# Moe Levine on Advocacy II

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Moe Levine


Trial Guides, LLC

Trial Guides, LLC, Portland, Oregon 97210



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# Publisher's Note

The lectures of Moe Levine that have been compiled and revised by Trial Guides, LLC, for publication in this volume were previously published in a different form. They also contain the transcripts of previously unreleased audio recordings. The text has been edited to enhance readability.

In keeping with Trial Guides' goal of providing the most comprehensive book of Moe Levine's work possible, we are including lectures that were delivered more than forty years ago. Since then, both medicine and medical malpractice law have progressed significantly, and readers should be mindful that the lectures do not reflect the latest developments in these areas.

This book is intended for practicing attorneys. This book does not offer legal or medical advice and does not take the place of consultation with an attorney or other professional with appropriate expertise and experience.

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# Foreword by Rick Friedman

It is harder to build a house than to tear one down. It is harder to clean mud off a wall than to throw it on in the first place. And it is harder to present a plaintiff's case to a jury than to attack that case as a defense lawyer.

The worst mistake a plaintiff's lawyer can make is trying to emulate tactics the defense has successfully used against him. Our job is harder than theirs; what works for them does not work for us. So how do we build a house the defense cannot tear down? How do we clean mud off the wall without getting covered in it ourselves? We need to find and articulate the moral core of our case.

No trial lawyer has ever been better at that than Moe Levine.

By the time I first heard of Moe Levine, he had been dead for ten years. In these dark days before the Internet, finding his out-of-print books and mostly forgotten CLE tapes was a laborious and often unsuccessful venture. When the first slim volume of Moe's *Summations* arrived in the mail from a used bookstore in Chicago, it was dirty, and the pages were warped and discolored. I felt like I held some ancient treasure map in my hands, and I did.

Moe explained why moral values—moral imperatives—required a verdict for the plaintiff. Moe explained the cynical nature and moral bankruptcy of the defense gambits. Moe demonstrated how to keep a plaintiff's case grounded in moral principles that were unassailable by the defense. Like thousands of lawyers before me, I began taking Moe's ideas and applying them to my own cases. For several years, before starting each trial, I would watch a videotape of Moe Levine doing a closing argument. It was like having my own mentor to tell me, "Stay calm, stay focused on what is important, keep everyone's focus on the moral issues presented by your case."

I had the one video and the one book, and hungered to hear more from Moe. I was not alone. By 2006, used copies of *Summations* were listed for sale on the Internet at $1,200 per

copy. Rumors and reports filtered through the plaintiff's bar about a lawyer in South Dakota (or was it Arkansas?) with a vinyl record of a Levine CLE presentation; a lawyer in Alabama had a reel-to-reel tape of a mock trial performance; a former president of ATLA [Association of Trial Lawyers of America] had some essays Moe had written. We Levine fans did what we could to collect and protect, but the truth was that Moe's ideas were gradually being lost.

At what felt like the last minute, Trial Guides, a young publishing company with a mission to help the plaintiff's bar, came on the scene and began a concerted effort to collect and publish Levine materials. Trial Guides saved Moe Levine for those of us who never had the opportunity to know him, and we should all be grateful.

This book is the second set of Levine materials published by Trial Guides. Two things strike me about this book. First, we are given a surprisingly intimate look at Moe Levine, the lawyer. We see him giving formal presentations, conducting cross-examinations, and discussing legal issues of the day with other lawyers. He makes jokes and talks about philosophy and why he never uses demonstrative evidence. Second, we see how every aspect of Moe Levine's advocacy is grounded in moral principles.

This is not some romantic, idealistic view of advocacy, but rather a pragmatic recognition that the most powerful weapons available to the plaintiff's lawyer are the moral principles at play in the case. Why is it we should win? Why is that fair and just? Why should the defense lose? Upon what moral principles does the defense rest?

A brilliant trial tactician and strategist, Moe could cut through the rhetoric, the advocacy clichés, and the lazy thinking employed by most trial lawyers and get to the heart of the moral issues at stake. Over and over again, the pages that follow show Moe coming up with brilliant arguments and tactics. Almost always, these are based on Moe's unerring sense that the defense is most vulnerable when the moral assumptions underlying its arguments are exposed. And no one could expose them better than Moe.

