

## KEYNOTE SPEECH

### THE HISTORY OF THE TEACHING OF TRIAL ADVOCACY\*

Terence F. MacCarthy\*\*

I share with you a quick observation. James Boswell wrote *The Life of Samuel Johnson*.<sup>1</sup> Johnson, of course a brilliant man, gave us the first dictionary.<sup>2</sup> In *The Life of Samuel Johnson*, Boswell repeated one of Dr. Johnson's famous quotes: people who write lapidary inscriptions are not under oath.<sup>3</sup> Well, most of you, I am sure, certainly those who went to Stetson, know what a lapidary inscription is. But some of us may not know.

A lapidary inscription is no more and no less than a tombstone epitaph. So, Dr. Johnson was telling us that people who inscribe tombstone epitaphs are not under oath. Well, let me sug-

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\* This Speech was given at a dinner on November 15, 2007, where Mr. MacCarthy was honored as Stetson University College of Law's inaugural recipient of the Lifetime Excellence in Advocacy Award.

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MacCarthy is also passionate about teaching. He has served on the faculty of the National Criminal Defense College for every summer since its inception in the early 1970s. He is also a member of the faculty of the Western Trial Advocacy Institute, the Northwestern Short Course, the University of Virginia Trial Advocacy Institute, has taught at the Gerry Spence Trial Lawyer's College, and will teach at Stetson University College of Law.

1. James Boswell, *The Life of Samuel Johnson* (Christopher Hibbert ed., abridged ed., Penguin Classics 1979).

2. Samuel Johnson, *Johnson's Dictionary* (Todd ed., Charles H. Hendee 1836).

3. Boswell, *supra* n. 1, at 273.

gest to you that people who introduce speakers or people like myself at functions such as this are, likewise, not under oath.

Dean Dickerson, I have to and do tell you, I am deeply honored. I am moved, I am very appreciative of this honor. This is a very, very special honor because of where it comes from. You people are to trial advocacy what Michael Jordan is to basketball. And to be honored by Stetson is a singular honor that I truly enjoy.

I was introduced tonight to William Reece Smith, Jr. It has been mentioned that I have been active in the American Bar Association (ABA) for many years. Reece Smith deservedly enjoys an incredible reputation as a past president of the ABA. It was an honor to meet and talk to him.

There are several distinguished judges here with us. Two are from Chicago. Not only are they great jurists, but of paramount importance to me, and I am sure to you, is that they are both great teachers of trial advocacy. They are involved in what you people down here at Stetson are involved in. Judges Erickson and Wolfson. Judge Wolfson may look a little old to you, but there is a reason for that.

I remember trying cases in the federal district court with Judge Wolfson when he was a young practicing lawyer. A great lawyer, now a great judge, and a wonderful teacher of trial advocacy. Judge Erickson is a committed teacher of trial advocacy. Many years spent in the state attorney's office of Cook County, Illinois, gave him the necessary background.

Speaking of my favorite judges, you have one right here who is on my all time favorite list. I have taught trial advocacy at Northwestern Law School with your appellate judge E.J. Salcines for over twenty years. He is a great and long-time special friend. Actually the best part of knowing Judge Salcines is getting to spend time with his lovely wife Elsa.

You also have two of my all-time favorite professors on your outstanding faculty. Professor Ellen Podgor and I go back many years. To explain this, I first met her when she was about twelve. She is nationally acknowledged as a great lawyer, a gifted teacher, and a wonderful person.

Today I met still another of your professors. I knew well who he was but I had never personally met him. I am speaking of Professor Michael Swygert.

Professor Swygert's father was one of the finest judges I have ever had the honor of appearing before. He sat for many years, including a stint as Chief Judge, on the Court of Appeals for the Seventh Circuit.

Today I had a great lunch with Mike. We spent most of the time sharing stories about his father.

Finally, though importantly, we have with us Michael Trainer. Michael serves with distinction as the Chair of the Board of the ALI-ABA Committee. They do an excellent job of teaching lawyers. I had the honor of serving with him on his committee a few years ago.

I gave some thought to what I should talk about. During the day I had the opportunity to speak about two of my favorite subjects, cross-examination and impeachment. Even if I had not spoke about them already, they would not have been appropriate topics for this evening. Accepting this I had a positive thought. Appreciating what Stetson law school has meant and contributed to trial advocacy, I decided to share some thoughts with you on the history of the teaching of trial advocacy.

