Moe Levine on Advocacy

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Moe Levine

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Publisher's Note

The lectures and summations 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 and are now being published by Trial Guides, LLC by arrangement with Stephen Levine, Louise E. Schwartz, and Edward Korns.

In keeping with Trial Guides' goal of providing the most comprehensive book of Moe Levine's work possible, we are including lectures and summations 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 and summations do not reflect the latest developments in these areas.

The names of some individuals and business entities mentioned in the original lectures and summations have been deleted or changed to fictional names.

This book does not offer legal or medical advice and does not take the place of consultation with an attorney or physician with appropriate expertise and experience. Attorneys are strongly cautioned to evaluate the information, ideas and opinions set forth in this book in light of their own research, experience, and judgment, to consult applicable rules, regulations, procedures, cases, and statutes (including those issued after the publication date of this book), and to make independent decisions about whether and how to apply such information, ideas, and opinions to a particular case.

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Foreword

By Don C. Keenan

Atlanta, Georgia, March, 2009

OVER THIRTY YEARS ago as a young law student, I was in the front row at a trial lawyer seminar that announced the next speaker as Moe Levine from New York. At the time I had never heard of Moe. However, what I witnessed thereafter was truly a career-changing epiphany. The lights were dim and onto the raised platform came an elderly man, obviously in poor health, with little vision. Moe stood in the spotlight and began to deliver the closing argument in an injury case. For thirty minutes I sat spellbound, engrossed in the passion of this imaginary case. Real tears fell down my cheeks and those of the people surrounding me, an experience I will never forget.

Many years later when I was inducted as a member of the Inner Circle of Advocates (www.innercircle.org), I was ever mindful that Moe was among the small number of founding members of this exclusive group. They consistently obtained million-dollar verdicts back when million-dollar verdicts were a rarity. The Inner Circle convenes once a year for a week to exchange information. In 2005, I assumed the awesome responsibility of giving a one-hour

presentation on what made Moe great. The title I chose was fitting for this great trial lawyer: "The Magic of Moe." The following is a brief overview of the elements of his magic, which endures to this day. No one can question that Moe, in speaking his words of years ago, would be just as effective, perhaps more effective, in the courtroom today than he was in his time.

To define the magic of Moe Levine, I got my hands on countless closing arguments, speech seminar transcripts, a couple of videos, and even some of his notes (all contained in this inspired volume you are about to read). I was also fortunate to speak with several of Moe's contemporaries who provided insight into his personality. To me, the magic of Moe is found in five simple truths:

First: Moe was the master of understatement.

Perhaps the best example of Moe's use of understatement is the case involving the loss of a young man's two arms. Moe's final argument on damages was less than two minutes in duration.

> I need not call an army of experts and parade before you countless medical professionals to illustrate this boy's loss. I need only tell you that I had lunch with him today, and he ate his food like a dog.

Simple, direct, profound.

Moe often cautioned lawyers not to bring their catastrophically injured client into court, but instead use words and images to describe the damages. If done correctly, they can be more powerful than the visual.

Second: Moe appealed to each audience's uniqueness.

Whether to a jury or to a law seminar, Moe always made his audience feel unique. He would often tell the jury, "Ladies and gentlemen, I am going to take you to a place I have never gone before with a jury." He would then go on to describe the damages of the case as if no other jury had ever heard those words before. Likewise

with lawyer audiences he would often say, "Today I will speak of things I have never spoken to a group of lawyers before."

The use of these words elevated the audience to a special place, embracing their uniqueness, and by implication telling them that Moe understood they were special people capable of hearing his important argument.

Third: Moe appealed to the jurors' spirituality.

From Moe's friends we understand that was a deeply religious Jew, who occupied the prestigious position of cantor. In fact, many who heard Moe's closing arguments remark that his voice had the sing-song cadence and modulation of a cantor.

Moe often remarked to lawyer audiences that all of the major truths in his presentation of damages came from scripture, and mainly from the book of Ecclesiastes. All of us recognize that Moe created the concept of the "whole man." From this concept he argued that a jury should not look at the plaintiff's damages as to what the plaintiff lost, but more importantly, what remained.

