



## The house that Jack built

interview by Benjamin R. Gideon

**J**ACK SIMMONS RECENTLY CELEBRATED HIS SEVENTIETH BIRTHDAY AT A DINNER party with the other lawyers of Berman & Simmons, all widely regarded as perhaps the best group of plaintiff's civil trial lawyers under one roof in Maine. If there is a significant case involving personal injury, product liability, nursing home or medical malpractice in Maine, chances are Berman & Simmons is involved. The firm has developed a reputation for lawyers who get superior results, based on aggressive and ingenious advocacy and, perhaps above all, a fearless willingness to take cases to trial—and win.

In the photograph above, seated left to right: Steven D. Silin, Jack H. Simmons, William D. Robitzek. Standing left to right: Susan A. Faunce, Benjamin R. Gideon, Craig A. Bramley, Jodi L. Nofsinger, Robert H. Furbish, John E. Sedgewick, Michael T. Bigos and Daniel G. Kagan. (Missing from the photo: Julian L. Sweet, Jeff Rosenblatt, Paul F. Macri and James E. O'Connell, III.) *Photos provided by Berman & Simmons.*

The reputation, success, and dominance of Berman & Simmons has, at its origin, the legacy of a trial practice built in the image of Jack Simmons. By the time I started working at the firm, his career was already the stuff of legend. It is no understatement to say that his fearless approach to courtroom lawyering, his larger-than-life personality, and his vision for a firm that would attract and retain the most talented trial lawyers around revolutionized the practice of civil trial law in

Maine. From his dominance as a high-profile criminal defense lawyer to inventing the state-wide lawyer-referral model for plaintiff's trial law, to creating the modern standard for medical malpractice trial advocacy, there is little involving a judge, jury, and courtroom that Jack Simmons has not accomplished. And even after all these years, he still loves the practice of law and has developed little cynicism about the process and the people.

So: Here's an interview with Jack Simmons:

---

#### **How did you end up in Maine practicing law at Berman & Simmons?**

When I was in law school, the road that you were supposed to take was to go to work in State Street or Wall Street. I had tentatively taken a job with a firm in Boston, one of the big major corporate law firms. I was going to be in their trust/estate department because I had been a trust/estate editor of the Law Review.

At that point I shared an office with somebody who never met a client. His whole work was drafting instruments. He would get a call from a senior partner telling him to do trust or whatever and I need it by eight o'clock tomorrow morning, and that was it. That is all he did. I did a little introspection and realized I would rather dig ditches than do that kind of work.

Then I realized that I thought more quickly than I did deeply. I had a big mouth and I wanted to see if I could try cases, because you don't know until you do it. Then I realized that because I didn't have any connections, if I actually wanted to try cases, I had to get out of Boston and find a small city where I would have an opportunity to get into court. In Boston it could be ten years before you got into court. My wife very much wanted to stay in New England. So those were the limitations: small city in New England. I started looking, and ended up at what was then Berman, Berman & Berman in Lewiston in the summer of 1964. Their first offer was \$75 a week, and I got them up to \$125 a week. That was my starting pay.

That first September I tried four or six jury trials and had a love affair with it. They were all small property damage subrogations.

#### **What were the results in your trials?**

I won them all. One of the cases I tried against what was then one of the giants of the trial bar, Frank Linnell of Linnell, Choate & Webber. I won, I think, \$1,800 on a property damage case. I was full of myself until I met a juror at a

cocktail party afterwards and she reminded me of the case. Of course, I had it well in my mind. She said, "Well you know, I really thought Mr. Linnell had the better of it, but we knew this was your first trial and we knew he represented an insurance company, and you looked cute in your new green suit so we thought we would give you a good start." So that is how I won my first case.

#### **Did you really wear a green suit?**

Yes, it was green with a vest. Then I started trying cases. It was a perfect fit for me. I did a lot of civil cases and a lot of criminal cases. At one point I was doing maybe half of the felonies in Androscoggin County. Our practice was really Androscoggin and Oxford counties. It was a general practice, and as I evolved as a lawyer, it became more and more of a trial practice.