My mention of this subject has caused interesting and for the most part a negative reaction. You are thinking "Oh, good God, he's not going to go through the whole history? We will be here for hours, maybe days." But such will not be the case. I have good news for you. Believe it or not, there is little history on trial advocacy. In fact, there is absolutely none before 1971.

The idea for the teaching of trial advocacy did not begin until 1971. It was first done in the summer of 1972. So we do not have to go too far back. Oh, I am sure there are some Doubting Thomases here who say "Wait a minute, Terry, what about the ancient Greeks, didn't they have advocates?" No, they did not. There were no lawyers in ancient Greece. If you want proof of the problems that caused, go back and talk to Socrates. Socrates did not have a trial lawyer, and look what happened to him. There were no lawyers in ancient Greece.

Well, what about the Romans? There were lawyers in Rome, but they were not trial lawyers as we know them to be. The people tried their own cases. Self-representation was the way it oc-

curred in Rome.<sup>4</sup> Oh, they could and frequently did bring in a lawyer, but they brought the lawyer in for a very specific and limited purpose. To give a speech. That was all they did. Rhetoric was big. They were good at rhetoric. A lawyer would come into the trial to simply give a speech. There was no need to teach trial advocacy. It did not exist.

Well what about the British barristers? Contrary to what we have been told and believe, they were not, save for the past few years, formally taught trial advocacy. They were expected to learn how to try cases by associating with an experienced trial lawyer. The downside of this was obvious—the experienced trial lawyer himself was not formally trained as a trial lawyer. However, on the plus side all the barristers did was try cases. In any event, the apprenticeship system was a far cry from formally being taught trial advocacy.

When I started practicing law in 1960 we had a weak attempt at the British apprenticeship system. Except ours was no system. We were told to go to the courtrooms and watch some of the good lawyers of the day. Well, that was good to a point. But the problem was those good lawyers were not themselves formally trained in trial advocacy. And if you happened to observe a bad one—and I can think of a few bad ones I watched over the years—you learned bad habits. In a word, there was no formal instruction in trial advocacy.

All of this said, have we not had some great trial lawyers in this country? We have had some great lawyers. John Adams was a great lawyer. Daniel Webster was a great lawyer. Abraham Lincoln, no less, was a great lawyer. Moving up to a more recent vintage, Clarence Darrow was a great lawyer. But I tell you the truth, I do not know how many of you have ever gone back and read any of the trial transcripts of these “great lawyers.” By the standards of their day they were marvelous. But by today’s standards, though their rhetoric and thinking skills were outstanding, their basic trial skills were not particularly good.

Along came 1971—and Reece Smith can take great pleasure in this—the ABA, which has done so much good for lawyers and

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4. Daniel R. Coquillette, *The Anglo-American Legal Heritage* 6 (1999) (discussing how Roman courts worked).

good for the country, was the moving force in helping to create the National Institute of Trial Advocacy (NITA).

NITA ran its first trial advocacy program in the summer of 1972 in Boulder, Colorado.<sup>5</sup> That was the start. That was the birth of trial advocacy as we know it today. It started what I will call the renaissance of trial advocacy. Everything suddenly changed, and this was a wonderful thing.

There are many programs today that are basically modeled after NITA and its progeny. Some of them have changed the basic model a bit. Some of those changes have been good changes. But most of the programs, the good trial advocacy programs, are modeled on the NITA method of teaching trial advocacy.

I share with you two observations on NITA. The first I do with great passion, as you will notice, and the second I do more for informational purposes.

You still read law review articles or hear people tell you that trial advocacy in this country was started by former Chief Justice Warren Burger. However, this is not accurate.

Many years ago I remember talking to Chief Judge William J. Campbell, the long-time Chicago judge for the Northern District of Illinois. He was a great judge for whom I clerked. I asked him if he had read Chief Justice Burger's 1973 Sonnett Lecture at Fordham Law School. Judge Campbell was always interested in the teaching of trial advocacy. I gave the Judge a copy of the talk and explained that the Chief Justice was advocating the teaching of trial advocacy.

Judge Campbell, a wise man, looked at me and asked, "Terry, did you read the article?"

I said, "No. Why?"

