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Twenty-Five Propositions for the Practice of Law

Jonathan K Van Patten

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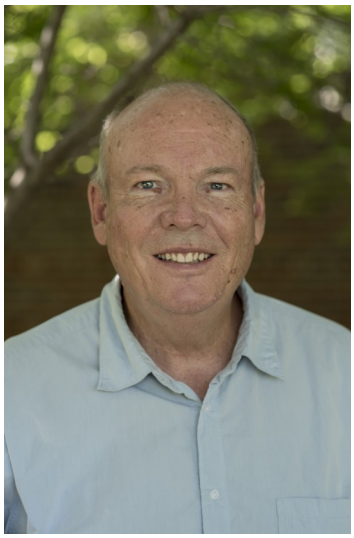

1. It is very important to recognize what you don't know. The extent of your competency falls off sharply. No matter how well you have done in the past, you are always one step away from disaster. Always be vigilant; do not assume. Do not be afraid to ask for directions. Donald Rumsfeld's observation is especially applicable to the practice of law:

> As we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know.

See also Clint Eastwood: "A man's got to know his own limitations."

2. Know yourself. Try to understand why you do the things you do, especially the stupid stuff. You must scout yourself. That is, look at yourself as if you were the opponent. It is time to do so, because your opponent has already been scouting you. You need to find your weaknesses and deal with them before your opponent pushes those buttons that make you less effective. Identify the wolf, who has been roaming around your inner-self, unchecked.

3. Know your opponent. When you think about the other side, be clear in your assessment. Don't project yourself on to the subject. Don't discount the power of the other side's argument simply because you disagree. The best way to eliminate your blind-spots is to start with a healthy respect for the other side. See what they can teach you about the problem. Some recommend writing out the other side's closing argument early in your trial preparation.

> If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.

Sun Tzu, The Art of War.

4. Learn how to deal with adversity. Conflict is inherent in the profession. Part of the process of becoming a lawyer is to become strong enough emotionally so that you can be effective in conflict situations. Acquiring strength through adversity is like the child who develops resistance to disease through experiencing sickness. This is not to justify everything that goes on in law school or in practice. But, if you survive law school and the bar exam with your body, mind, and soul intact, you will be stronger and more effective throughout your career. The caution is that you should not become so strong or detached that you forget where you came from.

5. Develop a bullshit detector. Not everyone is telling you the truth. Your own client may not be telling you the whole truth. A clear understanding of the situation (diagnosis) is essential to figuring out what to do (prescription). It is your job to figure out who is not reliable and why. This is a basic skill for lawyers (and an important life skill as well). To do this, you must employ healthy skepticism; everything must be questioned. But don't get stuck in this phase. Your questioning will lead you to figure out whom you can trust. You can use a mentor (and probably should) to help you through this thicket, but eventually you will have to grow into making this assessment on your own.

6. Develop your listening skills. Listening is not simply waiting for the other person to stop talking. Real listening is a discipline; it is classic multi-tasking. It requires respect, voluntary loss of control, suspension of disbelief in order to take in information accurately, and judgment that allows for an appropriate response. Listening poorly is like an astigmatism of the brain that prevents you from taking in information accurately. Listening well helps you to get to the diagnosis of your client's problems and as well as enhancing the counseling side of your practice.

7. Learn the skill of asking good questions. Good lawyers know how to ask questions. Questions are an instrument of control. Questions frame the issues, control the agenda or discussion, lead to the discovery of evidence and arguments, and are the means through which evidence comes into the courtroom. Know the difference between open-ended and closed-ended questions. This is key to effectively taking depositions and controlling a witness at trial.

8. Know how to say no. The art of negotiation is learning how to say no, until it is time to say yes. No is essential in getting to yes. Whether in the litigation or transactional context, you cannot be effective in representing your client's interests without a healthy dose of no. A continual resort to no, however, may be ineffective because it stands as an obstacle to agreement. No is necessary, but off-putting. It advances the process of coming to an agreement, but may derail it, if not used with care. Knowing *how* to say no is essential.

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9. Know how to tell a story. Storytelling is an essential part of advocacy. It involves much more than telling facts in chronological order. You will need to find your theme; plan where to begin the story; think about how to balance between background (who, when, and where) and action (what, how, and why); consider when to deliver the important facts; "squeeze" the facts to include important inferences; figure out how to express your theme through thoughtful word choices and metaphors; and build all this toward the ending of your story.

10. Find the theme for your story. Every story has a theme. Look for it. The search for the right theme is one of the most critical tasks facing a trial lawyer in presenting a case to a jury. Human beings do not absorb facts in the abstract. The theme gives them the necessary perspective to understand the evidence. If the plaintiff attorney does not provide jurors with the right theme, the defense will, or jurors will do it for themselves.

William S. Bailey, *Tie Your Case Together With A Good Theme*, TRIAL, Feb. 2001, at 58.

