Opening Statement

One Man's Freedom, One Man's Faith

by Michael E. Tigar

Chair, Section of Litigation

It is hard to say what makes a great trial lawyer. Those we celebrate have been students of society, quick to resent injustice, eloquent in the defense of freedom and fairness. I recall telling my father, when I was about 11, that I was thinking of becoming a lawyer. He thought for a time, then went to his room and came back with a copy of Irving Stone's *Clarence Darrow for the Defense*. This, he said, is the kind of lawyer you should be. Through high school and college, I devoured books on Darrow: his autobiography, the Weinberg collection of trial excerpts, *Attorney for the Damned*, the fictionalized *Inherit the Wind*.

In college, I began to read of a Washington lawyer who had defended Frank Costello, Jimmy Hoffa, and even—though this was harder to understand—Senator Joe McCarthy.

Edward Bennett Williams had also written a book, *One Man's Freedom*. Unlike other lawyer books, it was not self-glorifying. It was a series of arguments for progressive change in the system of criminal justice, coupled with observations on such things as the duties of a lawyer and the prospects for international law.

My first week in law school, in the fall of 1963, I picked up an issue of the *California Law Review* and there was an article on the Teamster monitors and more about Ed Williams.

By the end of my second year, I was sure enough of my grades and law school standing to put together a résumé, asking that he consider me for a job when I finished my clerkship. The time for job interviews came far sooner than I had anticipated, and I went to the offices of the ten-lawyer firm that Ed Williams headed. He offered me a job that day, and I accepted.

During the years we spent together, I learned what it means to be a trial lawyer. I learned technique, discipline, passion, honor, and humor. And I grew a lot trying to match his stride.

At a technical level, Ed's cross-examinations, summations, and oral arguments are the finest example of the lawyer's art. They are like symphonic poems that excite awe in other composers and give understanding to the audience. The typical cross-examination of a major witness began with "clearing the underbrush," a process that Ed described with a gesture of wielding a machete. He had to make sure how many prior statements the witness had given, and match that against the log of material provided by the prosecution. Any small concessions would be won here, and ambiguities resolved.

Then the examination would march through its themes: the witness's bargain with the government, prior inconsistent statements, extensive preparation with the prosecutors, and record of peculation. Ed always held two complementary insights about these cross-examinations: *First*, he would keep on until the witness made the concessions compelled by the facts—and in the very words that Ed needed for his closing argument. *Second*, Ed never forgot that cross-examination cannot do the work of closing argument.

In the *Connally* case, for example, he confronted the witness Jacobsen, who had testified on direct that Connally counted money with a "glove or gloves" in order to leave no fingerprints:

Williams: You told us that Mr. Connally and you had a meeting in his office alone, that he excused himself, left his office for ten minutes and came back with a cigar box and a rubber glove or rubber gloves on top of a pile of money in the cigar box, is that right?

Jacobsen: Well, it was something like that.

Williams: No, tell me what it was, Mr. Jacobsen, not whether it was something like that or not. You tell us exactly how it was, Mr. Jacobsen.

Jacobsen: I believe the rubber glove

was on the side of the money in the cigar box. The rubber glove or gloves was on the side of the money.

Williams: I'm sorry?

Jacobsen: I say the rubber glove or gloves was on the side of the money, not on top of the money.

Williams: Now, when you told Mr. Tuerkheimer in your interview with him back last year about this episode, you told him it was a rubber glove, did you not?

Jacobsen: Yes.

Williams: And when you testified before the grand jury on March 23rd you told the grand jury it was a rubber glove, did you not?

Jacobsen: Yes, sir.

Williams: But when you testified on Thursday here in this courtroom before His Honor and this jury, you said it was a rubber glove or gloves; is that correct?

Jacobsen: Yes, sir.

Williams: When did you decide it might have been a glove or gloves?

Jacobsen: Between the time I testified before the grand jury and the time I testified here.

Williams: What was it that changed your recollection from it being a glove to it being a glove or gloves?

Jacobsen: Just the logic of it being gloves instead of glove.

Williams: It was the logic of it, is that right?

Jacobsen: Yes.

