DEVELOPING A TRIAL PERSONA

Introduction

As all trial lawyers know, the course of a trial is hardly ever wholly predictable. It ebbs and flows, developing its own rhythm, but is rarely without some mystery or surprise. This is part of the lure of trial work: precisely because of its unpredictability, the trial process is for some of us an endless, irresistible fascination. Still, too much mystery, too much surprise, can be fatal to your client's interests and to your own good health. Thorough, effective trial preparation tempers the element of surprise during a trial, so the more you know at the start, the better. In this modest effort, I propose to set out a few of my thoughts on how to develop a trial persona. A trial persona can only complement thorough preparation, not replace it.

Be Positive, Be Respectful

The best disposition for battle is a positive one. My former colleague, Harvey Strosberg, says: Trial is war, and the weak go to the wall. I say: Preparation and presentation, and now it's time to get it done. A positive attitude is essential. If you are or feel defeated in your own mind before the case is truly over, then it truly is over. Recently, I was involved in what for me was a rare experience: a civil trial. Until then, my experience was exclusively in the criminal courts. Luckily, I had the assistance of a bright young lawyer as co-counsel. At one point in the trial the evidence was not going

well for our side. My talented but less experienced co-counsel was perceptive enough to sense it and began to think that all would soon be lost. When I tried to reassure her, she said "Well, if I were a betting person, I'd wager one hundred dollars against the possibility of us recovering any damages. I said: "I'd take that bet in a heartbeat." I should point out that I too had my doubts about the merits of our case from time to time as the trial process ebbed and flowed. But I also knew that a positive attitude is often the difference between winning and losing.

As it turned out, in our case we were awarded the entire amount of the damages requested and also our costs on the solicitor/client scale. And I have no doubt now in retrospect that one reason for our success is that, despite the occasional twinges of doubt and uncertainty, we stayed with our trial program and never allowed ourselves to be governed by anything other than purposeful positive energy.

Respect

Aretha Franklin spoke for all lawyers and judges when she said:

> What you want….. Baby I got it
> What you need….. You know I got it
> All I'm asking for... is a little respect.

A little respect seems as if it should be easy to provide. But anyone who has spent time in a trial court knows that sometimes even a little respect is difficult to find. And if we are all honest with ourselves we will admit that our profession could use a huge dose

of professional courtesy and civility from all the interested shareholders: lawyers, judges, litigants, witnesses, everyone.

Recently, I addressed the Education Seminar of the Ontario Court of Justice on the topic of "Professionalism in the Courtroom."[1] This included a discussion of Marchand v. Public General Hospital Society of Chatham.[2] In this case two defence lawyers maligned the plaintiffs' counsel by alleging deception, misconduct, manipulation of the evidence "flatly lying" to the court, deliberately misleading the court, showing contempt for the court, and defying and deceiving the court about evidence. On appeal, the appellate counsel acknowledged that the accusations and behavior fell below any acceptable standard. The court itself said that any degree of trust between the two sides had completely vanished and was replaced by a level of rancor and hostility rarely, if ever, seen in an Ontario courtroom. The court determined that unprofessional conduct of counsel is a matter for the Law Society of Upper Canada. According to several Justices attending the seminar, this lack of professionalism appears to be more prevalent today. As interested shareholders in the justice system we owe it to ourselves to be diligent against such behavior.

Witnesses should therefore be prepared not just based on **what** they will say but also on **how** they will say it. You should explain to each witness the roles of the various

[1] Education Seminar, Superior Court of Justice, May 11, 2001, Toronto.
[2] Marchand v. Public General Hospital Society of Chatham (2001), 51 O.R. (3d) 97 (Ont. C.A.).

people in court. Once the witness understands that it is opposing counsel's responsibility to ask questions, the witness will have a better understanding of why it is essential to respond without impatience, without rancor, without hostility.

Just as it is important for counsel to know in advance as much as possible about the court before whom counsel will appear, it is equally important for counsel to prepare witnesses by arming them with the same information. It is, however, bad preparation not to alert potential witnesses to the disadvantage of attempting to create an unjustified rapport between themselves and the court. Witnesses should be told the proper title of the presiding judge. They should know that if they are sitting in the courtroom prior to the case being called they should be attentive, and observe all protocol. The favourable impression you obviously hope to create with the witness may actually get created long before the witness takes the stand.

