

knowledge." They cannot describe a conversation by saying "he said" and "I said"; they speak in conclusions. Sometimes it takes the combined efforts of counsel and the judge to get them to state who said what.

[United States v. Marshall, 488 F.2d 1169, 1170, 1171 (9th Cir. 1973).]

28. I. Goldstein, Trial Technique 170, 171 (1935).
29. Crain had been a judge and had presided over the famous *Triangle Shirt Waist Fire* case, which Steuer defended. That case is significant for two reasons: one from the point of view of women's rights—it was this disaster killing scores of young women in a sewing sweatshop that awoke the conscience of the nation to women's rights and was the beginning of the International Ladies Garment Workers Union—and the other for Steuer's famous cross-examination of Kate Alterman, whom he had repeat her testimony over and over to show it had been memorized.
30. R. Boyer, Max Steuer: Magician of the Law 67 (1932).
31. *Id.* at 73.
32. *Id.* at 104, 105.
33. *Id.* at 106.
34. From the transcript of *People v. Marcus and Singer*.
35. *Id.*
36. *Id.* Every one of the defendants waived his opening. This is a mistake, in my view. See page 132 *et seq.*

Chapter Three

Rule II: One Central Theme

THE PRINCIPLE OF THE WHOLE

It takes real self-discipline to pitch enough of your personal commitment into your case to establish its credibility, while simultaneously withholding the overt partisanship that destroys your credibility with the jury. It takes even more self-discipline to obey Rule II, which requires you to jettison some arguments—even a possible winner—in order to maximize your chances to win.

I term Rule II "One Central Theme." The psychologists call the phenomenon "the principle of the whole." It rests, in part on four cornerstone premises:

1. Everyone, including jurors, remembers a general principle, an overall theory, a central theme, if you will, better than individual details.
2. Jurors feel a need to resolve conflict, and that need gets critical as the trial nears its end.
3. Jurors get nervous when offered alternative positions by the suitor. It tends to destroy their confidence in all of his positions.
4. Jurors look for that one explanation, that one central theme that best reconciles the greatest number of discrepancies.

Some call this last point the "Rosetta Stone" approach to life. We all have it. Whatever life's problem, we all want to think there is some simple solution to it, somewhere: a master key, a formula, which—if we could but find it—would unlock the secret to success. We want to believe this because it provides the possibility of a shortcut around the thicket of hard work and perseverance, which is the only true Rosetta Stone to success in life.

Stress the Simple

The art of the advocate stresses the simple—*never* the complex. Yet how very often we hear lawyers say to judge or jury, “This is a complicated case.”

That is a phrase you should never use. The overwhelming presumption is against its use—even if you do not have the burden of proof and believe, as many criminal defense attorneys apparently do, that confusion and complexity are on your side. A confused jury may well acquit when it should convict, but it never listens to a confusing and complex lawyer. Telling a jury that a case is complicated and confusing does not make it so. But it may make the jury stop listening to you. Promise, instead, ease and simplicity. The jurors will listen. And if you *do* make it easy and simple for them to follow, they probably will—all the way.

Avoid the Buffet Approach

Lawyers frequently violate this rule. Why? Because they cannot abandon what I like to call the buffet theory of advocacy—they cannot bear to relinquish any possible winning point because, they think, there is no way to know which of the *possible* winners will be the one accepted by the jury. And so, notwithstanding that we *know* that jurors get nervous if they are offered a wide variety of themes, lawyers abandon the approach of one central theme because, they say, statistical analysis impels them to the buffet or menu theory.

What is it? It goes something like this: I, the lawyer, have six possible winning arguments or theories. I have six jurors. I cannot tell which argument will appeal to which juror, but I know that if I make all six points I have 36 chances to get at least one juror on one point. If I have a 12-person jury, I have 72 chances to pick up a juror on at least one point, and if I get just one juror on just one point, then, in most jurisdictions, at the least I cannot lose.

So I will spread a buffet before the jury, with every contention and argument I can reasonably make. They will have a full menu. The more points, the more chances to win. I must

not hazard all on one throw. I must not “put all my eggs in one basket.” A rifle bullet is not as sure as a load of buckshot.

I believe this approach is outright wrong. It lessens rather than increases the chances of winning. As one commentator put it, it is easier to sell the merits of one car to two people than two cars to one person. Part of this has to do with the perceived integrity of the salesman, as we discussed under Rule I. But another part has to do with the nervousness and discomfort we all experience when offered a wide variety of alternative possibilities. We all want it clear, clean, and simple—one true path to heaven, one clearly best car for the price. Once we are decided, we may well throw out a cloud of reasons why we are right, in self-justification. But it is usually one strong point that initially got us there.

