

# TRIAL TECHNIQUES AND TACTICS

June 2009

## IN THIS ISSUE

*Matthew D. Keenan challenges a conventional notion – that an aggressive litigation style is what wins cases. Is that true? Or, do nice guys win trials? And get business? The answers to those questions just might surprise you. Read on... Also, check out the One Minute Trial Tip after Matthew Keenan's article!*

## How Nice Guys Finish First

### ABOUT THE AUTHOR



**Matthew D. Keenan** is a partner at Shook, Hardy & Bacon L.L.P., where he has practiced in the pharmaceutical and medical device division for 24 years. Matt authors a monthly column in *The Journal of the Kansas Bar Association* on topics of interest to practitioners, including civility and professionalism.

### ABOUT THE COMMITTEE

The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice.

Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

Any attorney older than 50 grew up in the era when the Hollywood role model for attorneys was Perry Mason, the longest running lawyer show in TV history. A defense lawyer who took cases against long odds and always found a way to exonerate the innocent defendant. Assisted ably by Paul Drake and Della Street, their approach to preparing and defending a case was old school. And along the way, there was always the utmost civility and professionalism between Mason and the prosecutor, Hamilton Burger, even though Burger's track record was akin to the Harlem Globetrotters' opponent, the Washington Generals.

Following Mason was Matlock, which ran from 1986-1992. Featuring Andy Griffith, he was a southern gentleman sporting seersucker suits and bright ties, his folksy manner won viewers and juries over. And then along came LA Law, and the public's image of the legal profession, and lawyers, was never again the same. The show changed many things, but one unquestionably was to take our noble profession and present it as a business, with interpersonal conflicts serving as the centerpiece of virtually every plot. And droves of students wanted to be the next Arnie Becker, divorce lawyer who craved driving Bentleys and extracting revenge from his rivals. Personal destruction was sport. It was more soap opera than anything else. And it created a culture that transformed, and some would say, disfigured, our profession.

Today the evidence is pretty clear that our profession is suffering from a spate of bad behavior. Almost 70% of lawyers surveyed for "The Pulse of the Legal Profession," a comprehensive 2006 ABA study surveying the opinions of 800 lawyers, believe that "lawyers have become less civil to each other over time." Anecdotal evidence reinforces this conclusion as well. It's no surprise that

happiness in the profession is sliding as well. *The New York Times* reported last November that lawyers, as well as doctors, find less satisfaction in their work, and quoting an ABA Survey, stated "Forty-four percent of lawyers recently surveyed by the ABA said they would not recommend the profession to a young person."

You can look for other evidence of a decline of civility. In 2005, before a high school civics class, Senate President Harry Reid called President Bush a "loser" and no one flinched. The next year, Venezuela President Hugo Chavez joined the fray likening President Bush to the devil.

And how many of us have received requests from friends or other attorneys requesting counsel, often in domestic relations cases, for the proverbial "pit bull." Or maybe not a jerk, but an aggressive, obnoxious, contentious zealot to do the client's heavy lifting. Some potential clients obviously think they need a jerk on their side. And with the Supreme Court allowing advertising by lawyers, the race to the bottom started many years ago, with lawyers invoking imagery that would hardly represent the legacy of Mason or Matlock.

As reported in a February, 2008 *Wall Street Journal* article, the Florida bar "filed a complaint in 2004 against a Fort Lauderdale personal-injury attorney Marc Andrew Chandler over advertisements that featured a pit bull wearing a spiked collar. The Florida Supreme Court sided with the Bar in 2005, ruling that pit bulls conjure up images of viciousness. "Were we to approve," the court wrote, "images of sharks, wolves, crocodiles, and piranhas could follow." Attorneys who used 1-800-PITBULL were disciplined by the Florida Supreme Court.

Which raises the question – are aggressive, obnoxious attorneys successful? Does that represent a successful trial strategy? In other words, do nice guys win out over the jerks of the world? Do juries like pit bulls? And do they consider their style effective? Turns out, what evidence we have, suggests, no, they don't. And the debate is not even close.

