STEVEN LUBET

NOTHING BUT THE TRUTH

Why Trial Lawyers Don't, Can't, and Shouldn't Have to Tell the Whole Truth

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To Natan Isaac and Sarah Nomi

CONTENTS

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INTRODUCTION

STORYTELLING LAWYERS

The best trial lawyers are storytellers. They take the raw and disjointed observations of witnesses and transform them into coherent and persuasive narratives. They develop compelling theories and artful themes, all the better to advance a client's cause, whatever it might happen to be. "Give me the facts," says the attorney, "and I will turn them into the best possible case."

The popular image is that lawyers, and trial lawyers in particular, are cunning deceivers and misleaders, flimflam artists who use sly rhetorical skills to bamboozle witnesses, turning night into day. In this conception, lawyers tell stories only in order to seduce and beguile the hapless jurors who fall prey to the advocate's tricks. Critics believe that the system would be better and more honest if the witnesses were simply asked to speak, without the distorting impact of lawyers' involvement.

But that view is wrong. As the following chapters—each one describing the events of a trial—will show, lawyers often use the techniques of narrative construction to enhance the truth, not to hide it. A fully developed and well-conceived "trial story" may result in an account that is actually "truer" in many respects than the client's uncounseled version of events, even though the narrative was adroitly structured with courtroom victory in mind.

Trial lawyers, the legal profession's ultimate positivists, tell stories because that is what works. There is nothing intrinsically valuable about storytelling at trial, other than the fact that a logical, interesting, linear narrative has proven to be the most successful way to persuade the fact finder. If some other method worked better—opera singing,

gymnastic floor exercise, emotive grunting—lawyers would adopt that approach instead.

Storytelling, however, cannot be defended merely because it is an effective device. That would justify the uncharitable, though extremely popular and certainly not irrational, view that attorneys are literary mercenaries, paid to concoct whatever tale a gullible jury is most likely to accept.

In fact, the lawyer's art—shaping disparate statements into a single meaningful account—is not an unprincipled act of creating useful fiction. It is just the opposite. A conscientious attorney fashions a story not to hide or distort the truth, but rather to enable a client to come closer to the truth. Language is an inherently awkward and indefinite instrument for conveying exact meaning, but precision is required in courts of law. The lawyer's storytelling seeks to employ language in the way that best communicates the client's case, making sure that the client actually gets to say what she really means. Without the lawyer's storytelling a client would be nearly incapable of accurately informing the judge or jury, cast adrift in a sea of ambiguity, approximation, and imprecision.

Any tool can be misused. Some lawyers spin clever fictions to assist in client fraud, just as other practitioners might devote their particular talents—computer programming, feats of strength, diplomacy, poetry—to either honorable or evil purposes. But as a baseline for lawyers, and excepting the out-and-out swindlers and thieves, storytelling is a noble pursuit.

There are three structural devices that add great power to the stories of trial lawyers: theory, theme, and frame.

A "theory of the case" explains what happened. It is a concise account of the facts and law, leading directly and rationally to the conclusion that the lawyer's client should win the case. In essence, a theory completes the sentence, "We win because. . . ." In the impeachment trial of President Clinton, for example, one aspect of the defense theory was that the president's words, even though misleading, had been "legally accurate."

A theory of the case provides the necessary bridge between the potential drama of the story and the requirements of the law. A winning case theory has internal logical force, explaining why the discrete facts,

however interesting (or boring) they may be, actually add up to "proof" that the attorney's client is right. Popular imagination notwithstanding, a trial is truly something more than a soap opera or a sporting match. Most of all, a trial is a contest of ideas, a process in which the law is applied to the facts. And unless that link is supplied by a comprehensive theory of the case, even the most rip-roaringly exciting story may come to nothing when the verdict is returned.

