

THE TRIAL LAWYER'S ART



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JO ANN HARRIS

Reportorial methods enhance her aura of competence, which is fostered too by her imposing height and voice—attributes that are, in her words, “intimidating,” and that, “casually dealt by forces wholly out of my control . . . permit me to be my natural low-key self without doing great harm to my cause.” These physical signs of commanding presence are conventionally associated, of course, with men.²⁰

Like Jo Ann Harris, James Goetz stresses factual substance and puts himself in a modest role (unlike Serra and Holleman, who stress mythic concerns and bring themselves to the fore). He combines close control of material with straight-from-the-shoulder delivery. Goetz describes himself as “conversational, fairly intense but not rhetorical, not big flourishes.” He grew up in the country south of Bozeman. His trial practice includes complex civil cases at the state level on behalf of Native American and environmental groups. He went to Yale Law School, but his persona is resolutely local.

Goetz speaks with an unadorned directness typical of old-time settlers’ speech in the Far West. In this vernacular there is an aversion to exaggeration, a modesty that steers away from pyrotechnics and values spare evocation. Goetz relies for emphasis on cadence, not extended metaphor, as when he explains the concept of reasonable doubt. His colloquialisms—*they saw things in a real hurry*—are minimalist. In the absence of elaboration, he draws jurors’ attention to the tightness of his reasoning. He buries his elite education in his hometown roots, making it serve rigorously practical ends.

Goetz’s austerity is based in a populist outlook, but it’s quite different from Gerry Spence’s lyrical brand of populism, and different again from the boisterous populism of Patrick Williams of Tulsa, Oklahoma, who, when arguing that Diamond could easily have gotten the gun away from Trudi Doyle without harm, said: “Folks, he’d have been on her like a duck on a bug. He’d ’uv mashed her to the ground in nothing flat, spun her around, disarmed her before she could say ‘Howdy.’”

I mention these dialects of populist expression to highlight a broad pattern: both within a place and between one area and another, variety is the rule in local styles. People sharing a cultural tradition (say, rural western or African American) draw on common symbolic resources, yet the particular place where they live also affects their identity. Lawyers like Tony Serra who practice in their home territory benefit, of course, from long intimacy with local ways of speaking and thinking. Transplants like Jo Ann Harris,

who grew up in a midwestern farming family, absorb local sensibility and patois, and so pass for native with juries.

The importance of locality surfaces in lawyers' conjectures about how well styles travel. The fabled "Philadelphia lawyer" was greeted as a suspicious type in other jurisdictions. The aggressiveness of Roger King or Bobby Mozenter would probably play well enough in Chicago. But in rural Pennsylvania? Patrick Williams would find a receptive jury if he tried a case in Montana, but perhaps not one that would be as comfortable with his flamboyance as they'd be with a plain speaker like James Goetz.

To be bested by the other side *because* you are the visiting lawyer is to be "hometowned." Recently I heard speculation about whether a New York City attorney had been hometowned when he lost a major case in Boston. He himself wondered if he had, and so did a close colleague. Another lawyer disagreed. The difference in styles between New York and Boston, she thought, wasn't nearly big enough to account for the jury's verdict.

Gendered Plotlines

A case file: Laura Hobson, twenty-two, is the government's key witness in the cocaine trial of her ex-boyfriend, Fred Peters. She had been arrested along with him as they sat in a car parked outside a house while a friend of theirs, William Howell, sold drugs to an undercover agent inside. Hobson is testifying against Peters in return for immunity from prosecution.²¹

Jo Ann Harris, representing the government, conducts the direct exam:

Now did there come a time, Miss Hobson, when you moved in with Fred Peters and had an intimate relationship with him?

Yes.

And when was that?

When I was seventeen.

When you were a teenager, did you use drugs?

Yes.

When did you start using drugs?

After I moved in with Fred Peters.

And did you sell drugs?

Yes.

And when did you start selling drugs?

After I moved in with Fred Peters!

And I was hurting for the cat.
 And my father,
 who used to give me some very important and mean-
 ingful messages,
 said,
 'Son, don't cry about it,
 do something right.'
 So I went to take the cat down,
 and there was a bullet hole shot through the cat in the
 stop sign.

It was the same stop sign, sir."
 We won that one and I didn't say another word.

Another salt-of-the-earth, utterly believable client. He, Bob, and Benito Celize strike me as modern-day incarnations of an old character type, the wise fool of European folktales. Following instinct, constantly underestimated by others, often aided by magical helpers, this is the heroic figure who proves to be pure of heart and worthy of success.

