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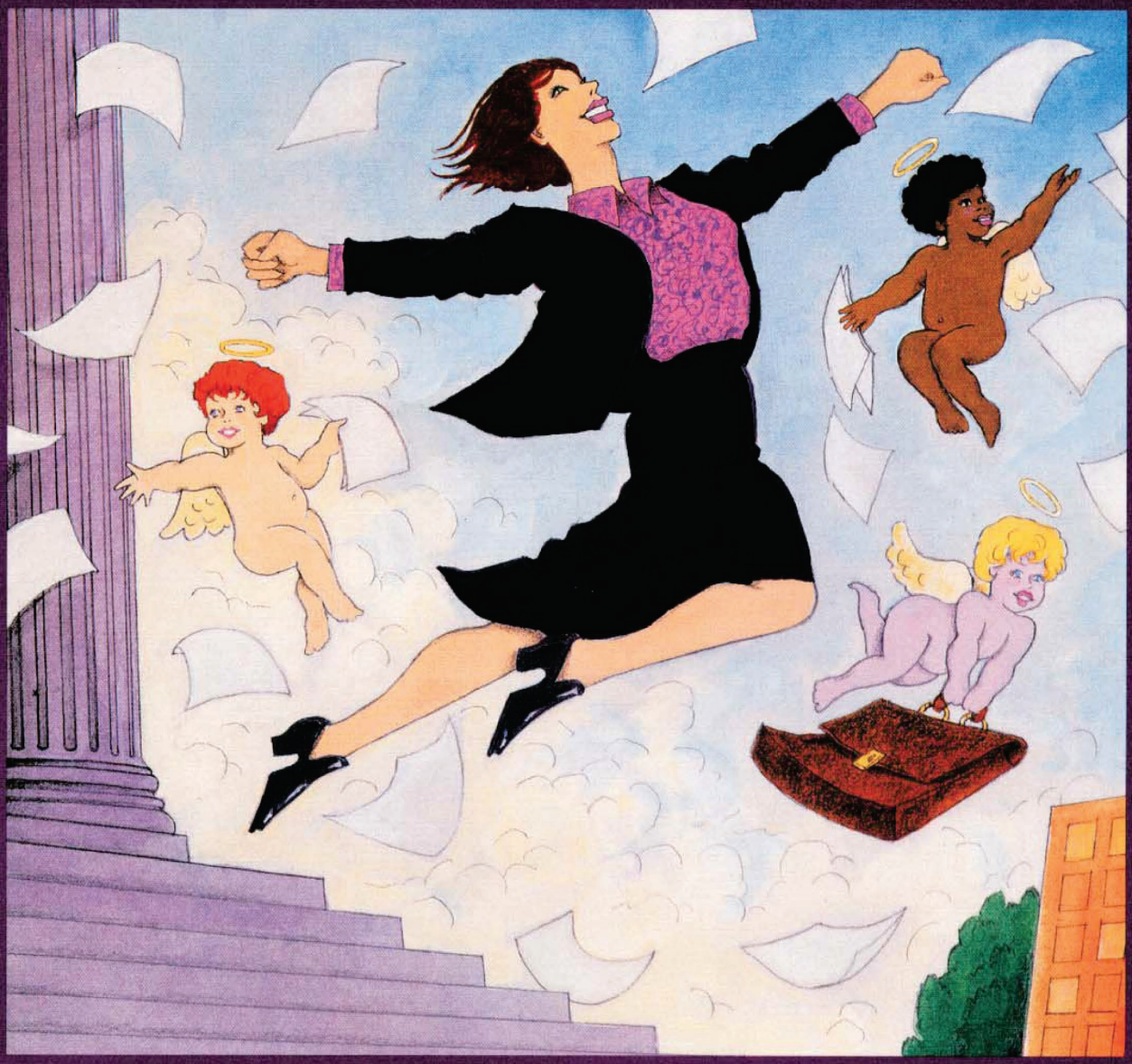

Winners · Witnesses · Writers

Streetwise Litigation: "Legitimate" Tactics for Operating Outside the Rules

by Gary C. Dobbs and George R. Speckart

In the film *The Untouchables*, Elliott Ness (Kevin Costner) finally convinces the Chicago beat cop (Sean Connery) to help him catch Capone. The beat cop sizes up Ness and asks him, "What are you prepared to do?" Ness replies, "Everything within the law." The beat cop responds, "And *then* what are you prepared to do?"