Getting to the moral core of a case (or defense argument) is not easy. We are not trained to do it, and most of our contemporaries—like Moe's contemporaries—do not do it. But, make no mistake: that is where our power lies. Simply stated: *the more we develop our ability to find the moral core of a case, the better trial lawyers we will be.*

For me, reading this book was like sitting with Moe and having a conversation about advocacy issues. I had the pleasure of having him repeatedly remind me to push past the surface of things and look at the moral principles implicit in the parties' positions. With Moe as teacher, my ability to find the moral core improved. Reading this book, I believe yours will too. Enjoy your conversation with Moe.

—Rick Friedman
December 5, 2011
Bremerton, Washington

# 1

# Essays in Mental Persuasion[1]

You might wonder how a trial lawyer in the personal-injury field develops. Certain tools are required in order to perform efficiently.

The speeches of Rufus Choate offer some insight. It is said his voice charmed the savage breast of the bucolic jurors and moved them like the wind moves the leaves of the trees and that he could make them sway with him. Continued reading to find out how he did this trick discloses that he had a mellifluous voice.

With the realization of the need for study in psychology and philosophy, semantics and ethics, this becomes a course of life. With the further realization of the direct relation of medicine to negligence trial work, a good deal of time is necessarily spent studying anatomy, medicine, and the medical journals often talked about. It is no secret that many trial men are on top of the latest developments in medicine. However, on the subject of mental persuasion, we are dealing with something slightly more

1. Reprinted from *Trial Lawyers Quarterly* 36 (Summer 1964). This article constitutes the substance of remarks delivered extemporaneously on the subject at a Bar Association meeting in Memphis, Tennessee.

esoteric, slightly less formal, the ingredients of which are more difficult to achieve. They require that you live more—I don't recommend this to you—but it would help if you suffer. In order to understand pain, you must have had pain.

It is true that there never was any joy that could be appreciated unless there had been an experience with sorrow. It is also true, in the words of the Ecclesiastes, that there is "a time to weep and a time to laugh." It is the defense counsel's time for laughter during the trial, and it is your time, as the plaintiff's advocate, for gravity commensurate with the nature of the case. These opposite roles are related to the art of persuasion of the jury.

Let's see if we can't here think out some basic principles of persuasion.

In our labors there is a good deal of sameness. When we develop a thesis, we stay with it as long as it is successful and try to add to it. So let's call upon some general precepts and see if we can implement them in this short discussion so that you will have some tools, which you can hold on to, which you can remember, and which you can use with juries, if they meet with your approval.

It is academic that a jury is made up of just people. It is equally academic that you must appraise within them their identification with your case. Can they identify with your plaintiff? If they can, your task has been reduced in difficulty.

There was a case tried in Akron concerning a housewife who had an injury which was subjective in its expression. She had pain, but there were no affirmative findings. The only thing she lost was the ability to bowl, and it was a very important case because it presented the most difficult of all problems in the courtroom. It is easy to speak persuasively about these cases of dura leaking out through the skull; it is easy to talk about how you evaluate a leg off, an arm off, or even the loss of an eye by a small child. However what does one do with these cases, like the Akron housewife's, which are apparently run-of-the-mill to us, but not to the client? The jury rendered a verdict for this woman who had this whiplash type of injury to the neck. There were no X-rays. She had had arthritis for years but without symptoms, and she

had had a prior accident. Although she was hurt, nevertheless there wasn't any way for anybody to tell the exact mechanism of her injury. She could do all the usual things she had done before, except she couldn't bowl. She wasn't much of a bowler either, as I remember—her average was ninety—but she liked to bowl.

