

LEARNING TO FIGHT AGAINST THE DEATH PENALTY AT THE TRIAL LAWYERS COLLEGE

Daniel R. Williams, TLC '94

Criminal defense lawyers need a new paradigm, a new way of understanding and engaging in courtroom battle. This is particularly true for front-line warriors representing capital defendants. For them, conventional thinking and long-acquired habits can prove deadly. The Trial Lawyers College (TLC) in Dubois, Wyoming, founded by Gerry Spence, has been dedicated to revolutionizing our conception of effective trial lawyering since 1994. This past July, TLC launched its first annual Death Penalty Seminar to spread the revolution to capital defense work. I was on faculty at the Seminar and I'd like to describe the program's uniqueness—the new paradigm for trial lawyering—with the caveat that it is impossible to capture in an essay the magic of the TLC experience.

"I've come here to get some new ideas, add some new things to my bag of tricks, because the old ways of doing things aren't working."

So said one capital defense lawyer on the first evening at the one-week Seminar—a rather typical aspiration. New items for a litigator's bag of tricks—ammunition to carry into the courtroom to wage war; a collection of trial techniques that will impress and persuade: these are what trial lawyers seek from skills

seminars. And how courtroom skills are taught is fairly typical: participants receive a lecture on a topic and observe an experienced lawyer's demonstration, and then they break out into small groups where their efforts to try out what they've observed are evaluated. In many ways, it is an exercise in mimicry with the hope that the tutored lawyers will somehow absorb the techniques into their own particular styles. It is based upon the idea that trial lawyering involves learned techniques—a "bag of tricks," in the words of some—and at times even a list of rules or grand principles.

Anyone stepping onto Thunderhead Ranch (the home for TLC) searching for a new bag of tricks is in for an abrupt awakening. Awakening, because TLC immediately seeks to extirpate this mindset behind the aspiration for more refined trial techniques. The aspiration itself, participants come to learn, is the problem, as it hampers the pursuit to excel in

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more tricks, and unveil the human being underneath—this is the first project of TLC's program. Unsettling? You bet. Difficult? No doubt. Worthwhile and effective? Ask anyone

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who has been through a TLC program, including the Death Penalty Seminar, or visit the web site. You will hear a description of the experience—yes, it's an experience, not just a course—laden with grandiosity: "It changed my life;" "I'll never try a case the same way again;" "I've become a new person, a better parent and spouse;" "pure magic."

Within the first day or two, participants begin to understand what drives the conventional training programs they have attended. Trying to mimic others, with their fancy techniques, derives from feelings of inadequacy and insecurity. Imitate the techniques and feel like a bona fide trial lawyer; follow the steps to effective cross-examination, remember the principles to delivering a powerful closing argument and be just like the "masters" of the profession—the bag of tricks seemingly provides security. But it is a false security, because underneath it all remains the person, the one with the feelings of inadequacy. The obsession over "trial techniques" masks the development of the most important asset to persuasion: one's own personhood. The pursuit of trial techniques, new skills, a new bag of tricks amounts to a flight away from yourself. TLC guides you back to yourself, bringing you home where the child inside you still lives, so that you may become who you are.

PERSONHOOD: BECOMING WHO YOU ARE

This is the bedrock idea of the TLC experience. Developing a greater understanding of oneself, nurturing one's own individuality and embracing the power of spontaneity become the platform for learning how to persuade. The TLC method, in short, sets you on a path to become who you are. Becoming who you are—think about that. It suggests that in your present state you are not you, that to be authentically "you" requires effort and courage, that being "you" does not happen on its own.