Williams: Was that because, Mr. Jacobsen, the prosecutors pointed out to you that nobody could count money with one glove on one hand and a big pile?

Jacobsen: No, sir.

Williams: Well, what was the logic of it that changed your mind. . . and caused you to testify on Thursday that it was a glove or gloves?

Jacobsen: Well, the fact that you couldn't hardly handle money with one glove.

Williams: Well, that was what I just asked you, Mr. Jacobsen.

This cross has it all. Control: "You tell us exactly how it was." Pace: We get each prior inconsistent statement and the witness agreeing to it. Preparation: The prior grand jury testimony *and* the prosecutor's notes—produced after a hard fight—are deployed. Daring: There are at least four nonleading questions in the series, including the ones laden with the most significance. Closure: Ed does not stop until he has the devastating admission that this witness kept working on his story until it was "logical," and then Ed moves on to another topic. This cross, like all of them, was sharp and clear.

The Jacobsen cross was a series of these episodes, each one based on the most intense study of the case and frequent heated discussions with those of us privileged to be second-chair. There were times during the examination when the news reporters would comment on how labored it sometimes seemed. Connally's friends would communicate these sentiments. Ed's impatient reply illustrates the second principle: Cross-examination is not closing argument.

Ed worked on the *Connally* summation, as on the summation in every case, from the moment he was retained. We were always talking in terms of goals, the better to see the path.

Work on the *Connally* summation intensified during the weeks just before the trial and during the trial itself. Ed changed the organization of it as he rethought the Jacobsen cross and the Connally direct. While Ed was always alert for the unanticipated, each unit of the cross was constructed to fit its proper place in closing argument. Making Jacobsen eat each prior inconsistency created a stack of court reporter's transcripts that Ed brandished and sampled throughout the closing. Then, in his closing, Ed made best use of the concessions patiently extracted during cross.

He knew the courtroom. It was his territory. He taught us that by his example. He had an imposing physical presence, made more so by his ability to use movement as a form of comment on the proceedings. He could even take paces backward from the witness box without looking, because he had measured the space in his mind's eye.

With technique went discipline. It was more than being at the office before any of us, and more than his rigorous insistence that he would know every document, every prior statement, every relevant argument, before he stepped into the courtroom. It was more than his patient work to prepare a witness to testify.

Ed taught us that discipline requires

(please turn to page 62)

Opening Statement

(continued from page 2)

you to test yourself before you are tested by others. Those of us chosen to be his sparring partners learned our lesson. I recall, just a few years ago, stopping to have lunch in Ed's office. I had been away from the firm for several years. Ed had been representing Victor Posner, and there were whispers that the illness that finally brought him down had slowed him, or eroded his powers.

The whisperers were wrong. He sat

preparing an argument for the court of appeals. "Listen to this." I listened. "The government puts Posner to trial with another defendant. We have moved for severance. The government has a document, admissible only against the codefendant but"—he paused for emphasis—"*lethally* prejudicial to Posner." "Lethally" may have been Ed's favorite adverb. "The judge has promised that if they offer it, he must grant a severance. Three days into the trial, they offer it."

Now Ed was on his feet. He did a perfect imitation of the judge's ire, the prosecutor's wheedling. His hands sawed and chopped the air for emphasis; those expressive hands that were always in the service of his advocacy. He recounted his motion for severance and mistrial. Motion granted.

"And the question is," cocking his head to one side in a familiar gesture, "would a retrial violate double jeopardy?" I had not come to do this workout, but was honored.

"Sounds a little like *United States v. Martinez* to me," I said. A Tenth Circuit case, but written by an Eighth Circuit judge sitting by designation. I told him the facts. Ed leaned over and punched four buttons on the telephone. "Hello," he said softly to whoever answered, "How about the *Martinez* case?" A pause while the other party replied. "I know it is not in the brief. The question is why it isn't." Another pause. "Meet me in the library."

We took the elevator to the library and got out the case. We read it. Ed thought the associate who joined us had been through enough. He turned on me. "This case doesn't get us there. The district judge was in on the misconduct."