But lawyers are so terrified at the prospect of relinquishing a possibly winning point that they egregiously violate Rule I in their desperation to avoid the command of Rule II—that is, they make the “*but even if*” argument to the jury.

Never the “But Even If” Argument

The “but even if” argument is the product of our law school training. It is particularly apt in a hypothetical Socratic argument with an instructor primarily interested in seeing how well you can argue, rather than in finding “truth.” But it is a particularly destructive technique when you are trying to appear as a giver of truth, in what the jurors expect to be a truth-seeking process. Why? Because every time you say “but even if,” *you are arguing against yourself*. You are saying, “I believe this, that, and the other is so, *but, even if it isn't so . . .*” You are damaging your own Rule I. It is bad enough to load on points when they don't conflict with each other. At least then, however, the major fault lies in dulling the point of your thrust, in diffusing your strength. But when you advance inconsistent and even alternative arguments to the jury utilizing the “but even if” language, you injure your personal credibility with the jury, and run a substantial risk of *helping* your adversary to destroy you. There are three cardinal sins of argument.

The First Sin: Actual Contradiction

The first sin of argument is *actual contradiction*. For example, only a law school graduate would consider making the following argument: "My client is innocent of the charge of murder because he wasn't there; but even if he was there, it was self-defense; and, anyway, he is crazy!"

Only a madman would explicitly say these things to a jury. Yet most lawyers say that or the equivalent with great frequency. We know our client is presumed innocent and that the prosecution must negate every possible defense, and each of them beyond a reasonable doubt. Here we have three possible holes in the prosecution's case. There may even be some evidence in support of each. We know—because we were taught it—that *we* need prove *nothing*; *they* must prove *everything*. And so we seek to exploit every weakness. But we forget that the jury does not view the case as we do. Their minds have not been tampered with in law school. They know that our client was either there, or he wasn't; that if there, it was either self-defense, or it wasn't; and, if there and not self-defense, that he is crazy or sane—and *they believe that we are in the best position to know what the truth is*. They are not interested in presumptions, or in our *legal* right to take inconsistent positions. They want to know what we claim *the* truth is so that they can find *the* truth. Anything less from us unmasks us as game players—interested only in winning—rather than righteous givers of "truth."

The Second Sin: Apparent Contradiction

The second sin is *apparent contradiction*, the transforming of noncontradictory points into contradictions.

We represent an old lady struck by a truck. Some witnesses say she was in the crosswalk at the time of the accident. Others deny it. What do we argue? "Mrs. Smith was in the crosswalk when the truck hit her, *but if she wasn't*, the truck was going excessively fast and the driver and his company are liable under the doctrine of last clear chance." This is not good.

The most frequently encountered situation of the lawyer unnecessarily finding himself sounding in argument against himself is in the defense of civil cases where both liability and the amount of damages are in dispute. The lawyer finds himself saying, "There is not liability because . . . , *but even if there is liability*, the amount claimed is excessive."

No lawyer has ever made that argument without at least a vague sense of unease. What bothers them about it is what we are now discussing, although all too often the advocates do not bring the concern up from intestinal unease to the level of conscious reflection. When they do, it is often handled deficiently. They say, "Look, I argue to you there is no liability, but I cannot know what you will find. So, now I must turn to damages. But don't believe that because I argue damages to you I expect you to have to reach it. I just do not want to be presumptuous." This is *not* good enough.

Use the "Moreover" Argument—but with Caution

How then do you deal with this problem? If, *but only if*, the two points you wish to argue are not in fact inconsistent, you can make both—without ever appearing to argue against yourself—by arguing "*moreover*" or "*nay more*," instead of "*but even if*." This is done by reversing the order of the presentation.

This elderly lady was struck by a truck going at an excessive rate of speed. Moreover, she was in the crosswalk—not that it matters—for the driver of that truck travelling at *that* rate of speed would be liable to any pedestrian he struck, wherever he ran them down.

Same two points. But now the attorney is not arguing against himself.

Look at the amount of damages in the case. The demand is grossly excessive, unwarranted by the injury in this case. Moreover, the proofs show that Mr. Smith is not even responsible for those injuries.

Again, the same two points. But again the *appearance* of contradiction is avoided by a rearrangement of the words. And, once the words are rearranged, you can then go on to argue liability before the details of damages. You have set the stage.

