

The Expert Who Walked Off Angry

by Edward Michaels

Henry Charles's trial practice is mainly big cases in which trial time is measured in weeks or even months. I have been his friend and colleague—and sometime chronicler—long enough to know the emotional, physical, and intellectual regimen of Charles's trial preparation.

Medical evidence now confirms that the tension of trial preparation has a physiological counterpart: Adrenaline is released into the bloodstream. To balance this, the wise trial lawyer will get plenty of exercise to send endorphins into the system as well.

All this is a long way of explaining Charles's behavior in the problem I am about to relate. We had been preparing for trial in the Defense Parts Supply criminal matter, which was to be a three-month ordeal. Two weeks before trial, the district judge granted the defendants' motion to suppress the 19,000 wiretap intercepts that underlay the government's case. The prosecutor knew an appeal would be fruitless, so she dismissed the case and ended a five-year battle.

Charles should have been elated but instead sank into a restless melancholy. The adrenaline had no place to go. He paced about the Victorian building where we live and work, at 1130 Torrey Street, Mirabeau, Texas, like a caged tiger. He drove Jim and Wanda, our secretary/paralegals, crazy with random thoughts about upgrading the computers, changing our word processing program, file storage, and a dozen other details that they already had well in hand.

Only a temerarious soul would intrude on such a mood, but the young lawyer who telephoned from Dallas could not possibly have known that. I heard only Charles's end of the conversation.

"Hello. Yes, this is Henry Charles." Pause.

"Yes." Pause.

Edward Michaels is the pen name of a trial lawyer who lives in Texas.

"I thought we were to have this conversation yesterday." Pause.

"Mr. Wilson, I'm terribly sorry, but this is not satisfactory at all. It is not your fault, I know, but I just don't operate that way. You tell your partner that I only agreed to do this as a favor. That was nine months and two trial teams ago, and in the meantime you people have sent me two irrelevant pleadings. The rest has been silence." A longer pause.

"Mr. Wilson, you can prepare or not prepare for trial as you wish. I won't comment on that. My own schedule does not permit me to be an expert witness in your case, so please dedesignate me. I'll send you a confirming letter. Good day."

Charles hung up sharply and noticed me standing in the doorway of his office. "Michaels, the damned . . . *rudeness* of some people. No, it's no worse. Sloppy, thoughtless, careless. Oh, the hell with it. I can't even find the word. It's no wonder lawyers lose cases that they should win."

"Charles," I said, as evenly as I could, "what is this in aid of?"

"Michaels," he said, head cocked to one side as he peered at me over his glasses, "I have just had an out-of-body experience."

"You mean like Shirley MacLaine?"

"No, that's other-lives stuff. I mean I was transported for a single dreadful moment to a place usually occupied by another. I was a *witness*. And not just a witness, but an *expert* witness, being victimized by a lawyer who didn't know what the hell he was doing or care how I felt about my task."

"I don't remember your mentioning an expert witness assignment," I said.

"I probably forgot. I took it on so carelessly. Let's get some coffee, and I'll tell you about it."

I followed him to the kitchen, glad that he seemed to be shedding the lassitude of the past two days. The kitchen, I

should say, is a scene of Charles's escapes and outlets. He has fitted it up to satisfy his passion for a half dozen culinary styles. Now he strode to the Gaggia espresso machine he insisted on going to a store in San Remo to buy. It wouldn't do to order one from Neiman Marcus: Charles had to be assured of authenticity, even at the price of taking a day's detour from a vacation on the Côte d'Azur.

We took our coffees—espresso for Charles, cappuccino for me—to the combination model courtroom and library that takes up the second floor of our building.

"Michaels," he began, "you remember that I was an expert witness in the Muntz bankruptcy?"

"I remember." Muntz was an automobile entrepreneur who was acquitted of narcotics charges and soon after filed for bankruptcy. The creditors challenged the fee Muntz had paid to his lawyer, Harriet Winslow. Charles reviewed the file, interviewed Ms. Winslow, and testified that the fee was reasonable. The judge later came up to Charles at a bar dinner and said the testimony had been brilliant.