He said, "Read it."

I asked if he had read it.

He said, "No, I did not, but I do not have to read it. I know Chief Justice Warren Burger."

I asked, "What do you mean by that?"

He replied, "The Chief Justice has no more interest in trial advocacy than the man in the moon."

I asked, "Why is that?"

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5. National Institute of Trial Advocacy, *Milestones*, <http://www.nita.org/milestones> (accessed Nov. 30, 2008).

He said, "Because he does not know a damn thing about it."

Well, first of all, the Sonnett Lecture wasn't delivered until November of 1973.<sup>6</sup> By then NITA had two summer programs in Boulder. As a matter of fact, Chief Justice Burger mentions NITA in the Sonnett Lecture.

Judge Campbell told me Chief Justice Burger hardly tried a case, and he never sat as a trial judge.

Judge Campbell did not mention this, but I discovered it was the D.C. Circuit, the Circuit Warren Burger sat on before he went to the Supreme Court that gave us the "farce and mockery" standard.<sup>7</sup> I do not know how many of you are old enough to remember it, but the standard that they gave us was a Sixth Amendment standard to be applied to a lawyer representing a criminal defendant. The lawyer was "adequate" under the Sixth Amendment as long as the trial was not a "farce and mockery."<sup>8</sup> This hardly suggests an interest in competent trial advocacy.

Chief Justice Burger also personally authored Rule 7.7 of the ABA Defense Function Standards.<sup>9</sup> Standard 7.7 was contained in the original ABA's Criminal Justice (then "minimum") Standards.

Standard 7.7 told us what we should do as criminal defense lawyers: we should put our potentially perjurious defendants on the stand in narrative form.<sup>10</sup> In other words, do not ask them questions. "Tell us, Mr. Witness, anything you want to tell us? I am going to go sit down while you are doing it." Commendably, two circuits, the Third Circuit in the *Wilcox* case<sup>11</sup> and the Ninth Circuit in the *Lowery* case,<sup>12</sup> held that it would be improper for an attorney to put on "narrative" testimony.

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6. Warren S. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 Fordham L. Rev. 227, 233 (1973-1974).

7. *Diggs v. Welch*, 148 F.2d 667, 669 (D.C. Cir. 1945).

8. See *Hayes v. Russell*, 405 F.2d 859, 860 (6th Cir. 1969) (holding that a client does not have a claim for inadequate legal representation unless the proceedings were a "farce and mockery" of justice).

9. Criminal Justice Standards 7.7 (ABA 1st ed. 1986). Rule 7.7 was later repealed and never reinstated.

10. *Id.*

11. *Wilcox v. Pennsylvania*, 555 F.2d 115, 122 (3rd Cir. 1977).

12. *Lowery v. Cardwell*, 575 F.2d 727, 730 (9th Cir. 1978).

Chief Justice Burger followed up his interest in ethics by writing an opinion in the Supreme Court: the *Whiteside* opinion.<sup>13</sup> In *Whiteside*, he told us, as criminal defense lawyers, that what you do given the possible perjury situation is you consider impeaching your defendant.<sup>14</sup> I have always wondered about that. Impeach your defendant? Come on. If that is not ineffective assistance of counsel nothing ever will be.

The Chief Justice was a man that was not interested in trial advocacy. He is also the same man who was Chairman of the Board of the Federal Judicial Center in Washington at the Dolly Madison House responsible for teaching federal judges.<sup>15</sup> I believe federal judges do a very good job. I have a great relationship and respect for the federal judiciary. They do a great job, except in one area. Then again everyone cannot be perfect.

Federal judges are taught at the Federal Judicial Center not to allow lawyers to do voir dire. Why is that? It takes too much time. You can, they are taught, do it in much less time than the lawyers. This teaching is inconsistent with an interest in improving trial advocacy.

Well then what was the intended and actual message of the Sonnett Lecture? Read the Sonnett Lecture carefully, especially with an appreciation of the background of the Chief Justice, and you will focus on his intended message. His concern was not the adequacy of trial lawyers but rather their manners, their deportment, and their deference to judges.

That was Chief Justice Burger's interest in trial law. He unfavorably compared us to our British barrister brothers. He said we are way behind them—which is ridiculous by the way. We are behind them because of our poor manners, our lack of proper

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13. *Nix v. Whiteside*, 475 U.S. 157 (1986).