At the time I started practicing, we represented one insurance company, and it became my goal to develop the defense practice, to get insurance company defense work, but there was very little of it available. But within a few years we had the largest insurance defense practice in central Maine, and it was clear that we were going to be one of the largest in the state if we continued in that vein.

#### **What was the Androscoggin County bar like back then?**

It was very close because it was small, and except for three or four of us, the lawyers were all Lewiston/Auburn people who had known each other forever. There were many family firms—there were the Bermans, the Isaacsons, the Clifords, the Traftons, the Linnells. In those days there was a fee schedule, which it would be unethical not to follow, so no one competed for fees. You didn't need contracts. People's words were good. It was just expected that if you said something, you lived by it. It was a very nice way to practice.

### **How many trials a year did you do back then?**

Ten to fifteen or more, I would guess. Fifteen to twenty, if you count both criminal and civil.

### **What sort of discovery was done in civil cases?**

By that time, the Rules of Civil Procedure had been passed, but generally you didn't do discovery except for the parties. You did the plaintiff and you did the defendant. Nobody did the doctors. Doctors came to court, you got the medical records, it was pretty informal.

So our practice became a trial practice with an emphasis on defense work, although we were still doing plaintiff's work. Then the doctors in Maine created their own insurance company, Medical Mutual of Maine. As a condition of the Androscoggin County Medical Association joining Medical Mutual, they wanted me to be their defense lawyer. I did it because I was flattered. I had some immediate success, and two of us, Bob Hanson and I, ended up doing 95 percent of the defense work for Medical Mutual throughout the state. I was spending about half my time doing medical malpractice defense work.

### **What was the medical malpractice bar like back then?**

It was much broader. It was not specialized. The conspiracy of silence, at least allegedly, still existed. Medical malpractice in those days was commission, not omission. Today it tends to be omission, not commission, for the most part.

### **Meaning what?**

Meaning that the doctor would do something or allegedly do something wrong—cut the wrong organ or something—as opposed to failing to do something, failing to do a test or failing to work up the lump in the breast or something of that nature, because they were still healers. They practiced medicine.

### **So how would you defend those cases?**

I defended them on the basis of the risk of the procedure: there might have been a bad result but it was not negligent, there was no causal relationship. I went for a number of years without losing a case, and that increased their willingness to send us cases.

### **What were you getting paid?**

We were getting an hourly rate that was roughly \$50 an hour more than our standard auto defense work. We were also adding new auto insurance companies. We had Concord Group, Allstate Insurance, Prudential, Maine Body & Casualty, and a host of others. We sat down and looked at the future and realized that if we continue to go the way we were going, we would grow to more than forty lawyers. The insurance business was just booming.

But we also realized that none of us had started out practicing law wanting to be insurers' defense lawyers. So we took an uncalculated risk: We resigned every one of our insurance clients in one swoop, except for Medical Mutual.

We thought we would have to pull our belt tight, because we were finishing the cases in the office and not taking any more. We sent out a general letter to every member of the Maine bar essentially saying, "You guys all know us as trial lawyers and mostly defense lawyers. We are now giving up the defense practice and we would love to do your trial work." By accident, it turned out to be a great marketing decision and a great economic decision, because we started getting referrals.

### **You succeeded in building a practice of uniquely talented and intelligent individuals—how did you attract these lawyers and keep them together practicing under one roof?**

I always had a vision of a firm as a team. As I looked around the state, I saw several law firms where there was an excellent trial lawyer, maybe two, but not a firm of excellent trial lawyers. I realized that people's egos got in the way, and I vowed not to let that happen to us, and to hire the very best people I could get, and give them opportunity and credit.

We continued to do the medmal defense work for a long time, until I was sixty years of age, which was ten years ago. When I reached sixty, I realized again that the future was no longer me, and that if we wanted to continue to be a vibrant firm, the people behind me had to be able to plot their own destiny. They very much wanted to give up defending for Medical Mutual because, first, if we were going to have a referral practice, the first thing that people call you on is a medmal case—and we would say we couldn't take it. They would go out and make contact with other lawyers, so it was counterproductive.

