

Borrowing and the art of trial advocacy

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Whether you are just starting out or an experienced hand, you should take every opportunity you can to watch other lawyers try cases.

When a trial lawyer stands up in open court, the lawyer is not only pleading the case, he is demonstrating his skills, style and technique. Watch, listen and learn. That is one essential way that trial skills are passed along and learned.

There are few trade secrets in trial advocacy. Trials are public events. You can pay good money to watch a trial lawyer demonstrate his skills in a mock exercise at a seminar, or you can walk into court on any given day and see the real thing for free. Better yet, do both.

You should feel free to borrow extensively from other attorneys who you think are effective — their turn of phrase, their voice, their mannerisms, anything.

The great satirist Tom Lehrer, in his song about Russian mathematician Nikolai Lobachevsky, crooned: "Plagiarize, Let no one else's work evade your eyes, Remember why the good Lord made your eyes"

However, what may be shameful in science and academia is well-accepted in court. Advocacy skills can't be copyrighted, and chances are high that the best attorneys borrowed all their best ideas, too. Take notes of things you like, and practice them based on your notes. See what works best.

Three key caveats, however, to watching other lawyers:

First, when you can, do more than just watch. Engage. Talk about what you saw with the lawyers you observed, with others in the courtroom, and with people outside the courtroom. Why did they do things a certain way? What worked, what did not, and why? What other choices are there? Those types of discussions will make watching trials far more valuable.

Second, you can learn without necessarily imitating. You have to be yourself in court. Juries may struggle with the complexities of a case, but they can be pretty good at spotting phoniness. Your goal is to be the best "you" that you can be, not to pretend to be someone else. Not everything that works for some other lawyer will necessarily work for you. You may need to try on different ideas and styles to find the ones that suit you.

Third, don't just follow the herd. You should take care not to imitate something without first questioning whether it makes sense. Many of the worst faults of lawyers are perpetuated from generation to generation, because new lawyers assumed (or were taught) that "that's how it's done."

It's especially important to remember that just because something sounds impressive, or lawyerly, it may not be a good idea. In fact, if it sounds lawyerly, you probably ought to avoid it. Just because something is said with great passion doesn't mean that there is either sufficient basis or strategic reason for that passion.

Nor does the fact that you saw a lawyer win a case using a particular approach mean that you should always imitate it. Every day, in courts across the land, lawyers stumble and bumble their way through trials but win anyway, because even their own incompetence cannot overcome good facts or good law. They may delude themselves (and even their clients) that they've done well, but don't let them delude you.

Watch for attorneys who make convincing points, who sound persuasive, who you believe are doing it right, and follow their lead. And remember that the outcome may not reflect the quality of the advocacy.

So go ahead: Observe, evaluate and steal freely what you think is good. You will become part of a long and valued tradition of trial lawyers learning from each other.

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