He also pioneered all of the arguments revolving around the concept of "loss of enjoyment of life." He often said that if the purpose of living were simply survival, who needs it? I can still hear his voice today. He would then say it is wrong to value the loss of enjoyment of life simply on the loss of the ability to labor, because life is far more important than labor alone. Once again, Moe cited Ecclesiastes as the source of this powerful argument.

Moe also wove the biblical concept of judgment into his closing arguments, by saying that his client had no animosity toward the defendant, for the defendant had no intention to harm. He said the verdict should not ask for forgiveness, because forgiveness is only in the hands of the Lord. The function of the verdict is judgment under the law, which is to compensate adequately in accordance with the jury's conscience.

Finally, the conclusion of virtually all Moe's closings was a reference to prayer. "Finally, ladies and gentlemen, I pray that you will

find within yourself the strength to do what must be done without regard to personalities involved, but with the pride that what you have done is right. Thank you."

Sometimes, given the venue of the jury, Moe would recite the specifics of scripture, verse and chapter. In other venues he would outline the concepts without reference to the biblical basis. Moe always knew his audience.

Fourth: Moe elevated the jury to the conscience of the community.

Moe told lawyers to avoid telling jurors that they were judges. He would explain that jurors do not feel like judges. As Moe would state, they are not judges, but the collective conscience of the community.

He always elevated the jury to a collective conscience of the community, not simply twelve individual opinions. "Your verdict speaks with one voice." Thus no matter what the case, no matter how small or big, Moe always elevated the jury to this awareness. As he said one time, "Whether it is a slip and fall, a Good Humor ice cream truck case, or a simple automobile accident, the justice in the case must rise to the conscience of the community." There is no question that his words empowered the jury to feel singularly important in their role of setting community standards.

Moe once told a lawyer audience, "The identification of the jury with the community to me is the most important thing that ever struck me, like a bolt of lightening. We have all skirted the issue. Do it directly, 'Jurors you are the voice of the community. When you speak, you speak for the community attitudes.'" Powerful then and powerful now.

While Moe's arguments are thirty and forty years old as you read this text, you must agree that the words ring true today. I just completed authoring a book with David Ball called *REPTILE: The 2009 Manual of the Plaintiff's Revolution,* and we have cited the brilliance of Moe throughout. As I wrote earlier, I truly believe that

given the current juror attitude in the United States, Moe's arguments are perhaps more powerful today than in his own era.

Fifth: Moe challenged his jurors.

One final and personal observation was Moe's ability to try cases throughout the United States in virtually every type of venue. I am fortunate to have a similar practice and often face the inference in some cases, and a direct comment from the defense in others, that I am an outsider—"not one of them." Moe always used this defense argument as a sword by reminding the jury that the local plaintiff should be entitled to the same measure of damage as the plaintiff in New York City, Chicago, San Francisco, or anywhere in the United States. Moe would ask, "Why should the people in Levitt Town be valued less and respected less than elsewhere in this great country?"

Moe often tried difficult malpractice cases in equally difficult venues, while the jurors' attitudes clearly protected the local doctors. Having found myself in that position many times, I am reminded that Moe once again used this argument as a sword. Moe would challenge the jury to ignore the law and the facts of the case and give the local doctors their protection by rendering a defense verdict. But Moe then argued that in so doing, the jurors would only invite more courageous lawyers from outside the community to return and file additional lawsuits, time and time again, until the justice in this community was justice for all and the same as justice anywhere in this great land. Moe gave the jury one opportunity to set the record right and to change the medical care in that community once and for all.

I must admit that from time to time, while reading the words of Moe, I doubt their effectiveness—as you may when reading this great collection of his works. Yet I continue to use Moe's arguments, and to my continued amazement, find them unbelievably effective.

I celebrate the magic of Moe and his wonderful works, and Trial Guides' tireless effort in bringing this collection of Moe's work together in one volume for all time. Thank you for this privilege

and the pleasure of presenting my thoughts on this great family member of the Inner Circle of Advocates, and one of the greatest trial lawyers of all time.