Again, we told the bar that we were now in the plaintiff's medical malpractice business. Medical Mutual was so upset



that they offered to increase our hourly rate. When I couldn't commit to continue, they called my partner, Jay Sweet, who was doing some defense work with me, and offered to fund his own office. We made relationships with lawyers that we hadn't made before because we did good work on their medmal referrals. We were doing trial work for about five hundred lawyers across the state.

**In terms of plaintiff clients versus defendant clients, did you associate more philosophically with one than the other?**

I was definitely a plaintiff's lawyer. Representing insurance companies was stock and trade as money, but there is no emotional satisfaction to it other than just winning. It used to be that the doctors took these cases very seriously and very personally, so to represent them you had the same emotional commitment that you would have if your client was a plaintiff. You could identify with those old-time healers—even if they

made a mistake, it was personal and they felt terrible if they did something wrong. That changed about the time we gave it up, because medicine was becoming a business. The doctors became employees of large groups or hospitals, they became business managers, and they stopped being healers. The nature of malpractice changed. It became omission: not enough time to read the chart, not ordering the next test. The new business of medicine is no different from any other business, and I would prefer to represent a plaintiff.

**How did the referral business grow to the extent that it did?**

Well, it was because we were excellent at providing service for other lawyers. We limited our practice to trial work, so we were not competing with them. We sent the clients back if they needed an estate plan or a deed or whatever. We got very, very good results, because we tried cases and we had good lawyers and tried them well.

**Was there any similar model for a referral law firm doing plaintiff's work similar to Berman & Simmons, before you started it?**

A bunch of plaintiff's lawyers who all wanted to get referrals, but nobody did it in the same way we did. Because we were, one, aggressive, and, two, we had a number of different lawyers capable of doing the cases. Even today, you can't find a Maine firm with a significant number of lawyers who are actual trial lawyers.

**How do you explain how good trial lawyers with big egos have all been able to coexist in one firm?**

It's because we recognize what we are attempting to build, and everybody is bright, and we talk to each other. We were able to create a spirit that we are an entity. We never allowed compensation to be based on formulas, so there was little or no internal competition. People took joy from their partners' successes. I'm as pleased when somebody in the firm wins a case as I am when I win a case.

**How has the trial process changed from the time you started practice to what it is like now?**

Well, trial process has gotten paper-heavy, much more technical. The old rules of comity are gone. People are super-technical, just like in the big cities, so now you need to dot the I's and cross the T's. It's harder to get jury trials, because of growing demands on the judicial system. Judges used to be on circuit, and they are less and less on circuit now. They are managing the docket order. Eighty percent of a case today is paper that doesn't need to be shuffled. In the old days there was little of that. You tried a case, you won or lost, and you went on to the next case. But Maine came into the modern world. It used to be that there was no such thing as a six-figure verdict. Damages were smaller, even not counting the change in the value of the dollar—just smaller.

**What did you like about doing criminal cases?**

It wasn't shuffling paper, it was fact-based. And when you defend, it's still mostly opening argument and cross-examination: a great way to try cases. It's fun, and the stakes are high. I tried either twenty-seven or twenty-nine first-degree murder cases. There are no higher stakes than that.

**When you defend a first-degree murder case, you have to assume in most instances, you are going to lose those cases, right?**

I lost one. Well, depending on how you count. I lost one first-degree murder case in my career.

**Really?**

If you count a conviction for manslaughter as a win. That is why I say it depends on how you count. I lost one, and in that one was I faced with a confession.

**Can you tell us about some of the higher-profile criminal cases?**

There are three that stand out as very high-profile. The first was the Schwartz/Dongo murder trial. It involved a movie being made in Maine where it was alleged that Herbert Schwartz, a Portland businessman, had raised money for the film and brought it to Maine. In the middle of production, towards the end of production, they ran out of money and the movie director was murdered.