Just as a case theory rests on logic, a trial theme appeals to moral force. Rather than explain why a particular verdict is dictated by the facts and the law, a theme shows why it *should* be entered, why it is the *right* thing to do. An effective theme allows the judge or jury to believe in the underlying righteousness of the verdict.

The most compelling themes invoke shared values and civic virtues—honor, duty, friendship, commitment. In a simple contract case, for example, the lawyer might say something like, "This is a case about keeping promises." In a products liability case the plaintiff's theme might be an accusation of "profits over people." Such themes can be forceful as rhetorical devices, though neither has any independent legal weight. Of course it is important to keep promises, but that doesn't mean that this particular contract was broken. And everyone is in favor of safety.

In the Clinton impeachment the House managers constantly returned to a refrain invoking "the rule of law." This was a moral appeal rather than a legal or factual argument. The president either did or did not commit perjury, which either was or was not an impeachable offense. Strictly speaking, the rule of law was never an issue in the proceeding; there is no contrary side to that particular argument. In another sense, however, the rule of law had everything to do with it, since the senators could not ignore the greater social and historical implications of their decision. A jury trial works the same way. A trial theme underscores the theory of the case by showing why the desired verdict is both decent and good—as well as legally necessary.

Perhaps even more important than theory and theme is the "story frame."

The trial process attempts to re-create the past, but it is an imperfect process at best. Witnesses may testify about what they saw and did.

Documents and physical objects may be placed in evidence. Experts may provide relevant opinions and conclusions. In the end, however, there is an insurmountable barrier. The fact finder—judge or juror—was not at the scene of the events. Not having been there, she cannot actually know what happened. Rather, she must ultimately deduce or suppose what happened, using not only the evidence presented but also her judgment, interpretation, common sense, and other insights. This is an inevitable feature of historical fact finding—the use of one's experience and intuitions to deduce what *must have happened.*

The trial evidence allows a juror to begin creating a mental image of the events, people, locations, objects, and transactions in question. That image, however, will necessarily be incomplete, since it is beyond human capacity to describe—or absorb—all the millions of discrete details that comprise everyday life. The missing details, and inferences drawn from them, will be filled in, however, by the juror's memory and imagination. If the accident occurred on a dark road, the juror will imagine or recall a particular dark road, filling in details consistent with that image.

That act of imagination or vision constitutes a story frame, the context in which the fact finder determines what *must have happened* in the circumstances described by the evidence. In the O. J. Simpson case, for example, the prosecution labored hard to create what might be called a "domestic violence" frame. At the very outset of the trial, prosecutors introduced evidence of Simpson's ill treatment of his wife, his past threats, and her fear of him. The purpose of this evidence was to support the conclusion that given his jealousy, anger, and violent nature, he *must have been* the murderer. In contrast, the defense developed a counterstory, the "police prejudice" frame, intended to advance the theory that the officers *must have* contrived or mishandled the DNA and other evidence against Simpson.

Neither case had the benefit of direct evidence, which increased the importance of the competing frames. There were no eyewitnesses to the murder, nor was there any direct testimony that police officers had indeed monkeyed with the evidence. Instead, the jurors were asked to reach a conclusion based on an accumulation of circumstances, in light of their own judgment and past experiences. As everyone knows, the "police prejudice" frame proved convincing and Simpson was acquitted.

The story frame may well be the trial lawyer's most powerful rhetorical tool, because of its extraordinary effectiveness in the battle for the fact finder's imagination. Once a juror begins to envision events in a certain context, new information will tend to be evaluated in that same context. A thought experiment makes this point more evident.

Imagine that the defendant in a criminal case is known to be a street gang member. An image immediately springs to mind. He slouches, he is rude, he is disrespectful of the law and susceptible to peer pressure. Even if jurors do not prejudge his guilt, they will probably regard him poorly and assume that they know the answers to many questions about him. How does he dress? What sort of hours does he keep? How much does he care about school? What does he do when he hangs out with his pals? How honest is he? Does he value the rights and property of others? The answers—or at least the suppositions—are pretty obvious if the defendant is a known gang banger. The jurors will tend to look at the case in a "street gang" sort of way.