Now, let us add a dash of Rule I to the last argument.

Look at the damages they claim for the injuries which the proofs have shown. Is that an honest claim? Do you people believe an honest plaintiff would inflate the values the way this person has? Is this not the best evidence that it is we—not they—who testified correctly as to how the accident occurred? One of the ways you can know who is really at fault here, who is telling the truth and who isn't, is by examining the honesty of the plaintiff as to his claim of damage. By that you shall know what he came to court to do.

Can you do that with every multi-pronged argument? Absolutely not—not if the two arguments actually conflict. But there is nothing conflicting in the points that the truck was going too fast and the lady was in the crosswalk, or between the points that there is no liability and the plaintiff is inflating the extent of his injuries. There is, however, a hopeless conflict between "I wasn't there" and "It was self-defense." And no rearrangement of these two points will avoid the collision. You must pick one or the other, else you will be crushed between them.

There is nothing new in this. It has all been known, studied, written of in current books and in books older than the grandfathers of the current writers. And yet the bar clings to the multi-pronged inconsistent argument. Here is Weymouth Kirkland, in part, from his chapter pasted into another of Wellman's books, *Success in Court*.

It is often necessary to base cases on alternative theories lest one discover too late that he chose to stress the weaker of two possible approaches. On the other hand, too often a lawyer who carelessly tries to rest his case on alternative approaches will

discover tardily that he has been betting against himself throughout the trial. Remember that you are armed with the fabulous gun which would miss if aimed at a mule but hit if aimed at a deer.¹

Now, it is true that alternative theories need not be inconsistent. It is therefore possible to advance two or more views of a case without repudiating yourself. As we have seen, alternative theories to victory must be presented as cumulative, not alternative, as "moreover" and "nay more," never as, "but even if" or "on the other hand."

The Third Sin: Cumulation

Yet even here there is a caution. In my view, this multiplication of nonalternative positions is also frequently cancerous to an otherwise healthy case—although not as easily demonstrable. It is the third sin: the cumulating of substantially weaker on top of much stronger arguments.

Our psychologist friends have demonstrated that when you add a weak argument to a strong argument, you weaken, not strengthen. The sum in such case is worth less than the best of its parts. Why? Because if you advance an argument that the jury rejects, you weaken *you*. Any such defeat is prohibitive. There are no "throw away" points with a jury. Your case is never stronger than your weakest argument. To put it simply: if you put 100 percent of your force behind a 75 percent strong position, your chance to win will be greater than if you put 75 percent of your push there, and spend 25 percent of your force behind any weaker position. You diminish a 75 percent probability to something less. Only the fear that we have misidentified the probabilities could rationally justify such a diminution of our considered best chance to win. But this is as unworthy a consideration of the trial lawyer in a courtroom battle as it is of a military general on the battlefield of war. Hesitancy and timidity in the courtroom is likely to be as ineffective against a determined adversary in court as it would be against a determined enemy in any other competition or war.²

In spite of all this, our profession more often than not will put every viable point before the jury, particularly when the points do not conflict. Asked for a reason, the typical lawyer might explain that he does it for the appeal—not knowing at trial what issue might later catch the fancy of one of the three, five, seven, or nine, as the case may be. This, if the real reason, is madness.

Trying the Case for Appeal Is Not Trying the Case to Win

No one should try a case for the appeal. To begin with, the more the lawyer tries the case to win it in an appellate court, the less likely he is to win in the trial. This is different, of course, from the legitimate, indeed indispensable concern with preserving on appeal a victory won at trial. Preserving your right to appeal a lost case contemplates an immediate loss, and seeks to sow enough nuggets for later use. Preserving a victory on appeal necessitates going all out to win, but not to the point of unwarranted jeopardy on review.

But in the largest sense, statistically speaking, the appellate courts are simply not an important enough factor to dictate the trial lawyer's strategy. The overwhelming majority of all cases are settled at some point before verdict—but even then after some lawyering and even some judging. These all shape the settlement, but escape review. Of those relatively scarce cases that are tried to verdict, many are not appealed—and the overwhelming majority of appealed cases are affirmed. An advocate whose major strategy at or before trial is vindication on appeal would face better odds with a state-run lottery.