Foreword

By Russell Corker

Mineola, New York, February, 2009

I REMEMBER VERY clearly seeing my new office for the first time. It was the first day at my new law firm, Shayne, Dachs, Stanisci, Harwood and Moe Levine. The senior partner of the firm told me that, "out of respect, the office had been left exactly as it was when Moe died."

The office looked like a museum. Plaques decorated the walls, from bar associations and lawyer groups all over the country. A life-size anatomical mannequin with removable organs was there, and other medical models were scattered around the room. A bookcase was filled with medical books, many of them autographed by the authors, and another was filled with books concerning philosophy, religion, and literature. On the desk lay a pair of black sunglasses. When the partner saw me staring quizzically at the sunglasses, he laughed and told me those belonged to Moe. Although he had been Moe's partner for many years, he had no idea why Moe wore them at all times, even in the courthouse during trials. I was later to find out from Moe's prep man, whom I also inherited with the new office, that he thought Moe wore the sun-

glasses so that wherever he was, people would always recognize him. It was one of his signatures.

Before he left me to enjoy my new office, the partner pulled two books down from shelf: *The Best of Moe: Summations* and *The Best of Moe: Structure and Function in Advocacy*. He handed them to me and told me to read them. He told me that I would have a better understanding of who Moe Levine was, and that I would learn a thing or two about being a trial lawyer from one of the greatest trial lawyers of all time.

I remember taking Moe's books home that night, and as I began to read them, I was simultaneously inspired and amazed at the brilliance of the books and their author. Not only were the thoughts and ideas simply brilliant, they were also brilliantly and eloquently expressed. Moe possessed a gift of unequaled oratory skills. He had the unique ability to mesmerize the jury and trial lawyers alike. His oratory conveyed knowledge and deep understanding of the human condition, and those qualities translated equally well in print. Since my original reading almost thirty years ago, I have re-read *The Best of Moe: Summations* many times, usually before beginning any significant trial. Like any great book, I still learn things with each re-reading.

Over the years, surrounded by his former partners and his belongings, I got to know a great deal about Moe. I learned that Moe had uncompromising confidence in his ability to turn even the worst situation around to his advantage. He had the uncanny ability to instantly reframe any contingency he encountered at trial. He was a master of rhetorical devices, having studied and effortlessly adopted the techniques of the great ancients, such as Aristotle, Demosthenes, Cicero, and Quintilian. In his summations, he used a rhetorical question, an imbedded command, or empowering language in almost every paragraph. For Moe, this was intuitive; for the rest of us, it is acquired. *The Best of Moe: Summations* truly captures his style in the context cases and real summations.

The following are among my favorite summations. "Death of an Alcoholic" is about how irreplaceable someone is to a specific person.[1] "Aggravation of Prior Condition" is one example of how Moe handles pre-existing conditions—and explains that it is not what you take from a person, it is what you leave them with that we should consider.[2] Finally, Levine's "Whole Man Theory" explains that you can not injure a part of person, you can only injure the whole person.[3]

A Nobel-prize-winning scientist once told me that the sign of true genius is not how many articles or books one has published, but how often one's works are cited in the works of others. Although Moe died in 1974, his theories and work live on in the articles, books, lectures and summations of countless lawyers of today.

All of us are or will be better trial lawyers because of what Moe Levine has taught us. The fact that his works have survived so long, and are so frequently quoted by other prominent trial attorneys, attests to his brilliance and his lasting influence. Moe was one of the most successful trial lawyers of his day in America, but he was also one of the most sought after lecturers of his time on trial techniques. Some of his lectures have been preserved by these writings. In the pages that follow, new lawyers will have the opportunity to learn from Moe Levine, who showed an uncommon willingness to share his knowledge while he was living. It is only appropriate that such extraordinary work continue to inspire and educate today's trial lawyers. What he had to say then is as powerful, relevant, and moving to our profession as the day it was spoken.