Many first-time attendees are initially surprised by TLC's heavy emphasis on digging inward to discover the person buried beneath the rubble of professionalism first heaped upon us in law school. The rubble of professionalism teaches us to torture the English language with fancy legalisms; it instills false notions of how to interact with clients and witnesses; it warps

our vision of what is possible in the struggle for justice. Most tragic, it suffocates our authentic selves, and thus suppresses our individual genius. TLC's five communications experts/trial consultants (with specialized mental health training) use a methodology known as "psycho-drama" to undo this damage. I cannot here capture the complexities of psycho-drama (there is an entire corpus of literature on the subject), but suffice it

to say that psycho-drama uses re-enactment, role-playing and role-reversal techniques to immerse the participants into their past to release the locked-away memories and emotions that

influence who we actually are. And in doing this, suppressed feelings—usually of anguish, guilt, sorrow, resentment, anger—explode to the surface and become visible. Who we are breaks through the shell of professionalism and we begin the journey to recapture our authentic selves. Watching the process, one may get the impression it is painful and unpleasant. But it is not. It is powerfully cathartic, and it creates a personal emotional climate for authenticity.

The link between developing personhood and authenticity is an important lesson at TLC. To understand that link, participants explore what changes must take place within people to become who they really are—that is, to be real. In my years with TLC, I have developed four insights about this:

- First, the cult of professionalism—which is the myth that acting "professional" necessitates denying or suppressing one's feelings in order to maintain good judgment—causes lawyers to be stilted, distant, and blind to the most critical aspects of a client's story. As one Seminar participant described it, being a "lawyer" is a "fake state." The cult of professionalism, in the end, prevents building meaningful relationships. And, as I discuss later, building relationships is the heart of persuasion.
- Second, you cannot be authentic in your interaction with others unless you can tune into the feelings of the other person. Tuning into the other person can only happen if you are tuned into yourself. Lawyers tend not to tune into the other person in the name of professionalism.
- Third, the intellect is only a small part of "knowing." Bob Marley told the truth when he

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sang, “he who feels it, knows it.” Relying on intellect at the expense of heightened awareness of how we feel deprives us of the ability to “know” more deeply. Artists communicate powerfully not because they try to find what is most general about an experience, but because they dig deep to express that which is most particular and personal about themselves. And it is the particular and personal, the deepest sentiments, feelings, thoughts, which resonate most powerfully in others. It’s a paradox: the more subjective, the more universal; the more self-expressive, the more affecting. The deeper a case sinks into you, the deeper is your communication about it, and the more universal will be the themes. So, rather than think in terms of trying to find global themes (which is what intellectualizing the process will do)—the basis for typical and largely ineffectual “brainstorming”—do the opposite: dig into yourself, find out what your own particular feelings are, and try to give voice to them. You’ll find that you will give voice to themes that are universal. You’ll find that you will be telling the truth. And telling the truth is essential to powerful advocacy.

- Fourth, you cannot achieve peak performance without unleashing your deepest self. Your actions and your arguments (legal or otherwise) must be a form of self-expression. Only then can the power of spontaneity enliven your courtroom presentation; only then can you express that enthusiasm and commitment for your case that is so overwhelmingly contagious; only then can your unique genius become part of the case, for “genius is nothing more nor less than childhood recovered at will.”

Let me now expand a bit on what I’ve said so far.

AUTHENTICITY AND AWARENESS: SHEDDING THE MASKS OF PROFESSIONALISM

Becoming who you are—which is to say, discovering your individuality and allowing it to take over—is but a step toward becoming an authentic human being. Authenticity (transparency through openness of one’s feelings) is the key to credibility, and credibility is a necessary ingredient to powerful advocacy. Stated another way, you cannot exude credibility if you are not authentic, and you cannot be authentic if you leave your personhood undeveloped. But helping participants get on the path to becoming who they are is only one facet of the training at TLC.

