

Abraham Lincoln Teaches Trial Advocacy

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Contemporary American historians focus on Abraham Lincoln's five years as President. However, for the twenty-three years prior to earning the high office, Lincoln was one of the premier trial lawyers of his time. He became a top practitioner by following basic tenets of good trial advocacy - principles that are just as applicable today as they were in the 19th Century. This is an overview of the rules of trial law that the modern practitioner can learn from Lincoln.

Introduction

During his twenty-three years of practice, Lincoln handled all types of civil and criminal cases.¹ Since lawyers of his time did not normally specialize in a particular field of law, a good attorney handled a variety of cases.² Thus, Lincoln's docket consisted of "a prodigious number of nickel-and-dime cases,"³ and the "pettiest and most trivial litigation in the justice of the peace courts, running the gamut to the most important in the Supreme Court of Illinois and three in the United States Supreme Court."⁴ He handled capital murder cases, suits involving property⁵, cases of assault and battery, bankruptcy, contract disputes, debt, divorce, medical malpractice, mortgage foreclosures, personal injury, slander and trespass.⁶ Indeed, he practiced in "almost every conceivable type of litigation,"⁷ and estimates of the number of cases in which Lincoln was involved range as high as 5,000.⁸ Lincoln's reputation as an excellent advocate caused "humble individuals and great corporations" to retain him as their attorney.⁹

The praise Lincoln received from his colleagues and observers evidence his mastery of trial advocacy. His fellow attorneys described him as "a real lawyer's lawyer,"¹⁰ "a dangerous adversary in every type of case and court,"¹¹ and "outstandingly able and successful."¹² A newspaper reporter observed that Lincoln's skills placed him "at the head of the profession in his state" and that "though he may have [had] his equal, it would be no easy task to find his superior."¹³

Lincoln adhered to certain rules that any successful trial attorney should still follow today.

¹ ALBERT A. WOLDMAN, *LAWYER LINCOLN* 126 (1936).

² *Id.*

³ ALLEN D. SPIEGEL, *A. LINCOLN, ESQUIRE* 95 (2002).

⁴ WOLDMAN, *supra* note 1, at 126.

⁵ *Id.*

⁶ SPIEGEL, *supra* note 3, at 21.

⁷ WOLDMAN, *supra* note 1, at 135.

⁸ SPIEGEL, *supra* note 3, at 22.

⁹ SPIEGEL, *supra* note 3, at 21.

¹⁰ SPIEGEL, *supra* note 3, at 28-95.

¹¹ WOLDMAN, *supra* note 1, at 46.

¹² SPIEGEL, *supra* note 3, at 48.

¹³ DAVID HERBERT DONALD, *LINCOLN* 15 (1995).

1. Be Brief and Use Simple Words.

Law schools teach students to speak “like a lawyer.” Lincoln never went to law school and indeed had less than one year of formal education.¹⁴ Even though he had a good vocabulary, he never spoke to a jury using legal jargon. Instead, when addressing a jury or a political gathering, his words were simple and brief.

Later, as President, two of his most famous speeches were the Gettysburg Address and his Second Inaugural Address. The Gettysburg Address consisted of fewer than 300 words and was delivered in two minutes and fifteen seconds.¹⁵ His Second Inaugural Address lasted less than seven minutes and was 703 words, 505 of which were one syllable.¹⁶ Lincoln learned to deliver a powerful and moving message to his audience by using simple words - briefly spoken - while in the courtrooms of Illinois.

Lincoln himself told his law partner, William Herndon: “Billy, don’t shoot too high - aim low and the common people will understand you. They are the ones you want to reach.”¹⁷ Lincoln knew what any good trial attorney knows - cases are won not by impressing jurors with legalese, but rather by communicating with them in words that they understand.

When speaking before a jury, Lincoln “rarely used technical language” and spoke “to each juror individually and in a conversational tone.”¹⁸ He had the ability to “go quickly and briefly to the heart of the matter”¹⁹ with words that were “plain, sensible, candid ... almost as in conversation” with “no effort whatever to oratory.”²⁰ But in this way, his “talking had a wonderful effect” and the qualities of “honesty, candor, fairness [and] everything that was convincing” were conveyed to the jury. “He was not a speaker, but a talker.”²¹ His rhetorical style consisted of “simplicity and economy of language.”²² A fellow attorney described his style as “straight-forward” and “direct.”²³ He had the ability to reduce complex issues into simple propositions.²⁴

An example of this is found in a medical malpractice case in which he was hired to represent a doctor. Lincoln retained a medical consultant to assist him in understanding the deterioration of bones as people grow older. Rather than using the technical knowledge he learned from this consultant about why older people’s bones are more brittle because of increased “lime and

¹⁴ SPIEGEL, *supra* note 3, at 19.

