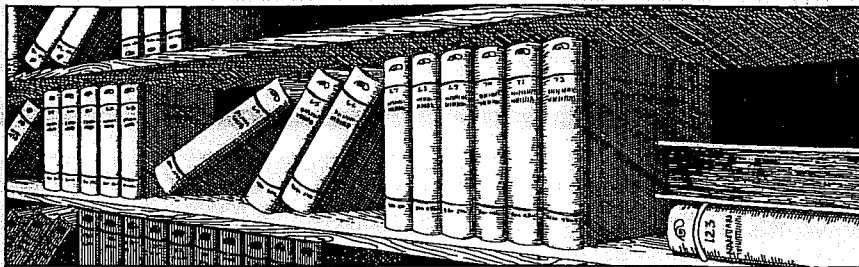


Litigator's Bookshelf



Anatomy of a Trial: A Primer for Young Lawyers

by Paul Mark Sandler

(Maryland Institute for Continuing Professional Education of Lawyers, Inc., 2008)

Reviewed by Mark A. Neubauer

Trials are drama. The 2005 trial in *United States v. Rosen* was precisely such theater. It involved power, politics, money, and Hollywood. Indeed, the only things missing were death and violence.

Defendant David Rosen was a young fund-raiser for Hillary Clinton's bid for the U.S. Senate seat in New York. At the Democratic National Convention in August 2000, Rosen coordinated a gala tribute to President Bill Clinton. The event involved a parade of Hollywood celebrities, including performances by Cher and Diana Ross. Most of the costs were underwritten by a start-up Internet company, Stan Lee Media, that was set up to distribute the works of the creator of Spiderman, The Incredible Hulk, and others.

The event involved a series of shady characters. Stan Lee Media, for example, was run by one Peter Paul, who had been convicted earlier on drug charges and would later flee to Brazil. Then there was Aaron Tonken, who had also pleaded guilty to federal charges; the "former" James Levin, a friend of

Rosen's from Chicago, who was also involved in Democratic fund-raising for the Clintons and who, too, pleaded guilty to federal felony charges; and finally, Ray Reggie, the brother-in-law of Senator Edward M. Kennedy who had been charged with bank fraud in an unrelated case and, as part of his cooperation, "wore a wire" in a dinner meeting with Rosen.

But it was Rosen who became the lead actor in a legal drama. A 33-year-old Clinton campaign staffer, Rosen was given just weeks to orchestrate a lavish Clinton fund-raiser tribute at the 2000 Democratic National Convention in Los Angeles. The gala included the rich, the powerful, and the Hollywood elite. Much money was exchanged—the campaign reported that the lavish concert and dinner cost some \$600,000. The government asserted that Tonken and Paul had rigged the event's accounting with Rosen's help. The indictment charged Rosen with four counts of aiding and abetting the falsified federal campaign finance reports. With Paul and Tonken offering to give evidence to the feds, all the attention turned to Rosen and his closeness to the Clintons.

Into the drama steps author Paul

Mark Sandler, a Maryland trial lawyer and long-time secretary of the ABA Section of Litigation. Sandler uses his defense of Rosen to develop this anatomy of the trial as a primer for young lawyers. Employing the specific to teach the general, Sandler lays out the drama of that 2005 federal trial in Los Angeles, covering opening statement, direct and cross-examination, and closing argument in long detail, using excerpts from the transcript of the *Rosen* trial as a teaching tool.

Sandler combines these excerpts with commentaries from four respected jurists: federal Judges Marvin E. Aspen, Marvin J. Garbis, and Paul W. Grimm, along with Illinois State Court Judge Mark A. Drummond. Each judge gives a careful analysis based on his own perspective from observing scores of trials. Although the judges obviously admire Sandler's skills, they do not shrink from critiquing him as well. For example, as Judge Garbis writes, "In my view, by promising the jury that Rosen would testify he closed the door to the opportunity to decide that the case was going sufficiently well to avoid the risk of putting Rosen on the stand. Sandler made a tactical error." Yet, Sandler takes solace in the fact

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that his gamble of putting Rosen on the stand paid off, and Rosen was ultimately acquitted.

Clearly, Sandler and his judicial commentators all love the theater of the jury trial. Sandler gives a careful description of how he crafted his opening statement but glorifies the process itself by writing:

When you stand up to deliver an opening statement to the members of the jury, you are being scrutinized by 12 unknown citizens with the power to determine your client's fate. Within the first 5 minutes of the opening, each of those citizens will have formed an impression of your case and of you. In those introductory minutes, every word you utter and gesture you make should do the hard work of persuading the jury on your client's behalf.