But now suppose that the defendant belongs to a youth club or a neighborhood association. Suddenly the image changes. He is more clean-cut, more responsible, more diligent in school, less aggressive toward strangers. His clothing, attitudes, and pastimes will all be imagined differently, simply because of the introductory description. The initial image dictates, or at least suggests, a variety of assumptions about the defendant's attitude, conduct, and character. Jurors will begin with a different outlook if they approach the case from a "youth club" perspective.

These assumptions are not immutable. They can be overcome or dispelled by the evidence. But a lawyer who can engage (and maintain) the jury's imagination will obviously start with a significant advantage. That is the power of story framing.

The development of a trial story is a creative process. The lawyer must imagine a series of alternate approaches, evaluating each one for coherence, simplicity, and persuasiveness. But take heart. An attorney is not free to choose a story simply because it will be effective. Trials are not merely confrontations between antagonistic fantasies. There is no room for lying. The theories, themes, and frames must be composed of truth.

Surveying all the available facts, counsel has to decide what to leave in and what to leave out. The story will be fashioned in equal parts through emphasis on the favorable details and elision of the nasty ones.

This means, of course, that trial lawyers do not tell the whole truth. Each side trumpets those facets of the truth that support its case, while doing everything legally possible to obscure or minimize that which is inconvenient or damaging. Is that process inherently cynical or corrupt, as critics contend? Or can it be redeemed, as lawyers insist?

The answer is that selectivity is inevitable. It is impossible to tell the whole truth, since life and experience are boundless and therefore indescribable. Every story will omit more than it includes. In the time-limited context of a trial, especially in the days of the famously vanishing Generation X attention span, streamlining is essential. As Marianne Wesson puts it, "Any witness who swears to tell the whole truth has just told his first lie."[1]

And there is more to it than that. The whole truth may be metaphysically honest, but nonetheless misleading and untrustworthy. For example, a criminal defendant might belong to a street gang, but still be innocent of the crime. Understanding what we do about story framing (and prejudice), are not justice and fairness actually served by excluding that feature of the whole truth? An abridgement, in fact, may be more accurate, as it removes distractions and misleading complications. The whole truth, in fact, may create a false impression.

Alas, one side's false impression is bound to be the other side's gospel, but that is inherent in the human condition—a phenomenon long predating the practice of law. In response, we have devised an adversary system designed to sort out competing claims to accuracy and justice.

For lawyers, then, virtue lies in presenting "nothing but the truth." This point can be illustrated—surprise!—through storytelling. The following chapters present a series of cases, some real and some fictional, some intricate and some straightforward. Each chapter explores the challenges, benefits, and complexities involved in expressing the truth at trial.

Although this is a book about lawyering, the emphasis in each chapter is on the story itself, rather than on the advocacy techniques. Trials occur in rich contexts, thick with facts, personalities, inferences, and implications. A thorough appreciation of the circumstances is essential to an understanding of the attorney's work. The more we know about the background of a case, the better we can understand the choices confronting the lawyers and other participants. And the more we can immerse ourselves in the details, the better we can recognize the challenges inherent in extracting a purposeful account of the truth from what is ultimately an unsettled and equivocal reality.

Perhaps the deepest lesson in this book is about witnesses rather than lawyers. Perceptions can be misleading. Memory is selective, indefinite, and undependable. Motives, though ever present, may be obscured and unrecognizable. Even the people who observe an event seldom know what really happened, much less are they able to recall and describe it with unfailing precision. A courtroom reconstruction, alas, is at best an approximation, a necessary—but still audacious—effort to extract a reliable conclusion from the ineffable secrets of past events.

