

## **"MY FAIR WITNESS - THE METAMORPHOSIS"- THE CRITICS RAVE**

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On the eve of trial, a principal expert said to me: "This is a tough case. If the jury doesn't like your client, you can't win". This statement was hauntingly accurate. Lawyers tend to focus on developing the theory and theme of the case without paying attention to the way the plaintiff is presented. Some lawyers even try cases in the "factory line" technique. Lawyers tend to cookie cut their trial technique to fit the mold. That usually won't work. What is clear is that cases are won by developing the decent character, sincerity and honesty of our clients. It has been proven to be one of the most critical aspects of jury decisions<sup>1</sup>.

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<sup>1</sup> Petty, RE and Cacioppo, JD (1986). *Communication and Persuasion: Central and Peripheral Routes Attitude Change*, New York, New York, Springer-Verlag; Batson, CD (1991). *Altruism Question: Toward a Social Psychological Answer*, Hillsdale, New Jersey, Erlbaum; Cialdini, RB (1993). *Influence: The Psychology of Persuasion*, Quill; Batson, CD (1997). *Empathy and Attitudes: Can Feeling For A Member Of A Stigmatized Group Improve Feelings Toward That Group?*, Journal of Personality and Social Psychology, Volume 72, pp. 105-118.

In a recently completed three week trial, the first words I heard from the jurors as they filed out of the jury room after verdict was: "Where's Tom?" who was the plaintiff. The jurors said they liked Tom and wanted to congratulate him.

It happens regularly that six months before trial we catch ourselves in daydreams at our desk, on the train or riding in an elevator. The dream has the image of twelve pairs of eyes (the jury), looking at us and our client without expression. The judge in this dream has a quizzical look on her face. The plaintiff testified on direct examination just fine. But on cross-examination, the plaintiff became belligerent, offensive and now unlikable. Thus, the image of the blank look on the faces of jurors and the unknowing expression on the face of the judge appears.

The key to a successful result in trial is the theory, the theme and your client. The theory will develop in voir dire, opening statement and by testimony of the witnesses. The theme comes across the same way, repeated again by testimony, illustrations, photographs from opening to closing. Trial lawyers take cases because they believe that the theory is one that will sustain legal and factual challenges by defense. The themes can be worked out creatively by knowing the record, the

testimony of witnesses and all of the facts. But the *case* is hinged on the client, the plaintiff, and how the jury perceives him or her.

The plaintiff is the reason we are in court. Suppose your client, the plaintiff, is a 38-year-old male construction worker. He has a shoddy 8th grade education. He has a chip on his shoulder and a bullying personality. With a dose of attention deficit disorder, he also has bravado on top of it all. He has made a promise to his lawyer that he is dedicated to his case. He will travel to his lawyer's office anytime. But now his marriage is in turmoil. His three young children are suffering. His injuries have contributed to the freefall decline in the business that he runs and depends upon. Now that he says he is committed, he will test you. He will be late for a meeting four weeks before trial. He will cancel an appointment three weeks before trial. He will have moved out of his home. His wife complains that he has become unreasonable. He renews his promise not to let his dedication to this case and the upcoming trial wane.

Knowing that one of the keys to success at this jury trial is how the plaintiff is perceived by the jury, it is critical that he or she be well prepared, both for direct and ultimately for the cross-examination. Then there is courtroom demeanor. The first

hurdle to get over is convincing this client to acknowledge the importance of following your instructions. That literally means taking your client to the courthouse to show him or her the inside of an active jury trial courtroom. Show your client where you might be expected to sit, where the jury will be located and where the judge is perched. Let the client know from the beginning that he or she needs to be prompt and ready to go each day of trial beginning with jury selection. Explain to the client that the jurors are always tuned in. They see and hear most everything.

Give the client instructions on voice projection, eye contact and posture. Carefully explain the process. Talk to the client about how to answer your questions and then spend time on responding to defense counsel's cross-examination. Train the client on how to respond by "qualifying" the answers to leading questions of the defense lawyer. We know that a competent cross-examination means the lawyer is testifying for the witness. What is suggested here is that the client counters that technique by either asking questions or elaborating on answers. Of course, the good cross-examining attorney will counter the "qualifying" witness by demanding that the answers be "yes" or "no".

When deposing the most significant defense witnesses, video tape their testimony. Video tape your client's question and answer exercise in your office. Assemble the important photographs, charts and records. Have them enlarged on sturdy boards. Use the videotape and the enlargements at your structured focus groups. Ideally, use two or more focus group sessions to test-drive the case, the personalities of the key witnesses, including your client, as well as exhibits, photographs, illustrations.