Witnesses should be advised that whenever possible they should refer to opposing counsel and other witnesses by name. Every witness should be reminded that most people are predisposed to accept the opinions of those they like and to reject those put forward by those they do not like. An adequately prepared witness is one who is at once courteous and reasonable. The witness should create the impression that he or she is simply telling a narrative, or part of one, and telling it to someone whom he cares for and respects.

A witness completely unfamiliar with the courtroom setting should visit that setting before the trial, thereby demystifying the aura of the place. Many witnesses who appear in our courts are like ships lost at sea. Familiarity breaks down irrational or exaggerated fears.

Be Humble?

Some of you may know my brother Edward. Where I come from, he is a well-known and respected lawyer in the field of employment and labour law. He is also presently a Bencher with the Law Society of Upper Canada. In my opinion, his greatest asset is his humility or at least what everyone perceives as humility. I have never met anyone who has spoken with Edward for more than 10 minutes who does not later tell me what a wonderful self-effacing person he is. To be truthful, this praise, even though it has been directed to a family member and my best friend has begun to be a little irksome. Frankly, I think much of his success in law is as a result of his humility. Because he is humble, everyone seems to want to do things to help him. As I say, it's irksome.

Now contrast that picture with this one. Opposing lawyers, no doubt sensing in me, well, a paucity of humility, seem to want to beat me up, at least figuratively. I envy my brother. It has been said that the first essential of genius is humility. If that is so, then there is no genius in pomposity. I, for one, intend to work on my humility. And I know that many of you believe I have much to be humble about.

Following a Particular Strategy: Be Imaginative

The best courtroom presentations are those that are creative and lively. In the dry spaces of the law counsel seem to sometimes check their imaginations at the door. Once the trial is underway, often a most effective and persuasive argument is developed by the use of visual aids, a simple technique too frequently ignored by trial lawyers. Graphic designers or artists can help in the preparation of items to be used at trial as exhibits to convey a message or theme. The defence theme can be portrayed graphically by diagrams, photographs, graphs or other kinds of demonstrative evidence. Once accepted in a criminal trial, the demonstrative evidence often remains within clear view of the trier of fact until the very moment the decision is made.

In a recent environmental law case, the prosecution of a corporate defendant turned on the issue of whether or not the company was liable for an ambient particulate fallout. The prosecutor produced photographs of the particulate matter but magnified many times over so as to highlight the distinctive characteristics of iron oxide particulate. Then the prosecutor produced photographs of similar particulate matter found at the defendant's place of business in an effort to demonstrate that the corporation was indeed the most likely source of the particulate matter.

The Crown's photographic evidence was countered by a defence expert who produced a different series of enlarged, colour photographs showing magnified iron oxide particulate remarkably similar to the matter presented in the prosecution's photographs.

The defence photographs were reproductions of those bound in a well-known text outlining various types of fallout from industrial complexes. The defence expert agreed with the opinion offered by the textbook writer that there was nothing particularly unique about iron oxide particulate, and that in fact the type of particulate represented in the Crown's photographs often took on the "well known appearance" depicted in the textbook. He went on to say that the particulate demonstrated in the Crown's photographs could have come from any of a number of different industries, many of which happened to have been in the same geographic area as the corporate defendant. The prosecutor's strategy was nicely checkmated.

The term "demonstrative evidence" normally connotes such things as schedules, sketches, models, photographs, x-rays, videotape, film, charts, models, and maps, the relevance and usefulness of which, I repeat, are too frequently overlooked at trial. Use these things as creative tools to assist the court in visualizing and grasping the issues, or the science surrounding the issues, all the while transforming an otherwise staid courtroom into an animated, informed classroom.

Should I Select a Jury?

It has often been said that counsel should elect trial by judge alone when in the individual circumstances of the case the law is favourable and trial by judge and jury when the facts are favourable.

In my view, this advice is overly simple and potentially hazardous to the client. Its most serious weakness is that it takes no account whatever of what is arguably the single most important factor of all, the personality of the lawyer who will advocate the case before the trier of fact.