Several of the chapters, therefore, may at first seem to be more about history than advocacy. But trials do not occur in a vacuum. Even simple cases, and certainly momentous ones, are strongly influenced by the times in which they take place. An obvious and well known illustration may be seen in the trial of O. J. Simpson. No aspect of that case, including the strategic and tactical decisions of the lawyers, can be truly understood without a thorough knowledge of southern California at the end of the twentieth century. Every aspect of the trial—from jury selection to cross-examination to final argument—was played out against a backdrop of race, celebrity, sex, drugs, domestic violence, police-community relations and general Los Angeles culture. To analyze F. Lee Bailey's cross-examination of Detective Mark Fuhrman, for example, one would have to appreciate the history of conflict between the Los Angeles Police Department and the African American community.

We begin with "Biff and Me," which introduces the general method of story reconstruction. Faced with the task of developing a legally effective narrative from a client's disorganized and self-interested account, a lawyer must determine which facts are relevant (and helpful) and which are distractions (or worse). Based on a real incident, the Biff story imagines a series of conversations between advocate and client, aimed at both

clarifying the underlying events and interpreting them in a way that can frame a successful lawsuit.

One challenge for the lawyer is to marshal the facts within a legal context. The law has its own requirements, which may or may not be evident to a layperson. The attorney's task is to recognize and accommodate these constraints. In the Biff story, for instance, the lawyer must explain to the client that not all threats, no matter how aggressively boorish, rise to the level of a legally actionable assault. This is the mundane stuff of daily lawyering. With the applicable statute as a framework, the attorney explores the facts to see whether the client "has a case." Predictably, it turns out that what is important to the client may not be so important to the law. In other words, the lawyer must winnow "the whole truth" into a legally meaningful account that is composed of "nothing but the truth."

That same problem arises in the following chapter, the case of Edgardo Mortara, in far more tragic circumstances. In 1858 in the Italian city of Bologna, a six-year-old Jewish child was removed from his parents by the papal police. Edgardo Mortara had been secretly baptized some years earlier, and canon law therefore held that he could not be raised as a Jew. He was taken to the Vatican, where he was "adopted" by Pope Pius IX. His parents, Salomone and Marianna, engaged a lawyer to help them regain custody of their son. But, of course, their advocate had to operate within the extraordinary confines of the Roman Catholic Church's legal system. At every turn, he had to circumscribe and limit his arguments, omitting the facts most important to his clients, in a desperate effort to persuade the Pope himself to reverse his earlier decision.

To be sure, there can be no criticism of a lawyer who must operate in a system where certain truths are simply forbidden to be told. But what of the lawyer who is complicit in a client's own distortions, perhaps outright lies? That issue must be confronted in the chapter on John Brown, who gave his life in the struggle against slavery. On trial for murder and treason following the raid on Harpers Ferry, John Brown virtually reinvented himself, disavowing his violent and insurrectionary goals while claiming to have sought nothing more than the bloodless rescue of slaves. His statements at trial were palpably false, but his goal was noble—to rally the forces of abolition by becoming an admirable martyr to the cause. But may his counsel assist him in that endeavor?

The next chapter takes up the concepts of case theory and story framing while considering the forgotten trial of Wyatt Earp. Though he is remembered today as a heroic lawman, Wyatt Earp (along with his two brothers and Doc Holliday) was actually charged with murder following the legendary gunfight at the O.K. Corral. The ensuing trial lasted for nearly a month, and at times the evidence against the defendants seemed nearly overwhelming. Nonetheless, Wyatt and his colleagues were exonerated, largely because of the frontier context in which the case was decided. Defense counsel, by presenting some facts and eliding others, succeeded in framing the case as a contest between orderly society and near anarchy, while the prosecution failed to present a coherent counternarrative that might have allowed the judge to rule in its favor.

Without giving away the surprise ending to the next story, suffice it to say that the Man Who Shot Liberty Valance must confront that same antagonism between law and lawlessness. Here, the defendant has a secret that might lead to his acquittal, but perhaps at the cost of higher justice. How much should he explain to his lawyer? And how should his lawyer proceed?