Moe's love of medicine; his wide readings in religion, philosophy, and literature; his profound understanding of the human condition with all of its hardships; together with his unequalled oratory

1. "Death of an Alcoholic" is Chapter 18.
2. "Aggravation of Prior Condition" is Chapter 5.
3. "Summation Using the 'Whole Man' Concept" is Chapter 16, and "Thesis of the Whole Man" is Chapter 3.

skill; all come through in his writings. All trial lawyers will be better for having read and applied his principles at trial. His writings cover almost every challenging issue facing today's trial lawyer: difficult liability cases, pre-existing conditions, unattractive clients, soft tissue back pain, and psychological injuries. Moe's approach to these issues is as fresh today as it was when he spoke or wrote these words.

Unfortunately, Moe's published works eventually went out of print when the original publisher and subsequent publishers went out of business. While there are still copies around, those trial lawyers fortunate enough to possess them do not readily lend them out, for fear of not having them returned. I am particularly pleased, therefore, to see that Trial Guides has re-issued what has been for many trial lawyers one of our most prized, and used, possessions.

Part I

Lectures on Advocacy

1

Precepts of Persuasion

American Trial Lawyers Association National Convention, 1966

I HAVE BEEN listening to lawyers of reputation for many years, and they try to teach you how to select a jury, how to open and how to close. Each one has his teaching techniques, and they are of no value to you—literally of no value to you. Each selection of a jury depends upon circumstances constantly altered by the place where the trial is being conducted, the kind of case you are trying, the judge before whom you appear, the opponent who opposes you, the client whom you represent, and all of the other circumstances that are involved. There are no rules.

The whole subject is one—and I've never said this, and if I am quoted, I shall confess it with pride—the whole subject is one that does not lend itself to teaching, but to preaching. The problem is the understanding of people and their motivations, to the best of your ability, the understanding of the human mind. When I am asked, "How do you prepare to sum up?" I hope that I do not offend when I say you prepare to sum up by living and suffering. No one can speak of pain out of a textbook. The young, bright faces that stand in the corridors, and who delight me with the hope

imprinted on their faces for the future of advocacy, are at a handicap. Tom Lambert said that a trial lawyer is not born full grown. A trial lawyer becomes what he is and whatever he is by the way he lives, by his understanding of people.

How is this relevant, then, to selection of a jury, because the fellows have said, "Tell us what we do in selection of juries; what good does it do us to know that a great lawyer got a million-dollar verdict. We don't know how he did it, and he doesn't tell us how he did it." I could tell them that he doesn't tell them how he did it, 'cause he doesn't know exactly what it was that produced it. So there are general precepts of philosophy that apply to the trial of a case, and you need not take notes. There will be no citations. There will just be you, my brethren, a rendering of my heart to you and my faith to you.

A jury is a group of people assembled in the imponderable and nebulous field of doing justice. It sounds so square when I say it, and I've heard it so many times that it is difficult to say it without expecting someone to make some snide remark about it. One of the triteisms—"Pillars of justice, you are wearing the black robes," and they look down, there are no robes, they don't even get the judge's salary. "You are judges without the robe." That's another one. They don't know what you're talking about.

They are citizens called together to render judgment on a conflict in which they are not involved, for people whom they don't know, and they're taken from their businesses and sometimes by deliberation from their families—their lives are disrupted. How are they involved in this? If you do not involve them, you have not reached them, and the result of the case will be a toss-up as to which of the two lawyers has irritated them less. This kind of a toss-up applied to advocacy is one of the most severe criticisms of the adversary system. The deficiency, according to all the great writers, is that the outcome does not depend upon truth or the needs of justice, but upon the skill of the advocate. Accepting this, it becomes your function to become more skilled, and our purpose

this afternoon is to tell you how to do it, and four minutes ought to be long enough.

You begin to select a jury, and your purpose is only, or should be, to impress them with you, with the interesting facets of your case, and to hope that they will reserve their judgment as to the irritation that has brought them to the jury box until they've heard more about it. You wish to increase their curiosity about the case, and this can be done in various proper ways. No rules, just use your heads. You're trying a case involving the knee. That sounds like the least glamorous of the injuries that you might talk about. Here are jurors walking about on their knees all their lives and they don't know a thing about them. It comes as a great startling surprise to them when you tell them that the knee is one of the most complicated mechanical apparatuses that has ever been devised.