Jo-Ellan Dimitrius is one of the most famous jury consultants, having the distinction of serving as a consultant on OJ's first criminal trial. She wrote a book with Mark Mazzarella entitled "Put Your Best Foot Forward." Their conclusions reflect that countless juror surveys confirm that "aggressive behavior, while sometimes associated with confidence, gives rise to predominately negative impressions of truthfulness, caring, humility and capability. People like to be led, not pushed. An aggressive, in-your-face, dominant approach is seen as an effort to achieve with force what cannot be achieved with reasoned, caring, and honest behavior."

There is additional evidence of this point. As part of a CLE presentation to the Kansas Bar Convention last year, I interviewed two prominent jury consultants, Pete Rowland and Merrie Jo Pitera of Litigation Insights, Inc. Pete offered these observations: "For roughly 20 years, we have been conducting interviews of jurors. Using either exit interviews with jurors or questionnaires with mock jurors. We frequently ask them to evaluate the attorneys. And the most productive question we ask them is 'If you had to hire one of the attorneys for a case that was going to trial, which of these attorneys would you hire? And why?' And some very consistent results come out of that."

"First of all, they will reference the attorney they like the most by how confident he or she was, and how credible he or she was. If we asked them follow-up – what led you to those

attributions, they will reference commitment – and their examples usually have to do with organization – how they knew their case, they knew their questions, they didn't waste the juror's time, concession – willingness in a courteous way to admit points that, in the juror's mind, was obvious and needed to be conceded, and then, the word they used was respect – it's cued by a perception of courtesy – respect to the court, respect to the jurors, and respect to those witnesses who had to be there. It's particularly important nowadays to corporate defendants. The jurors want to see the plaintiff treated with respect."

Merrie Jo has this observation: "What jurors tell us about an aggressive style in cross examination – many attorneys feel that from a dramatic stand-point, that may be appreciated by the jurors – and what we learn from our exit interviews is that an aggressive style can adversely affect the attorney's credibility. What they do appreciate is more of an assertive, confident style. What that translates to is a specific example for interruptions. An assertive attorney, who recognizes that a witness is going on and on and on, and nicely interrupts the witness to stop the ramble. That approach is seen as a good method for interruption – it keeps a tone of politeness to it. However the attorney who is aggressive, picking on the witness, cutting them off, and just being disrespectful – that approach has two effects: 1) It increases the credibility of the witness; and 2) It decreases the attorneys' credibility as now you are seen as the "badgerer" – showing disrespect, and that affects your credibility going forward."

In the ground-breaking law review article in a 1993 Indiana Law Journal: *Jurors' Views of Civil Lawyers: Implications for Courtroom Communication*, 69 Ind. L.J. 1300 (1992-93), they concluded: "The first misconception is that many attorneys believe that they should

not be concerned about whether or not the jury likes them. ...People accept a message more readily when they like the messenger." An additional misconception is that "jurors want to see a warrior or "Rambo" attorney... warrior tactics reduce the attorney's credibility when it counts: An attorney who is constantly on the attack loses the opportunity to signal to the jury when he or she feels the witness really is lying.

Issues that appeared to influence the way jurors evaluated attorneys were the credibility and demeanor of the attorneys, the emotionality of their arguments, and their organization of the case. Attorneys who were not credible, had poor demeanor, used excessive appeals to the jurors' sympathy, or were poorly organized, tended to alienate the jurors. These points are best illustrated by specific examples from cases in which one attorney was considered to be better than the other. In one case involving a sports injury that left the plaintiff paralyzed, the majority of the jurors who favored the plaintiff's attorney referred to the level of the attorney's organization in explaining why they preferred him. Since he appeared to be better organized, the jurors concluded that he was a better attorney. Moreover, the defendant's lawyers did not seem to be as involved in the proceedings.