Atticus Finch, on the other hand, is universally revered as a lawyer who always knew how to proceed. Atticus is the very symbol of truth and justice, standing against bigotry even at grave risk to professional success and personal safety. In 1930s Maycomb, Alabama, Atticus alone was willing to tell the truth about Tom Robinson, a black man falsely accused of raping a white woman. But what if Tom Robinson had actually been guilty of the crime? What if Atticus's compelling defense had been an artful contrivance rather than "the truth"? Would he still be a hero?

Finally, we come to the trial of Sheila McGough, which serves as the overall conclusion to this book. According to the journalist Janet Malcolm, Sheila McGough was convicted of larceny and sentenced to prison simply because she insisted on telling the whole truth. By infusing her defense with a numbing welter of shapeless details, McGough deprived her attorneys of the ability effectively to make her case. In contrast, Malcolm believes that the prosecution used bits and pieces of the truth to construct an essentially misleading narrative, leading to an unjust result. But is that really what happened? Was the case truly a clash between "the whole truth" and selective storytelling? Must naive honesty necessarily

fall prey to sly advocacy? Or is there another explanation for McGough's conviction?

The answers to those questions will either validate or indict the central premise of this book, which is that purposive storytelling brings a positive ethical value to the adversary system.

NOTE

1. Marianne Wesson, *A Novelist's Perspective,* DePaul L. Rev. (forthcoming 2000).

CHAPTER ONE

BIFF AND ME

Stories That Are Truer Than True

Truth and accuracy are not the same thing. A lawyer's client may tell a story that is entirely sincere but nonetheless imprecise and unreliable. Witness accounts are often clouded by poor memory, self-interest, preconception, partiality, wishful thinking, reticence, and unwarranted conclusions about the law. In shaping a case, the lawyer has to cut through the client's misperceptions in order to arrive at a more lucid understanding of the relationship between the facts and the law.

Together, the lawyer and client may reexamine the client's own recollections and characterizations of events. Perhaps the client forgot something, or misunderstood something, or failed to comprehend the significance of one incident or another. To be sure, unscrupulous lawyers may use this process as an opportunity to put words in the client's mouth, simply in order to improve the story. But decent, ethical lawyers also review facts with their clients, helping them remember and correctly interpret the underlying occurrence.

The following account is completely true, presented here without exaggeration. Of course, I am reporting it from my perspective because that is the only one I know. There may be another side that is perfectly reasonable and plausible (although I doubt it). My biases aside, this story illustrates the ways that thoughtful counseling may actually result in a story that is "truer than true."

Arriving an hour early for my morning flight out of O'Hare, I picked up my boarding pass and looked for a place to read. There were no available seats immediately adjacent to my gate, so I headed for the

circular waiting area in the middle of the concourse. I chose an empty seat at the end of an aisle. The seat next to me was also vacant, though covered with the loose sections of several newspapers. Two seats over, a man was sitting with his arms folded. I have since come to think of him as "Biff."

I sat down and dug a book out of my briefcase. My neighbor leaned over and said, "Someone was sitting there."

Not quite understanding what he meant, I looked around for the usual indicators that a seat is occupied. Seeing no bags or jackets, I turned my head to the speaker to ask what he meant.

Before I could make a reply, however, he said, "I'm telling you that my father is sitting there . . ."

Realizing what he meant, I started to pack up my briefcase so that I could move. But Biff continued talking, now in a highly agitated tone.

". . . and he's coming back." The last word was sharp.

As I pulled the zipper on my briefcase, I started to tell him that I would be gone in a moment. "Hold on a minute, mister."

Biff lost his temper before I could finish. Barely controlling himself, he angrily hissed, "Don't piss me off!"

Stunned at the threat of violence over so trivial a matter, I quickly grabbed my stuff and moved to another part of the waiting area.

