our everyday activities.¹ An accessible example is the "argument is war" metaphor.² Imagine you are in an argument with your significant other. Our everyday language reveals that we see that argument as war.³ We speak of *winning or losing* an argument and we *attack weak points* in our opponent's position.⁴ We might say that our opponent *shot down* all of our arguments.⁵ Our language is linguistic evidence of how we perceive argument.⁶ Much more importantly, the way we perceive argument dictates our goals and our actions.⁷ What if we change our concept of argument and see it as dance rather than war? The war language would no longer fit. We would not talk in terms of *winning or losing, attacking or defending, or gaining or losing ground*. Instead we might refer to being *out of step* or *not being in sync* with one another. We would think in terms of *not being on the same page* (musically). If we conceive of argument as dance, the goal would not be to win but "to perform in a balanced and aesthetically pleasing way."⁸ Not only would our language change but our goals, attitude and actions would also change.⁹

So—back to the "trial lawyer is warrior" metaphor. The term "warrior" certainly implies a person with great vigor and courage—great qualities for a trial lawyer. In an athletic context we might think of the boxer or a self-sacrificing football player. "Warrior" also conjures up an image of an aggressive soldier engaged in warfare. The word literally means one who wages war. The metaphor is useful in gathering us together and solidifying us as a group with a common purpose and a common enemy. We are, in a very real sense, engaged in battle in individual cases against real enemies—the prosecutors who are intent on incarcerating or even killing our clients and civil defense lawyers whose goal it is to minimize or prevent our client from receiving justice in the form of a monetary award. Mike

O'Loughlin, my trial lawyer friend from Dayton, Ohio, says in defense of his aggressive style, "I didn't come here to make friends—I have friends at home." The warrior metaphor is also useful in a larger context in that we are unified in defeating tort-reform, in preventing the erosion of our civil liberties and in our opposition to the death penalty. But should we present ourselves in trial to the jurors as warriors? Does the warrior metaphor in trial lead us to proper goals, attitudes and actions?

We can agree that most jurors come into the trial process feeling a heavy responsibility to figure out what the facts really are and what the law requires them to do about it. We assume jurors are essentially fair—that they are open and anxious to make correct decisions about the case presented to them. It is unlikely that the verbal clash of sworn enemies and the resulting chaos of warfare will help jurors make sense of conflicting information. If we appear overly aggressive in our dealings with the jurors, or if we are seen as gratuitously attacking our opponent or their witnesses, the jurors will likely recoil from us and find us intimidating or, worse, unfair. We are clearly partisans in the contest—but do the jurors see us as partisan because one side and not the other hired us, or do they see us as partisan because we have sided with justice and are trying to present the truth to them?

Our clients need a warrior—someone who is committed to them and their cause—someone who will have the tenacity to overcome any obstacle to deliver them a victory. The civil and criminal justice systems need warriors—those who are unwilling to stand idly by while the rights of the underprivileged are eroded. But jurors need something else. Jurors want to make the right decision—not just side with the best fighter. Jurors need a guide through this maze—someone to lead them toward a just result—someone to escort them to the truth. The jurors, more than anything else, need a good teacher.

Who was your favorite teacher? Mine was Mrs. Engles in third grade at Holbrook Elementary School in the small town of Lebanon, Ohio. She seemed old to me. She was probably younger than I am now—but I figured anyone as wise as she had to have been around for a long time. I can easily envision her—a heavy-set woman in a cotton dress and sensible shoes standing with chalk in hand at what we called the blackboard (but was in fact green). She had a kind voice. She was patient and encouraging, sympathetic and genuine. She seldom raised her voice and only then if someone was being unkind or unfair to another. She knew that anxiety would distract us and keep us from learning so she made her classroom a safe place to try new things. She made the material she taught accessible to us with visual aids and fun exercises designed to hold our attention and she gave us breaks when we needed them. She was not boring. She kept us engaged. The process was about us and nobody else. We trusted her. She loved us. Mrs. Engles would never lie to me.

Gerry is [third grade teacher]
Mrs. Engles in cowboy boots and
a buckskin jacket.

Our beloved Mr. Spence has carefully cultivated a well-deserved image as a warrior, a cowboy, a man's man—even a gunslinger.¹⁰ His favorite movie is *Tombstone* and I contend that the movie is about him (Gerry is Doc Holiday—not Wyatt Earp). But the truth is, the predominant characteristic Gerry displays in his relationship and interaction with the individual jurors is that of caring teacher and not warrior. We've all seen him in front of the large group in the big barn at Thunderhead Ranch discussing and demonstrating various trial skills. There is little difference in what we see in the big barn and the approach he takes when he stands before juries. In short, Gerry is Mrs. Engles in cowboy boots and a buckskin jacket.

In jury selection Gerry approaches the prospective jurors as friends—believing in their essential fairness and accepting their opinions and feelings with respect.¹¹ He seeks to include jurors—not exclude them.¹² Does this sound like a warrior or a teacher?