Like Ness, many litigators approach a jury trial well armed for a legal battle, fully stocked with case law, briefs, motions, documents, and exhibits. Once the case reaches the jury, however, they often are faced with a situation that has more in common with a knife fight. The trial lawyer who is best prepared for this reality is likely to be the last person standing when the jury renders its decision.

It is not unusual to find jury awards in contemporary litigation that are the result of one side's simply "outlawyering" the other. Even when the evidence is, by objective standards, ambiguous and controvertible, aggressive courtroom tactics outside bland, accepted conduct can make the difference between jury awards of zero or hundreds of millions of dollars. Aggressive courtroom tactics that are effective do not require abrasive, unpleasant, or strident conduct. As we discuss in the following points, they require a diplomatic combination of tact, tone, timing, and tenacity, in which "killing with kindness" is the ultimate weapon.

Cross the line—but choose your spots. In his opening statements in *City of Long Beach et al. v. Exxon*, defense counsel Howard Privett suddenly raised his hands in the air and shouted:

> Out of thousands of Exxon employees, the plaintiffs cannot bring forth one single witness to support their claims. There isn't even one disgruntled employee out of all these thousands that will come in here and testify that the plaintiffs' theory is correct. The plaintiffs' theory is fantasy. It's just fantasy!

Plaintiffs' counsel dutifully objected to the obvious argument, and federal district Judge Tashima sustained the objection. Privett very politely thanked the court and continued with his opening as if nothing had happened. Six weeks later, in post-trial interviews, jurors remembered the substance of Privett's "argument"—but they did not remember that he was caught "crossing the line." Exxon won the case. 1993 U.S. App. LEXIS 31164.

After watching courtroom dramas for the past 20 years in dozens of venues across the country, we find a consistent trend is apparent: The counsel team that is willing to bend the rules and cross the line is more likely to win the jury verdict. The team that is the most cautious, operating out of a consistent concern about stepping on the judge's toes, operates at a tactical disadvantage. Of course, there are appeals issues, and such legal considerations bring into focus the central question addressed in this thesis: Should the litigator put the jury first, even ahead of the rules of the court? Although it would certainly not be reasonable to argue that the answer is always yes, many litigators are too hesitant to utilize what we like to call guerilla tactics from time to time in order to secure a victory. Indeed, after working with hundreds of trial attorneys, the impression emerges that the most successful ones operate from the premise that rules are made to be broken, and that litigation is "anything you can get away with"—within, of course, ethical constraints.

The line can only be found by crossing it. In a trade secrets and misappropriation case in which a corporate plaintiff was suing two individuals, the roles of the attorneys were reversed: The plaintiff corporation was represented by an attorney who normally handled defense litigation, while the individual defendants were represented by lawyers who otherwise handled only plaintiff cases. The corporation's lawyers were advised to provide a lengthy opening statement (well in excess of two hours) at the outset of trial. Lead trial counsel responded to this suggestion by declaring, "I can't do that—the judge won't let me." His subsequent opening lasted about 100 minutes.

Opposing counsel then gave an opening for the defense that lasted two *days*. The judge simply watched while the plain-

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tiff's case was buried in the avalanche. During the remainder of the seven-week case, the plaintiff's attorneys never were able to gain control of the trial and ultimately lost the case.

What happened? The plaintiff's attorneys (more usually defense counsel) attempted to comply with what they anticipated to be the court's reaction to a lengthy opening. They thought they knew where the line was, but they didn't—because they never tried to approach it, let alone cross it. The defense (usually plaintiff lawyers) decided to push the envelope and take whatever they could. The difference in these two approaches determined the entire complexion of the trial and drove the ultimate jury verdict in favor of the team that was willing to take risks.

You cannot serve two masters. For the purpose of a jury trial, it is the jurors who have the votes. Of course, the court rules on motions, renders directed verdicts, and so on, and some cases cannot be won except at the appellate level. Nonetheless, the fact remains: In a jury trial, you cannot serve two masters.

Risks in strategic decisions are assessed primarily on either the basis of their effect on the jurors or some other basis—usually the presumed impact on or reaction of the court. When the estimated impact on the judge dictates procedural or substantive decisions made by litigators in front of a jury, the result can render a trial team unable to navigate effectively and strike decisively in the courtroom jungle. More effective criteria for strategic decisions would be "Will this influence the jury in a favorable manner?" and "Can I get away with it without creating any permanent damage?"