"Well, when I had a weak moment nine months ago, this lawyer Ben Goins called me and asked whether I would be an expert witness on a fee issue in a case his firm had. I said OK but send me the stuff I'll need."

"Charles," I said, "you don't even like Goins."

"I know, Michaels. I said it was a weak moment. But anyway, Goins's firm designates me as an expert, never sends the file to review, then hands off the case to another lawyer, who hands it to still another, and now I get this call from that lawyer's associate telling me the case is going to trial in six weeks."

"Rude and frustrating," I agreed.

"That's not all. This young associate asked me yesterday to be ready this morning for a call with his partner about the case. And now he calls up and cancels that."

"A waste of your time," I said, "but I fail to see how it qualifies as soul travel, or teleportation, or even as the transcendental game of the week."

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Charles smiled. "You fail—as I did at first—to see the lesson of it. The rudeness toward me could thrust me into outward anger and inward self-pity—two things I can do without. When I cleared my mind of those emotions, I saw that I had been transported into the middle of their case and not as me. If I am to be a good expert witness, I must be prepared. I must be directed in a way that fits my sponsor's theory of the case. I must be given heavy doses of self-confidence and dire warnings on the pitfalls of arrogance.

"The most common complaint of experts is that the lawyers take them for granted and then expect them to shift and shave their theories to fit the lawyer's latest bright idea about

the case. For some reason, I had expected better treatment than that. Instead, I get . . ." He struggled again for the word but didn't find it. "This nonsense. I, Henry Charles, a master of the courtroom, felt the alienation, confusion, frustration, and even foreboding that witnesses—especially experts—feel in the hands of lawyers who are lazy or inept. That was the experience of which I speak."

I couldn't suppress a grin. "And Charles, my colleague and friend, who has been wallowing in despair these past 48 hours, do you feel compelled to leap naked from your bathos and run into the street announcing this discovery?"

Charles inclined his head to acknowledge the sally. "Ah no. But I am going to host a dinner party. I'll put some veal chops to marinate in Szechuan pepper sauce, grate some ginger to have with cooked carrots, and work a little magic with mustard seeds and olive oil for the arugula and endive. I have a guest list in mind."

We were seven for dinner the next evening. Juan and Rebecca Cavazos, Florence and Tom Wilson, Charles, me—and Samantha Pannill. Juan has been a lawyer in solo practice for two years since he left the attorney general's office and came home to marry Rebecca. Rebecca teaches music at Mirabeau High School, where Tom is a woodshop teacher and Florence an award-winning physics teacher.

I hesitate to describe Samantha, for she may well read these words and—as usual—resist classification. I will say only that she is a Legal Services lawyer and Charles's and my good friend.

"Rebecca," Charles said, midway through the first course, "you have our thanks for luring Juan away from the office tonight."

Juan looked up. "And what makes you think I've been chained to the office, Hank?"

"Well, Juan, I could say it is because I walked past your building last evening on the way to a meeting and saw your light on. I could observe that you arrived here tonight in a coat and tie, carrying your attaché case, and that you came in a separate car from the lovely Rebecca—so you must have come from the office. This would all be true, but I confess that I ran into Mary Martinez at the library today, and she told me you've been working long hours on the case of her husband's death. Something to do with the defendant's trying to make the straight paths crooked."

Juan speared a tortellini and chewed. "Henry, since you are so damn smart, you can solve this one. Roberto Martinez was 34 years old. He worked on a construction site in northwest Mirabeau. A scaffolding board broke. He fell 30 feet and was impaled on a reinforcing rod sticking up from a partially poured retaining wall. He left Mary and three kids. Two other workers saw it."

"Sounds direct enough," I said.

"'Twas," Juan replied, "until the insurance lawyer designates this Ph.D. expert, who will say that the board could not have broken unless Roberto was goofing off and jumping on it. And that he wouldn't have fallen on the reinforcing rod if he hadn't been fooling around."

"What do his workmates say?" asked Samantha.