"You're going to learn, jurors, during this trial, why it is that your knee bends only so far and never overbends. What is there about your knee that prevents it from bending further back than a straight line? How does it rotate? What protects it? Why does it hurt? You're going to find out all about your knee, jurors."

The way to do it in selection is to say, "You're going to find out all about it, and will you wait until you've heard the evidence, and put aside whatever thoughts you have about it until you've heard the proof? Because in this case this man's knee has been hurt, and we're going to show you by medical proof how this has affected his entire life. Just think of what happens when it's the heart."

You say, "You all know about your hearts because you've read about President Eisenhower," and so forth, "But you are going to find that there are things learned about the heart just in the last year or two that you don't know a thing about, and I didn't either. You wait and hear about it, and you may find some ways to take care of your heart a little better and what should be done to protect it against injury and insult."

On one occasion a juror, after I said this, was challenged by my opponent and he wouldn't leave the box until I arbitrated and said,

"Well, if you're not picked on another jury, why don't you come up and hear the trial?" Because he really had become—and wouldn't you become—interested in this.

Just one thought on the selection of jury, and then let me preach to you for a few moments. If your purpose is to project your personality, then obviously in an adversary position it becomes practical to you, if you can, legally, to prevent your opponent's personality from being projected. This can be done legally and properly—it's not going to make you any friends, but there isn't a thing your opponent can do about it—if you ask all the questions that could be asked on both sides. Don't say, "Have you ever been sued in an accident?" Say, "Have you ever been sued or have you ever sued anybody in an accident?" All the questions that are asked on both sides. For instance—when you're finished, incidentally, asking all the questions, my opponents—and I am less than blessed by the fact that they become a contest—they're sending in per diem men and these fellows scout around and read your records on appeal and your speeches and they're all set for you and they're all ready for you—and these experienced defense counsel, after that kind of a selection, get up and say, "There isn't anything left to talk about." I'm going to show you in just a moment how to eliminate the things which the defendants rely upon in order to win the jury.

Here's a question that's asked in every court in every part of the country, and every plaintiff's lawyer sits and listens to it because he doesn't know what to do about it. Your opponent takes the best-looking plaintiff's juror he has in front of him and says, "Do you believe that anyone who gets injured should be compensated?" You know the law is that everyone who gets injured doesn't necessarily need to be compensated. You know the law is you must prove fault and injury resulting from that fault, proximate cause and all the other things. You sit and listen, and if he has picked the right sympathetic lovely juror, the juror will not understand the catch in the question. He asked it mildly enough: He wasn't angry. He probably wants the juror to say yes, so the juror says, "Yes. Yes,

it sounds all right. Everybody who gets hurt should get money." You've lost one of your best jurors.

When that question is asked with me, I object. I will not permit you, I say with heat, to ask this juror to tell you what the law is. I wouldn't even permit you to tell the juror what the law is, so I certainly won't permit you to ask the juror to tell you what the law is. Now the judge will tell the juror when a plaintiff may recover, and we all know that it cannot be just because injury was inflicted. But don't you ask the juror what the law is. A whole commotion comes up, but at least I've told the juror how to answer the question. The judge will probably affirm me—that you may not ask questions of the juror which presuppose knowledge of the law.

Selection of the jury sets the framework for your case, and I repeat what's been told to you—if you do not have the right of selection, fight for it. It's a court-made rule which can be altered by courts. If you have any influence pooled in your assets of strength, change it, because I start my selection of a jury by saying, "This is a very important case to the defendant, who is being sued here for a great deal of money, and to the plaintiff who seeks damages." This sets the stage for this very important case. Sympathy is a problem you will be confronted with in your trial of cases every time you come to it, and the way it's usually asked by gifted defense lawyers is, "We all know that human beings are sympathetic, and nobody's more sympathetic than I am, and if you are not sympathetic, you have resigned from the human race . . ." and he goes on and on with this. "But if you decide it on sympathy, you listen to the law," and he goes on, and then the judge talks sympathy, and then your opponent talks sympathy again, and by this time everybody is so scared to death that they figure that the only way to avoid being criticized for being sympathetic is to find for the defendant.