In the opening statement Gerry tells a story.¹³ In doing so he trusts the jury with all of the admissible, relevant information. He, of course, discusses facts favorable to his case, but if there are damaging or embarrassing facts, he hastens to tell them.¹⁴ He

wants the jurors to know the disputed facts and he explains why his version of the events is more likely to be true.¹⁵ If there are hurtful facts that cannot be explained, he tells them.¹⁶ If regrets need to be expressed, he shares them

with the jurors.¹⁷ If there are apologies to be made, he makes them.¹⁸ All the while, Gerry trusts that the overriding justice of the case still rests with him.¹⁹ Warrior or teacher?

Gerry has shown us that the **direct-examination** is also storytelling—telling the story through the lips of the witness.²⁰ "Our job is to help the witness tell the part of the story the witness knows."²¹ It is here that we show the jurors the case—not just tell them. We show them through exhibits, illustrative aids and psychodramatic reenactments. Does "show and tell" sound familiar?

What about **cross-examination**? If there's one aspect of the trial that calls for a warrior mentality, isn't it the cross-examination of adverse witnesses? Gerry explains:

Cross-examination is simply storytelling in yet another form. Cross-examination is the method by which we tell our story to the jury through the adverse witness and, in the process, test the validity of the witness's story against our own. *** Our strategy will be to cross-examine the witness with what I call the 'compassionate cross,' simply a cross-examination that takes into account that this witness is a decent, ordinary human being facing a moral dilemma. We want to understand him and, before the cross is ended, to speak for him in ways he cannot speak for himself. *** It is rarely productive for a lawyer to attack the witness with an angry cross-examination. Unless

the witness is truly a miserable monster, I'm not interested in trying to convert the witness into one, nor to show up the witness as some species of idiot, because in the process the magic mirror always works. Too often I will also be revealed as a cruel ruffian, and in the process of trying to display someone as an idiot, I will be seen as one.²²

Gerry does not see the adverse witness as an enemy to be destroyed but as a struggling human being whose motivations are to be revealed. Warrior or teacher?

What about the **final argument**? As Gerry puts it, "The [final] argument *is* an argument, the reasoning that supports the justice, the creation of the whole aura of rightness that shines down on our case."²³ It is our chance to blend logic and passion and motivate the jurors to action. Certainly in our demand for justice we feel and express genuine ethical anger or righteous indignation, but our anger is not directed at the jurors. If anything we are modeling for the jury the passion they should feel as a result of the injustice suffered by our client. We are teaching the jurors by example and empowering and motivating them to make a difference in the life of another person. Isn't that what good teachers do?

The warrior metaphor is valuable in the right context and I am not suggesting we abandon it (or change the name of this magazine). But if we see ourselves primarily as warriors when we are in trial, we will not have the appropriate mindset to develop a trusting relationship with jurors. The warrior mentality will cause us to think and act in ways that will likely interfere with establishing a good rapport with jurors. Our goal will be to attack

rather than educate, defend rather than reveal, protect rather than trust. Certainly the teacher metaphor is insufficient to capture all we do, but if we envision ourselves in trial principally as caring teachers, the winning approach we teach and practice at the Trial Lawyers College will be easier to adopt. ☺

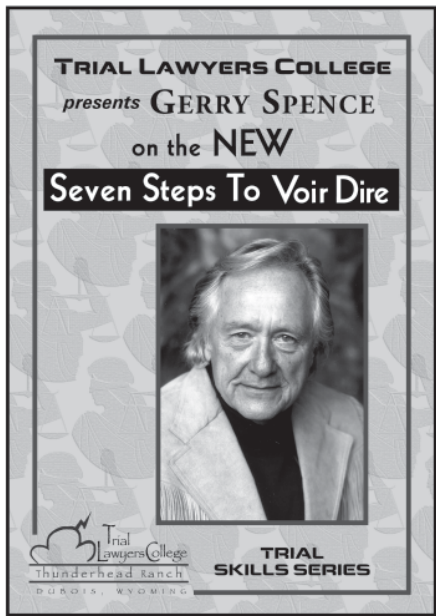
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ENDNOTES

- 1 Rex recommended several sources, most notably LAKOFF & JOHNSON, METAPHORS WE LIVE BY (1980).
- 2 LAKOFF & JOHNSON, *Id* at 4-5.
- 3 *Id.*
- 4 *Id.*
- 5 *Id.*
- 6 *Id.*
- 7 *Id.* at 5.
- 8 *Id.*
- 9 *Id.*
- 10 See generally GERRY SPENCE, GUNNING FOR JUSTICE (1982).
- 11 GERRY SPENCE, WIN YOUR CASE 113 (2005).
- 12 *Id.*
- 13 *Id.* at 131.
- 14 *Id.* at 129.
- 15 *Id.* at 130
- 16 *Id.*
- 17 *Id.*
- 18 *Id.*
- 19 *Id.*
- 20 *Id.* at 149
- 21 *Id.*
- 22 *Id.* at 169, 178, 189.
- 23 *Id.* at 228.

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