14. *Id.* at 157, 171. In *Whiteside*, defendant originally told his attorney that he did not see a gun. *Id.* at 157. However, he subsequently told his attorney that he saw something metallic and said "if I don't say I saw a gun, I'm dead." *Id.* His attorney informed him that if he was going to tell that version of the story he was committing perjury and he would have to impeach defendant's testimony and seek to withdraw representation. *Id.* Defendant was found guilty, and moved for a new trial based on the claim that he was deprived of a fair trial because his attorney would not allow him to say that he saw a gun or "something metallic." *Id.*

15. Linda Greenhouse, *Warren E. Berger Is Dead at 87; Was Chief Justice for 17 Years*, <http://query.nytimes.com/jst/fullpage.html?res=990CEODA1E#!F935A15755C0A963958260&sec=&spon=&pagewanted=2> (last updated June 26, 1995).

courtesy, and deportment. These were his concerns and his complaint.

Today our lawyers, thanks so much, Dean, to what you and this law school have done, are far ahead of the British barristers when it comes to trial advocacy.

What then was Chief Justice Burger concerned about? If you want to become a more competent lawyer, you have to spend less time trying a case. This was his example: you do not try a case for five days that you should be able to try in one day. That is what he was interested in—speed. He unfavorably compared us to the British system where speed becomes essential. He did not note, but probably should have, that they have all but eliminated the jury system except in criminal cases and they do not have appeals. Yes, they have really sped things up. Doing this they are hurting the reputation of the British barrister.

The second thing I wanted to share with you was an interesting observation about NITA. What is and was the genius of NITA?

The genius of NITA was and is its teaching method, how it went about teaching trial advocacy. It was a three-prong method.

Number one, students heard a lecture by a lawyer who knows what he or she is talking about.<sup>16</sup>

Number two, the most important element and the one that takes the most time, is the participants actually performing the skill, an opening statement, a cross-examination. The lawyer participants actually get to do the skill they have been lectured on.<sup>17</sup> Not only do they get to do it, but more importantly they are critiqued. They are critiqued by trial lawyers and judges who know what they are doing. They learn by doing.

Number three is a demonstration.<sup>18</sup> A lawyer who knows what he or she is doing will demonstrate the skill.

I was always curious: how did the geniuses who started NITA, and we have many of them from Chicago, come up with this wonderful system of teaching trial advocacy? It was ex-

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16. Sanford M. Brook, Mark S. Caldwell & John T. Baker, *National Institute for Trial Advocacy Teacher Training Manual* 17 (2003).

17. *Id.* at 19.

18. *Id.* at 17–18.

plained to me by a wonderful lawyer from Chicago, a civil trial lawyer by the name of Bob Hanley.

Bob was a great person and an outstanding trial lawyer. He helped get NITA started, and eventually he served as its chair. By the way, Bob Hanley was a Marine Corps major. I had the privilege of serving under him in the Marine Corps for a short period of time.

One day we were talking, and I asked him, "How did you guys come up with this method of teaching trial advocacy?" He said, "I do not recall who, but somebody sitting around the table came up with an idea. They said, 'We want to teach trial advocacy. How do we go about it?' We cannot use the Socratic method, Christopher Columbus Langdell's case method will not work, and the apprenticeship concept does not work."

Somebody came up with a great idea. They explained that not too many years ago the Armed Services were faced with a much larger but similar problem. At the start of the Second World War the Armed Services had millions of people they had to train in thousands of different things. They had to teach one guy to shoot a mortar, somebody else to cook for 500 people, and somebody else to fly a helicopter.

To find out how they should go about this they went to educators, some of the best educators in this country. The educators prepared a report for the Armed Services. They suggested the training be broken down into three aspects: (1) a lecture by somebody who knows what they are doing; (2) the major segment would allow those who were learning to do it themselves and be critiqued by somebody who knows what they are doing; and (3) a demonstration of the skill. NITA adopted this concept.

The second major advancement in the teaching of trial advocacy was again encouraged by the ABA. The time had come to get the law schools involved in the teaching of trial advocacy. The law schools did not welcome this suggestion. The more prestigious the law school, the more it was against it.