Once it is decided that a case will actually be tried to the jury, the legal parameters of the case cannot drive the choice of courtroom tactics. The primary battleground—the fulcrum for making strategic decisions—is the hearts and minds of the jurors, and who they are. This is not to say that legal parameters should be ignored. Rather, the present thesis merely asserts that a jury trial is won or lost on nonlegal issues, and that combat in this realm operates using an entirely different, far more primitive set of rules—one too often relegated to the background of the trial. Streetwise litigation is a matter of focus and state of mind. The primary issue is a choice between judge-centeredness versus jury-centeredness; between accommodating one's strategy to the law versus tackling head-on the murky "heart of darkness" in which jurors' decisions are formed. The implications of this choice range through all aspects of trial, from voir dire to closing arguments.

Many of the pivotal mistakes made by litigators occur at the very outset of trial, during the jury selection process. The following is an illustrative example: In a case involving fraud and breach of contract, pretrial research indicated a strong antipathy in the venue between many African-American women and key defense witnesses. As a result, the defense team was advised during jury selection to use peremptory challenges on two particularly vociferous African-American women. Defense counsel declined, citing concerns over a *Batson* challenge and political correctness (the judge was Hispanic). During deliberations, these two women led the charge against the defendant; ultimately, hundreds of millions of dollars were awarded by the jury. Instead of focusing on the jury—who they are, what they're going to think—the defense team focused on legal issues and the appearance of propriety. Even if the *Batson* challenge had been made and won by the plaintiffs (an unlikely outcome when a juror questionnaire is used), the result simply would have been a reseating of the stricken jurors.

It is interesting to note also that, in this trial, defense counsel were called into chambers by the judge after a string of continuous, aggressive tactics used by plaintiffs' counsel. Examples of such tactics included making arguments through speaking objections and habitually inserting comments in front of the jury that amounted to floating parcels of the closing statements throughout the defendants' case-in-chief. The judge told defense counsel, "If you don't make objections, I can't do anything about this." Despite several cautionary admonitions from consultants and even the court, defense counsel instead bet on a conservative approach throughout the trial. The result was the largest plaintiff verdict in the state that year.

Defense attorneys tend to focus on *not losing* rather than on *winning*. The preceding example is not an isolated or unusual occurrence. Indeed, after watching dozens of jury trials to verdict, we had the distinct impression that plaintiff attorneys are more likely than defense attorneys to bend the rules in their zeal to capture the hearts and minds of the jury. There seems to be a greater conservatism among defense attorneys, along with greater focus on protecting the record for appeal and comparatively less emphasis on winning the approval of the jury at any cost. This trend of increasing bold-

ness on the part of plaintiff attorneys is one of several factors that have led to the staggering increases in damages awards in the past two decades. Although protecting the record is obviously critical, it is also true that many cases are ultimately settled while on appeal for an amount that is dictated at least in part by the size of the prior jury award. In short, there is seldom a defensible reason to place the record—or even the bench—over the hearts and minds of the jurors insofar as tactical priorities are concerned.

Observation of plaintiff and defense litigators reveals distinct differences in how they assess and manage risk. Plaintiff attorneys generally are not trying to protect a client relationship. They are simply trying to win. They know that after the case, the client will be gone. Defense attorneys, on the other hand, often are encumbered by a myriad of extraneous considerations, including competition among the firm members or other law firms, relationships with corporate counsel, and, especially, extension of the corporate client's continued loyalty to the firm. Although these considerations are not trivial, they can compromise the ability to fight effectively against more nimble and aggressive opposing counsel.

Defense attorneys often orchestrate courtroom strategies based on the goal of not losing when instead they should behave more like the opposition and concentrate on winning. Believing that a case can be won simply because the plaintiff has not carried a burden of proof is a fallacy and leads to impotent courtroom strategy. Every jury trial is like a chess game or a sport, where the best defense is very frequently a good offense. Here are two examples of the types of boldness we have seen exhibited by plaintiff attorneys in the past few years:

- In a catastrophic personal injury case involving a paraplegic plaintiff, plaintiffs' counsel filled the audience pews with paraplegics and quadriplegics who simply watched the jury throughout the entire trial.
- In another case, plaintiffs' counsel set up video cameras around the courtroom and used tapes of prior witnesses' in-court testimony to impeach later witnesses. Defense counsel did not know how to access the same tapes and thus never used them.