Structured focus groups can be done economically. Depending on the case, if you were to gather your own group of participants by newspaper ads, for example, you may be able to handle the whole project for under \$1,000.00. If you use a service, trial consultants or a combination, you may be able to do the process for \$3,000.00 or less. With a structured focus group you can test the theory, the theme and most importantly the client. Focus groups will point out the most glaring annoyances and assets of the client's personality. "He knows too many medical terms". "How could he not have health insurance? He has children and a wife!" "Why doesn't he sit still?" "He has a

strong voice." "Isn't it his responsibility to follow-up when his doctor told him to?" "Why was he using the machine that way?"

With the focus group's reaction to the client's short video comes hours of courtroom training by you and your consultants. Develop courtroom behavior with your client. Make sure that your client understands that he must always appear to be listening to the proceedings and show his intense interest. It doesn't matter if you are preparing a two-day auto rear ender trial or a three-week product liability, wrongful death trial. Have the client equipped with note pad and pen at each trial day, beginning with jury selection. Have the client get involved with jury selection and understand who these jurors are when they are selected. Even if the client were to just write his grocery list, the birthdays of his family members or notes to his out-of-town friends, he should be busy and look busy as though he were participating with his lawyer. When he is not writing, he should look attentive. His hands are folded on the table. He may look at all of the jurors from time to time. He should make eye contact with all of them. He should be respectful of the jury, the judge and the court personnel. There should be no water

at the table since the jury has nothing to drink. Let the defendant's lawyers drink all of the water they want.

When testifying, your client will answer questions directly. He will not argue with the defendant's counsel. He will answer the opponent's cross-examination questions with as many necessary "qualifiers" as the court may allow. This takes a lot of practice. Some defendant attorneys like to impeach on the most insignificant facts. Let them. Teach your client to answer cross-examination questions without answering "yes" or "no". If handled well, the defendant's lawyer will look like he is bullying the plaintiff. Sometimes a judge will let a plaintiff go through his monologue even over defense counsel's objection. The court will say: "You opened the door counsel."

Be politely blunt. Tell the client what the focus group said. For example, some witnesses will start each answer by: "To be honest . . ." Remind the client to drop that phrase or any other phrase that the focus group or you find undesirable. Every client is different. Some are able to learn faster than others. Some are not able to learn at all.

Let the client be as passionate as she chooses to be about her case. At the time of trial the client and you will know the facts much clearer than when the depositions were taken.

Take the plaintiff into your office, close the door and be that defense counsel. Badger him. Fire off question, after leading question. The lawyer knows the case backwards and forwards by this time. The client will make factual mistakes in his practice sessions. Over time, the factual errors will be fewer and fewer. Use timelines to help the client remember the important events in order. Fix those factual mistakes by repeating the questions, allowing the plaintiff to correctly answer.

The goal is to win your case. In furtherance of that goal it is important to develop the courtroom demeanor of your client.

1. Courtroom demeanor.
  - a. Establish rapport with the client to create a trusting, open relationship. The client needs to feel "safe" and be open to develop "appropriate courtroom behavior".
2. Behavior assessment of the client.



- a. Evaluate the behavior your client exhibits when interacting.
- b. Evaluate the behavior your client exhibits when responding to others.
- c. Evaluate kinesic behavior (non-verbal) of the client.
  - Teach your client to be aware of his/her non-verbal behavior.
  - Non-verbal behavior includes;
    - i. Facial gestures;
    - ii. Posture/body language;
    - iii. Non-verbal behavior during direct and cross-examination;
    - iv. Non-verbal behavior upon entrance and exit of the courtroom;
    - v. Non-verbal behavior when seated at the counsel table.

3. Strategic verbal responses.

- a. Teach your client how to respond to leading questions.

- b. Teach your client to respond to double negative questions.
  - c. Role play with your client, using defense theories. Develop a script for the client to refer to in trial preparation.
4. Knowledge of depositions.
- a. Have your client read his/her deposition and know its content.
  - b. Have the client read the depositions of key witnesses, including the defendant or defendants.

With a good working knowledge of his/her deposition and that of the key defense witnesses, your client will become a confident and poised witness.

### **CONCLUSION**

Human behavior, with the added pressure of the court and a jury, can be unpredictable. Lawyers strive to bend their cases to appeal to the jury. The stage is the courtroom. The actors are the witnesses. The critics are the jury. If they like the "play", the critics rave. If they don't, the play closes. The other side wins. One of the goals is to direct the client in a winning role.