They argued and explained they did not want to become a trade school teaching people to try cases. The ABA persisted. They wanted the law schools involved. So in the late 1970s, the law schools, many of them, did get involved in teaching trial advocacy. Again this was great progress.

This major change required the law schools to find faculty to teach trial advocacy. The law schools understandably went in different directions. Many looked to their existing faculty. Doing so, the obvious answer was the evidence teachers. This was often a mistake as many evidence teachers knew little about trial advocacy.

Still other law schools brought in trial lawyers and judges to do the teaching. This was the better way to go.

Speaking of being the start, there has been no law school in the country that has, over the years, taught trial advocacy better than your law school, Dean Dickerson. Now we have some wonderful trial advocacy programs in our law schools.

I would be remiss if I did not mention Colonel Eleazer. I have read all about you in Mike Swygert's excellent book about the history of Stetson Law School.<sup>19</sup> To say the least I was impressed. I was impressed not only because you are a Marine, but also because, as I have told you, you were married on November 10th. November 10th is the Marine Corps birthday. What you did teaching trial advocacy for twenty years at this law school is unparalleled.

Colonel Eleazer did an outstanding job getting you started. Now, commendably, you have Charlie Rose to carry the ball. He is as fine an instructor in trial advocacy as I have ever worked with. Stetson Law School has been truly blessed.

As you probably know, back in 1995 *U.S. News & World Report* started to grade law schools. One of their areas was trial advocacy. Their top trial advocacy law school was Stetson.<sup>20</sup>

In eight out of the first twelve years they rated trial advocacy, Stetson was number one,<sup>21</sup> and three of the years it was number

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19. Michael I. Swygert & W. Gary Vause, *Florida's First Law School: A History of Stetson University College of Law* 456–459 (Carolina Academic Press 2006).

20. U.S. News & World Rep., *America's Best Graduate Schools* 84 (1995 ed.) (ranking Stetson University College of Law as first in trial advocacy).

21. U.S. News & World Rep., *America's Best Graduate Schools* 48 (2009 ed.) (ranking Stetson University College of Law as first in trial advocacy); U.S. News & World Rep., *America's Best Graduate Schools* 46 (2008 ed.) (ranking Stetson University College of Law as first in trial advocacy); U.S. News & World Rep., *America's Best Graduate Schools* 48 (2007 ed.) (ranking Stetson University College of Law as first in trial advocacy); U.S. News & World Rep., *America's Best Graduate Schools* 62 (2006 ed.) (ranking Stetson University College of Law as tied for first in trial advocacy, with South Texas College of Law); U.S. News & World Rep., *America's Best Graduate Schools* 48 (2004 ed.) (ranking Stetson University College of Law as tied for first in trial advocacy, with Temple University); U.S.

two.<sup>22</sup> I do not know what happened, Dean, but I would make an inquiry because in 1999 you fell to number four.<sup>23</sup>

You have always been in the top ten.<sup>24</sup> You have dominated the national competitions. You started something pretty good there Colonel. You have done a wonderful job.

We have had this renaissance. We have seen the wonderful things you have done here at Stetson, and the wonderful things NITA started. By the way, law schools basically brought in the NITA method, or some form of the NITA method, when they started teaching trial advocacy.

Where has all this left us? Where are we today in terms of the teaching of trial advocacy? Let me share a few personal observations. I have in mind the five things that trial lawyers may want to do and may be allowed to do. Let me consider them in order depending upon which side of the aisle you are sitting.

First, voir dire. I have done extensive research in the area of voir dire. I have done this research notwithstanding the fact that I never get to do it because I practice in the federal court. But by teaching trial advocacy I get to see experienced and talented lawyers conduct voir dire examinations. I am then much like a eunuch in a harem: I get to see it done every night, but I cannot do it myself. My research suggests voir dire is done differently, if at all, throughout the country. It is also pronounced differently in different places in the country. There are places where they call it

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News & World Rep., *America's Best Graduate Schools* (2003 ed.) (ranking Stetson University College of Law as first in trial advocacy); U.S. News & World Rep., *America's Best Graduate Schools* (2002 ed.) (ranking Stetson University College of Law as first in trial advocacy); U.S. News & World Rep., *America's Best Graduate Schools* 77 (1998 ed.) (ranking Stetson University College of Law as first in trial advocacy); U.S. News & World Rep., *America's Best Graduate Schools* 76 (1997 ed.) (ranking Stetson University College of Law as first in trial advocacy); U.S. News & World Rep., *America's Best Graduate Schools* 82 (1996 ed.) (ranking Stetson University College of Law as first in trial advocacy); U.S. News & World Rep., *America's Best Graduate Schools* 84 (1995 ed.) (ranking Stetson University College of Law as first in trial advocacy).