There were six jurors from Akron, and they were on the same social level as the plaintiff. The identification was easy. All you had to do was make a proper appeal to their identifications with themselves. What would it mean to the men on the jury if the only injury they had, for instance, prevented them from playing golf? Well, if this was their only hobby, if this was their only method of release from tension, and if this was removed from them, what's left? You know the jury knows instinctively, but you have to tell them, and so, wouldn't your summation be something like this:

> And, we are concerned now with what I consider to be the most important injury that can befall a human being—the impairment of the enjoyment of living. Fractured legs heal; fractured arms heal; fractured skulls heal. Even things like epilepsy can be controlled by drugs to a certain extent, even though the terror and danger of it persists. But take the homely little injuries of a man who has a sprained leg and his hobby is hunting. He can do everything he had done in his life before, except he can't hunt anymore, and says the defendant's counsel from his viewpoint, properly: "What's the big deal? What is all the commotion about? Take up painting where you don't have to walk." Well, the man doesn't want to take up painting. He is fifty-five years old. He has been enjoying hunting all of his life. It is his pleasure on a raw October day—I don't understand it, but this is his pleasure—to get out on a bleak field and look for some little frightened deer to shoot. This is his pleasure, and what have you done to him?

So expand your mind into a recognition of this problem and the loss as it would or could relate to you, and talk to the jury as you talk to yourself about the meaning of life. You see how deeply we get involved with the emotions when we talk about mental persuasion.

What is life, really? The Bible . . . it is the greatest inspirational source known. You talk about life, and you say it is divided into two phases, survival and the enjoyment of living. They are not synonymous. We know too many people who have no fun in living at all. They survive. They exist. We talk about our very seriously injured clients as being vegetables. We talk about them in this sense because they are physically prevented from moving about. Physical motion does not bring with it necessarily the enjoyment of life. The enjoyment of living must be on the level of the mind much more than it is on that of the body. The body, in the deepest possible religious sense, is composed of inanimate chemicals held together and motivated and energized and activated by the human mind, which is synonymous with the human soul. Does this sound corny to you? If it sounds corny, you have never heard a sermon that wasn't corny. It can be said without fear of any successful contradiction that when this world is saved, if this world be saved, it will not be by men's bodies but by men's minds.

So take this man with a body who has been left relatively unimpaired except in the minor sense that he has been prevented from pursuing those minor things which brought him pleasure, and what have you left him! Labor. Survival. Struggle. Stress. He is constantly beset by economic problems which plague him all of his life: the need for just existing. He works from morning until night. The only thing that makes it worthwhile for him is, of course, the love of those who are close to him, but beyond that, the expectation that there will be moments which he can treasure and which are totally separated from the ordinary ordeal of survival.

Do you see the importance of an injury which takes from a man this one small pleasure which he had to relieve the tedium of existence? Do you see now how important it can be if, in truth, the injury which he suffered, minor as it seems, has interfered with his enjoyment of living? If you begin to think this way, and you can easily, by thinking to yourself about the small pleasures which make survival tolerable and what it would mean to you to be deprived of these small pleasures, you will begin to understand the problem of your inarticulate client who is embarrassed,

almost, to say to you, "Well, there's nothing really wrong with me. I can do my housework, but I can't bowl." She is ashamed to say it to you. It sounds so petty. It sounds so small, and yet you, as advocates, might understand it.

Let's think about identification. Let's talk in general terms which apply equally to both sides, for plaintiffs must be aware of the defendants' procedures, and defendants aware of plaintiffs'. You must try to get the jury to identify with your client and, if possible, with you.

If they cannot identify with your client because he is in a low social stratum and his type is alien to them, then you must bring them somehow to rise to an understanding that they are in the unique position of being able to look down on a small man and to render him justice, which he mutely beseeches them to do. You must explain that your client does not have much awareness of what is going on except that he has been assured not to worry, that the jury will understand his problem, and that they will not reject him on account of his not enjoying the same station in life. The defendant would like very much to have the jury reject your client.

How do they do this? Well, take the case of traumatic neurosis. Traumatic-neurosis cases are the most difficult kinds of cases for the plaintiff to try. They involve an area which the normal, healthy juror will reject. Although he has within himself the seed of neurosis, yet he will not identify with it. The defendant can exaggerate the subjectivity of this type of complaint by indicating that nobody gets a traumatic neurosis unless he has a strong predisposition to it. Normal people do not react neurotically in the usual traumatic situations. Only people who are already on the brink of a precipice can be pushed over by the slight touch that is the usual type of injury which precipitates this type of condition. If the defense counsel can get the jury to understand that this man was on the edge of a precipice with one foot raised and the wind blowing behind him, and it was just the unfortunate luck of the defendant to be the one to walk by and brush his clothing, the jury might very well either reject the plaintiff who is already so predisposed, or at least not punish the defendant for this casual contact with the plaintiff.