"Just that he stepped from one scaffold board to another, and the board broke. He was wearing a full tool belt and carrying a bucket of sealant. But hell, man, these guys are Chicanos like Roberto. You can say all you want about the

goddamn enlightened New Texas, but you look at the verdicts in district court and you'll sing a different song."

Rebecca put her hand on Juan's, and he turned to look at her. Their eyes met briefly. "I'm sorry," he said, to no one and everyone. "It makes me mad, that's all."

Charles nodded. "Me, too. An expert is, too often, somebody who wasn't there when it all happened but who for a fee will gladly imagine what it must have been like. Tell me, Juan, have you considered doing martial arts to deal with your anger?"

"Are you kidding, man? Me in karate pajamas? They'd bust me as an illegal alien, sure as hell."

Charles stepped to the sideboard and removed a napkin from what he had laid out there. "Here is a wooden board on two bricks. It breaks quite satisfyingly." And with that, he whacked the board with the heel of his hand. It broke in two.

"I say, Charles," I said. "This is a bit much."

"No, wait, Michaels. Here are the broken pieces and here is a laminated board that is unbroken. I hand these to Florence and Tom to inspect. Now, Florence, if I asked you to explain how I could easily break the one board but not the other, how would you begin?"

"Well, if you were a student in my class, I would draw you a diagram of the forces you had exerted, and then a more complicated diagram of wood fibers and how crisscrossing them in a laminated board adds strength."

"And, Tom," Charles said, "what would you say if I were a student in *your* class?"

"First thing I'd do, Hank," Tom said, turning a piece of the broken board this way and that, "would be to ask you where you got this cheap piece of lumber with a big knot in it. Then I'd remind you of what you are supposed to know about how to put strength in things you make out of wood."

"I'd call that a good beginning," Charles said. "While I am clearing plates and getting the main course, would you, Juan, mind getting the diagrams of the scaffolding out of your briefcase?"

When we were all at work on our veal chops and carrots, Charles asked Florence, "Do you have any more prize-grabbing entries in the Texas Science Fair this year?"

"I think so, Henry. The students are so fired up about science being the way to become the first professional in their family. And of course Tom is there to advise on building models and exhibits."

"I wonder," Charles said, "do you see any models of simple physical ideas—of what we called statics and mechanics when I was in school?"

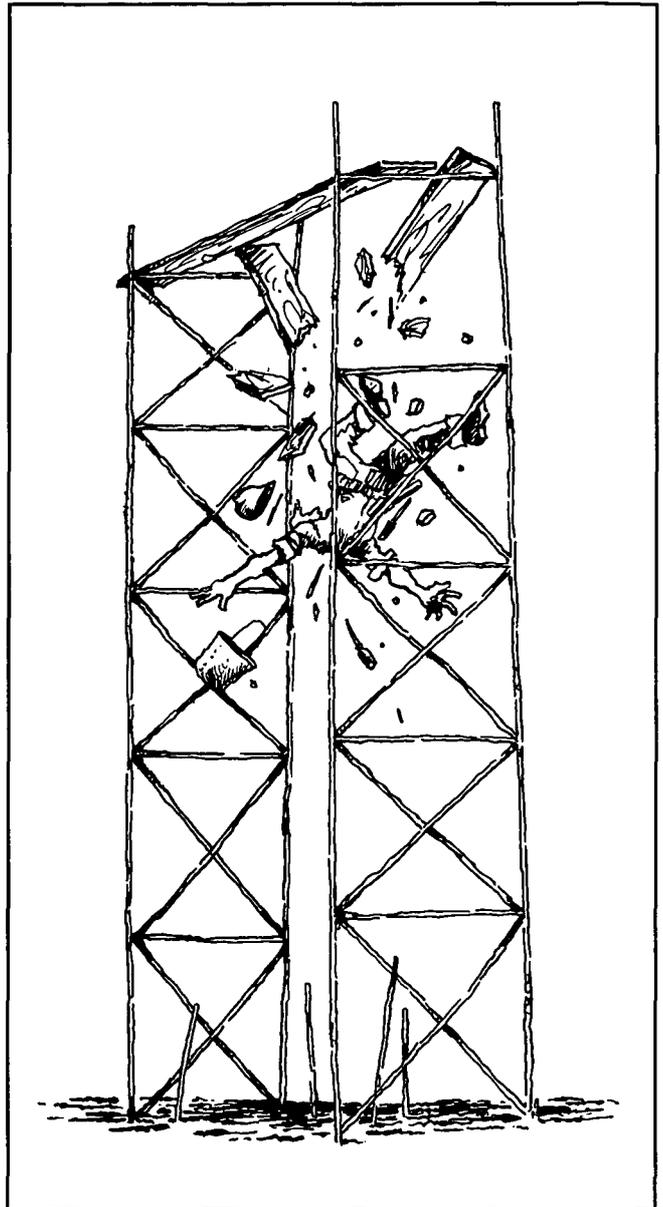
Florence smiled. "Not often. Students today figure they have no chance unless their project belches fire or makes a noise."