Trial lawyers tend to treat the issue of “credibility” as a device to make the advocate more persuasive with the jury. They tend to have a constricted understanding of what it means to be credible. TLC pushes the idea further. Linking credibility to authenticity, which in turn is linked to the development of one’s personhood, participants become more sensitive to—more aware of—their surroundings. Awareness, or as Eastern mystics put it, “mindfulness,” anchors you in the present. You cannot be fully alive if you are not completely in the

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moment. Athletes and performing artists who seek peak performance talk of being “in the moment,” “in a zone” or “in a flow.” Zen masters do too. And yes, trial lawyers at times speak in these terms, often after having delivered powerful jury arguments. TLC seeks to make such moments part of one’s being and not just an episodic event in a trial lawyer’s life.

Focusing on how to deploy fancy trial techniques, trying to live up to some image of the great lawyer, rather than unleashing the power of your own personhood, gets in the way of deep awareness, because it prevents you from tuning into yourself and being in the moment. And there is no way to be credible if you are not fully in the moment, as any accomplished actor can attest. The deep awareness that comes from a heightened sense of one’s own unique personhood allows for powerful communication, because it is then that communication erupts from the heart and soul, rather than dribbles out from the head, where argument remains as dull, lifeless intellectualism.

BUILDING RELATIONSHIPS: JURY SELECTION AS GROUP FORMATION

With all of this inward directed searching for one’s true authentic self, one may rightly ask, is there any effort to connect it to actual trial lawyering? Not only is a connection made, the entire self-discovery process leads to a revamped and fresh outlook, a re-orienting of our thinking, a new conceptual paradigm, on courtroom persuasion. We see this immediately in the training when the program focuses on the all-impor-

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tant task of selecting our audience, the jury.

Virtually all accomplished trial lawyers regard jury selection as the vital moment in a trial. In a capital trial, it is the defining event—you win or lose in the jury selection. We trial lawyers typically look upon

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jurors as “the other”—we're the professionals and “they” are there to receive our arguments with the hope that they will be convinced by them. Jury selection under this paradigm becomes a process of “deselection” and indoctrination. This paradigm has developed almost into a sacred dogma. But the sad truth is that it just doesn't work. It reduces jury selection to a game of chance and it separates the lawyer from jurors. Additionally, this paradigm, taught routinely at conventional training programs, produces lawyers who never come close to mastering the art of voir dire. In fact, we must admit the truth: when it comes to this art, the vast majority of trial lawyers, even after a dose of training, are simply awful.

But participants at TLC return to their home jurisdictions doing voir dire in a new and powerful way—new and powerful, because they gain the courage to break down the barriers between lawyer and juror. I noted above that the development of personhood promotes authenticity and deep awareness, which in turn allows for more powerful communication. If, as conventional trainers believe, powerful communications skills are the cornerstone to persuasion, then skills training would amount to developing it. But powerful communication is not equivalent to persuasiveness; it is a pathway to persuasion. At TLC, the development of personhood, authenticity, and awareness is a platform for building relationships. And building relationships with jurors is indispensable to winning consistently.

Once you understand jury selection as a process of developing relationships, you embrace jurors as potential team members and you view yourself as a team leader, a guide and teacher. To be the team leader, you

need to build trust. It is impossible to trust someone who is not real, who is not fully authentic, who only preaches and lectures. You can't “be” trustworthy. You can only be genuine, authentic and transparent in your display of feelings—all of which breeds trust. Thus, developing one's unique personhood, TLC teaches, becomes a basis for developing trusting relationships with jurors, and from there, jurors can see you as their leader. How all of this works is extremely difficult to describe: one has to see it to appreciate its power.

Furthermore, this new paradigm of jury selection jolts you with an awareness of how inhospitable a courtroom is for genuine communication. With this awareness, you appreciate the need to create a safe environment for others to share and be themselves—how, after all, can we expect openness and honesty from jurors in voir dire if they don't feel safe to be open and honest. Creating a safe haven for openness and honesty can only happen through the force of your own personhood. Neither the judge nor the prosecutor will do this; and neither will you, the defense lawyer, if you insist upon asking long-winded, jargon-filled pseudo-questions. TLC teaches how to bring to the jury selection process that ability to share which invites reciprocal sharing. When you are in touch with your own individuality, you cannot help but tell the truth. And when you tell the truth, others reciprocate. Sharing and truth-telling become the basis for developing a relationship of trust.

