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Communicating More Effectively with the Judge

By Richard J. Crawford, Ph.D. and Charlotte A. Morris, M.A.

Among all the communication choices available to you before and during a trial, few are more critical than those that involve your interaction with the court. Your trial communication strategy must always include consideration of how you intend to induce cooperation from the judge. Your choices are complicated by the variety of the potentially contradictory goals you may confront as you outline that strategy, but you cannot afford to be casual or non-reflective as you face this major persuasion challenge. As in all other forums, you need to develop an approach that fits you and works for you; the ideas in this article are worth considering as you develop your approach.

Examine Your Goals

You will interact with the judge primarily outside the presence of the jury. Here are eight goals you may have, among others, as you prepare to face a judge in a hearing or any other setting where a jury is not present:

1. To win a key motion or part of a motion.
2. To build a record for appellate purposes.
3. To learn about your opponent's thinking, strategy or case.
4. To establish a good relationship with the judge, which may be helpful to you in the jury trial.
5. To provoke the judge into decisions which will cause reversible error.
6. To make a point for the public or the press.
7. To convince your client of your competence and commitment.
8. To test the judge's temperament, judicial philosophy, and depth of legal knowledge or intellect.

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Here, although not a wholly different list, are eight potential communication goals to consider as you prepare to face a judge when the jury is present:

1. To influence the judge to rule in your favor on objections.
2. To convince the jury that you know what you are doing and that, while you respect the judge and the court's authority, you are not awestruck by the judge.
3. To give the press and the public points you want them to carry from the courtroom.
4. To convince the jury that the judge respects you.
5. To demonstrate your professionalism, commitment, and skill to your client, your client's family, the family members of the victim, and others.
6. To get a reversible error decision from the judge.
7. To convince the jury that you may be fighting the judge as well as your opponent.
8. To remind the judge that he or she should not send negative nonverbal messages about you and your case to the jury.

Clearly, your goals will be markedly different from case to case, and your communication strategy and goals may have to change from time to time inside a given hearing or a particular jury trial.

There Is No Magic Formula for Persuading Judges

You can fall into a common trap if you believe that the bench represents a kind of monolith, for judges are as different one from another as are lawyers, clients and jurors. A communication approach that works for one judge may well fail for the next. There are, however, some general guidelines which have emerged from research, common sense, and the combined experiences of practicing

lawyers and trial consultants.

Judges Are People Too

There are limited opportunities for lawyers to interact with judges outside the scope of litigation, and judges are trained to maintain a high level of discretion when it comes to revealing their own perspectives to attorneys. You've no doubt learned that the legal community (wherever you practice) is indeed a small world, and judges live a relatively cloistered life in order to protect their reputations for impartiality. Most judges are very experienced at masking their decision-making processes and preferences; as a result, many maintain a fairly flat affect and bland courtroom demeanor which causes lawyers to assume they are all alike.

In recent years, trial consultants have had an increasing opportunity to interact with judges outside of the courtroom, and in some instances we've obtained more candid responses than a lawyer might expect to get from a casual conversation with a judge. One extremely effective way to study judge decision making is the use of pretrial research. Just as you would invite mock jurors to participate in focus groups, we engage judges who are no longer on the bench to participate in mock bench trials or simulated hearings. In this kind of research, we can encourage greater candor and probe decision making more freely than in any other setting. We've also found that judges are extremely eager to share their insights with us when they participate in these exercises; it is as though the veil of impartiality has been lifted and they are finally free to tell someone what they really think about a case and the lawyers.

By and large, what this experience has taught us is that judges are people too. That is, their decision making behavior is not so different from that of the average person. Admittedly, their legal expertise

and the constraints of a hierarchical system in which judges are conscious of what appellate courts will say of their decisions affect them in ways that other people are not affected. But at the most basic level, judges, like all other decision makers:

- are interested in you and your client;
- are curious about the underlying facts;
- use cognitive “short-cuts” to process of a lot of information;
- organize the case in a framework or story which makes the most sense to them and which appeals to their pre-existing ideas and expectations;
- want and need to master the complex or technical aspects of your case;
- favor organized and well-prepared arguments;
- are thinking about the relationships between, and motives of, the various witnesses;
- are watching your courtroom demeanor and appreciate verbal and nonverbal variety; and
- benefit from visual cues (demonstrative aids) to understand and organize the evidence.