I am slight, short, bespectacled, and middle-aged. Biff was far taller, much stockier, and a good fifteen years younger. Words on paper cannot begin to convey his menacing manner as he used his voice and size to intimidate me. In the otherwise orderly airport terminal, it was alarming to realize that he was actually ready to hit me if I didn't get out of that seat quickly enough to suit him. Biff left absolutely no doubt that he was threatening me with violence, at least for the purpose of frightening me into moving faster. And, of course, it worked. (Who knows whether "airport anger" may someday replace "road rage" as the latest deadly emblem of social degradation?)

The rational response to Biff's outburst was to move as far away as possible, doing my best to avoid him in the future—let's call it defensive seating. But for the purpose of story development, assume instead that my own anger, frustration, and petulance continued to mount

even after I was out of harm's way. Imagine that I returned home determined to get even.

Since I lack the physique or weaponry to do the job personally, my best alternative would be to swear out a misdemeanor complaint. Being cautious, I would probably begin by consulting my own lawyer, just to make sure that I had a case. After hearing the facts, my attorney would no doubt tell me the definition of assault in Illinois: "A person commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery."[1]

Then we would talk about how I might go about proving that I had been assaulted.[2] The first few conclusions are fairly obvious. Biff certainly acted without lawful authority and I was no doubt in apprehension of receiving a battery. (It's embarrassing to admit, but my hands were shaking. I felt scared and I probably looked scared, too.)

But now comes the hard part. Was my apprehension reasonable, or was I just overreacting? The answer to the question makes the difference between a misdemeanor and an insult, between a good case and a bad case. Let's think about how the interview might proceed:

Attorney: What has made you so angry that you want to swear out a complaint?
Client: I didn't do anything to provoke this guy, and suddenly he was threatening to hit me.
Attorney: Why do you think that he was going to hit you?
Client: Because he threatened me.
Attorney: What made it a threat?
Client: It was obviously a threat; he was trying to scare me with his words and voice.
Attorney: How can you be sure about what he was trying to do?
Client: It was obvious.

And it was obvious, dammit. It was completely clear that he was using his size and aggressiveness to frighten me into doing what he wanted. And it was unnecessary, too, since I was happy to move as soon as I understood the situation.

The law, however, does not convict people, or even take away their money, based on assertions of obviousness. The law, for very good reasons, will act only on the basis of proven facts. The problem for me, as a client, is that I don't know intuitively how to translate my impressions into proof. That is where my lawyer comes in. How can I tell my story in a way that will be meaningful and persuasive under the law? My lawyer will have to take me through the story again.

Attorney: Why do you think that he was going to hit you?
Client: Because he threatened me.
Attorney: Let's go one step at a time. Why didn't you move when he first spoke to you?
Client: He said someone "*was* sitting there," which didn't make any sense to me, so I looked around to see if anybody seemed to be coming back.
Attorney: Did you refuse to move or say anything else?
Client: No, I just tried to figure out what he meant.
Attorney: Then he told you about his father?
Client: Right, so I began gathering my stuff, but I guess I wasn't doing it fast enough.
Attorney: Why do you say that?
Client: Because that's when he raised his voice at me.
Attorney: What did he say and how did he say it?
Client: He said, "And he's coming back." But it was really the angry tone in his voice that upset me.
Attorney: What do you mean by "angry tone"?
Client: Well, I really can't describe it any better. You just know when someone is angry.
Attorney: Let's continue, then. What happened next?
Client: I said, "Hold on a minute, mister."
Attorney: Why did you say that?
Client: Because I had to gather my stuff up in order to move.
Attorney: It sounds like you were a little annoyed.
Client: I was a little annoyed. He was rushing me for no reason.
Attorney: Then what happened?
Client: That's when he threatened me.