Overloading Is the True Malpractice

I believe there is another concern that drives lawyers away from Rule II and to multi-pronged arguments: fear of criticism, particularly complaints of malpractice from a disappointed client. If a lawyer advances every possible argument, he thinks he is safe. The jury may have rejected the arguments—but at least it heard it all. If the lawyer holds anything back so that the jury did not hear it—has not judged it—then the lawyer

can be accused of having failed to do something. The abandonment of one central theme may well protect the lawyer against the client, but that is all it does. The real irony is that this overloading is the true malpractice. All too often we use our probability theory to justify advancing all the claims to all the jurors, hoping, we say, to catch someone with something. What we are really doing is protecting ourselves from cheap criticism, at the client's great expense.

THE OLD, ONGOING DEBATE—ONE THEME VS. MANY

This debate is not new. Here are the observations of James Ram from his book *A Treatise on Facts as Subjects of Inquiry by a Jury*, taken from the American edition of 1873. The English edition was much earlier.

It has been considered a defect in Lord Eldon, when at the bar, that he did not single out one strong point of his case, and mainly rest and insist upon that, but chose rather to rely on number, mingling strong and weak points together. "He was defective," says Lord Brougham, "in one of the great qualities of an advocate—a prompt and steady determination as to the course he should pursue, that which is called the coup d'oeil in the field. His wish to leave nothing unnoticed being proportioned to the extreme anxiety of his disposition, he frequently overlaid his case at the bar, while the multitude of his points gave his adversaries the opportunity of entangling him in the mazes of his own web, and still often enabled them to defeat him on some immaterial ground, where he was weak, though other stronger and impregnable positions were his, had he never ventured out of them to fight at a disadvantage. Where a single and learned judge alone is to deal with a case, this will seldom mislead him, but before a jury its defects must have been extremely prejudicial. Accordingly his greatest failures were in such proceedings."³

You will note that I stand with the quoted words of Lord Brougham, who wrote in 1839. We shall meet Brougham again, when he was plain Henry Brougham and we hear him open in defense of the Queen of England when she stood on trial for adultery before the House of Lords.

But is there another view? Of course there is. We have already seen Weymouth Kirkland, at one time in the forefront of the American bar, come down squarely on both sides of the question.

A leader of the bar of ancient Rome counselled exactly the opposite of Brougham's view. Pliny's letter is also cited by Ram:

"I remember when Régulus and I were concerned together in a cause, he said to me, 'You seem to think it necessary to dwell upon every single circumstance; whereas I always take aim at once at my adversary's throat, and there I closely press him,' ('Tis true, he tenaciously holds whatever part he has once fixed upon; but the misfortune is, he is extremely apt to mistake the right place.) I answered, it might possibly happen, that what he called the throat was, in reality, some less vital part. As for myself, said I, who do not pretend to direct my aim with so much certainty, I attack every part, and push at every opening; in short, to use a vulgar proverb, I leave no stone unturned. As in agriculture, it is not my vineyards, or my woods alone, but my fields also that I cultivate; and (to pursue allusion) as I do not content myself with sowing those fields with one kind of grain, but employ several different sorts; so, in my pleadings at the bar, I scatter various arguments like so many kinds of seed, in order to reap from thence whatever may happen to succeed; for the disposition of your judges is as precarious, and as little to be ascertained, as that of soils and seasons."⁴

So there you have it. Pliny on one side, Brougham on the other, and Kirkland, taking a leaf from Pliny, advancing both

points of view. In my view, consistent advocacy of a single theme is the mark of great advocates. Stay firmly behind your strongest central theme and let the jurors and the judges tap their way to their own compromises. Listen to one of Lincoln's contemporaries, who heard the great man try more than 100 cases of all kinds:

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.⁵

Having advocated the necessity for one central theme, indeed elevating it to the status of Rule II, we must deal with Pliny's concern—and that of a large portion of the bar: how do you isolate your one central theme? How can you tell when you have reached the kernel, the jugular? If we cannot meet those questions, we are back to a lottery, a matter of blind chance. Then, indeed, the best bet would be to place as many bets as your proofs allow.

DEVELOPING THE THEORY OF THE CASE

In developing your theory, there is no straight path. Some facts exist apart from testimony. Others are a product of testimony. Some testimony is in dispute, even as between your own witnesses. Some objective evidence is corroborative of testimony, while some impugns it. The entire mess is surely not a straight bright line. It is not even circular. It is a swirling of bits and pieces of things of greater and lesser worth. In the creation—selection, if you prefer—of a central theme you must consider *all* of it separately, and all of it together, to first answer one critical question: what will jurors certainly believe after hearing all of this stuff—what facts will every juror believe to be true? Remember, whatever the objective "truth"

is, the "facts" are what the jury will believe. The "facts" may be the "truth" or not, but they are truth in court.

