



A LITERARY GUIDE TO LITIGATION

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It may seem odd, or perhaps revelatory, that Henry James and Robert Louis Stevenson developed a close relationship, largely by correspondence. James was of course the superior artist, although Stevenson was no slouch, and their bonding seems the sort that occurs in opposites. The lesson of their relationship, with its several different edges, is a lesson that practicing lawyers might attend to, and I don't mean in choosing clients.

A distillation of that relationship can be found in Graham Greene's essay, "Two Friends," when in a review of a biography of Stevenson, Greene shifts to an examination of the friendship that developed between the two writers.¹ The biography of Stevenson, by Janet Adam Smith, "sees in the friendship the aesthetic appeal to James of Stevenson's situation"²:

The man living under the daily threat of a fatal hemorrhage, yet with such an appetite for the active life; the novelist who could only gain the health and energy for writing at the risk of dissipating them on other ends; the writer who had to spur his talent to earn more and more money to pay for the life of action that kept him alive; the continual tug between the claims of life and literature-- here was a situation not unlike those which had provided James with the germ of a novel or story.³

This glimpse of Stevenson could as well be a thumbnail sketch of a high-powered, occasionally reckless, litigator.

James, on the other hand, once he moved from the security of the family brownstone on Washington Square, off Fifth Avenue, to England, maintained the reserved and distant (some thought cold) composure that perhaps only an expatriate writer with no financial worries in the world can adopt. He seemed comfortable only at

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¹ GRAHAM GREENE, COLLECTED ESSAYS 60-62 (1970).

² *Id.*

³ *Id.*

his writing desk, and is the exact person one would want to have working on contracts and briefs. His weighty seriousness, as Greene points out, was no match for Stevenson's agile metaphors, as when in correspondence Stevenson debated James on the possibility of the art of fiction being able to "compete" with life:

These phantom reproductions of experience, even at their most acute, convey decided pleasure, while experience itself, in the cockpit of life, can torture and slay.⁴

One can imagine the effect of this poised and colorful statement in a courtroom, where "phantom reproductions of experience" are recounted, some of which may have to do with torture or one slain. Or in a mode more instructive, perhaps, Stevenson writes to James that "catching the very note and trick, the strange irregular rhythm of life, *that* [my emphasis] is the attempt whose strenuous force keeps Fiction upon her feet."⁵ Indeed it is the capture of that note and trick, "the strange irregular rhythm of life,"⁶ which will stand out, for the accomplished litigator, as the force that in every instance keeps a jury alert.

But it is James who proves more relevant to courtroom procedure, and not for his rolling, periodic sentences or finely turned sensibility. It was James who nailed down for good in the composition of fiction the concept of point of view. Before his strictures, narrators of fiction were often omniscient or the point of view shifted from character to character or scene to scene, as with Tolstoy and Dostoyevsky and their lesser compatriots in America. No, James said, in more than one of his prefaces and especially in his practice; no, a novel or story that begins with third-person point of view must retain that point of view in every movement to its end, for aesthetic and conceptual veracity to adhere.

His view arrived with such intellectual weight that by the 1940s and 50s into the 60s, American writers and instructors of creative writing were talking noisily as telegraphers about *violation* of point of view, as if it were imbedded law about the human body. Those points of view can be summarized in this way: *first person*, meaning "I did this, I did that," the I I I of so many modern novels; *second person*, meaning "You were the one, you did that," seldom used for a novel although entire stories have been composed in it; *third person*, meaning "She did that, he did this," the mode commonly used in distanced writing of a Jamesian mode; *limited third*, meaning "She or he is I," that is, limited within the skull of the same, singular person--an effect similar to first person, when handled judiciously; *omniscient*, meaning "I am God," or maintain an all-seeing godlike view of the mortals far below, as encountered in Thomas Hardy. The shifting Tolstoyan view, however, often accommodates all of the above, excluding the "I" that entered with Turgenev and Chekov.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

These are the compartmentalized limits, as may be seen, that must be adhered to in a courtroom. The defendant is always "he" or "she," unless she takes the stand, and in that movement takes on the first person "I," as in "I did not do that"--although she may include references, within limits that don't extend to hearsay or impugning others, in the third person: "*He* did it."

The litigator, in referring to this witness, must be solicitous to use the second person, as in, "Is it true that you..." Occasionally this litigator may step back inside his or her first person to say, "I think that you..." but this step is best taken with prudence or is likely to summon the first person response, "I object, your honor!" The only situation in which a litigator may safely use the first person singular ("we" is the province of judge and jury) is when he is called to the bench to explain himself, as in the instance of using first person too freely in interrogations.

Your honor the judge and court must be addressed in third person, to signify her objective distance, and is often referred to in an elevated third that suggests an omniscient entity, as in "If it please the court..." The court, the judge, is permitted to use any person she pleases: "You, sir, are out of order" or "I rule that--" or "She may retake the stand" or "This court, having seen all..."

If the lawyer-litigator does not mind his manners to remain inside the proscribed lines of point of view so solidly set in place in American fiction by Henry James, then that lawyer, though ascending to the colorful language of Robert Louis Stevenson, had best exempt himself from another day in court.