In a case in which the defense attorney was reported by the jurors to have badgered a medical witness, the witness performed well under the circumstances and increased his credibility in the minds of many jurors.... By constantly pressing the plaintiff's witness, the defendant's attorney made the jurors feel uncomfortable and sympathetic to the witness. Because the witness was consistently able to answer the attorney's questions during the cross-examination, the

attorney actually increased the witness's credibility, instead of decreasing it. Thus, in these cases the attorneys seemed to gain nothing from badgering a witness. The jurors were more likely to sympathize with roughly treated witnesses, and less likely to believe, when witnesses were badgered, that inconsistencies in their testimony were a result of weaknesses in the case.

Chilton Varner in Atlanta offered her own observations: "Good manners come in lots of different forms. Deference and politeness to court officials (judge, court reporter, bailiff, clerk) shows the jury who you are (and, my mother would say, how you were raised). Jurors notice whether courtroom personnel like you. Helpfulness to the opponent can reap benefits, too, such as helping with an easel or assisting in straightening out a snafu with exhibits. Such instances can suggest that you are the one actually in control.

There can be other advantages. In a most difficult trial involving catastrophic injuries, the jury had deliberated for several days. At long last the parties and attorneys returned to hear the verdict. Before the jury had fully assembled back in the jury box, the federal marshal turned to me and asked "How are you doing?" "I don't know," I responded; "guess it depends on this jury." The marshal gave me a discreet wink and murmured "I think you'll do okay." That wink lifted the pressure of that awful wait for the jury to read the verdict. It later turned out that as the jury was being escorted from the jury room, the marshal had overheard a telling comment by one of the jurors as to how they had decided the case. On a later trip to the venue I stopped by the courthouse to give that marshal an Atlanta Braves baseball hat - he was a fan.

## **THE ONE MINUTE TRIAL TIP**

The brain child of President Rob Hunter, each of our newsletters features a quick, practical trial tip.

### **HOW DO EFFECTIVE ADVOCATES PERSUADE COURTS TO DECIDE CASES IN FAVOR OF THEIR CLIENTS?**

The question is as old as the law itself, and it has been answered by many writers in various ways during the last two and a half millennia.

My suggestion is to obtain, as soon as possible, the outstanding book on this subject,

“Making Your Case – The Art of Persuading Judges”, by Antonin Scalia and Bryan Garner.

The authors have systematically worked through their answer and deal with the principles of persuasion, legal reasoning, brief writing and oral argument.

The book is \$29.95. It can be ordered at [www.WestAcademic.com](http://www.WestAcademic.com).

That’s it in a nutshell. I urge you to read and re-read this great work. As the book notes, “Excellence is the product of the diligent study and applications of sound principles, not simply the accumulation of time logged in ....Courts.”

## **ABOUT THE AUTHOR**



**JACK T. BANGERT** is a Senior Partner in the firm of Sherman, Taff, Bangert Thomas & Coronado, P.C. He is also an Adjunct Professor in Trial Advocacy at the University of Missouri at Kansas City School of Law. He has taught at numerous trial academies including the Missouri Bar Trial Academy, the Missouri Organization of Defense Lawyers Trial Academy, the Missouri Judicial Trial College and the IADC Trial Academy.

Mr. Bangert concentrates his practice in civil cases involving serious personal injury or death. Mr. Bangert is presently Chair of the Trial Techniques and Tactics Committee. He is a past President of the Missouri Organization of Defense Lawyers, Legal Aid of Western Missouri, Board of Trustees of the Law Foundation of the University of Missouri at Kansas City among others. Mr. Bangert was recently named a Top 100 Super Lawyer for Missouri and Kansas. He has been named to the Best of the Bar in litigation by the Kansas City Business Journal and Legal Leader of the Year by the Daily Record. He was also recently awarded the "Ben Ely, Jr., Outstanding Defense Lawyer Award for Missouri, 2009" and the "Alumni Achievement Award in Law, Westminster College, 2009".



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