People are theme-seeking creatures. If you do not provide a theme, someone else will, and it may not be one to your liking. A theme has organizing power. It helps the storyteller to decide what to include and what not to include. It supplies the measure through which to highlight the important facts and exclude or diminish lesser or countervailing facts. If a theme resonates with listeners, it can become so powerful as to override any opposing narrative. Embedding a theme in a story becomes a way to tie into people's own narrative stories that drive their decision-making processes.

11. Look for the moral center of the argument. Similar to finding the theme, but here you dig deeper. Trial lawyer Rick Friedman emphasizes what he calls "moral core advocacy." He asks lawyers to confront what they are afraid of, even what they are ashamed of, and challenges them to talk honestly about it. This is similar to Gerry Spence's advice to use *voir dire* to talk to the jury about what scares you about your own case. *See also* NICK ROWLEY, TRIAL BY HUMAN (2013). Looking for the moral center of the case should lead you away from theory to the common sense of what you should be telling your listener. You appeal to shared values, as if you were Atticus Finch.

12. Understand the strategy of storytelling. People do not like to be told what to think or even how to think. But lawyers do this all the time. Give the audience the space to make the decision and it might stick; if you do not give them space, they will resist. The story is a way to advocate without appearing to do so. This is indirect persuasion. The sequence or timing of the telling of the facts is important. What you want is the audience to be led at the beginning, but to be ahead at the end. Good storytelling requires audience participation, though not necessarily verbal (although a few "amens" going off in the mind would be good). At least by the midway point, you want the audience to be invested in your narrative emotionally and eventually to arrive at the conclusion before you do.

13. It is important to think about what to include and what to exclude. The purpose of the initial draft of a letter, memo, or brief is to research and collect the relevant materials into a single document. Another purpose is to begin the process of exclusion. Culling and synthesizing are just as important as the collection phase. Be vigilant about clutter, but don't decide against more explanation when it is needed. What is going on in your head is not always reflected in what is on the paper (or the screen). Include what needs to be included and omit what does not. Got it?

14. Learn how to be responsive to questions. Most people do not have this skill. Only when you have developed this skill will you realize how useful it is. The question and answer process is very familiar to students, but it is not practiced with much rigor before law school. Because students often stick with what they think they know, the answer they give may be true, but not responsive to the question. The questioning process in law school provides students, particularly the ones *not* called upon, with plenty of practice in developing this skill. Just listen and evaluate. It will take time, but less so if you concentrate on the responsiveness of the answer. One eventually develops an ear for it, like a piano tuner's for when the pitch is true. This will become a necessary skill in depositions, negotiations, and trials. The ability to gauge when the responder is evasive or incomplete will usually lead to productive follow-up.

15. Know when you are on offense and when you are on defense. Probably the best advice I heard on argument was from Professor Ken Graham at UCLA: "There are two ways to win a race: run faster than anyone else or make sure that no one runs faster than you." In terms of argument, it means that you can win by making sure the other side does not win. It also means that you should not try to win arguments you cannot win, just do not lose them. Many lawyers, being naturally aggressive, try to win every argument. This is a mistake. A corollary is: do your side of the argument, then deal with the other side.

16. "Don't beat up on a witness until the jury gives you permission to do so." Very good advice from Gerry Spence. But what exactly does it mean? The attorney's natural instinct is often to attack first. But the jury's first impression may be sympathy for the witness. The jurors were previously interrogated by the lawyers during *voir dire* and that experience may not have been pleasant. And they may also have brought with them some bad thoughts about lawyers in general. In any event, don't assume the jury is on your side. The best way to bring them over is to show, gently at first, that the witness is lying. When you sense that the jurors have given permission, then you can turn up the heat.

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17. The paragraph is the unit of composition. This concept is the essential tool for writing (composition) and fixing writing (editing). The paragraph is the right size for thinking about composition. It forces the writer to think about the issues of proposition, support, transition, and sequence in the most productive way. Similarly, this concept is the most useful diagnostic tool for editing, especially for your own writing. It will expose structure, sequence, and tone problems. It will slow you down to the right pace to discover problems, both large and small. Substantively and procedurally, the paragraph is the right size unit for thinking about writing and editing.

18. Omit needless words. The second most important principle for writing, especially during the re-write process, is to strike out unnecessary words. Trim, trim, and trim. Crossing out unnecessary words is the editor's primary tool. Stephen King tells it this way:

> In the spring of my senior year . . . I got a scribbled comment that changed the way I rewrote my fiction once and forever. Jotted below the machine-generated signature was this: "Not bad, but PUFFY. You need to revise for length. Formula: 2nd Draft = 1st Draft – 10%. Good luck."

The second draft is the first draft minus ten percent. This is a great formula for all writers to live by. First drafts always have too many words. Inexperienced writers use too many words. Lawyers generally use too many words. Inexperienced lawyers? Watch out.

19. The use of adjectives and adverbs is okay in legal argument, but be careful. Adjectives and adverbs are the language of opinion, whereas nouns and verbs sound more in fact. They are useful to shade the argument, but don't rely on them to close the deal. They are supporting actors, not lead actors. Argument by adjectives and adverbs is cheap argument. It is only slightly more sophisticated than *ad hominem*, which in turn is only slightly more sophisticated than a fistfight outside of a bar.