The juries in both instances awarded the plaintiffs substantial damages. Although the specific events may not have necessarily *caused* the losses to the defendants, they serve as exemplars of how defense counsel can be out-hustled and out-innovated by tactics that seem more and more ubiquitous in courtrooms nationwide.

Only hits are counted. Many litigators assume that a judge will deny a request and thus elect to not make the request at all. For example, in venues where supplemental juror questionnaires typically are not used, many lawyers assume they should not even bother to ask for one. In essence they create a denial by the court without even making a request, which, of course, violates Wayne Gretzky's rule that "you miss 100 percent of the shots you don't take." Juror questionnaires present a vital strategic opportunity to tilt the trial playing field by shaping the jury panel through scientifically derived strikes using various psychological measurement techniques. *See* G. Speckart and L. McLennan, "How to Tap the Potential of the Juror Questionnaire," ALI-ABA's Practice Checklist Manual on Trial Advocacy (2001), IBN # 0-8318-1405-5; *see* also G. Speckart, "Identifying the Plaintiff Juror," *For the Defense*, 42:9 (2000). Juror questionnaires also provide an invaluable tactical weapon in supporting cause challenges and defending *Batson* challenges. Our experience is that challenges for cause frequently determine the outcome of a jury trial because every cause challenge won is like taking a peremptory challenge away from the other side.

In one conversation with a defense lawyer, we recommended a juror questionnaire for an upcoming asbestos case in Baltimore. She said, "Judges don't allow them in Maryland." Upon informing her that we had just used one in a Baltimore trial, she then declared, "Well, asbestos judges do not use them." She had not asked the judge in her trials whether he would accept the use of a juror questionnaire to evaluate the venire because she simply had made up her mind that the judge would rule against it. The fact remains that no statutes anywhere in the 50 states (to our knowledge) preclude the use of such an instrument. Regardless of the legal issues, there is certainly no harm in asking for one. If the judge says no, then you can't do it—but you miss 100 percent of the shots that you don't take.

Plaintiff attorneys generally are not trying to protect a client relationship. They are simply trying to win.

We recently finished a large mock trial exercise in which some of the lawyers had the opportunity to play the part of the plaintiff's counsel. One of the defense lawyers in the exercise blurted out, "It would be so much fun to play the plaintiff—then you get to do whatever you want to do." We asked him, "Why can't you do that as a defendant?" He replied, "Well, defendants are constrained by the causes of action." It was then pointed out to him that plaintiffs are also constrained by the same causes of action, whereupon he suddenly became speechless.

What is the *real* difference, then, between being the plaintiff and being the defendant in a trial? It is a state of mind. Defense lawyers too often restrict their own innate creativity and innovative potential by putting themselves in a psychological cage simply because they represent the defendant. With regard to the jurors themselves, research and experience indicate that jurors discard 99 percent of what they see and hear in making decisions. There is simply too much information in a trial for most jurors. Many defense litigators are too concerned with missing the net when the reality is that, in a psychological sense jurors record only the goals, not the shots on the goal. For example, they may worry that they will draw an objection or that the theme will not be persuasive enough, even when they are being pounded by an opponent who is "throwing everything against the wall and seeing what sticks."

Post-trial interviews reveal that jurors do not remember how many objections are sustained for either side. Themes that are not particularly effective are simply discarded from memory (as long as they are not downright offensive, which is a consideration that points to the necessity of pretrial testing with mock jurors). As long as the conduct is not unlawful, egregious, or reprehensible, the preferred strategy is to take risks, if the risks are reasonably calculated to produce the desired results.

There are five closing arguments in every trial. One way to escape the artificial constraints that some lawyers place upon themselves is to look at the trial as a series of closing arguments. Some junctures of the trial are trickier than others (e.g., voir dire), but five general styles of closing arguments can assist in liberating the conservative trial attorney from thinking only "inside the box."

1. ***Voir dire.*** Once the venire enters the courtroom, persuasion begins. The art of persuasion involves general demeanor and nuances of conduct—standing up when the jury enters, facial expressions, and interactions among members of the trial team all affect jurors' assessment of your case. The most impressionable and sensitive period for jurors occurs at the very outset, at the start of voir dire. In some courts where counsel is given the latitude to conduct long and thorough questioning, attorney-conducted voir dire can tilt the psychological playing field in ways that are outcome determinative. Arguments can, and should, be woven into voir dire in subtle and unobtrusive ways. Thus, the first arena in the battle for the jury—the initial place in which influence over the jury should be exercised—is in voir dire. Although this is not a recommended time to incur the ire of the judge, it is a critical strategic point at which finely tuned suggestions can serve as subliminal arguments.
2. ***Opening statements.*** The second arena is illustrated clearly by the example from the Exxon case. Opening statements represent valuable opportunities for choosing critical points to cross the line and strategically insert arguments. Perhaps objections will be made, but by the time the trial is complete, jurors will have heard so many objections, they will not remember.