I searched for years to find the answer to this. I am happy to say that I have, for me, found the answer, and have used it in court, it's been tested on appeal, it's not been criticized, it's proper.

"You may not find a verdict on the basis of sympathy. The responsibility of this defendant may not be determined because of your sympathetic attitude toward my client's hurts. This is the law, and this is a proper law. I say to you now that sympathy is a form of charity, that charity is a demeaning thing to happen to a person of pride, and my client was and is and has a right to be a person of pride. I want your promise that throughout this case whenever you hear about sympathy, and you will not hear of it from me again, you will resist it, and you will not permit your verdict to be tainted by sympathy, because, like charity, it is not only demeaning but usually inadequate."

From then on, anyone who talks about sympathy you will get knowing looks among the jury.

"See, they even told us they were going to try to do this to us. We won't let them."

"Don't taint your verdict by sympathy."

If you have made the proper approach in selection of a jury, and I suggest to you that what I propose will make you the briefest jury selector of all, it doesn't take long to ask all the routine questions on both sides. I usually, for instance, do not even tell them what the injury is at that point. I tried a case where a man lost both eyes in an accident and the jury never knew it. Through six lawyers following me, and they were all experienced, and they didn't know why I had not told them, but they weren't going to open it up because they knew it couldn't have been because I forgot it, so they just didn't mention it, and the seventh one, a young lawyer, got up and he said, "Nobody told you—the man is blind."

I said, "Son, do you mind if I interrupt you?"

He should have said, "I mind," but he didn't. He was respectful, he had been one of my students, and he said, "No, Mr. Levine, I don't mind."

I got up and said, "No, I didn't tell you about the man being blind, and he didn't tell you he's not only blind, but he's in a wheelchair for

the rest of his life, and the reason I didn't tell you was that I didn't feel that it was proper, when we are discussing your qualifications to be jurors, to impress this upon your mind so that it would affect your decision in the case. It should not affect your decision in the case. You must establish responsibility without regard to his injuries. But now that he's told you about it, let me say this—if there's a juror here that doesn't care that a man is blind, I don't think he'd want to serve on the jury. So let's just not be left with people who can tolerate a man's blindness, and lose all the jurors who feel that this is one of the most horrible things that can happen. Instead of that, do you all promise me now as you will swear under your oaths, that the circumstances of the horrible, catastrophic injury will not affect your determination of responsibility, because if it does, injustice will be done. It must not be done in this case. This case can and it will be decided justly, and the liability will not depend upon the injuries. Do I have your assurance?"

I said, "Son, take them, see what you can do with them." Now, this was my purpose. I wanted somebody else to open it up, and if they hadn't it would've been fine. The jury would have learned about it in opening statement.

If you have selected your jury, not in order to win the case but to develop in them a tolerance toward you and your cause, I beg of you to believe that's all you can do in selection of a jury. You can't win it at that point. You can lose it. You can't win it. Just let the jury know by your questioning in demeanor that you are a lawyer dedicated to truth, that you will have an exciting, interesting case to present to them, that you will present it to them with the best skill of which you are capable, that you will ask for no verdict not borne out in the evidence, and let it go. If they tolerate you through this, you will have a springboard for your case. Your case will be won or lost during the proof, and your case will not be won or lost by opening, selection, or summation.

What is your function in summation? I have believed for a long time that in closing argument you do not persuade anyone who,

during the trial, has formed judgment against you. I believe that people's opinions, firmly reached, are not changed by argument. I remember I was a federation speaker at a charity dinner, and I told them what I believed then, just about the jury. I could make the greatest speech I ever made, but nobody's going to call for his card of donation in order to increase the amount. I may shape him for the next year's drive, but that drive's gone. So I told them I thought my function was to fill in between dessert and the card calling. You cannot persuade a man who has firm convictions, if he is on the threshold, which rarely happens, at summation. The judge told them to keep their minds open.

Did you ever see an open mind? It's a mess. As the witnesses spoke, their attitudes were being formed, they were taking sides, they were believing or disbelieving, and they were judging the various people. You can give them a basis for discussion and you can give your friends on the jury arguments that they can use in the jury room, and by force of numbers and general community attitude expressed by the majority of them, have some effect upon the jurors who are not friendly. This is all you can do in summation. How far must you reach in order to do this? What must you do? Al said he uses simple words like "extrapolate." I don't know about Al. I've never heard him sum up to a jury. I don't know about you.