How does the plaintiff's counsel answer this argument? Only by exposing to the jury the basic nature of a neurotic injury, only by teaching them. Let me show you by an example. A young man suffered an injury as a result of getting on the train where a platform suddenly rose—one of those movable platforms—and struck him in the groin. This young man became impotent—psychologically induced impotency. There was nothing organically involved. He was under the care of a psychiatrist and, as nearly as I can remember, this is the summation. I should like to tell it to you as though you were the jury, if I may. There were only men on this jury—it had been agreed there would be no women.

> Jurors, while I talk to you, you need not look at me. The things I will say to you will be painful, and yet they must be said or I shall not have discharged my duty to my client. If this man had a broken leg, I have no doubt that some of you would say in the jury room, "Well, we know what a broken leg is like because we've had one," but in view of the nature of this man's condition, I cannot expect nor, indeed, do I ask you to acknowledge any subjective understanding of this condition. The seriousness of it is manifest in the fact that all of you fine, adult, mature men will not be able to find within yourselves the ability to say, "Well, of course, we're very manly, and we have never had such a problem as impotency," but let's see if we can understand what it would be like. I don't even expect that of you, and yet, I say to you that there never was a man who came to maturity who did not sometime during his life suffer doubts as to his maleness.
>
> I won't go into the medical aspects of it, which you've heard from the doctor, about the fact that no man is all man nor is any woman all woman. There are components of both in each, and when the balance becomes unbalanced, we have deviants. That there is some imbalance, we must acknowledge. And there never was a man who, with his wife, whom he loved, didn't get a little drunk on occasion and found that he wasn't quite the man he thought he was, and didn't have a seed of worry—just for a moment—that maybe there was

> something wrong with him. All I am asking you to do is to say this to yourselves—to yourselves—you need not say it to each other. It isn't necessary for you to embarrass yourselves by talking about it—I wouldn't expect you to—but to say to yourselves, *What a horrible condition this must be that it imposes upon me against our strongest will—silence. We cannot even discuss it*. This is the worst of all injuries; this is the reduction of a man in his mind to a state which is less than a man, and the human male cannot tolerate this. This is the invasion of his integrity, and so, jurors, understand the seriousness of it by the fact that it imposes silence upon you.

Now, do you see, then, how you get a jury to relate to your client's condition in a difficult area? There are other problems, and we cannot touch upon them all, but they are problems which are so far-reaching that they refer to every case you try. Haven't you been plagued by the problem of sympathy? From the minute the jury is taken into voir dire, either by the judge or by you, you hear this constant accent—you must not decide this case on sympathy; your verdict must be brought in free of sympathy. This goes on and on until your opponent becomes alert enough to say to the jury, "I'm glad I don't have to decide this case. I'm glad you do, because it would take so much strength to resist sympathy that I don't think I could do it," and you sit there mutely through this and, of course, some bromides have been devised to cope with it.

For instance, several years ago we were saying with some effect upon the jury: "We don't want any sympathy; the law doesn't permit it. We don't want it. My client has had all the sympathy he is going to need. His neighbors sympathize with him; his wife sympathizes with him. Please, we're just here now for justice and damages."

This is all right, except that the lawyers for the defense have begun to say, "He says he doesn't want any sympathy, but he does want a verdict, and I tell you he doesn't care why you bring it in. If it is on account of sympathy, that's all right with him."

Laboring to find a solution to this problem because of its gravity, the following argument appears to be one you may properly

employ: that the law requires that there be no verdict based on sympathy; that you are bound by the law, so if you wanted an appeal to sympathy, the law would not permit it; that you agree with the law, and the reason for your agreement with the law is that any verdict based on sympathy alone would obviously be an inadequate verdict. It would be a charity verdict. It would be a handout verdict; and when you give charity, despite all the importunities of those who raise money for charities who say, "Give until it hurts," no one gives until it hurts. They give that amount which they can give safely and be freed of the responsibility of having to give, and this is just as true in the jury room as it is in a charity drive. You may then say, "So, jurors, if you are going to decide this case on sympathy, you're going to end up with an inadequate verdict—please don't. And when the defendant talks to you about sympathy, you think of whether or not he wouldn't like very much for you to bring in a verdict based on sympathy because that would be a low verdict." Now you try to think up an answer for that! This is important because it deals with a problem that has plagued the bar.