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It is in this way that TLC participants learn to shed the obsession over trying to stake out jurors' views; they become less preachy (all in the name of indoctrinating); and they rely less on unreliable stereotypes and personality profiles. Participants move away from trying to mold others, or to manipulate them with witty arguments. Instead, they spend time on team-building, which is simply a way of thinking about group formation theory.

Then comes the critical moment in the jury selection process. A relationship built on trust is a relationship that can confront and solve difficult problems. Isn't

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that what jury selection and the trial process should be about—confronting and solving problems? For most lawyers, it involves mind-numbing questions that supposedly seek to ferret out biases that would allow for intelligent strikes against objectionable members of the panel. But a more powerful goal in jury selection is to lay out for prospective jurors a problem (say, the urge to impose death in reaction to a particularly ghastly crime) and “co-create” a solution. How should we decide between life and death? What kinds of things should we consider? Should we try to overcome our urges to extract revenge or to vent our anger through a death verdict? Why should we? How should we? Participants explore ways of getting prospective jurors to answer these questions in meaningful and deep ways. The idea is that the jurors and the lawyer are devising life-affirming solutions to a problem that, if unsolved, will prompt jurors to treat the death penalty as the default solution.

If jurors “co-create” the life-affirming solutions in *voir dire*, then they are more than receptive to the life-affirming arguments delivered in the closing statement. They are, in fact, emotionally connected to those arguments and you are simply giving voice, as a team leader, to things that the team itself has validated. Opening and closing arguments then become less about logic and more about rallying people around ideas and powerful sentiments that they themselves have put into play. This is critical to saving lives.

This is such an important point, let me state it again. The issue is not what arguments, or what line of logic, can I conjure up to convince. Rather, the question is: how can I develop a relationship with each of these people so that we can together “co-create” a solution? In a death case, the problem, stated in the abstract, is something along the lines of: How can we overcome our anger, outrage, desires for vengeance to understand this defendant as a human being, flawed and damaged as he is? How can we get to that place where we will allow for the possibility of human redemption? How can we step so completely into the private world of the defendant that we lose all desire to stand in ultimate judgment over him? It is not effective to look for arguments to “convince” a person to be merciful, or most anemic of all, to have sympathy. These are hit-or-miss arguments. You may get a life verdict because the

“facts” cry out for it. But you won't get that verdict where, as is usually the case, the cards are heavily stacked against you. You do better if you can get the jury to participate in a collective effort to solve the problems you have introduced in the jury selection.

ROLE PLAYING: TRUTH THROUGH ACTION

Although the development of personhood is the central aspect of TLC's training, it is not the only thing. Learning to discover the core truth about one's case, getting inside the client's universe to understand his life from his perspective, and discovering the story that will serve as the foundation to the case that is presented to the jury are the other parts of the training. As with learning about oneself and connecting with one's own feeling, role playing and re-enactments are the devices used here. These are the devices because psychodrama is built upon the idea of discovering truth through action. Intellectualizing an issue, thinking about it only with the mind without connecting to the emotions, produces sterile ideas. Role playing and re-enactment exercises produce vital ideas that go beyond understanding the “facts.” Shocking as it may seem in our fact-obsessed profession, “facts”—

if there are such things as “facts”—are only a small part of the equation.

First, the whole notion of “facts” comes under intense critique at TLC. Psychodramatic

exercises bring into sharp focus what Friedrich Nietzsche said: “There are no facts, only interpretations.” When someone reports an event, it is never neutral. How that reporting is structured, what is emphasized and what is omitted, the sequencing of the telling, the very way an event is reported—these are never neutral. The reporting of facts is necessarily infused with interpretation, which is, in turn, laden with often disguised feelings. We uncover the hidden truths—the more powerful aspects of a story—through role playing and re-enactment of significant events in a case. By doing these exercises, we (meaning the lawyer, the client or a key witness) experience, or re-experience, an event to call up the emotions that existed at the time the event was first experienced. Often, when the event was first experienced, the person is not fully aware of the emotions attendant to the experience. Through these exercises, those emotions can be fully understood and appreciated.