22. U.S. News & World Rep., *America's Best Graduate Schools* (2005 ed.) (ranking Stetson University College of Law as second in trial advocacy; Temple University was ranked first); U.S. News & World Rep., *America's Best Graduate Schools* 74 (2001 ed.) (ranking Stetson University College of Law as second in trial advocacy; Temple University was ranked first); U.S. News & World Rep., *America's Best Graduate School* (2000 ed.) (ranking Stetson University College of Law as second in trial advocacy).

23. U.S. News & World Rep., *America's Best Graduate Schools* 95 (1999 ed.) (ranking Stetson University College of Law as fourth in trial advocacy).

24. U.S. News & World Rep., *supra* nn. 21–22.

“vorr die-ur.” My research suggests that where they call it “vorr die-ur,” they wear big cowboy hats, big buckles, and cowboy boots. But interestingly, they get to do it.

I want to go back to Illinois, and get our general assembly to change the pronunciation from “voir dire,” to “vorr die-ur” and as a follow up let lawyers do it.

The renaissance impact on voir dire has been incredible. What NITA, Stetson’s great trial advocacy faculty, the late Cathy Bennett, and so many others have done is incredible.

If you want to read something both funny and shocking, go back to Clarence Darrow. You may be surprised to see what the great lawyer of his day had to say about voir dire. Basically to Darrow voir dire was two things: the religion of the juror, and the ethnicity of the juror. I can remember years ago hearing a well respected criminal lawyer give a lecture about voir dire. Religion and ethnicity were all he talked about.

Look at what is happening today. Lawyers that do voir dire now do a great job. You even have experts running around the country helping lawyers do voir dire. Jo Ellen Demetrius is the one that immediately comes to my mind. What an incredible person, and she learned from a dear, dear friend of mine. Marion and I heard her give a speech when she was deservedly and recently honored at the University of Virginia Law School last year. She literally brought tears to my eyes when she told how much she learned from Cathy Bennett.

Cathy Bennett was a truly dedicated and great person. She died, unfortunately, very young after helping select the jury with Roy Black in the William Kennedy Smith case. Black and Bennett—what an awesome combination.

Well, these are great people, and lawyers themselves who know how to pick juries. Ethnicity and religion—they may be factors, but they are not big factors. Trial advocacy people take credit; you have literally changed the focus of voir dire, and that is quite commendable.

What about opening statements? Again, the progress has been incredible.

When I started trying cases, prosecutors gave opening statements, but they were horrible. They used to literally read from the indictment in the opening statement. The indictment was then written in old English with an abundance of wheretofores

and heretofores. And the defense attorneys were even worse. They simply waived the opening statement. The mid 1970s saw a change in this. The National Criminal Defense College taught criminal defense attorneys the importance of and the necessity to give opening statements. Today the very important opening statements by civil and criminal trial lawyers are often the highlight of the trial.

If there is one area in trial advocacy that has avoided the renaissance, it is direct examination. Most direct examinations today are still boring. Jurors are often bored with direct examination. Why? Because of the way lawyers do direct examination.

How do lawyers bore them? We bore them with our language. Many lawyers still, when calling a witness to the stand say, "Mr. Black, would you please state your full name for the record and spell your last name for the court reporter." Have you ever thought of how stupid this is? Anything said in the courtroom is for the record. "State your full name and spell your last name for the court reporter" violates my Trial Advocacy Rule 11: you speak in a courtroom the way you speak in a bar.

Before you start you can and should give the court reporter the spelling of any unusual names along with any other unusual terms the witness may use.

Why not simply ask the witness to: "introduce yourself to the ladies and gentlemen of the jury" or to "tell us who you are." Frequently we follow this introduction with a stupid transition. Transitions are a great tool for trial lawyers and sometimes a necessary trial tool, a necessary thing, but not the way we do them in direct examination.