¹⁵ PHILLIP B. KUNHARDT, JR.; PHILLIP B. KUNHARDT, III; PETER W. KUNHARDT; THE AMERICAN PRESIDENT 113 (1999).

¹⁶ RONALD C. WHITE, JR., LINCOLN’S GREATEST SPEECH, THE SECOND INAUGURAL 48 (2002).

¹⁷ WILLIAM H. HERNDON, HERNDON’S LIFE OF LINCOLN 262 (1942).

¹⁸ *Id.*

¹⁹ SPIEGEL, *supra* note 3, at 48.

²⁰ SPIEGEL, *supra* note 3, at 57.

²¹ *Id.*

²² SPIEGEL, *supra* note 3, at 20.

²³ *Id.*

²⁴ STEPHEN B. OATES, WITH MALICE TOWARD NONE 103 (1977).

calcium” deposits, he used a simple illustration:

[I]n showing the flexibility of the bone of a young chicken to the jury, he used the expression: ‘This bone has the starch all taken out of it, as it is in childhood.’ When he easily snapped the bone of an older chicken, the jury quickly understood the age differential.²⁵

Lincoln’s brilliance as a trial lawyer was thus based in large part on his understanding of how best to communicate with the jury—by using simple words and being brief.

2. Understand Your Opponent’s Side of the Case.

A good trial attorney can competently represent the plaintiff or defendant in any case and has the ability to see the strong and weak points of both sides of an issue. Lincoln was effective on either side of the docket. For example, he opposed railroads in cases as often as he represented them.²⁶ He would argue against the freedom of slaves in one case while he would favor abolition in another.²⁷ He would argue on behalf of water transportation interests in some cases while later espousing the opposite position for his railroad clients. One Lincoln biographer noted:

He examined the law both of his side and that of his opponent. . . . [H]e was never thereafter surprised by the strength of an opponent’s case. . . . [He learned the] ability to foresee and comprehend an adversary’s contention. . . . He began to comprehend a case in all its fullness of circumstances.”²⁸

Stephen T. Logan, another of Lincoln’s law partners, stated that Lincoln liked to know every facet of every issue of a case.²⁹ In this way, Lincoln could anticipate and refute his opponents’ theories and arguments. Lincoln’s successes were thus due in large part to his skill in understanding the strength and weaknesses of his side of the case as well as that of his opponent.

3. Out-Prepare Your Opponent.

Lincoln had a “terrific work ethic”³⁰ and a “willingness to work very hard.”³¹ He thus gained the respect of his colleagues as a “hardworking lawyer”³² and “tenacious” in his preparation. Lincoln believed that success in the law came only through “work, work, work.”³³ In a lecture Lincoln gave regarding the legal profession, he began: “The leading rule for the lawyer, as for the man of every calling, is diligence.”³⁴

Lincoln prepared by learning the facts through the skillful interviewing of witnesses, careful

²⁵ SPIEGEL, *supra* note 3, at 128.

²⁶ SPIEGEL, *supra* note 3, at 2.

²⁷ SPIEGEL, *supra* note 3, at 42-43.

²⁸ WOLDMAN, *supra* note 1, at 41.

²⁹ SPIEGEL, *supra* note 3, at 26.

³⁰ SPIEGEL, *supra* note 3, at 95.

³¹ SPIEGEL, *supra* note 3, esp. 48; Donald, *supra* note 13, at 149.

³² H. HOLZER, LINCOLN AS I KNEW HIM 58 (H. Holzer ed. 1999).

³³ SPIEGEL, *supra* note 3, at 26.

³⁴ DONALD, *supra* note 13, at 96.

pleading, and legal research.³⁵ He knew he could not rely solely on “speech making” without “a thorough knowledge of the applicable law and the evidence of the case.”³⁶

Lincoln thus became an effective advocate of the cases he handled by mastering the facts as well as the law. In short, he learned to out-prepare his opponent.