20. Try to refrain from editorializing when making the presentation or argument. Don't trust an advocate who uses ALL CAPS or snarky quotation marks to make a point. Shouting is not persuasion, neither is insincere sarcasm. When trying to persuade, you must give the listener space. People resist being told what to think. Editorializing during the argument is premature. You want the decider to reach the desired conclusion before you do. When you try to close the deal with "clear" or "obvious" or "obviously," you put your credibility at risk, if the listener is not yet ready to agree. Don't disclose what else is going on inside your head, like "This might be a stupid question, but . . . ." or "Well, this is just off the top of my head . . . ." False modesty does not play well in argument. Not much good can come from editorializing.

21. What might you say if you are asked: how can you defend a guilty person? We have all heard this question, even when we do not practice criminal law. Here is a possible response: "It's because I believe in our system of justice. The State may not put someone in prison unless it follows its own rules. The rules say one is presumed innocent and the State must prove its case beyond a reasonable doubt. It has to show that the evidence is both relevant and properly obtained. The lawyer makes sure the State follows the rules and that the process is fair. This is for everybody's protection and I can get behind that."

22. For newer lawyers, be patient while you are growing. There is a certain amount of seasoning that is required to transform the foundational skills and knowledge from law school into problem solving reflecting good judgment. Don't sell yourself short. You know more than you think. But it takes time. Malcolm Gladwell says it takes roughly 10,000 repetitions before one becomes proficient at his or her craft. That is probably overstated, but don't disregard that thought. It takes time, for example, to absorb the rules of evidence in order to make the quick, correct calls that are necessary at trial. With experience, "the game begins to slow down," and the calls become more instinctive. There are few shortcuts, although the key is not just working hard; it is working smart. Repetition with reflection will lead the way.

23. Pick your fights wisely. Win the fights that you can win. Do not lose the fights that you cannot win. Recognize the difference between the two. Got it? You do not have to always fight like a terrier at the first sign of conflict. You must control your inner terrier. Visualize the endgame. Figure out how to make the fight take place under favorable circumstances.

24. The lawyer is not like the captain of the ship; you are not obliged to go down with your client. The lawyer has a duty to zealously represent the client's interests. Your advocacy of those interests requires you to care. But, caring has limits. There are worse things than losing. You have worked hard to become a lawyer. Don't throw that away in the heat of the moment. Zealous advocacy requires you not to lose your head when everyone else is losing theirs.

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25. Think like a lawyer, talk like a real person. The practice of law is not just mastery of a set of rules. It requires many additional skills, including understanding yourself, careful listening, ability to synthesize law and fact, working smart, exercising good judgment, reflection on experience, and tenacity. While this is a complex mix, the outcome also needs some translation back to simple terms. The one who makes it the simplest generally wins. And that outcome must make sense. If the law is to continue to command respect, it must make basic common sense.

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Twenty-Five Ways To Say No, 63 S.D. L. Rev. 337 (2018); *Skills for Law Students*, 61 S.D. L. Rev. 165 (2016); *On Editing*, 60 S.D. L. Rev. 1 (2015)
Metaphors and Persuasion, 58 S.D. L. Rev. 295 (2013); *Storytelling for Lawyers*, 57 S.D. L. Rev. 239 (2012); *Themes and Persuasion*, 56 S.D. L. Rev. 256 (2011);
Twenty-Five Propositions on Writing and Persuasion, 49 S.D. L. Rev. 250 (2004)

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And if the client is determined to have some money immediately, as some are, the entire recovery need not go into the Trust.

I believe that lawyers should consider an SSAT for any client who receives a substantial recovery. It has many benefits over a traditional structured settlement or annuity. And for many clients, it is the only thing that will stop them from wasting by far the largest sum of money they will ever see.

[1] In the interest of full disclosure, I do not have any relationship with The Halpern Group. I have worked with them and recommend them to other plaintiff lawyers.

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for remote jury trials that can be followed by other jurisdictions. With the exception of jury selection, Tutor ran a mock civil jury trial from start to finish. While there are obvious issues with remote jury trials (accessibility for all citizens to serve on the jury, not being able to see the entire panel when questioning one juror, and technology), there are also major issues with empaneling a jury in the courthouse. There is simply no way to ensure social distancing. The lack of space starts at the courthouse doors and throughout the building, no space is big enough. Judges and lawyers don't want to risk empaneling a jury and take the chance that one of them gets sick. The traditional jury trial just isn't possible right now.

In closing, I think Mark Cohen said it far better than I could:

> The contours of the AC (after-Corona) legal world are taking shape. There are challenges and opportunities. Those who upskill and adopt a learning-for-life mindset will find opportunity. Others that stand pat, hoping that things will soon return to the BC (before-Corona) world, will be redundant. COVID-19 will produce a thinning of the heard and a reimagined legal industry. Embrace the challenge."

I will embrace the challenge, will you join me?