Attorney: I think we need to do this part step by step. What did he say, exactly?
Client: He said, "Don't piss me off."
Attorney: What was his tone of voice?
Client: Angry and loud.
Attorney: Did he do anything with his hands?
Client: Yes, he made a fist.
Attorney: Did he move his fist?
Client: He clenched it and sort of shook it a little.
Attorney: Did he swing it or put it in your face?
Client: No.
Attorney: Did he move his body?
Client: He raised himself up in his seat.
Attorney: Did he stand up?
Client: No. He just lifted his backside a little bit off the chair and leaned over.
Attorney: Which way did he lean?
Client: He leaned toward me.
Attorney: Was his fist still clenched when he leaned toward you?
Client: Yes.
Attorney: Did he clench it while he was leaning?
Client: Yes.
Attorney: Did he say, "Don't piss me off" while he was leaning toward you with his fist clenched?
Client: Yes.
Attorney: Did he ever leave his seat?
Client: I don't think so.
Attorney: Did you wait around to see whether he was going to leave his seat?
Client: No, I got up and left as quickly as I could.
Attorney: How long did all of this last?
Client: Maybe a minute; not much longer.
Attorney: Are you certain he was threatening you?
Client: Absolutely. Do you think we have a case?
Attorney: I believe that you felt threatened and I think it was reasonable. We might have a case.

Client: Why wouldn't we have a case?
Attorney: It depends on the other side of the story.

You can see from my lawyer's questions that she is starting to think in terms of developing a persuasive trial story. My initial, self-generated account was adequate to explain my reason for seeking counsel, but it left too much unsaid to be useful in court. I began with an impressionistic, conclusory narrative about a perceived threat. I believe it is true. I want to tell it truthfully, but also meaningfully and persuasively. That is where my lawyer steps in.

There is more to story construction, however, than simply the addition of important details. A persuasive story will need to have

> [A]ll, or most, of the following characteristics: (1) it is told about people who have reasons for the way they act; (2) it accounts for or explains all of the known or undeniable facts; (3) it is told by credible witnesses; (4) it is supported by details; (5) it accords with common sense and contains no implausible elements; and (6) it is organized in a way that makes each succeeding fact increasingly more likely.[3]

For present purposes, let us focus on the first characteristic. To succeed at trial, my case will need to include the reasons for the way the participants acted. Of course, there were only two participants, Biff and myself, and I have already explained to counsel my own reasons for sitting, pausing, and eventually moving. But that leaves a gap.

Why was Biff so aggressive? Of course, I cannot look into Biff's mind to see what actually prompted him to behave as he did. And, strictly speaking, Biff's motive would not actually be essential to my case. I only need to prove that he acted in a certain way, placing me in reasonable apprehension of receiving a battery. But my case will be stronger, more believable, if I can supply a plausible reason for Biff's aggression. After all, everyone has been in an airport at some time or another, but almost no one has ever been assaulted over an empty seat. So in many ways my story suggests a counterintuitive scenario. To justify a verdict, the fact finder will probably want to know why Biff reacted in such an unusual fashion.

Imagine a continued interview with my lawyer:

Attorney: Can you think of any reason why he might have reacted so violently?
Client: He's probably an anti-intellectual who loves to attack university professors.
Attorney: That seems unlikely. Any other possibilities?
Client: Maybe he is simply a psychopath?
Attorney: I suppose that's possible. Did you see him threaten anyone else or act in any other irrational fashion?
Client: No, I didn't. Say, doesn't crack cocaine make people violent?
Attorney: It does, but there's the same drawback as with the psychopath theory.
Client: Well, the real problem seems to be that his actions were just inexplicable. No one reacts that way!
Attorney: If "no one" reacts that way, then we'll have a tough time convincing the jury that he reacted that way. Get it? We have to tell them why someone—meaning Biff—really did react that way.