MAXIM: Your central theme must never contradict even one of those indisputable facts. If it does, you must reject it because the jury most certainly will. That is the absolute minimum. Without that, your theme collapses.

Your Theme Must Account for All the Facts

To be strengthened, your theme should do more than avoid conflict with these inevitabilities. To make a jury feel most comfortable, your theme should take account of, that is, have a place within its mosaic for, every fact that the jury will find as true. This is particularly true for those facts that seem opposed to you. You cannot collide with them, of course, but you must not ignore them. They must, if possible, be brought into your equation and made a part of it. Imagine one of those yellow pads we lawyers are so fond of. Now draw a line down the middle of it, as we love to do. On the left side, closest to your heart, put all of the immutable facts that you think are for you. On the right, list those that are against you. Your pad looks like this:

- | | |
|----------|----------|
| 1. _____ | 1. _____ |
| 2. _____ | 2. _____ |
| 3. _____ | 3. _____ |
| 4. _____ | 4. _____ |

Your theme should account for everything on your page. If it does, and you believe it to be a winner, then you will find that you have moved whatever was on the right side of the page over to the left. How do you do that? By use of "inferences" drawn from indisputable facts. Any given fact may permit of varied inferences. Some may help, while others may hurt.⁶

For example, let's say you represent a person accused of causing an accident. Three witnesses have seen him speed away after the accident. No juror will believe all three are wrong. Under these circumstances, any advocate who suggests the driver did not speed away is doomed. Even if he has a "but

even if" argument, he is doomed. What are the possible inferences—the "but even ifs"—that might be advanced?

Well, what can we infer from the "fact" that he sped away? We might conclude that he was trying to hide and conceal his crime or negligence as the case may be. But, in searching for his intent by inference, we infer another "fact"—his state of mind.

He might have intended to go for aid. He may not have known he hit anything. All these are possibilities. Which one should you try to prove and therefore try to argue? That depends on your analysis of the probabilities—your situation sense—and your use of the probabilities and inferences as you interview your client prior to trial.⁷

You must not argue, "He did not speed away, but even if he did, he was going for help." That is self-contradictory. And you must not argue, "He sped away, the evidence shows that. But from that alone, you cannot infer guilty knowledge by reason of flight. He may have been going for aid; you could on the facts find that. He may not have known he hit anyone. You will hear that the blow was a glancing one. Ours is not the burden. It is for them to prove his intent."

Projecting What the Jury Will Accept or Reject

To me, this argument is worthless. It is one routinely made by defendants in criminal cases, who may rest on their presumptions, and it is all too often made in civil cases as well. It is worse than worthless; it is self-destructive. You represent the man. The jury believes you know what his intent was. You must pick one or the other, or be unmasked as a game player. But which one shall it be? How do you determine what the jury will believe? By the use of what I call situation sense, what Louis Nizer has called law of probability.⁸ It has something to do with the inner computer, which we all have, that constantly tallies the likelihood of the thing we are asked to believe based on everything else we think we know. We each have a kind of tuning fork within, against which we sound whatever we are asked to credit. When it rings true, we accept it. When it hits slightly off, we pause. And when it sounds wrong, we reject it.

Nizer puts this process in terms of the lawyer looking back during pretrial investigation to discover unknown facts that *must* exist on the basis of what is known. He then makes it clear that the jury goes through the identical process in judging the believability (hence the truth) of what the lawyer puts before them.

There is more to it than that. In projecting what the jury will accept and what it will reject, the trial lawyer goes through a mental direct and cross of every witness. This is not a one-time thing. The entire process is repeated whenever new information is added to the pot. As your information grows, the shape of the examinations changes—therefore, so does the image projected to the jury. This cycle goes on and on until the last moment before you open to the jury. Then you must commit yourself. We will return to a full exposition of this when we reach opening statements. For now, however, it is enough to note that this process is not ponderous. It does not take a great deal of time. Most experienced trial lawyers do it instinctively and very quickly.

Juries view a case as a whole—not the sum of *your* case and your adversary's. Only lawyers employ the schizoid approach of two cases—plaintiff's and defendant's. The point is, then, that your case is not made up of *your* facts and inferences, on one hand, and the *adversary's* case on the other. You must regard the whole mess as *one case—your* case. And you must develop a central theme that accounts for everything you cannot remove by successfully challenging its veracity.

LESSON: Whether you have the burden of proof or you do not is of no moment. Do not rest on the adversary's failure of proof. Use all that advances your theme, and try to account for everything within that theme. And on no account try to tidy up for your leftovers by offering alternative theories.