"But suppose I wanted to prove something about, say, boards. And suppose—because it's the truth, which makes it easier even for a lawyer to suppose something—that I am not in the habit of trying to break them with my hand. Whom would I ask? A woodshop teacher or a physics teacher? Or should I ask, say, a Ph.D.?"

Juan looked at Charles evenly. "Hank, I think I see where this is going. But you have too many ideas whirling around in a small space."

"Henry's ego is *not* a small space, dear," Samantha said.

I coughed into my wineglass. "Charles knows perfectly



well that the rules don't require you to choose among the alternatives. A woodshop teacher, a physics teacher, a Ph.D.—any or all of them can qualify as experts. And the physics teacher can consult the woodshop teacher in preparing to testify, so long as such an expert 'reasonably relies' on that type of information. At any rate, those who are wondering why we called you all here can stop wondering. It began with Charles here pitching a fit about a case in which he was to be an expert witness. From there we were led, spurred on by the thought of Juan's case, to construct scenarios about experts, some fanciful and some conjured from memory."

"Rebecca, Tom, and Florence share a gift and an insight," Charles said. "They teach evocatively, by illustration and example. They never condescend to their students. In a word, they *empower*. When we are good at our own craft, Juan, Michaels, Samantha, and I exhibit those same qualities. When I think of Juan's opponent in the Martinez case dragging a Ph.D. down from College Station, I see Juan brandish-

ing two swords—one to slay the message and the other to strike at the medium.”

“A little too McLuhanesque for me,” I said. “Is this like the Irish lawyer who denied the allegations and despised the allegators?”

“All right,” Charles said. “I’ll return to Earth. One more indulgence, please. Tom, you worked summers building houses with your dad here in Mirabeau. Your granddad built the house we are sitting in. Do you remember telling me about your first engineering course at U.T. in Austin?”

Tom smiled at the memory. “I sure as hell do. We were studying materials, and it was a little too abstract for me. My dad and I had been thinking about ways to minimize the need for interior load-bearing walls in houses. So I asked this professor about the relative strengths of ordinary bond beams, truss-type structures, and the new laminated bond beams. He looked at me like I was from Mars, like there was something wrong with me. No practical side to him at all.”

“Rather like some fancy experts I have seen in litigation,” Charles said. “They ask the question, ‘If it works in practice, will it work in theory?’”

“Tom,” asked Juan, “how would you choose the planks to use for a scaffolding? I mean, could you help me get ready to cross-examine this Ph.D.?”

“Sure,” replied Tom. “It would help if you got me the lumberyard tickets for the boards they actually used.”

Samantha furrowed her brow. “Juan, you know I had that sexual harassment case against the mayor, and I actually used a social worker as my expert witness, even though she didn’t have a doctorate.”

“Samantha’s right,” Charles said. “The Rule of Evidence defines an expert as one qualified by ‘knowledge, skill, experience, training, or education.’ Tom, when you went off

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to U.T., you were already an expert. You just didn’t know it. So now the secret is out. Juan, I thought Tom and Florence could be your experts, combining their skills and education to explain why the board broke and why Martinez fell so as to miss the safety platform.”

