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JURY TRIAL**Marketing your Client: Unspoken Advocacy**

By JOEL HIRSCHHORN AND ALEXANDER STRASSMAN

The widely quoted adage, commonly attributed to Woody Allen, states, “80% of success is showing up.”¹ No doubt, there is significant truth in that statement. We suggest, however, that for criminal defense trial lawyers and their clients, where in-person, face-to-face advocacy is the primary tool used to persuade the jury, simply “showing up” in court with one’s client is not enough at all, unless of course the prosecutor has no case, no witnesses and no exhibits.

Success at trial is frequently obtained by *how* the client “shows up.” Indeed, this is especially true in the defense of a criminal matter, where the jury is undoubt-

¹ William Safire, *On Language; The Elision Fields*, N.Y. TIMES (Aug. 13, 1989).

Joel Hirschhorn is currently a shareholder at GrayRobinson, P.A. Joel focuses his practice on the criminal and civil white collar defense of corporations and business executives, as well as elected public officials and private individuals accused of alleged criminal misconduct.

Alex Strassman is an associate in GrayRobinson’s Miami office. He focuses his practice in the areas of criminal and white collar defense, as well as complex civil matters.

edly more interested in the accused’s appearance and demeanor than the lawyer’s. It is for precisely that reason that, when selecting a jury, criminal defense lawyers are keen on exploring a potential juror’s willingness to judge fairly a defendant who chooses to invoke his or her Fifth Amendment right to not testify at trial. The inference is all too tempting for many: If the defendant is innocent, why is s/he too afraid to “take the stand” and tell us his or her side of the story? To protect against the threat posed by that inference, the U.S. Supreme Court unequivocally established that “no adverse inferences are to be drawn from the exercise of that privilege.”² That rule of law, though, flies in the face of human experience and common sense: Please, if you didn’t do “it,” stand up and say so!

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Beyond the well-known danger lurking around the Fifth Amendment, equally important, but far less discussed, are the conclusions jurors draw based upon a client’s physical appearance, dress and demeanor, both in and outside the courtroom.

Consider the following scenarios: The overly well-dressed doctor on trial for health-care fraud, whose clothing can be easily imagined as from an expensive fashion designer purchased with ill-gotten gains. Or consider the former owner of a now-bankrupt business, on trial for fraud charges, whose poor, slovenly dress suggests top-to-bottom disorganization and sloppiness at that business. Or the Hell’s Angels biker, charged with a violent crime, who comes to court clean-shaven, “GI buzz” haircut, elegantly dressed in a three-piece designer suit, all of which “tell” the juror, “who is HE trying to kid?” Or the mother accused of killing her own

² *Carter v. Kentucky*, 450 U.S. 288, 305 (1981) (citing *Griffin v. California*, 380 U.S. 609 (1965)).

child out of deranged love, whose bleary-eyed, disheveled appearance in court is entirely consistent with, and corroborative of, an insanity defense. No doubt, these observations flow through the minds of all who scrutinize the appearance of the accused.

Thus, in every trial the following questions become critical to the trial lawyer: How do I, with my client, present an effective “unspoken” case to the jury? How do I honestly, but persuasively, “market” my client? Successfully addressing these questions at trial requires advance planning and trial strategy beyond merely “showing up,” which may well suffice in many other walks of life, but never in court.

The correct approach depends on a number of important factors: the nature of the case, the background of the client, the circumstances surrounding the events at issue, the quality of the prosecution’s case and how the defendant presents himself or herself. The combination of these factors warrants an individualized approach for each trial and at every phase of the proceedings.

Contrary to what some may think, when it comes to marketing one’s client the first stage of the trial is not opening statement or even jury selection. It is in fact the means by which the client arrives at and presents himself or herself outside the courtroom, in the elevator and walking the hallways to the courtroom—all before the bailiff announces, “Order in the Court, here comes the Judge.”

For better or for worse, the fact is we all have expectations of how certain people, such as the criminally accused, should appear and how they “present” themselves. Observations consistent with those expectations often confirm our initial inherent prejudices, and observations inconsistent with those expectations often take us aback, or perhaps shed some light where before there was only gloom and doom. Like it or not, we know “all the world’s a stage, and all the men and women merely players.”³ That is as true today in the courtroom as it was four centuries ago when first penned by William Shakespeare.

For instance, imagine a plumber arriving at your home. You may very well expect the plumber to arrive driving a truck, in work clothes, with tools in-hand. Your expectations are for a plumber who is dressed and equipped to get his⁴ hands dirty and to fix the problem. You probably would not expect the plumber to arrive in an expensive sports car, wearing a designer suit. You will likely not think the person dressed in this manner is the plumber you requested, even if the plumber called just five minutes before his/her arrival to say, “I am just five minutes away.” The plumber is living his role. The stage is set, just as we would expect. Not a well-dressed man in a suit, white shirt and tie, but rather a plumber in his work uniform, overalls and coarse blue shirt.

On the other hand, now imagine the trial of a high-profile, alleged drug-dealing king (or queen) pin. Would

it be wise for the accused to appear at the courthouse in a luxury vehicle driven by a chauffeur, accompanied by a team of larger-than-life individuals all wearing expensive suits and designer sunglasses? Definitely not. Clearly that would be a bad first scene because it is wholly consistent with the public’s image of stereotypical drug lords, their ladies and their coterie from the 1980s and ‘90s, an archetype that has been vividly and indelibly etched into the minds of many Americans, 12 of whom may well be your jurors, and is unequivocally associated with guilt.

