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Paul Luvera on Trial Strategy

Renowned trial lawyer offers specific advice to plaintiffs' advocates.

Review by Rick Friedling

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For generations reared on Perry Mason, L.A. Law and Boston Legal, trial lawyers are viewed and view themselves as functioning in a more rarified air than "transactional" attorneys, eschewing the noble heritage of hired knights. Within the modern-day ranks of modern trial knights, Paul Luvera dwells in the more rarified of those heights, as past president of the Inner Circle of Advocates and of the Washington State Trial Lawyers' Association, Fellow of the International Academy of Trial Lawyers as well as a Fellow of the invitation-only International Society of Barristers.

On Trial Strategy consists of four DVDs comprising Luvera's seminar delivered at the Washington State Trial Lawyers Association 2008 convention, distilled into the following topics: Techniques of Advocacy; Pre-Trial Preparation Done Right; Winning Settlement Ideas; Dealing with Tort Reform Bias: Jury Selection That Works; Opening Statements That Grab the Jury; Capture Jury Interest in Direct Examination; Cross-Examination Tips for Success; and Making Powerful Summations.

Luvera's lecture presents a "nuts-and bolts" manifesto of the hazards, opportunities and resources which are the world of the modern plaintiff's litigator. Luvera's emphasis on communication is fascinating and eye-opening. His lecture is directed at jury-trial practitioners rather than bench-trial lawyers, and he admonishes that only seven percent of our effectiveness is derived from the words we use – 93 percent comes from the way we look and act in the courtroom.

Luvera's point is well-taken; we have all heard that juries tend to make up their minds before the close of opening statements and seldom vary from those initial viewpoints. If that is the case, it might be argued, it is the advocate's advocacy that is weak; certainly Luvera's point does not seem to comport with Darrow's startling success in either the *Scopes* or *Loeb and Leopold* trials; in both cases, initial, almost rabid prejudices were effectively countered by brilliant and articulate advocacy.

Perhaps most interesting is Luvera's recurring theme, derived from Dr. G. Clotaire Rapaille's The Culture Code, highlighting the distinction between our reptilian brains and our more highly developed faculties – and why appeals to our more primitive needs win over our logic in a ratio of 80 percent to 20 percent. Looks, sounds, our dress, and our passion; all appeal to the vestigial but controlling "reptilian" portion of jurors' brains; first engage their hearts, and their brains will find a way to hang their decisions on those impressions.

Trial preparation is given relatively short shrift; the overarching lesson which emerges here is to avoid becoming so mired in preparation and checklists that active listening and agility to deal with the inevitable unanticipated ceases. Luvera advocates the use of focus studies; these, in fact, should be composed of "any normal person who is not a lawyer" (insert your own joke here), but conservative Republicans are best – if you can play to that audience, it will probably play in Poughkeepsie.

In his discussion of settlement negotiations and mediation, Luvera notes that his attorney-client fee agreements include a clause that the client will not agree to inclusion of "confidentiality" agreements to serve the social goal of openness; this would seem to carry with it its own set of ethical questions when the "larger" social goals of transparency run head-on into the duty to achieve the best possible outcome for the client in hand; most states' Bar Associations require us to be zealous advocates, not social scientists.

The most interesting portion of the section on Opening Statements was Luvera's sample – a clear and concise example from an experienced master. The theme is that a juror's job is to fix what can be fixed; to help that which can be helped; and to compensate for that which can be neither fixed nor helped, as well as to occasionally punish with punitive damages to discourage similar torts in the broader social context.

Only 14 minutes were given to direct examination, and only three minutes to the absolutely critical topic of cross-examination; there was little time remaining in the single-day lecture to discuss more than the importance of dividing cross-examination into what Luvera calls "chapters," with one objective in each chapter, and these arranged in order of

importance, but starting and ending with one major point.

In discussing closing argument, Luvera returns to his theme that jurors, and all people, tend to vote their personal core or "reptilian" values even over their self-interest; therefore, always start in terms of values and frame arguments in these same terms, using controlled passion. Paramount is remaining calm; calmness = control.

Two relatively minor annoyances are the omission of the written materials to which the attendees were privy, and that questions posed by the audience are inaudible, and not repeated by the lecturer; but his answer gives enough context to guess at most of these.

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Rick Friedling is a plaintiff's attorney in Oakland, California. He has been practicing for over 16 years in the areas of civil rights and family law.