As for me, I speak to a jury on the highest level of which I am capable. I will not reduce my language, I will not reduce the content of my thought, I will instead compel them to reach for it. I will define words which are words of common use by me, and I will define them so.

"Jurors, we are involved here in such matters as the intangibles, the discussion of the impairment of the enjoyment of living, the imponderables, the effect of pain and suffering upon a man's personality." You see, I use the words, I define them not as though they needed to be defined, but almost as though they were hyphenated words, if you must use such words. When I use words like

"injustice," there's no problem. Jurors know what it means. Do not underestimate a jury.

When they come back with an adverse verdict, you cool off and sit down, and you will decide in most cases that they were justified. They did not agree, but they were justified. So I have for years been saying to a jury. "Jurors, I may not tell you what I think your verdict should be. It would come as no surprise to you. You have heard my opponent say that he thought his client should win. Wouldn't you be surprised if he got up and said his client should lose? So it must come as no surprise to you that partisan advocates will take a position favoring their client.

"What I implore of you is that you render a verdict not necessarily right or wrong. Who knows, in the last analysis, what's absolutely right or wrong? We are not dealing here with a machine's calculation. No machine can decide a case for a jury. Machines will never be used to decide conflicts between people or the appraisal of damages. Machines can't feel. Machines can't suffer. Machines do not dream and do not hope. Only people do, and so only people can decide. So I am not concerned—of course I am—but I must not be concerned with what your verdict is. I am concerned with whether your verdict is for the right reason."

You think of this. This you can use, constantly. "If you find the verdict for the defendant, a doctor, you might be finding the right verdict. But if your reason for finding it is that he is being impaired in his reputation, that he is being humiliated in his profession, that the amount of the verdict may be so large as to be financially onerous to him, if these are your reasons for your verdict, then this is not a verdict you may be proud of because your verdict might have been right; your reasons are wrong. You may only find for the defendant if he did nothing wrong.

"If you find for the plaintiff, because the plaintiff was so terribly injured, and if that's your only reason, you might be bringing the right verdict; it would not be, to us, by conscience or justice, because it would be for the wrong reason. The plaintiff may only

recover if the defendant is wrong." Can you conceive of a thesis more acceptable than that? The right verdict for the right reason.

We have slaved and suffered so. You can have no idea how all of us throughout the country, exchanging ideas, borrowing from the Bible, reading the philosophers, have been tempted to reach up for concepts which are universally acceptable. I heard the president of Defense Research Institute standing on a platform in some southern state say to the audience, "We could cope with a per diem measure of damages, so much an hour, so much a day, so much a year. We could cope with that. We cannot cope with the concept of the whole man. We cannot cope with a biblical concept—biblical concept that man is not composed of many parts, but of one. When any part which makes the whole suffers, all suffer." I don't know a better authority to cite to a jury than the Bible.

Think about damages in the concept of the impairment of the enjoyment of living, the most serious of all damages. A man loses his leg. Please forgive me if I seem insensitive to this. I cannot try a case anymore—I've been trying cases for thirty-eight years—I can no longer try a case for a man who lost his leg. He has a perfectly fitting substitute; he's back to work, he's earning his money, he's playing golf. I will try the case, instead, for a girl with a minor scar on her face. As a result, she has an emotional reaction to this sudden recognition of her lack of beauty, which existed before the accident, except that she never had to look at herself so closely before. She has not been made much less beautiful but has been impaired sufficiently to withdraw her from society—I'll try that girl's case. Her soul has been involved.

The impairment of the enjoyment of living is found in Ecclesiastes where it says it is right and good that when a man has finished his day's labors, he shall enjoy living. I have said to juries in all parts of my state and many parts of the country, if all that's left in this tense world of ours is survival, who needs it? Who needs just survival? Just labor. Just work. No pleasure. No enjoyment of living. Is

there a worse injury than the impairment of the enjoyment of living?