4. Focus on a Single Theme for Your Case.

Only attorneys, judges and law professors understand alternative pleading and alternative arguments. An example of alternative pleading is defendant’s answer which states, in effect, “defendant did nothing wrong to cause the accident; but if he did, then Plaintiff was also at fault; or if Plaintiff was not at fault, it was some third party that caused the accident.” This reasoning makes no sense to a layperson. By like token, presenting various alternative themes and theories is not persuasive to a jury. The experienced attorney will select the strongest theory of the case that the facts can support and that a jury can believe, then build the case around this theme and present the evidence and argument to support it. A Lincoln contemporary who observed him try numerous cases wrote:

Mr. Lincoln had a genius of seeing the real point in a case at once, and aiming steadily at it from the beginning to the end. The issue in most cases lies in a very narrow compass, and the really great lawyer disregards everything not directly tending to that issue. Mr. Lincoln saw the kernel of every case at the outset, never lost sight of it, and never let it escape the jury. That was the only trick I ever saw him play.³⁷

Lincoln did not use the confusing “alternative argument” method; instead, he had “the ability to go quickly and briefly to the heart of the matter.”³⁸ “He seized the strong points of a cause and presented them with clearness and great compactness.”³⁹ No matter how complicated the case, Lincoln would “disentangle it, and present the real issue in so simple and clear a way that all could understand.”⁴⁰ By knowing what he had to prove to win the case and not fighting over issues, which did not advance his theme or which he could not prove, he kept the focus on a central believable theory of the case. Lincoln historian David Herbert Donald gives an illustration of this principle:

In court he rarely raised objections when opposing counsel introduced evidence. According to Leonard Swett, the young Bloomington lawyer who traveled the circuit with Lincoln, “he would say he ‘reckoned’ it would be fair to let this in, or that; and sometimes, when his adversary could not quite prove what Lincoln knew to be the truth, he ‘reckoned’ it would be fair to admit the truth to be so-and-so.” But this, Swett noted, did not mean that he yielded essentials: “What he was so blandly giving away was simply what he couldn’t get and keep.” Many a rival lawyer was lulled into complacency as Lincoln conceded, say, six out of seven points in argument, only to discover that the whole case turned on the seventh point.

³⁵ DONALD, *supra* note 13, at 98-99.

³⁶ DONALD, *supra* note 13, at 98.

³⁷ L. STRYKER, *THE ART OF ADVOCACY* 178 (1959).

³⁸ SPIEGEL, *supra* note 3, at 48.

³⁹ HERNDON, *supra* note 17, at 27.

⁴⁰ SPIEGEL, *supra* note 3, at 20.

“Any man who took Lincoln for a simple-minded man,” Swett concluded, “would very soon wake up with his back in a ditch.”⁴¹

Obviously, Lincoln predetermined what he could prove, could not prove, and the point upon which the “whole case turned.” Another related principle is evident from Leonard Swett’s description of Lincoln’s trial techniques: Lincoln gave away the weak points he could not prove, and by doing so, increased his credibility with the jury. He focused then on the central credible theory of the case.

A good trial attorney will follow Lincoln’s example. The attorney will know the law, the facts, and the “real issue” in the case and then will focus on that issue from voir dire to final argument.

5. Win the Jury in the Opening Statement.

Having determined the strongest theory of the case, the attorney should begin selling that theory from the earliest stage possible. If the judge allows the attorneys some leeway in voir dire to state their side of the case, the good attorney will take the opportunity to do so. If the judge is more restrictive, then the opening statement is the time to sell the case to the jury. In either event, the jury should focus from the beginning of the trial on the most favorable view of the “real issue” and the predetermined theory of the case. At an early stage in the trial, jurors tend to decide which side they believe and want to win; therefore, strongly advancing the theme as early as possible puts one at a distinct advantage.

This description by one of Lincoln’s colleagues illustrates principles of the importance of the opening statement as well as the necessity of a focused theme:

As a lawyer, in his opening speech before the jury, he would cut all the “dead wood” out of the case. The client would sometimes become alarmed, thinking that Lincoln had given away so much of the case that he would not have anything left. After he had shuffled off the unnecessary surplusage, he would get down to “hard pan,” and state the case so clearly that it would soon be apparent that he had enough left to win the case with. In making such concessions he would so establish his position in fairness and honesty that the lawyer on the opposite side would scarcely have the heart to oppose what he contended for.”⁴²

6. Be the Truth Giver

An attorney’s personal credibility with the jury is a key factor in winning cases. According to Aristotle, author of *Treatise on Rhetoric* “ethos (credibility) was the most powerful means of persuasion.”⁴³ Lincoln instinctively knew that the speaker’s credibility with the jury as the “truth giver” is critical for persuasion.⁴⁴

In his role as the “truth giver” he would not raise futile objections to the admission of evidence which he knew was not critical to the outcome of the case. Jurors perceive that a lawyer objecting to the admission of evidence is trying to hide facts from them. Lincoln knew he could not be the “truth giver” if he was frequently objecting to the admission of evidence. Rather, he

⁴¹ DONALD, *supra* note 13, at 149.

