

Telling the truth: Our most important trial skill

Understanding your client's trust relationships and conveying them to a jury

By Eric Ratinoff

I confess at the outset that everything I know about trial skills — what to do or not to do in a courtroom — has been either learned or stolen from others. Odds are that if you are reading this article, you have read all of the same books that I have read. I have, however, spent a huge amount of time over the past several years trying to make myself a better person and a better lawyer. Along the way, what I have discovered, through the help of many amazing people, is that what matters most in what we do as trial lawyers is to tell the truth.

From my side

"The truth, the whole truth, and nothing but the truth." As lawyers, we hear those words every day. We are in deposition, and the witness swears to tell the truth. We go to trial, and the witnesses swear to tell the truth. But lawyers so often only pay lip-service to the truth. It is easy to fall into the role as lawyers who sell, manipulate, advocate, etc. Give it any name you want to give it. Doing so brings no greater success in the courtroom, than it does at home.

My wife knows when I am full of beans. Usually she tells me, but even when she doesn't, I can see it in her face. My kids know when I am trying to duck out of something they are trying to get me to do. They are five and seven. They don't let me get away with it. My dog knows when I call him to come to me for a good reason, versus a bad one. I can try to fool them all, but I am only fooling myself when I do so. They see right through me. They love me more than anyone in the entire world, and they are most likely to give me the benefit of the doubt. Yet they see right through me when I am not being truthful.

Twelve total strangers will see it from a mile away. They are already expecting me to be dishonest. They expect me to fit the lawyer stereotype. They expect me to manipulate, fudge, sneak, or even outright lie. They will not ever give me the benefit of the doubt. They don't like me, and they haven't even met me yet. If I am not truthful, they still will not have met me by the end of the trial. Their verdict will make that pretty clear. I cannot just wear the cloak of honesty, and suddenly be an honest person, because I choose to be one in the courtroom. My jury will see right through that, too. I can't pretend to be truthful, just because I am in a courtroom.

Learning from friends

Now that I have had the benefit of learning from some of the most personally honest people I have ever met – who just so happen to be great lawyers – here is what it means to me now, after almost 20 years as a lawyer, and with more years than that ahead of me. Every day, I have the opportunity to discover a part of who I am. I get to learn about myself, my beliefs, my capacity to love, to feel joy, anger, shame, etc. Every day, life throws something at me. Fortunately, never anything like the things that life has thrown at my clients. A few close calls, but luck was on my side.

Tell the truth

Gerry Spence tells us at The Trial Lawyers College that our job as lawyers is to tell the truth. He also reminds us that telling the truth "begins with me." Each of us needs to discover the truth within ourselves. Who am I? What makes me tick? Why do I feel the way I feel? I once read that to be a trial lawyer, you have to live every moment of every day as a trial lawyer. Until I met Spence, and had the incredible opportunity to go to the College, I had no idea what that meant, really. Spence speaks of getting "inside the hide" of others – getting inside their skin and feeling what it is to be them. I can't do it without first figuring out who is inside my skin, and coming to terms with what I feel. In short, being true to oneself.

My client as my muse

My client is the most important person in my case. I recently read that every successful person has a muse. My muse is my client. I love him, or her or them. Everything I do in a case is about her, for her, because of her. She teaches me about myself. She makes me a better person, and a better lawyer because of it.

My client is sitting in my office because recently luck was not on her side. She has only recently been diagnosed with terminal cancer, even though she told the doctor about the lump in her breast in time to save her life; or the radiologist missed the tumor in her abdomen

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three years ago; or her primary care doctor assumed her rectal bleeding was hemorrhoids. Or, a million other scenarios.

Alternatively, my client is here because for years he religiously paid on his insurance policy, just in case he got sick and couldn't work; or to protect his home, or his business, or his family if he died. Tomorrow, it may be the client who got hit in an intersection. My client is mentally ill, on medication for his bi-polar disorder, his schizophrenia, or in jail.

Every client has a personal story. Each is different, and each is common. I try to figure out who my client is by learning her story. What is unique about her story? What common themes run through her life story? What in her life resonates with my own life experience? Where does she come from, where does she live, work, etc.? What feelings drive her? What is painful to her about what has happened to her? What does she love about life?

How do I feel about her? Why do I feel that way? Why does he bother me? Why do I feel a certain kinship with him? What don't I trust about him and why? The more I get to know my client, and the more I get in touch with my own feelings about him, the more I am in touch with how my jury will feel about him.

Trust and betrayal

More and more we hear about the theme of "Trust and Betrayal." The defense wants the theme to be "personal responsibility".

So, a couple of things I want to learn about her: Whom does she trust and why? After all, Mr. Defense Lawyer asks this in one way or another. Or the jury asks during deliberations, "Why didn't she get a second opinion?" "Why didn't she ask more questions?" "Why wasn't she more careful?" "Why doesn't she take more personal responsibility for what happened?"

My client's trust relationships are key to understanding her, as well as to understanding "personal responsibility." Whom has she trusted, and who has betrayed that trust? Her answers may be very similar to my own, or they may be quite different. But her feelings about that will likely be very similar to my own, as well as to those of every member of the jury.

Trust is a two-way street. Yes, blind trust may not be taking personal responsibility. But blind trust, for the most part, doesn't exist. The other side of trust is a promise, express or not.

When my daughter was eight weeks old, my wife and I stood outside a set of operating-room double doors, my daughter cradled in my arms, ready to be handed over to an anesthesiologist I had met for the first time just moments earlier. She was having open heart surgery, and I didn't know if I would ever see her again. That moment, more than any other, allows me to feel my client's trust of her doctor. It is a palpable connection, which we have to feel. Otherwise, how do we ever hand our child, husband, wife, mother, or father over to the people who are supposed to take care of us?