Now picture that same individual arriving in a modest car being driven by the defendant himself, dressed in an off-the-rack suit, holding some files, accompanied by his wife and adult children—all of whom are also modestly dressed. Serious, but not frightened. Humble, not arrogant. A juror who, by chance, happens to see the accused probably will do a double take: first when s/he notices the defendant and again when s/he notices the defendant’s modest appearance, quiet demeanor and family, all of which are clearly inconsistent with the public’s (and therefore jurors’) perception of drug kingpins. A family man is perceived, not an arrogant, flamboyant drug dealer. It is precisely this type of branding (or re-branding) that may define the juror’s attitude in a positive way, so s/he looks differently at the accused.

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Most important is the branding process that takes place inside the courtroom, where jurors are exposed face-to-face to the defendant (and trial counsel) for hours, days and sometimes even months on end. The trial is nothing less than a branding war between the defense and the prosecution. Inevitably, jurors pay close attention not only to the defendant but also to the people (or the lack thereof) seated in the gallery. All reasonably experienced trial lawyers recognize the subtle, but real, value of having people stand behind their friend, your client—figuratively and literally. What conclusion is drawn by jurors who see the defense side of the gallery empty but the prosecution’s side packed with law enforcement officers and government workers, all sitting professionally and attentively? What if this same one-sided vacancy continues over the course of a month-long trial? While it is our experience that jurors often arrive at the “correct” result, asking a jury to acquit a defendant who has nobody in the courtroom supporting him or her is asking a lot of the 12 folks who have had their daily lives disrupted while they sit in judgment of the key question in every criminal case: Has the prosecution proved its case beyond a reasonable doubt with truly believable evidence?

Aside from the number of folks in the gallery, it is just as important to consider the makeup of the gallery members who are there in support of the client. It is naive, and contrary to empirical evidence,⁵ to believe that there is no decisional relationship between the ethnic

³ William Shakespeare, *As You Like It*, Act II, Scene VII.

⁴ You probably also expect the plumber to be a man. Indeed, the labor force statistics from the Bureau of Labor and Statistics’ current population survey observed that only 1.1 percent of all plumbers surveyed were female. U.S. BLS, *Current Population Survey* (Feb. 26, 2014), available at <http://www.bls.gov/cps/cpsaat11.htm>. Imagine your chagrin if the plumbing dispatcher sent a female plumber to your home? After all, what do women really know about plumbing? Precious little, as we all know, which is why when the drain gets clogged, the lady of the house calls a plumber.

⁵ See, e.g., Shamina Anwar et al., *The Impact of Jury Race in Criminal Trials*, *THE QUARTERLY JOURNAL OF ECONOMICS*, 1-39 (2012) (finding, inter alia, “juries formed from all-white jury

makeup of the jury and the accused, and the likely outcome of a trial. Bearing that principle in mind, it stands to reason that prudent counsel should advise the client to encourage a group of supporters who reflect the ethnic makeup present in the jury panel to attend the trial, dress modestly, act respectfully and thus let the jurors see the defendant is a real person, with friends and family who are there for the accused.

Now then, what does the defendant wear? Clothing consistent with his occupation, background and station in life. A physician charged with Medicare or health-care fraud would wear the kind of clothing (without the white jacket, or a blue or green “scrub”) you would expect the Doctor to wear in his office: a pair of slacks, white shirt, perhaps a tie. Nothing flashy. Understated works best. A Lawyer or Banker? Off-the-rack suits, shirts and ties. No monograms, no cufflinks. You would be amazed at how carefully and closely jurors scrutinize the accused, how attentive they can be to the smallest detail and how the collective observance of 12 jurors leaves no stone unturned, not even the smallest detail.

Because jurors really do pay attention (even if it appears to trial observers that one or two may be “napping”), the criminal defense lawyer should consult with a behavioral psychologist for important guidelines: What “colors” are the least “aggressive”? The warmest? A woman on trial for murder should never wear red or her flashy jewelry. She should be dressed like the professional or full-time house mom she is, her hands always visible, never under the table. Regardless of whatever the evidence may show from the prosecu-

tor’s perspective, the woman on trial needs to dress as if she is going to church (or temple) with a complimentary but not overwhelming hair style. Lipstick, rouge, eye shadow are all left to the wisdom of the behavioral scientists.

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The scenarios and considerations discussed above are a few of the many issues well worth addressing when preparing for trial. Trial lawyers are, in essence, high-end salespeople. And, like all salespeople, lawyers must learn to brand (or re-brand) their “merchandise” as effectively as possible. If the jury does not “buy” what you are “selling,” the client is lost. Subtly but wisely dressing the client and teaching the client how to act and react both in and out of the courtroom will go a long way toward increasing the likelihood of success.

Though the task may appear daunting, close attention to these details may indeed sway victory in your client’s favor. No doubt, there are infinite factors to consider when mastering the art of marketing one’s client: Branding is never a one-size-fits-all task. For that reason, a complete laundry list of “to do’s” is neither practical nor advisable. That is as it should be. When it comes to nonverbal advocacy, as in all delicate interpersonal exchanges, some things are best left to the drama of the moment. It can never hurt to sit back and assess who the client is, what s/he is charged with, how the client “presents” to people who are seeing the accused for the first time in the sterile but highly emotional courtroom.

Success has many parents; failure is an orphan. Just as the trial lawyer presumably dresses and presents to make the best possible appearance, so too must the client.