Let us take another position. When the judge talks sympathy and your opponent talks sympathy, the jury has a perfect right to say, "Do you know what they're doing? They are trying to get us not to give enough money, so let's just pay no attention to this. Plaintiff's counsel told us right. This is not a charity case." You couple this with the concept that anything less than full justice is injustice, and you have all of the components of preventing the jury from making ridiculous compromises. You at least alert them to the need for full consideration.

Lots of lawyers have said, "Well, what is the purpose of closing argument?" Really, do you win your case in closing argument? If you have not won your case by the time of closing argument, you're not going to win it then. However, closing argument can be a bridge, and the judges won't have to hammer their desks to tell you to stop if you recognize that your main purpose in closing argument is to furnish those jurors who are on your side with arguments which they can use in the jury room in order to bolster reasons for your position. This, in my opinion, is the

main purpose of closing argument. You will not have convinced those who came to your closing argument with their minds made up against you, but you will have given your jurors on that jury arguments which they can use against the others who might be more articulate.

It's an odd thing, but my experience has been that the defendant's jurors always have the strongest voices and talk the loudest and the longest. So give the plaintiff's jurors something with which to answer them.

Let's continue this journey into mental persuasion: all different types of problems, all requiring different types of answers. How do you cope with the case of a mailman who was driving a 1954 automobile[2] and inflicts $100,000 worth of injuries? How do you cope with the danger that the jury will figure that this poor fellow can't possibly be carrying more than $10,000 worth of insurance? He's a little old mailman. How is he going to pay a big verdict? Actually, he has $100,000 worth of insurance by some freak—he has a brother-in-law who is an insurance agent. How do you get the jury to know this, and isn't this a serious problem? What is an answer which is legally acceptable and which is not sneaky? Haven't you a right to say this to a jury:

> If you find a verdict for the plaintiff because he was so badly hurt, so crippled, so mangled that you could not, in conscience, let him go out of the courtroom without some compensation, you might very well have brought in the right verdict. But if that's your reason for bringing it in, then you have brought it in for the wrong reason, and one of my functions here is to see not only that the right verdict is arrived at, but also that it is arrived at for the right reason.

Now having said this about the plaintiff, no one could object to your then saying:

> If you bring in a verdict for the defendant because the injuries are so serious that you are concerned with the financial effect

2. This article was published in 1964.

> upon him of a large verdict, he might be entitled to a defendant's verdict, but you have then brought it in for the wrong reason. If he was not entitled to a defendant's verdict, and that is the only reason you have brought it in, then you have participated in injustice, and, jurors, you might as well not have come here, because we could have had injustice in this case very easily without a jury. You have been assembled here to do justice. There is only one reason to find for the plaintiff, and that reason is that the defendant was negligent and the plaintiff was not. There is only one reason to find for the defendant, and it has nothing to do with how large a verdict must be or whether he can pay it. It may only be because he didn't do anything wrong or the plaintiff did.

Do you see how you can use this in a case against a doctor when you say to the jury:

> If you find a verdict for the doctor not because he was blameless but because you are worried about the effect upon his reputation in the community, because you revere doctors and don't like to see them hurt by an adverse verdict, if that is your reason for bringing in a defendant's verdict here, why did you come to be jurors? Don't you see how immoral and unjust this would be? You may not concern yourselves with this.

You're not belligerent about it, although you can on occasion be, in the effort of persuasion.