   Jurors do not add up objections or the judge's rulings on them in order to decide who is "winning." Jurors typically do not even understand why objections are being made, and, as a result, objections frequently are lost in their memories within the morass of legal technicalities that float by them every day in trial. Two considerations are relevant here. The first is to be careful to choose your spots. Although breaking the rules is necessary, there is an optimal region between too much and not enough—like adding spice to a dish or sugar to your coffee. Second, composure and demeanor are of paramount importance. As mentioned earlier, the use of guerilla warfare does not dictate that trial counsel become strident or abrasive. This is psychological warfare, and tact, timing, and tone are key weapons in the assault.

Guerilla warfare is psychological. Tact, timing, and tone are key weapons in the assault.

3. ***Objections.*** The third place for argument is in objections. Although some courts prohibit speaking objections, many do not. Those that do prohibit them seem to compromise continually, and speaking objections still are made even in the presence of admonishments by the court during the heat of battle. In these environments, speaking objections should be made anyway when a strategic emergency presents itself. In courts that do not ban speaking objections, failure to make arguments routinely in front of the jury prevents the persuasion engine from firing on all cylinders.
4. ***Witness examination questions.*** Examination of witnesses constitutes the fourth realm of argument. Ironically, jurors often are instructed that the question posed to a witness does not represent evidence, whereas the answer does. In terms of jury psychology, however, the question itself often is more important than the answer because the question is evidence for the juror. Consider the following example in which an expert, John Riley, is being cross-examined:

Q: Mr. Riley, do you know what the letters CDCFD signify?

A: No, I'm sorry, I do not.

Q: Those were your grades in your first year of graduate school, weren't they?

There is no information here in the answer. The information is in the *question*. There are countless situations during a trial in which the *question* occupies jurors' interests and lodges in their memories—not the answer. The judge can admonish jurors to treat only the answer as evidence, but these instructions are inherently futile and do not alter fundamental principles of juror psychology.

In another jury trial, a small software company sued a telecommunications corporation for fraudulent inducement to enter into a contract. The software company was the only vendor, among dozens of others that offered similar services, to which the telecommunications corporation had awarded a contract. However, before the contract decision was made, the principal of the plaintiff software company had offered special "treats" to the telecommunications corporation officers who would sign the contract, including exotic boating excursions to foreign countries and hard-to-obtain tickets to concerts and sporting events. Nonetheless, the jury was left wondering why this particular vendor had been awarded a contract while its competitors had not.

The jury did not assimilate the importance of the personal relationships and corresponding "treats" that led to the award of the contract because the plaintiff succeeded in conveying the false impression that the software company had unique intellectual property that the telecommunications corporation needed and, as a result, was the only software company to receive a contract. These beliefs naturally supported the plaintiff's position that the telecommunications corporation had fraudulently induced the signing of the contract. Mirror or "shadow" jury results indicated that the real jury did not piece together the crucial information that the *software company* had induced the *telecommunications corporation* to award a contract, not the other way around. Consequently, the lead trial lawyer was advised to ask the principal of the software company in cross-examination, "You got that contract by providing African safaris and football tickets, didn't you?" The lawyer responded, "I can't do that." When asked why not, he replied, "He [the principal] would just deny it."

As a result, during post-trial jury interviews, the jury made it clear that it never did put together the obvious relationship between the special favors and the awarding of the contract. The jury's large damage award for fraudulent inducement ultimately was based on the supposition by jurors that the software company was somehow "special" in the eyes of the telecommunications corporation because of its intellectual property, when in reality there was nothing unique about the software at all.

Again, the "evidence" is in the question, not the answer. It would not have mattered whether the principal denied the significance of the special favors given to the telecommunications corporation's officers. Jurors at the time did not have enough facts to conclude that the inducement to enter into a contract was instigated by the plaintiff, not by the defendant. The question would have implanted this critical information in jurors' minds, causing them to decide for themselves who induced whom in this relationship. The trial attorney in this instance assumed that the jury would remember the answer, but, on a psychological level, the jury needed to hear the question. Moreover, the refusal even to ask the question incorrectly presupposed (apparently) that the jury would be required to or simply would accept at face value a naked denial by the witness. Of course, the opposite is true. *NLRB v. Walton Mfanufacturing Co.*, 369 U.S. 404 (1962).