The truth is that absent many promises, written, spoken, and otherwise, there would be no trust. Quality care, safety, cleanliness, experience, knowledge, education, training, standard of care, etc. My trust is not blind; it is built on a foundation of promises. If the doctor kills my baby due to a careless error, does my failure to ask more questions or extract further promises absolve him?

I drive down the road with my son in his car seat, and I trust the driver heading the other way not to run the red light, turn in front of me, or crash into the back of me.

I buy the insurance policy and I trust the "A"s and the "+"s in the rating, and all the promises, and advertisements, and pay the premiums, because I trust that if I become disabled or die, that my family will be taken care of.

I am no different than my client in that way, nor am I different from anyone sitting on the jury. We are similar in that we all make promises, and we all trust each other to do what is promised. But we are also similar in that we have been burned by our trust. Or, more truthfully, we are burned by people in whom we place our trust. Wherever there are people, there are also people who disappoint. But, absent trust, society cannot exist. We all know that, and we all depend upon it.

How do I want my jury to feel about "trust"? That my trust in my doctor, insurance company, fellow drivers, etc., to follow basic safety rules (thanks Rick Friedman and all the Reptile people), is not the same as my failing to take "personal responsibility." Really, what I want my jury to feel about "trust" is that whatever trust my client placed in the defendant was reasonable.

In short, be true to your client. Be true to her story of why she trusted the doctor who told her that her child was fine, despite evidence to the contrary, and who therefore didn't get a second opinion.

The truth in action

Recently, my long-time law partner, Brooks Cutter, asked me to try a case with him. It is a tragic case involving a very young African-American woman who ended up paralyzed from the chest down due to medical malpractice. No money was offered to settle the case.

The facts were pretty scary. When the child was 13 years old, she became temporarily paralyzed from an unknown cause. She was taken to a major medical center in the Sacramento area, unable to stand or sit up. She was fully tested, including a spine MRI, which was read as normal. She was attended by the pediatric neurology service. She was diagnosed with Guillain-Barré syndrome and was treated for it. She improved in the hospital with treatment, and could walk with a walker by the time she was discharged. Her discharge instructions, which her parents received and signed, expressly stated that she was to return for follow-up care with the pediatric neurology service. Later, her pediatrician's office arranged for insurance approval for the follow-up care with the pediatric neurology service. The child continued to experience leg weakness, but got to where she was able to walk without a walker. For

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years, she was given medical excuses for PE and to give her more time to get to class due to her leg weakness.

Despite the discharge instructions and the ongoing problems, the parents did not bring her back to the neurologist. They trusted the doctors who diagnosed the Guillain-Barré, and they trusted the diagnosis. As it turns out, there was a very subtle abnormality on the spine MRI. That subtle abnormality was in the same area of the spine as an arterio-venous malformation that blew out shortly after she turned 18. When that happened, she was single and pregnant.

Nothing about this case was easy. We spent a huge amount of time exploring trust/betrayal on the one hand, and personal responsibility on the other. We knew the defense would try to make the entire case one in which the parents were solely to blame. The defense made a strong case that the ongoing symptoms were inconsistent with the diagnosis that she was given when she was 13. Had the parents brought her back, their medical experts testified, as they were told to do, a diagnosis would have been made somewhere in that four- to five-year period, and she would have been cured. There was complete agreement from everyone in the case that, had it been diagnosed, it would have been a simple surgical fix.

We struggled with the idea of parental responsibility. We both have kids, and we both are great parents. What Brooks knew about our client's parents, and what I came to learn, is that they are great parents also. But they are parents who trusted doctors and a diagnosis.

We worked together to cut the case down to the bare essentials. We only put on what we needed, and we discarded the rest. But, looming out there was still "personal responsibility," "blame the patient," and the like. In the end, it was the truth that saved us and our client on that front. Getting to that truth, though, took a lot of work. The defense lawyers kept saying it was the parents' fault. During the motions in limine, at one point it was clear the judge felt that way. We didn't want to admit it. Sure, in the case we felt like we needed to "admit" it – probably the smart thing to do. But we were so resistant to it. But why be resistant to the "smart" thing? The truth – we loved our client and her parents, who were her full-time caretakers. How could we betray their trust, just like the doctors did, and the defense did, just because it seemed smart? It wasn't lawyers who came up with the right approach. It was fathers who love their kids who did.

We reversed roles with our client's parents and figured out that not a day would go by without blaming ourselves for a child's broken body, regardless of whose fault it was. To me, the most honest moment in the trial was when Brooks told the jury that probably not a day goes by that the parents don't blame themselves for what happened to their child. Most of the jury, people who have had common life experiences of trusting, and loving, got it. Our client was awarded one of the largest medical malpractice verdicts in Sacramento County history.

Every case has a true story that will motivate a jury. Find it and tell the jury the truth.


Ratinoff

Eric J. Ratinoff is a partner in Kershaw, Cutter & Ratinoff LLP in Sacramento. He received his B.A. from UC Santa Cruz in 1989 and J.D. from UC Davis 1993.

Ratinoff specializes in serious personal injury, products liability, insurance bad faith, consumer fraud, medical negligence and serious auto accidents. He served as former president, secretary and vice president of Capitol City Trial Lawyers (formerly Sacramento Consumer Attorneys. He is a member of the National Association of Personal Injury Lawyers and was a former president of Sierra Forever Families.

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