In Ohio, a jury selected from a municipal court—I think this was in Akron, Ohio—presented with a case of a woman with a whiplash injury where she formerly had arthritis, very bad arthritis, but had not been symptomatic. Now she had a minor injury and she now was symptomatic. Her injury meant that she couldn't bowl. Couldn't bowl. A sixty-two-year-old housewife who couldn't bowl. Everybody laughing about her, especially my opponent, including the jury, until I got up to talk to them and present to them the facts of humanity.

She was not the best bowler in the country. I think her top score was ninety-two, and I'm told that's not very good bowling. But her life consisted of two parts—hard dawn-to-dusk labor on a farm, and bowling. That's all there was to her life. The bowling was the pleasure which compensated for the pain and anguish of survival. They have removed from her the pleasure, and they have left her with survival, and it isn't worth it. Do you remember the verdict, Dave? A $15,000 verdict rendered by four housewives on this jury, and the two men dissented.

Your chief judge said, "Well, that just shows men can't be carried away. What did you want to do, fellows?"

The men said, "We wanted to give the full amount of $25,000."

Dave was there. Nothing startling except that there was a revelation to them of something which you must inspire them to think about. That is what advocacy is. You're not teaching them. You're reminding them.

Listen to another concept of damages which I have not been talking about, because I have been trying it out on juries. You know, a lot of lawyers try out ideas on you, and then use them on juries. It's more important to me how the jury is affected than how you are. So I try mine on juries first and it's worked out well. The most important element of damage, and maybe somebody had

better write this down, because it took me a long time, after nibbling around the edges to get to this. The most important element of damage is not what you take from a person, but what you leave them. Ever hear anything simpler than that? Let me accent it. You have a man with 20/20 vision. He has an accident and is left with 20/40 vision. You have taken his 20/20 vision from him. But you've left him 20/40 and he has good functioning with 20/40. I wish I had it. But you take a man with 20/200, and he barely sees the light, and you blind him. You've only taken 20/200, but you've left him with nothing. I've said to a jury that in the darkest place, the smallest candle will make the darkness tolerable. Blow out the candle and you are plunged into the abysmal fear of the dark unknown. One little candle makes darkness tolerable. Blow it out and there's nothing but the blackness of terror. The jury understood.

Dick Grand called me. He said a man lost his wife. They didn't work very much. They were well known as Tucson's derelicts. They worked a little bit to make money for drinking, then they stopped working. They had no children, they had no possessions. These were the two people, and his wife died in an accident.

Dick called me up and he said, "Moe, they have conceded liability. What do I say are the damages?" This was it. He had so little, and they took it from him. Now he has nothing. Now he has nothing. Whom is he going to get as a companion? Who is going to live with him? Who can he now get?

Don't say to yourselves, "These are inferior people." They loved each other. In their own way they loved each other. No one else loved them, but they had each other, and they removed her from him and the damages are for the loss of her companionship and her tending of him in whatever way she tended him. Do not look down upon them. Judge not lest ye be judged. He sent me a clipping from the paper. I think he got $35,000 for that case. They had offered him $4,500.

No miracle was achieved. But you sit down and say, "These are people. I must accept them as such."

What is the last thesis? The last thesis is the evolution and synthesis of years of struggling to reach the plateaus that will find acceptance in a collective jury's attitude. The identification of the jury with the community is to me one of the most important things that ever struck me like a bolt of lightning. We have all skirted about edges. Do it directly.

"Jurors, you are the voice of conscience of this community. When you speak, you speak the community's attitudes."

Every case, I don't care whether it's slip and fall in a store, falling down stairs, tripping on the sidewalk, being hit by an automobile, a Good Humor truck that attracts children, anything. The community is interested, because it involves people and they are people.

"So, jurors, when you render your decision, you do not speak alone for yourselves. You speak for justice and the community."

Watch the jury grow two feet in the jury box as you talk to them, if you mean it. If you don't mean it, don't say it. Jurors will spot a phony argument at twenty paces. If you don't mean it, if you don't feel it, if you don't believe it, don't say it. But think about it, and if you believe it, and if you feel it, you say it, and they will believe it.