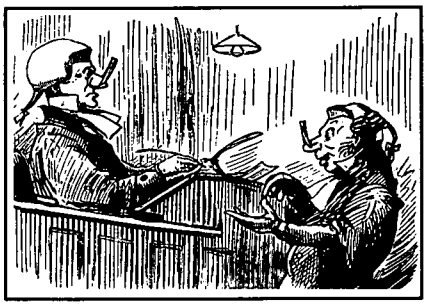
Ed continued to fan the debate, arguing first on one side and then the other. Supreme Court volumes came off the shelves. At last, he was satisfied that he had explored every crevice of the argument, and we went back upstairs to his office to eat the cold remains of our tuna sandwiches.

The discipline was for clients as well. He demanded candor from them, and when trial rolled around, hard work. Before going on the stand, the client was forced to confront the evidence piece by piece and to be ready for the ordeal of testifying.

Ed's discipline was physical as well as mental. I have spoken of his hands and his courtroom mien. He had internalized the idea that every nuance of movement or gesture in a courtroom may be observed by the jury and considered in some measure significant. He practiced control, and demanded it of those who shared the counsel table.

Beyond discipline was passion. Ed made his reputation by the vigor and eloquence of his defenses, not just of people but of the principle of fairness in an adversary system. What other major figure in American trial law so eloquently described the values inherent in adversary justice, and so wisely adumbrated the constitutionalization of those values? I say none, and I offer his book *One Man's Freedom* as an exhibit.

In *Ivanov v. United States*, we had persuaded the Court to grant certiorari on disclosure of wiretaps. Ivanov was a Soviet citizen convicted of espionage. Some of the taps were of his apartment, and there were rumblings that some of them had been at the Soviet diplomatic premises. Ed was asked during oral



argument whether it was his position that wiretapping in national security cases was always illegal. He paused and made what was, for him, the most crucial distinction the law can know. The national security, he replied, might require or permit any number of things. "But I have always been taught that the federal courts, sitting in criminal matters, are a kind of sanctuary in the jungle."

I saw the passion summoned again and again, and I am sorry that I missed his last oral argument, where it was in full flower not long before his death. Evan Thomas, a *Newsweek* senior editor, is writing what I hope will be a worthy biography of Ed, and I look forward to his chapter on that argument—and to the entire book.

Ed's passion for justice led him to approve jaunts of mine that would have given other senior partners pause. I undertook the defense of an alleged SDS saboteur pro bono. I was three weeks in trial, and more weeks on appeal of the counts on which the jury did not acquit. Ed shared my joy at our victory, declaring the Sabotage Act unconstitutional.

With technique, discipline, and passion went honor. Ed had struggled to redeem the image of the criminal defense lawyer, and his work endures even the baseless assaults of today's new crop of deriders and detractors. He was, however, more than an eloquent advocate of honor. He was honorable. I recall vividly a shouted argument about one of the office's valued clients, on a certain Friday afternoon. Sunday morning the telephone rang. It was Ed. I began to apologize for some of the things I had said. He brushed that aside. "I called to say I've thought about it. I owe you an apology. We can't say in court what the client wants; the facts aren't there. Come in early tomorrow morning and let's figure it out."

My first day in the office, he warned me in terms that Watergate figures and inside traders should have heard: "Just remember, when times are tough and it looks like someone's going to jail, make sure it's your client."

Then there was humor. Ed's fund of stories about clients, politicians, judges, priests, and others was inexhaustible. The humor of these stories was irrepressible. It bubbled up as the story went on and spilled out over the assembled group. And at the punchline Ed looked always like an altar boy caught with the wine on his lips.

Underneath the qualities of a great trial lawyer were those of a best friend and mentor. And there was courage. As he battled with cancer from the moment he announced his first surgery to a meeting of partners, down through the years that remained, he fought that battle as he had every other.

The day Ed went to the hospital and asked for the last rites of the Church, I was in South Africa. I had gone to work with the Black Lawyers Association of South Africa in teaching trial advocacy, principally for use in political cases. I knew I was in a place that my years with Ed had pointed out to me. But I sat, alone in my hotel room, and wept.

Learning to be a trial lawyer is through example, which is a shared and vicarious experience. Vindicating the fighting faith of our profession is also through example, a striving to be worthy of those who have gone before.

Good night, Ed.