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Second, placing the notion of “facts” within a broader canvass where emotions provide the backdrop to an event, we begin to understand a case as more than just a collection of facts that need to be presented to a jury in a way that is structured by the law. We understand our cases, and our clients, in a more authentic way. We relate to the case at a deeper level of our humanity. Only then are we able to communicate more deeply, to share deeper truths about our case, to bring our own personhood into the telling of the story, and to pack our communication with the authenticity that gives the story its overwhelming compelling quality.

In the Death Penalty Seminar, participants strive to appreciate the interrelationship of personal discovery with the development of mitigation evidence—perhaps the most important, and definitely the defining, aspect of capital litigation.

Developing one's own personhood through psychodrama involves excavating memories and re-experiencing those meaningful moments in one's life. That is precisely what an effective capital defense lawyer seeks from a client and his family, friends, and others who know him. It is wrong to develop a mitigation case as if one were seeking out mere facts. And it is wrong to settle for a rendition of “facts” from a client and those who know him. Critical in developing a powerful case for life is the excavation of memories, usually a deeply painful and enormously difficult process. Few people ever engage in this—surely not the damaged human beings we represent and their often damaged families. It makes no sense for lawyers and mitigation specialists to ask others to do this if they themselves haven't done it. At the Seminar, lawyers and mitigation specialists receive training in excavating their own memories, and the emotions associated with them, not only for personal growth, but also to enlarge their ability to draw these memories and emotions from others.

It is here that love and understanding enter into the program. When have you heard of a training program that seeks to teach how to love and understand others? Yet, that is precisely what this Seminar, and TLC generally, strives for. By understanding our own uniqueness, by excavating all the suppressed baggage we carry inside, we create space within ourselves to love and understand others. We become more aware of others'

humanity and seek to draw out their uniqueness. We become better able to understand our clients and their families—no small feat in capital litigation. And we actually develop an ability to love them.

We cannot truly tell compelling stories about our clients, we cannot bring our team members (the jurors) into the tragic world of our client, we cannot excavate the emotional core and truth of our case without that love. Without that love—and not some false, saccharine version of it, or mere lip service to the notion—our success in advocating for life will be episodic, in large measure a product of chance.

Without that love, the dominant emotion in the courtroom will be anger, hatred, fear—all splashed on a canvass of sorrow and sympathy for the victim and those who have been hurt by the defendant's crime. Without that love, many of our clients will die.

With love, we understand why mitigation matters—not as a legal concept, but as something deeply spiritual. We understand that mitigation speaks to the power and universality of redemption. And redemption, which is a powerful notion that exists within all well-developed spiritual paradigms, necessarily links the past to the future. Mitigation is backward looking, but it links that past to affect the future. Mitigation looks inward, but it calls upon jurors to embrace life-affirming values. Through our own personal development, we begin to understand how mitigation can show that no human being, no matter how despicable the act, ought be denied the opportunity for redemption. All of the participants in the Seminar, and at the other TLC programs, are given exactly that opportunity—to link their past to an unknowable future within the present moment, and by doing so, to redefine their own past so that they may be redeemed. And with their own personal redemption, they are prepared to save the lives of others.

DANIEL R. WILLIAMS specializes in capital punishment litigation with New York's Capital Defender Office. He is the author of numerous articles and essays, and most recently of Executing Justice: An Inside Account of the Case of Mumia Abu-Jamal (St. Martin's Press 2001). The views expressed in this essay are of the author only and do not necessarily reflect the views of the Capital Defender Office.

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