Give Away What You Can't Win

What then should you do when you have things left over—things you cannot account for, cannot make into a helpful part of your theme? Should you ignore them? No! Proclaim them! Give them away generously, like Lincoln ("I reckon I was

wrong"). Get some affirmative use out of what you must lose. Use Rule II!

If you represent a driver who fell asleep behind the wheel, or some other case where you think liability will almost certainly be found against you, don't defend against it; *proclaim it!*

Do lawyers generally do that? Not usually. Why? Malpractice. What do they do? If they compute that there is a 98 percent chance that liability will be found, but the damage claim is out of bounds, they compensate by spending 2 percent of their time defending liability and 98 percent on minimizing damages. Who do you think is likely to get the lower judgment, the defense lawyer who does that, or the one who says, "We believe we were wrong here. We are not perfect. All of us have an occasional momentary lapse on the highway. We had one. It is right, decent, and just that the plaintiff should recover here. We want him to be fairly compensated. But look at the demand his lawyer has made!" (Then the lawyer goes on to show that the plaintiff seeks a windfall.)

Let us take a hypothetical intersection accident case. You represent a defendant driver. You believe that you have only a 5 percent chance on liability, but that the plaintiff's damage claim is greatly overstated.

The first lawyer in your position does what most lawyers do. He argues 5 percent of his time on liability (of course, using the "nay more" rather than "but even if" argument) and 95 percent of his time on damages. The second lawyer does not mention liability (he has conceded it out of the presence of the jury) and spends 100 percent of this argument and proofs on damages. Which lawyer is most likely to get hurt the least? The third lawyer in your position not only does not argue liability; he gives it away to the jury (we want you to return a verdict in favor of the plaintiff—but only a fair amount.) Which tack gives you the best chance to "win" (to get hurt the least)? And why—if not for Rule I and Rule II?

Again and again we see the confluence between Rule I and Rule II. They are the metaphoric left jab and right cross of

adversarial courtroom combat. No truly effective fighter uses only one, and they are best thrown in combination.

Of course, as the case of liability gets weaker, the attorney for the defendant becomes more inclined to meet it. There is no point to giving away a case on liability if you have, say, a 40 percent chance to win it. But as your chances to win improve, your credibility in making the argument also improves. And, as we all know—although the law says it should not be so—as the jury finds the issue of liability becoming more and more troublesome, the damages it is willing to award become less and less. It is also true of criminal cases; here, too, the legal standard and the practice are divergent. Guilt is for the jury to decide. Sentencing, at least in federal court, is the exclusive province of the judge. Yet the weaker the evidence is perceived by the judge, the less severe sentence the judge is likely to pronounce.

LESSON: Self-contradictory theories should never be advanced; truly weak arguments should not be advanced but should be voluntarily handed over to the jury; alternative theories in support of the identical issue should be avoided; but no strong, non-self-contradictory, nonalternative theory or argument should be abandoned if it can be made without loss of the advocate's personal credibility.

ENDNOTES

1. F. Wellman, *Success in Court* 390 (1941).
2. The same may not be true of appellate judges, who are focusing on legal arguments, on what the law is or should be, rather than feeling their way towards finding what the facts were. In an appellate tribunal, it is possible to effectively make multiple, even inconsistent arguments. Even here, I think, this is not the best approach—but at least it is not the act of immolation it would be before a trier of fact, whether judge or jury. But appellate advocacy is outside my mandate. Appeals are the resort of trial lawyers who have lost at trial, and we are discussing how to win.
3. J. Ram, *A Treatise on Facts as Subjects of Inquiry by a Jury* (1873) (quoting from Lord Brougham's *Historical Sketches of Statesmen*, 2d series, at 66, (1839)).
4. J. Ram, *A Treatise on Facts as Subjects of Inquiry by a Jury* (1873) (quoting from Melmoth, *Pliny's Epistle*. i, 20).
5. L. Stryker, *The Art of Advocacy* 178 (1954).
6. This subject will be more fully developed under the subject of openings. See page 141.
7. Obviously, if your client tells you that his motivation for speeding away was solely to flee the scene, then you will be stuck with that answer and will need to deal with the bad fact in some other manner, or at least on Level III as explained in Chapter Seven.
8. L. Nizer, *My Life in Court* 9–13 (1961). Of course, this "situation sense" or Nizer's law of probability must be used in the first instance in conducting pretrial investigations and interviews of the client and important witnesses to make sure that the theme will be consistent with this testimony.