Tom looked at Juan. “What about our making a model of the scaffolding and breaking some boards for the jury? Real ‘L.A. Law’ stuff.”

“Charles doesn’t watch ‘L.A. Law,’” I said. “He’s afraid he’ll throw something at the screen.”

“I also advise against experiments in the courtroom, as a general rule,” Charles said. “Your gadget makes a quite satisfactory pop, whistle, or snap in the office but then refuses to work when you try it in front of the jury. Far better to do a video and play it in court. Then you can show multiple operations of the model.”

With contributions from everyone, the idea took a more definite form as the evening went on. We had two experts who could qualify as such, and yet who would appeal to jurors’ good perception of teachers. And, as Charles reminded us, we were dealing in common sense. He even trudged out his Sam Rayburn imitation, “If you’ve got common sense, you’ve got all the sense there is.”

Juan worried that Judge Harley wouldn’t grant a motion to amend his pretrial statement to add new experts, but we chided him for pessimism and promised to show up at the motion hearing to cheer him—and Florence and Tom—on.

“Martinez versus Top-Flite Construction,” Judge Harley’s courtroom clerk intoned some three weeks later. “Civil matter number 86 dash 726, on motion to amend the pretrial order. Appearances, please.”

“Juan Cavazos for the plaintiff.”

“Richard Mulvihill for Top-Flite, Your Honor.”

“Counselors,” Judge Harley began, “I’ve read your papers. Mr. Cavazos, I know it’s your motion, but honestly, Mr. Mulvihill, why are you opposed to it?”

“Well, Your Honor, the pretrial order binds plaintiff to designate her experts by a time certain, that time has passed, and trial impends.”

“Mr. Mulvihill,” said the judge, “that’s all in your papers. I am trying to find out why you are going to spend the jury’s time and your client’s money putting on some Texas A & M Ph.D. in a straightforward workplace-accident case.”

Mulvihill was too good a lawyer to betray indignation. “Dr. Charpente is important to us and not just because of the damages sought in this case. We designated him and provided a full summary of his opinions in a timely manner. The Rules of Evidence—Texas and Federal—give us great latitude in calling experts who will ‘assist the trier of fact’—in this case, the *jury*.” Mulvihill gestured toward the empty jury box. “The plaintiff was not so diligent as we.”

Charles and I were seated in the back of the courtroom, behind a visiting group of high school students. Charles nudged me and whispered, “It’s all very well to remind Harley that the jury will decide, but they are not there right now. He’s shadowboxing with the wrong opponent.”

“Or at the wrong time,” I added. “You’d think he’d know better.” Charles nodded.

“All right, Mr. Mulvihill,” Judge Harley continued, “here’s my ruling. The court finds a change of circumstances due to defendant’s unexpected designation of Dr. Saul Charpente. I possess a discretion in the matter. I exercise it. The pretrial order is amended. Plaintiff may designate as its experts Thomas Wilson and Florence Wilson, in accordance with the summary attached to Mr. Cavazos’s moving papers. But I am going to go further, Mr. Cavazos. Are the designated experts in court?”

“Yes, Your Honor.”

“Very well, I want you to bring them up here, swear them, and let them give us an overview of their direct testimony. I am not going to take jury time with a lot of wrangling about this. If Mr. Mulvihill has any useful questions, he can ask them now. As you know, I don’t hold with the practice of just letting each side chew on the other’s experts with endless depositions.”

Tom and Florence came forward with a collection of
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boards and a sheaf of papers. Juan turned on the VCR/video receiver at his counsel table and pointed the screen toward the bench. Tom went first, answering questions about his background and experience and then turning to the case at hand.

"And, Mr. Wilson, will you tell the court what records you reviewed to prepare today?"

"Yes, sir. I looked at the lumberyard tickets from the defendant contractor's files, which showed what boards they had bought for the scaffolding at this job site."

"What did you find?"

"The only two-by-twelves on the site were scaffold boards, best I could tell. The two-by-twelves they got were all knotty boards, twists, and warps."