The allegation was that Schwartz hired Truman Dongo to kill the director to get the key man insurance that was on the director's life so they could finish the movie. It was a huge, high-profile murder trial. I represented Schwartz and Dan Lilley represented Dongo. We tried it for three and a half weeks in Portland. We got a "Not guilty."

**What was your defense?**

In my opening, I explained reasonable doubt and presumption of innocence and the other important things, and then said that this case was different—it was more Perry Mason, because I was going to tell them who the killer was. I named the killer.

**Who was that?**

It was another person involved in the movie. The state prosecuted Schwartz and I prosecuted this other guy. Schwartz was found not guilty, so that tells you something. It was amazing as a defense tactic, to stand there saying I don't have to prove anything, but I am going to tell you who did it. That was for a long time the most famous criminal trial in Maine.

Then there was the Raia case, which Dateline made a television documentary about, a show called "City Confidential."

**In that case, the defendant, Sabino Raia, shot and killed three people.**

Right, and they were unarmed. The Portland police chief said this wasn't murder, this was assassination.

**So how do you explain how you were able to win that case?**

We were able to try to pick a very intelligent jury. The concept of self-defense is one of perception of actuality. We were able to convince the jury that Sabino Raia objectively had a right to—and subjectively did—perceive himself to be at risk and that he was defending himself and his girlfriend. We were also able to convince the jury that when they looked at the circumstances, it was not three separate acts, but one continuous act resulting in three deaths. When you reach the point where you are chasing a car down the street with the gun in your hand as the third person is trying to get away and you pull the trigger, it is not a separate act which you sat down and thought through. You start off defending yourself against three people and it is one continuous act, not three separate acts.

The third high-profile criminal case was a young man who was accused of shooting a Bates College dean through the back. I often thought about what it must be like to have your son, a junior in college—never had any trouble from him, a member of the swimming team at Bates College—call on the phone and say “I'm in jail charged with attempted murder.”

**What happened?**

The dean was shot in the back while he sat at his kitchen table. The bullet lodged less than a millimeter from his heart. He had had discipline issues with our client, who was about to be expelled.

**Did they have any physical evidence?**

It was very interesting. The bullet had splattered, and I said, it was like a millimeter, pieces of it were a millimeter from the heart. The local surgeon wanted to take it out and they got second opinion. The second opinion doctor in Boston said taking it out was too dangerous because it was so close to the heart, they could injure the heart, so they decided to go with the Boston doctor and it was not removed. The State brought in this expert from John Hopkins who attempted to measure mass by x-ray and concluded it was a .22 caliber gun. They could put a .22 caliber gun in our client's hands.

We said that you can't measure three-dimensional mass in a two-dimensional plane. Among other things, we hung a cucumber from the ceiling and took X-ray pictures of it from different angles and then brought in a ten-place view box to the jury. We put up ten different X-rays of the same cucumber, in different angles, and one point it looked like a fifty-cent piece; at another point it looked like an elongated penis. It was clear the angle was so important that you couldn't possibly measure the difference between a .22 and a .25, no matter what your mathematical formulas were. That was our thesis. Then we brought in a radiologist to so testify. But if he had to guess, it was a .25.

**So was that a defense verdict?**

Yeah. The other big thing they had, they had an imprint—a foot imprint and a cast of the shoe—which was consistent with, but not diagnostic of, the shoe that was in our client's closet. We deposed the manufacturer of the shoe. He essentially testified that every college kid in the country wore those shoes or the mark-off of those shoes. There were literally millions of them out there in that size. That negated that issue.

The case was well-trying and hard-fought, and the jury returned a “not guilty” verdict. And it was interesting that one of the jurors was quoted in the newspaper as saying “We thought he was probably guilty, but not beyond a reasonable doubt,” which made me very happy—it proved that the jury system works.