Our direct examinations start with the transition "Well, Mr. Witness, directing your attention to at or about 3:00 p.m. in the afternoon, in, or near Murphy's Bar, what, if anything, unusual occurred?" Trial lawyers help put jurors to sleep when we talk like that.

We may want to try: "I want to ask some questions about what you saw when you left Murphy's Bar, do you understand?"

Finally listen to what a trial lawyer says when they show a witness a document. "Mr. Witness, I now show you what's been previously marked Defense Exhibit Three for identification which purports to be a statement you gave on or about such and such a date, and I ask you, sir, do you recognize it?" Come on. This lan-

guage makes directs boring. Everyone can see you showing the witness the document; there is no need to explain what you are doing. Anything that has been “marked” was of necessity “previously” marked. Telling the witness what the statement “purports” to be (rather, for instance what it is) not only violates my Rule 11, but some trial judges would not allow you to tell the witness what the document is. Finally, the “do you recognize it” again violates Rule 11. A simple “what is it” or “do you know what this is” would sound much better.

Cross-examination has improved and continues to improve. The history of cross-examination has gone through three stages. Up until the early 1970s, the cross-examiner, including the greats and the near greats, would cross-examine by asking the witness questions, simple questions and indeed even open-ended questions.

Back in the thirties, trial advocacy books, which by and large were not very good, did talk about the possibility of using traditional leading questions, if all else failed. It follows leading questions were seldom used. This changed in the early seventies. Unfortunately, I have not been able to figure out who was responsible for this change. If I had to take an educated guess I would give credit to NITA. I do know that the National Criminal Defense College (then the National College of Criminal Defense) was teaching the use of the leading question by the mid-seventies at the latest. The use of the traditional leading question greatly improved cross-examination.

The third and final stage of cross-examination came in the late eighties. It was born at the National Criminal Defense College. It involved the use of “statements” rather than the traditional leading question.<sup>25</sup> Most trial lawyers are still not using “statements” but the number of converts is growing at a remarkable rate. Cross-examination is done much better now than it ever was.

That leaves us with the closing argument. The old lawyers, the Clarence Darrows and those people, they were great elocutionists. They were spell-binding speakers. But I really believe

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25. Terence F. MacCarthy, *MacCarthy on Cross-Examination* 80–83 (ABA Publ. 2007).

that today's trial lawyer is just as good, because today's trial lawyer is more into story-telling.

The current lawyer could benefit from looking at the rhetorical forms of speech and trying to use them more often. They make what we say more pleasant and more importantly they help people remember what we have said.

I close by sharing with you a story. I was told the story is true by the wonderful trial lawyer who told me the story. He does not come out as a hero in the story, which gives us an additional reason to believe it was true.

The story teller is one of the greatest lawyers I have ever met. His name is Richard "Racehorse" Haynes, and he practices, of course, in Texas. He is, by the way, also a former Marine.

Race tells a story about a murder case he tried as a young lawyer. The defendant was accused of killing his wife. Now, in Texas that may only be a misdemeanor.

The defense was they had no body, no *corpus delecti*. In a word there was no proof the wife was dead.

At the end of his closing argument, Race looked at the jury, and reminded them of the importance of the reasonable doubt requirement. He suggested that each and every one of them should have a reasonable doubt. He would prove to them that they had a reasonable doubt. He explained that if Mrs. Brown is not dead, we would not have a crime. So if they did not know beyond all reasonable doubt that Mrs. Brown was dead, they had to find Mr. Brown not guilty. Then, with typical Race drama, he told them to look at the door of the courtroom. He would then count to ten and at the end of his counting to ten that door would open and Mrs. Brown is going to walk into this courtroom. All of the jurors focused on the door of the courtroom. Race counted to ten. The door never opened. Race looked at the jurors, and he figured he had them. He reminded them that they all looked at the door. Then he explained that they looked at the door because they had a reasonable doubt. She may still be alive.

The jury went out to deliberate. They deliberated for less than ten minutes, came back and convicted Brown. Race was heartsick.

He went up to the jurors and reminded them that all of them looked at that door when he told them Mrs. Brown was going to walk through the door. They explained: "Mr. Haynes, each and

every one of us indeed looked at the door. As a matter of fact, everybody in the courtroom was staring at that door. Everybody but one person: Mr. Brown. He didn't look at the door."

Dean Dickerson, thank you.