When witnesses are on the stand, jurors are typically struggling to connect the dots in the case. There is so much information in contemporary litigation that the map coordinates must continually be supplied to jurors, from voir dire through witness examinations and all the way to the very end of trial. The text of the queries from a key witness examination should read very much like the actual closing argument at the end of the case, complete with suggestions as to how the evidence should be construed and what its significance truly is.

5. ***Closing arguments.*** By the time of the actual closing argument, jurors often have made up their minds about the case. From this vantage point, the impact of the preceding four areas of "argument" can be seen as pivotal: Because jurors' minds are largely closed by the concluding portion of the trial, the earlier forms of argument must be effective.

   Final arguments typically are used by jurors only to buttress their already existing views of the case; jurors are not converted by closing arguments, but they do store ammunition for their subsequent deliberations during this phase of the trial. As a result, all the lawyer can do at this point is to "arm" the jurors to be able to hold out during the deliberation process. Suggestions to defense litigators to make arguments in front of the jury during trial frequently are met with responses such as, "We'll have to save that for closing argument." Jurors generally do not make decisions at this juncture in the case. Every trial has a window of opportunity for persuasion. By the time of closing arguments, this window often is closed. The mind of the juror is like a drawbridge on a castle: Once the bridge starts to rise (well before the end of trial), there is no longer a means to enter.

Kill with kindness. The emphasis on streetwise litigation should not be construed to mean that the effective trial attorney is somehow abrasive, mean spirited, or unlikable. The high probability of incurring objections using more aggressive tactics points to the need of even greater likability and attractiveness on the part of the effective litigator. It is unfortunate that a phrase such as "kill with kindness" seems trite because the phrase holds such vast strategic importance. In the face of objections and even admonishments by the court, jurors will assume that an abrasive trial attorney really is committing serious transgressions. However, if the litigator is likeable, gracious, and refined, objections are more likely to be seen by jurors as arcane technicalities that have meaning only to members of the legal profession.

By the end of trial, jurors will have heard scores if not hundreds of objections. Information connected with objections does not carry nearly as much weight in jurors' minds as their impressions of the trial attorney's demeanor and persona. These impressions of the attorney in turn carry less weight than jurors' conclusions as to which party is justified in its position and which party is not. Nonetheless, there is an interaction, or a psychological relationship, between the "face" of the litigator and the "face" of the litigant.

In a dissent and appraisal action taken to verdict, the defense trial team conducted itself in a very courteous manner, always standing up promptly when the jury entered the room. The plaintiff team was more erratic and did not meticulously acknowledge the jury's presence. Witness credibility was a key issue because jurors did not fully understand the technical determinants of the stock price they were deciding. The jury viewed witnesses for the defense more favorably, partly as a result of the witnesses' association with the more polite trial team and partly because the witnesses had been assiduously trained in presenting themselves as well. One juror remarked in post-trial interviews, "We just thought that [the defense team] hung out with a better class of people." The resultant stock price delivered by the jury was only a few dollars off the defense's position but $32 from the plaintiff's position.

We recently finished an accountant malpractice case in which the defendants had clearly violated generally accepted accounting standards. The case did not appear to be winnable for the defense, but mock trial research revealed that the jurors saw the plaintiffs as unscrupulous and dishonest. Defense counsel's approach was to attack the plaintiffs repeatedly, and the trial ended in a defense verdict. His approach to streetwise litigation? "Unless I'm told it's against the rules, it's not against the rules."

A quote attributed to Goethe states, "Boldness has genius and power in it." The connotation of power is associated with authority, relaxation, and self-assurance. Genius, on the other hand, suggests the judicious use of timing to decide where, when, and how to cross the line with maximum effect. It is not an "I can't do that" frame of mind. It is a state of mind that jurors admire and that captures their imagination.

It is easy for the trial attorney to become boxed in by the law—to believe that only responses to questions are evidence and that "evidence" as defined legally is the true basis for the verdict. It is not. The true basis for the verdict is the hearts and minds of the jury. The jury typically looks for answers beyond the evidence, outside the parameters of the law. The trial attorney who meets them there, in that uncharted territory, is the one who will win the case.

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