I lost a lot of friends over that case, because I had been actively involved in the Bates community. I was a Bates graduate. When I defended that kid, many of the Bates community said “How could you do that?” I said, “You know, if you read in the newspaper that a black kid was tried for shooting a dean at Duke and no local lawyer would defend him, you would be the first to be signing petitions.” But that was not persuasive to them.

**How do you deal with the fact that you almost certainly represented many criminal defendants who were guilty?**

I believe in the system. Never, ever ask what the alternative is. The rule is that you have to find somebody guilty beyond a reasonable doubt, and the burden of proof is on the state. I believe that. If they can't do it, that is their failure. Because the alternative is to assume guilt. I'm not necessarily pressing innocence, I'm pressing they don't have sufficient evidence of proof beyond a reasonable doubt.

**Do you think there have been significant changes in the way criminal trials are prosecuted and defended?**

Sure. There had been a swing to the left and now it will swing back to the right. The swing to the left was caused by the obvious mistreatment of defendants, physically, emotionally, and mentally, by unchecked police forces nationwide that adopted the assumption that the ends justified the means. That's a police society which we specifically reject, and there was no way to correct that situation except by penalizing the government when they got evidence in an illegal manner.

Now, the courts have been chipping away at constitutional protections, essentially adding an element of intent to evoke the rule of suppression. It isn't enough to show a violation of rights, you have to show an intent to violate rights. That is really the summary of what happening in criminal law. That was because people were concerned that guilty people who confessed were going free. If you put it on a seesaw, the balancing of the social equity of a guilty man going free versus a police force that could do anything they wanted with their guns and batons without remedy, I have to say that the possibility of the guilty going free is better.

**You don't see that many acquittals in high-profile criminal cases in Maine anymore. They almost always result in convictions these days. Do you think that that is the result of change in the way that cases are prosecuted or defended?**

I think what has happened is that you find very few really good trial lawyers defending criminal cases.

**Why do you think that's the case?**

Most criminals in Maine are poor. Most people accused of crime in Maine are poor. It costs a lot of money to hire good private counsel. You are talking six figures, or high five figures if you are lucky, and most people can't afford that. So they either get inexperienced private counsel, or, more likely, court-appointed counsel. In Maine, we have a court-appointed system where there is no training and there is no oversight, and we have some lawyers, mostly young, who live on what they earn from the court-appointed system, which pays minimum dollars with caps. You can have a felony where you get \$50 an hour with a twelve-hour cap. That is \$600. You cannot try a criminal case for \$600. You just can't.

**Is that something that has changed, or were you getting paid reasonable money for the criminal defense cases you tried?**

It was not reasonable money so much as that it was closer to what the private bar was getting. We were working for something like \$35 an hour for court-appointed and be charging \$50 or \$70 a hour privately. That has spread: Now, people are charging as much as \$500 an hour privately. We could not operate our office for \$50 an hour.

**In terms of professional and personal satisfaction, did you find more in doing criminal or civil or certain types of cases than other types of cases?**

Well, in the first place, I like trying cases. You become involved in the case. It becomes my case and I want to win, and it doesn't matter what it is. That's the short view. The long view is that I like representing people. People who care. So I am much happier representing criminal defendants and individual plaintiffs or individual doctors who have a stake than I am in representing business institutions where we only talk about the money, which is a business judgment. It's hard to be excited in those cases about anything other than the fact that you like to win. When you represent the victims of society—whether the case is criminal or civil—and you accomplish something for them, there is a real feeling that has nothing to do with money. I've been doing this now for forty-four years, and I am the least cynical person you will ever meet. I believe in the system and I believe in people.

**Do you think there are many lawyers out there who are cynical?**

There is an overwhelming number of cynical lawyers. Think about, for example, the work of the workers' compensation defense bar: lawyers who spend their whole life calling people fakes. That's offensive, and the insurance bar, the automobile bar, they spend their whole life minimizing injury. It makes them sour, unhappy people. It really does. There are exceptions to everything, but there are few defense lawyers who are happy people. They like the money they earn, but they don't get joy from their practice. There are also plaintiff's lawyers who think of it as a business and they forget they are representing human beings. They are business people. They get less joy from the practice. Some of them work to handle a huge volume in an economical way to return a high yield. Some of them forget, or they don't care, that they are dealing with live human beings.