And now it is time for a little bit of lawyering. The client came to the meeting believing that his own actions were wholly reasonable and that Biff was entirely and exclusively to blame. In the case of violent threats, however, the law does not impose such a strict burden on would-be plaintiffs or complainants. In this case, I can prevail in court *even if I was inconsiderate or rude* so long as Biff's response was disproportionate or unreasonable. In other words, you are not allowed to threaten violence simply because someone has been discourteous. With that in mind, let us return to the story-framing interview.

Attorney: Do you think Biff might have felt that you were disrespecting him?
Client: I suppose it's possible. I didn't really understand what he was asking until the second or third time he said it.
Attorney: It would be rude, don't you think, to refuse to give the seat back to Biff's father?
Client: Yes, that would be really wrong. But that's not what I did.

Attorney: Well, let's try to look at it from Biff's angle, just for a moment. He did ask you three times before you moved?

Client: Not really, but I guess he could have seen it that way. Still, there was no reason for him to threaten me with his fist.

Attorney: Exactly. He might have had a reason to be annoyed, but not to become violent. That's your best case.

And now the story has taken shape. I sat down in what appeared to be an empty seat. Biff wanted me to move, but he didn't make himself very well understood. I tried to respond, but in the minute or so it took me to figure out what he meant, Biff had become livid. I probably, though unintentionally, made things worse when I said, "Hold on a minute, mister," which he might have mistaken as a refusal to move. But his reaction was out of all proportion to anything I did. He raised his voice, began to lift himself from his seat, leaned toward me, and threatened me with a clenched fist.

Of course, there will be more to the trial story than the simple outline above. My lawyer will want to fill in more details and she will definitely need to emphasize how quickly everything happened. I will also need to explain exactly why I believed that I was in "reasonable apprehension of receiving a battery." And if we file a civil case I will also have to say something about damages. Finally, my lawyer will also want to develop a theme, a shorthand introduction to the case that invokes conscience or moral force. A few possibilities spring immediately to mind. Maybe "You can't solve your problems with your fists." Counsel will no doubt come up with a better theme by the time the case gets to trial.

The most important thing about my lawyer's trial story, however, is that it is absolutely faithful to the events as I experienced them. Counsel has made my case stronger and more compelling, but not at any cost to the truth. That is, she has fulfilled the client-centered ethical obligations of the advocate as well as the system-centered duties of an officer of the court.[4]

Imagine now that my lawyer decided that the case was worth pursuing. Biff has been charged with misdemeanor assault, or perhaps served with

a civil summons.[5] In either case, his first step would also be to consult a lawyer. Biff's story, we can certainly assume, will not be the same as mine. As he tells it he is no doubt entirely innocent of any wrongdoing, and I am an overwrought seat stealer.

Let us consider the initial conversation between Biff and his newly retained lawyer:

Lawyer: This guy says that you threatened him at O'Hare. Did you actually do that?

Biff: Not really.

Lawyer: What do you mean by "not really"?

Biff: Well, I wasn't going to do anything.

Lawyer: But did you threaten to do anything?

Biff: He wouldn't get out of my father's seat.

Lawyer: Come on, Biff, did you threaten him or not?

Biff: Just enough to get him to move. I wasn't really going to hit him or anything, you know.

Biff and his lawyer have a problem because they are not exactly speaking the same language. When the lawyer says "threaten" he is thinking "place him in reasonable apprehension of receiving a battery." But to Biff, "threaten" means something like "give the guy an urgent message that he ought to move his ass pronto." Compounding the problem, Biff seems to think that his actual intention—to hit or not to hit—makes a difference. The lawyer knows, however, that Biff's apparent intentions matter far more than his real ones.

From this early uncertainty the lawyer must now begin to develop his own trial story. Since Biff's "mental reservation" is not a valid defense, the lawyer will probably want to go to work on the "reasonable apprehension" angle.

Lawyer: I have to tell you, Biff, that it is illegal to threaten someone with violence, even if you don't really mean to go through with it. The law is going to look at whether he thought you were threatening to hit him.