But Sandler does not focus solely on the abstract glory of the jury trial. Instead, he tries to set forth a series of tools for lawyers to practice their craft. For example, in discussing direct examination, he lays out both by general description and specific examples from the trial the tactic of "looping and incorporation." Looping, Sandler writes, is using the answer to the previous question in the subsequent question. Incorporation is building your question on the previous answer—both techniques designed to imprint certain testimony in the jury's memory.

Similarly, Sandler sets forth specific doctrines or tools to guide a trial lawyer in crafting cross-examination. One such technique he calls "impeachment by exaggeration or improbability." To demonstrate the technique, Sandler pulls from the *Rosen* case his cross-examination of James Levin, one of the witnesses against Rosen's management of the Clinton fund-raiser. After going on at length about Levin's claims to have a strong relationship with President Clinton, Sandler sets out the following exchange:

Q: Was it also significant to you that your friend, the former President of the United States, asks you to be his eyes and ears at this event?

A: It would be significant, yes.

Q: And how many times did you

call or notify the President of the United States that things were amiss at the gala or the planning of the gala?

A: We had no questions about it before the gala.

Q: So it's your testimony that you never reported to him that there was a problem, correct?

A: Correct.

As Sandler writes, the purpose of this exchange was to demonstrate that Levin was exaggerating his closeness to President Clinton and therefore probably exaggerated his testimony against Rosen.

Sandler also demonstrates how he used cross-examination to blame others, such as Hollywood promoter Aaron Tonken, for the real financial shenanigans in the Clinton fund-raiser that led to Rosen's trial. Tonken provided Sandler with an easy mark, which Sandler hit squarely in the following cross-examination of Beverly Hills event planner Bretta Nock:

Q: When was the last time you had a conversation with Mr. Tonken?

A: I don't recall.

Q: Do you know where Mr. Tonken now resides?

A: Yes.

Q: Where is that?

A: He is incarcerated.

Similarly, Sandler shows the powerful glory of closing argument—in this case, the prosecution's as well as his own. Sandler praises the government's presentation as "smooth, meticulous, and precise," adding that it is an approach "befitting of a prosecutor, who advocates for the people, for law and order, and ostensibly serves a higher purpose."

But his job as defense attorney, Sandler writes, was to appeal to the emotions. Both Sandler and Judge Aspen agree on one thing: There is no single way to deliver a closing argument. "Every attorney is a unique individual. In closing, your personality is on full display," Sandler writes. Judge Aspen joins in, saying, "In my view a closing argument is not a science. It is an art form, an opportunity for the creative juices of the advocate to flow and shine, which need not be

too overly circumscribed by an extensive laundry list of dos and don'ts."

As good as this book is for the beginning lawyer, and even for the experienced practitioner, it sometimes falls short, leaving the reader desiring more. First, although he writes that *voir dire* "often pre-determines a trial's outcome," Sandler devotes only nine pages to one of the more difficult aspects of jury trials. This brief discussion of one of the more rarely honed skills of jury trial conspicuously has no comments from a learned judge about mistakes lawyers make. It is ironic that although a jury decided the outcome of Sandler's trial, jury selection is given the shortest description of practice in his book.

Equally lacking are three important voices—that of the two assistant U.S. attorneys who tried the case against Sandler and the trial judge himself, Judge A. Howard Matz. Although Sandler tries to set them in a good light and treat them fairly, the reader can't help but be curious what each would say about the trial. What were the prosecutors' thoughts regarding Sandler's various strategy decisions, especially his controversial decision to put defendant Rosen on the stand? And, as an impartial observer, what is Judge Matz's view of the two sides' trial techniques that Sandler describes? Did Judge Matz agree with the jury's determination of not guilty? Unfortunately, we do not get these answers from Sandler's book. No doubt it is delicate to approach your opponent—especially if opposing counsel loses—for candor as to what occurred during the trial, and there is obvious sensitivity involved in asking a federal judge to comment about a case that he or she has presided over.

Yet, despite these omissions, *Anatomy of a Trial: A Primer for Young Lawyers* is an excellent book for trial lawyers, young and old alike. It is an important teaching tool that doesn't just set out general concepts—it applies them. With the glitter of Hollywood and the glamour of politics, along with the allure of big money, the trial of David Rosen presented Sandler with an excellent setting for teaching trial techniques in an exciting and readable format. This is a book that all trial lawyers and trial-lawyer wannabes should read. □