Let me give you an illustration where you must be belligerent. I recall a case against a doctor in a small town who had delivered the babies of everyone on that jury. He was the only doctor in the neighborhood, and they all loved him. It was in upstate New York, and a New York City attorney came to try a malpractice case against him. It was a pretty good case. He had delivered a premature baby, and he had seen a hemangioma on one toe—the toe of a baby that size is smaller than the head of a matchstick. He decided that he had read some place that these hemangiomas occasionally become malignant, so he strangled the little toe with a black thread and he let it fall off. Well, that was all right, except

the baby got gangrene, which became blood borne, and it ended up with retrolental fibroplasia, and so we now had a blind baby. How do you try a case to the jury which loves and reveres this doctor and which had treated me abominably during the week of the trial? I'd like to give you part of that summation to show you how occasionally anger, righteous anger, is the only approach to use in a case of this kind.

> This has been one of the most miserable weeks of my life. I have come among you, and I have been totally ignored by you. I have walked down the street, and I have said, "Good morning" and no one has answered, and I wondered what had I done that was wrong, and then I realized what I had done that was wrong. I had left my family and grandchildren in New York and had come all the way up here, and do you know why? It was because all of your lawyers were too busy to try this case against your doctor, and yet here they are all in court through the whole trial, listening to me try it. And as I talk to you, I feel from you to me an animosity and antipathy, and you're saying to yourself as my opponent very courteously just said, "We didn't need this shiny-shoed New York lawyer to come up here and tell us how to try our cases, did we?" Would anyone have represented this child if I had not been sent by the Bar Association to do it?
>
> So let me tell you what this case is about in my mind, and let me get out of here. You can say one of two things by your verdict. You can say, "Doctor, we love you, and you are ours, and if you want to go ahead and mangle our babies, you go right ahead. Because when you do, no lawyer from here will take it, and when they bring one up from New York, we'll send him right back where he came from. So you go right ahead and do what you want to our babies. You're safe." Or you can say, "Doctor, we love you, you are ours, but when you do to a baby what you did to this one wrongly, you're going to have to pay for it, and we will continue to love you, and we will continue to respect you, and we will say to you by our verdict: don't do things you're not qualified to do. You're a baby

> deliverer—stick to your baby delivering. When you need a surgeon, bring one in." Then you decide which of these two verdicts will permit you to sleep more easily at night. And I thank you very much, Your Honor, for your courtesy.

Well, the jury came back with a plaintiff's verdict in that case. I don't think the attorney would have gotten a verdict if he had been namby-pamby—if he had pussyfooted around—if he had tried to coax or cajole them into an acceptance of him. He correctly decided that these people had to be told.

Let me end on a note, almost a sermon, that understanding your client is a condition precedent to your representing him. Every client should be met, seen, and talked to by trial counsel. One should not appraise the value of a case without talking to the client. It should not be determined upon medical evidence or reports or certificates or hospital records. You must meet your clients. You must know them, and, most of all, you are asked, if at all possible, to love them: not love in the abstract sense, but specifically love which is expressed in understanding. Understand your client's problems so that when you speak for your client in court, the jury will have the feeling that this is not some cold, impersonal matter. Maybe this is why I can't speak as rapidly as some of my colleagues, whom I envy. The words pour from them with such ease and fluency that I wish sometimes it would happen with me. Instead, it is slightly labored. I must stop and think, unfortunately, and this takes time. How much easier it would be if I could just talk without thinking. You can't do this, can you, with your clients? Mustn't you know them? Mustn't you understand them? When you talk to your ladies, never mind saying to them, "How do you feel?" If she's a shy woman, she says, "I feel fine," but she doesn't. If she's a neurotic, she begins to tell you about her aches from head to toe. Instead of that, say, "Tell me what it is that you can't do today that you used to like to do?"

You must strive to learn what has been lost. We no longer use blackboards or the *per diem* argument. I have railed against demonstrative-type evidence such as the bringing in of butcher's wrapping paper with a bleeding leg in it. These are devices which

are for the circus and vaudeville and not for the trial man. Rely upon the fact that the jury must have a feeling of empathy for your client because they are people, like your client, and when you ask them to appraise your client's hurt, you ask them to appraise the injury to the whole person, because the thesis that underlines all of this is that you cannot injure a part of him without injuring all of him.

So to your tender hands is consigned the protection of those people who have entrusted you with their rights. Have compassion and give of your understanding and your efforts to secure justice for them in this, the best system we have ever devised, until some better system comes along.