Whatever the law or the facts may be, the lawyer must shape and develop the theme of the argument and ultimately persuade the trier of fact of the sufficiency, the validity, of that argument. And the plain truth is that, while some lawyers have proven themselves quite capable of impressing judges with the "truth" or the cogency of their arguments, they are far less naturally suited to attract or persuade juries.

There is, in short, a phenomenon in advocacy which might be called the "jury personality." Some of the country's most renowned trial lawyers clearly have it. The lawyers most likely to succeed before a jury are not those who are shy or retiring. Although they steadfastly avoid pomposity or arrogance, they have an unmistakable bearing in and subtle control of the courtroom. They know, usually instinctively, that their every word, act, or gesture is being closely observed by the jury. They are magnetic. For them, the trial is elemental human drama and they are invariably "center stage."

The “jury personality” is also one who has developed some considerable mastery over language. Her words are sharp and crisp and simple and direct. Knowing that the jury members are likely to be in their everyday experiences far removed from those dry spaces in which the law and lawyers reside, she speaks correct informal language free of stilted legal jargon and cliché.

Lawyers with “jury personalities” are also consummate storytellers. They understand, therefore, that the story they tell must always and ultimately please and persuade. They must tell it easily, naturally, without detracting attention from it by making it seem rehearsed or otherwise insincere. For this reason, too, jury lawyers tend to work well without artificial props, without podium or paper. Literally and figuratively, these things serve as barriers, not as bridges, to the jury. They get in the way of communication. By contrast, lawyers with well-developed jury personalities let nothing stand between themselves and the triers of fact. Their body language suggests intimacy and identification rather than cool professional distance.

At the same time, the jury lawyer is a model of civility to everyone assembled in the court. Generally speaking, the best jury lawyers interrupt and object to the questions or tactics of opposite counsel only as necessary. In every such instance, they are certain of the correctness of their position. Their civility is manifest too, in the way they address the jury in closing argument. Again, they eschew the podium and the paper. They remove, in other words, the obstacles. They speak directly to the trier, making eye

contact, but avoiding the platitudes and irrelevancies and needless, painful, boring repetition. They show respect for the jurors, by avoiding any remark the least bit demeaning. Thus, they do *not* admonish the jurors to "pay close attention" and they do *not* tell them that the decision they are about to make is the most important decision they have ever made, and they do *not* use words such as "winning" or "losing," words with limitless capacity for conjuring all the worst images of lawyers as hired guns and self-aggrandizing, money-grubbing mercenaries.

Above all else, the lawyer with jury personality connotes with every move made in the courtroom a sense of principled belief in and commitment to the rightness of the client's cause. The jury lawyer has, in this sense, an abundance of pathos, the quality or power of evoking a feeling of compassion or pity. There is nothing new in this: as long ago as the fourth century B.C., the Greek philosopher Aristotle said that "pathos" was an essential quality of the skilled rhetorician. Before juries, especially, the lawyer is pre-eminently a rhetorician and must be capable of inspiring feelings of compassion or pity from his audience.

In light of this, then, it certainly seems that the election of trial by judge alone or by jury requires, in addition to any other considerations regarding the facts or the law, an honest self-appraisal by the lawyer as to whether he or she possesses the kind of personality likely to affect the jury positively, empathetically. If the lawyer is satisfied, upon this self-appraisal, that his or her skills are of a different order than those revealed

by the best jury trial lawyers, then for the client's sake the choice should be trial by judge alone. Whatever the decision, it is for the lawyer to make, not the client, because in the final analysis the burden of rhetorical persuasion falls upon the advocate.

The advice, then, to a lawyer weighing his or her election: know the facts; know the law; know yourself.

Conclusion:

The nineteenth century poet and essayist Matthew Arnold once wrote: "Use your gifts faithfully, and they shall be enlarged; practice what you know, and you shall attain to higher knowledge." In the end, if we are to be true to ourselves and to this noble profession, we need only strive to fulfill this dictum. I know that the modest advice I have offered here is not going to re-fashion or re-shape anyone. Nor would I presume to do so. But if any bit of it helps, if any part of it can be enlisted to enlarge your gifts as advocates, then I too will have succeeded and enlarged my own gifts.

DEVELOPING A TRIAL PERSONA

PATRICK J. DUCHARME

Re: The Six-Minute Criminal Defense Lawyer
Saturday, June 9, 2001