But when you take the case and deal with people one-on-one, when you realize the significance of the injury to them and how it has affected their life, and you try to translate that so that the jury understands—that's an art form. To me it is a great way to spend a life.

**Can you think of any significant trial losses you had?**

I haven't had many.

**Anything that sticks out for you?**

In twenty-seven years of doing medical malpractice defense work, I had two adverse verdicts, and both of them were overturned. So as a defense lawyer, I would count no losses. I've only lost one murder case, if you count the way I count.

**What is it that you think most explains your success?**

I think it is an art of illogical persuasion.

**What do you mean?**

Lawyers use inductive and deductive reasoning very well, and many of them would be great non-jury lawyers, but don't relate to human beings and to what is convincing to human beings. A prime example is of a case I tried not very long ago against a very good defense lawyer. My client was totally disabled with depression and was on Social Security disability. He spent his life watching television and maybe walking down Bates Street to Kennedy Park and back, in Portland, and that was his whole existence. He was involved in an automobile accident and suffered a significant neck injury, but it didn't change much about how he lived, and so the insurance carrier didn't think he had a significant loss. Zero lost wages and a bunch of medical bills, and that was it.

I argued to the jurors that if you have 90 percent and you lose 10 percent, you're left with 80 percent—not a big deal. But if you have 20 percent and you lose 10 percent, it is a huge deal. I was able to make them understand that. The crash took away from my client all of the essence of the life he had. The jury awarded him close to \$300,000, in a case where my demand was \$50,000, the offer was \$45,000, and we both got stubborn and went to trial over \$5,000.

You have to get past the logical and get to the emotional. It's true.

**Do you think jurors today are open to persuasion?**

It's not just emotions, it's truth, and I do think that jurors, for the most part, want to do what's right. I really do, and they can be convinced. There are some cynics who think everybody who makes a claim is cheating, that it is going to drive up their insurance costs, and you can hope you can identify those people and get rid of them on *voir dire*. I really trust people, and I think that for most people, it is a sacred honor and a duty to be on a jury; people want to do it and want to do what is right and to do justice. Now, if you have a client that comes across like a cheat, you lose. Jurors have to like your client for it to work—or, at least, not dislike him, not think he is trying to get something for nothing.

I had a sixty-year-old lady who got a whiplash, and Allstate Insurance Company said there was nothing they could do for her. She had like \$1,800 in medical bills, she was already on Social Security retirement, and they said "It's worth nothing, settle for \$3,000." It was clear liability. The only joy in life for this lady had been going to a nursing home and playing the piano and leading the sing-along, and she couldn't do that any more, because outstretched arms would hurt her neck. The other thing was that she loved her grandkids. She used to hug them, and they were toddlers. She couldn't lift them anymore. Her way of dealing with it was to retreat. She became a hermit in her own apartment.

Allstate offered \$3,000—"We will never give you a nickel more"—though at the time of trial I think they went up to \$5,000. The jury gave us \$75,000, because the neck injury took from this lady all the joy of living. I never talked about pain and suffering other than to establish its existence, because nobody likes to hear about pain. But the jurors could understand what happened to this poor lady. The doctor established that she was no longer able to play the piano, and that was all I needed. I didn't have to talk about how much she hurt. I talked about what she couldn't do, about her life, and it was true. She sat and watched soap operas and she probably deteriorated mentally because she didn't exercise her mind. She lost the joy of living. That is a real loss. You will never get her insurance company to agree it is a real loss, because it doesn't fit into the computer: so much in medical bills, no lost wages, no broken bones, exacerbation of an underlying arthritic condition made it symptomatic. "Three thousand dollars sound right to you, maybe \$4,500?" Jury said \$75,000.

**How is your view of Berman & Simmons as it exists today?**

We are a juggernaut. 