"Can you tell us what that means in terms of the strength of the boards?"

"Sure. Can we turn on the video?" Juan did so. "Now this first scene is me in the backyard with boards identical to those the contractor bought. I set them up on sawhorses, like you would have them on a scaffolding."

"Your Honor," Juan asked, "may Mr. Wilson step down so that he can narrate the video?"

"Surely."

Charles nudged me. "Now he's going to teach. He's in his element," he whispered.

The video showed weights resting on boards of various types and then the boards being broken. Tom's exposition was direct, not to say pungent.

"In conclusion, Mr. Wilson," Juan asked at the end, "what would be your opinion of erecting a scaffolding with boards like those the defendant used here?"

"I think it is very dangerous."

Florence followed, with charts and calculations. She had some diagrams of parallelograms of force and taught us as if we were a class of her students. Juan remembered to have her step off the witness stand so that she—and we—felt the full effect of her teaching and so that she could keep eye contact

with her audience—the judge and Mulvihill.

"Mrs. Wilson," Juan at last asked her, "do you have an opinion about how somebody would fall from a scaffolding like the one Roberto Martinez fell from?"

"Oh yes." Florence paused, as a good witness should after answering the question.

"Tell the court, please, how you reached your opinion."

"Well, the matter is very complicated when you first look at it." Mulvihill nodded knowingly and made a note. "But then I got to thinking that if you identified all the forces at work and tried to quantify them, you might come up with an answer. Doing that and then demonstrating the results were more than I could do." Mulvihill rocked forward in his chair as though to rise and object, but Juan's next question caught up with him.

"So what did you do?"

"What I always do with one of these challenges. I asked my students here." Her gesture took in the young people in the audience. "They devised and video-taped the experiment I would like to show the court."

Judge Harley nodded. The 10-minute video showed a model scaffold, a weighted sack labeled "175 lbs.," and several experiments with the sack crashing to earth as scaffold boards broke. Reinforcing rods were sticking out of the ground, and each time the sack fell, it was impaled on a rod, and red powder came out of it. The sack was then repaired for the next experiment, so by the end it had duct tape all over it. The students in the video looked both earnest and responsible.

As Juan switched off the recorder, Mulvihill reached the end of his patience. "Your Honor, this is absurd. A human being is not a sack of red powder."

Charles looked at me and raised an eyebrow. I drew breath. But Judge Harley had the matter in hand.

"Mr. Mulvihill," the judge said in the tone cats use to explain to birds the meaning of "dinner," "I think the jury is going to understand that perfectly. I'm going to take a recess. Would you and Mr. Cavazos mind coming into chambers for a few minutes?"

Two days later, Juan and Rebecca hosted a dinner party at the newest local restaurant, Beth's. Mary Martinez

joined Tom, Florence, Charles, Samantha, and me for imaginative Southwestern food and—for everyone except Charles—celebratory wine.

“Well, Henry,” Juan said, “here’s to you. Since everybody here is a legal helper and Mary consents, I can tell you the numbers. Old Harley got us in there and put us in separate rooms. I think we all have a pretty good idea of what he said to Mulvihill. The insurance company took a couple of days, but it finally put \$3 million on the table. We took it. Goes to show me. Sometimes we get so tied up in our cases, we forget to keep it simple.”

Charles nodded gravely. “Was it not Euripides who said, ‘Avert thine eyes from the lore of the wise, that have honor in proud men’s sight. The simple, nameless herd of humanity hath deeds and faith enough for me.’”

I peered at him. “Yes, Charles, I think it was. But it was Henry Charles who once quoted that to a Brooklyn prosecutor, who shot back with this: ‘Your Honor,’” I intoned in my best mock-Brooklyn manner, “‘I never had no classical education, but I did take my pants to the tailor last week. He says, ‘You rippa dese?’” And I says, “‘Yeah, you menna dese?’” ’”

Charles inclined his head. “I think Michaels is saying, in his own provocative way, that one should keep it simple even when extolling the virtues of keeping it simple.” □