The lawyers, meanwhile, are reduced in these plots to bystanders. They pave the way for the client's vindication, but the victory belongs to the client. *Their* relation to truth is, by comparison, tainted. James Ferguson ended his story by saying that the foreman was impressed that Bob wore a cross around his neck, although he himself had never considered that the cross might have such an effect. Ralph Lancaster, who was sitting next to Ferguson, joked, "Not much! I bet it was your cross!" That comment hints at the gulf separating attorneys from other trial participants. Their craft, a Faustian pact, bars them from fully possessing a truth-teller's authority. Inevitably, they're suspected of guile.

For every story at the Festival about a client vindicating her- or himself, many more showed clients causing their own convictions. It can happen before trial, with the accused inadvertently providing damning evidence:

JAMES GOETZ

One time I was defending a driving-while-intoxicated case. In Montana they film these people after they apprehend them, and they administer these field sobriety tests, having them walk the straight line and doing the test to touch the nose and so on. And the whole issue

here was whether this guy had been drinking while driving and was intoxicated.

And this was on the videotape that I reviewed before the trial: the officer said, "Well, would you reach out with your arm, with your right hand, close your eye, and then pull your finger over and touch your nose?"

And the witness turned to him and said, "Hell, I can't even do that when I'm sober."

Once at trial, chances for self-betrayal multiply. To wit: when the defense attorney asks prospective jurors during voir dire how many believe cocaine should be legalized, the defendant raises his hand. When the opening statements are being made, the defendant, who has been charged with causing an accident by falling asleep behind the wheel, falls asleep. When a government witness provides an unexpected piece of evidence, the defendant gasps, "Oh my God, how did they find out about that?" When a police officer wavers in his identification of the defendant, the defendant pipes up, "You know it's me, don't lie!" When the judge finds the defendant not guilty of selling drugs but warns him to stop it if he has been, the defendant blurts out: "Yes, Judge, I'm gonna quit. I ain't never gonna sell no more dope as long as I live!"

There are also stories about the most celebrated revelations at trial, confessions under cross-examination:

BOYCE HOLLEMAN

Down in Mississippi we have what we call a Justice Court. It's a misnomer.

It's a lower court where the judge is not a lawyer, and he tries people, and then if they don't like that they appeal the case up to the Circuit Court.

A few years ago, when I was District Attorney down there, I had a Mrs. Ladner. And I tried her down in the Justice Court, and the judge promptly convicted her. And she *appealed* it up to the Circuit Court. Got up in front of the jury and the big court and the judge. Had her lawyer put her on, and she testified.

I got up in absolute amazement when I got up to cross-examine her.

I said, "Mrs. Ladner. Do you remember when we were down in the Justice Court about three months ago?"

listening. A judge denies a lawyer's request for a break to stop the pounding his client is getting on cross-examination by saying, in the jury's presence, "You never call off the dogs when you got the coon treed!"

The Expert

Judges must be shown deference. The other side's witnesses have to be handled gingerly, lest the jury think the lawyer unfair. With opposing experts, however, the gloves can come off. They are supposed to clarify facts for the jury. But in war stories they seldom deserve respect:

JAMES GOETZ

I had a case one time: it was on a motion to suppress, and it involved hashish that was boxed and sent in Hawaii. The agricultural inspectors inspected it, found it was hashish, boxed it up again, and shipped it to the Bozeman, Montana, police department. And the police had it delivered in a controlled stakeout, and then went in for their arrest.

They brought for the suppression motion a witness from the police department in Honolulu. And he was testifying in response to the county attorney's questions. And the question was, "Where does hashish come from?"

And the witness said, "Well, you're not gonna believe this, but," he said, "in the Middle East they have these fields of growing marijuana. And what they do is they turn a bunch of camels loose and they eat this marijuana and then what they defecate turns out to be hashish."

At that point I said, "Your Honor, may I approach the bench?"

And I walked up, and we had a sidebar up there, and the county attorney walked up.

I said, "I have a motion to make."

And the judge looked at me, and said, "Yes, counsel, what is your motion?"

And I said, "Your Honor, I have to move to dismiss this case."

And the judge said, "On what grounds?"

And I said, "On the grounds that this is not hashish. This is camel shit."

Lawyers relish this moment of discrediting the opponent's expert. Experts' authority as truth-tellers derives from their control of the esoteric