⁴² HOLZER, *supra* note 32, at 77.

⁴³ WHITE, JR., *supra* note 16, at 83.

⁴⁴ *Id.* at 84.

“rarely raised objections,”⁴⁵ so he was not perceived by the jury as hiding evidence. Another Lincoln contemporary, Leonard Swett, noted that he seldom objected to a judge’s ruling on admissibility grounds unless it was a critical point. If Lincoln’s objection was overruled, Lincoln would tell the court: “Well, I reckon I must be wrong.”⁴⁶

Herndon described his partner’s courtroom demeanor as “cool, careful, earnest, sincere, truthful, fair.”⁴⁷ Another contemporary remembered Lincoln’s attitude in court as being “so straightforward, so direct, so candid, that every spectator was impressed with the idea that he was seeking only truth and justice.”⁴⁸

What should the modern trial lawyer learn from Lincoln’s “honest style” of trying cases? First, that a lawyer’s credibility with the jury is critical. Second, a good attorney, if possible, will not do anything to cause the jury to think the attorney is hiding the truth. Thus, the advocate will be perceived as the “truth giver.”

7. Learn the Art of Direct and Cross-Examination.

An observer of Lincoln’s examination of witnesses stated that “he display[ed] a masterly ingenuity and a legal tact that baffle[d] concealment and defie[d] deceit.”⁴⁹ His “legendary skill”⁵⁰ and “masterful ingenuity”⁵¹ in cross-examining witnesses is reflected in the account of his defense of William “Duff” Armstrong for the murder of James Metzker. The state’s key witness was Charles Allen, who testified that, at eleven o’clock at night from a distance of 150 feet, he saw Armstrong strike Metzker.⁵² Historian Allen D. Spiegel describes Lincoln’s seemingly casual cross-examination of Allen:

Q: Did you actually see the fight?

A: Yes

Q: And you stood very near to them?

A: No, it was one hundred fifty feet or more.

Q: In the open field?

A: No, in the timber.

Q: What kind of timber?

A: Beech timber.

Q: Leaves on it rather thick in August?

⁴⁵ DONALD, *supra* note 13, at 149.

⁴⁶ HOLZER, *supra* note 32, at 79.

⁴⁷ SPIEGEL, *supra* note 3, at 19.

⁴⁸ SPIEGEL, *supra* note 3, at 20.

⁴⁹ DONALD, *supra* note 13, at 150.

⁵⁰ *Id.*

⁵¹ OATES, *supra* note 24, at 101.

⁵² *Id.* at 151.

A: It looks like it.

Q: What time did all this take place?

A: Eleven o'clock at night.

Q: Did you have a candle there?

A: No. What would I want a candle for?

Q: How could you see from a distance of one hundred fifty feet or more, without a candle, at eleven o'clock at night?

A: The moon was shining real bright.

Q: Full moon?

A: Yes, a full moon, and as high in the heavens as the sun would be at ten o'clock in the morning.

After having the witness repeat this testimony several times, Lincoln placed an almanac in front of the witness, and continued his cross-examination.

Q: Does not the almanac say that on August 29th the moon was barely past the first quart of being full?

A: [No audible answer from the witness]

Q: Does not the almanac also say that the moon had disappeared by eleven o'clock?

A: [No audible answer from the witness]

Q: Is it not a fact that it was too dark to see anything from so far away, let alone one hundred fifty feet?

A: [No audible answer from the witness]

Needless to say, Lincoln won the case.⁵³

Lincoln must have learned the art of examining witnesses from observation of attorneys and by his own "trial and error." The modern practitioner will also need to master the art of direct and cross-examination by observation, study, and experience.

8. Try as Many Cases as Possible

Lincoln's heavy trial experience made him a premier trial attorney. Unfortunately, today's trial attorneys do not have the opportunity to try the numerous cases each year that Lincoln and his contemporaries tried. Thus, present day attorneys should seek all available opportunities for trial, regardless of the type of case or the amount in controversy. The best way to learn advocacy is by trying cases.

9. Lessons Learned

Lincoln is a role model for any aspiring trial attorney. His use of simple language, his insight into his opponent's case, his thorough preparation, and his intense focus on a central theme made him a successful advocate. He knew the importance of the opening statement, and during trial,

⁵³ SPIEGEL, *supra* note 3, at 156-158.

he conducted himself as one who was not afraid of the truth. His numerous trial experiences and his learned skill of examination of witnesses made him a very worthy adversary in the courtroom. Today's trial attorneys should emulate Abraham Lincoln, a real trial lawyer.

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