Face judges as any advocate faces any decision maker: with the intent to influence and the confidence that you possess the power to do so.

In light of this, all of the communication choices we've urged you to consider for jurors matters as much—if not more so—when you seek to persuade a judge.

What we have learned from pre-trial research with retired judges reinforces our experience and expectations about how judges are persuaded. Specifically:

- Judges need and want to be taught complex or technical issues more slowly and deliberately before being asked to consider arguments or make important decisions about them. None are eager to rush to judgment.

Lesson learned: Even if you can't avoid

technical terms, lawyers and witnesses need to use conversational language to explain them—even to judges.

- When the issues are incredibly complex, or difficult to understand, judges—like “average jurors”—will also defer to the side that provides the simplest explanation.

Lesson learned: Keep it simple.

- Judges need lawyers to pause and use transitional phrases when moving from one topic to the next in order to organize their thoughts and follow the argument. They are no more capable of “trying to drink from a fire hose” than anyone else, and they frequently interrupt an argument out of a desire to slow down the process so they can truly learn along the way.

Lesson learned: Pause at the end of each topic and ask judges if they have any questions about what you have covered before you move on. These questions are a direct and immediate feedback loop that can tell you what the judge is most interested to hear and, therefore, what he or she may be more likely to believe.

You will be wise to answer them when they are asked, even if you planned to address the issue more fully at a later point in your presentation.

- Judges rely on visual aids to guide their decision making. Text-heavy slides or graphics are not as effective as simple pictures, diagrams or graphics.

Lesson learned: Do not assume that the written word (even the law) will be more compelling to a judge than it would be to a lay juror.

- Expert testimony is not necessarily more credible than fact witness testimony. Inasmuch as every case involves the

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real lives of human beings, judges are incredibly curious about the personal stories, relationships, and motives behind the facts.

Lesson learned: Do not downplay the human interest aspects of your story just because you think the judge is supposed to decide an issue based only on the law.

- Judges grow weary of hearing a single lawyer argue an entire hearing. Verbal and non-verbal variety—including the use of multiple speakers—will hold their interest longer. In the alternative, a single lawyer will have to work extra hard to maintain their interest and attention.

Lesson learned: Style matters as much as substance.

- Judges want to hear your best affirmative case rather than listening to you set out the opposition's case and offering your rebuttal.

Lesson learned: Stick to your story. The number of times you refer to an opponent's argument should be limited to avoid diluting your own.

What this and other examples teach us is that your attention to detail is essential in every interaction with the judge. Purposeful persuasion requires thoughtful consideration of the communication choices available to you.

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Wyzga on Words

By Diane F. Wyzga, R.N., J.D.

The front page of the Sunday *New York Times* business section dated June 4, 2006, carried a well-written piece by Alexei Barrionuevo and Kurt Eichenwald entitled, "The Enron Case That Almost Wasn't."

As the story goes, in the beginning there was a blindingly complex case. The prosecutors sifted through millions of pages of documents that hinted at criminal misdeeds. But the question remained: what story do we tell and how do we tell it? The answer was hidden in plain sight. The Enron case came down to one of the most basic of childhood transgressions. Prosecutors (with the help of a savvy trial consultant) found a theme that carried the day: Mr. Lay chose to lie—to shareholders, to employees, his banks—and those lies were his crimes. The jury found that Mr. Lay criminally misled investors and employees about Enron's performance. In short, they decided that Mr. Lay was a liar.

Winning depends on identifying a well-structured story with vivid sensory images, unifying themes and clearly defined human truths. Human truths are things we know as true and know without empirical evidence. Listeners resonate with human truths by recalling their own experiences. They tune into you and your message to act on your client's behalf.

The key to winning your case story begins with identifying the story you want to tell. Once you identify the story, the shaping and delivery fall into place using what I call the three vital supporting structures of the story: Visualize—Humanize—Dramatize.

Visualize: When listeners follow a story, they journey, virtually, with you into an imagined reality or mental location where the story

actually exists, while never leaving their physical state. The process of transition from physical world to virtual world is active. The listener energetically connives and conspires with the attorney all the time to actually will the virtual world into existence. Why? Because the listener wants to believe the story so that they can do something which matters. When you clearly see the place of the story, you can bring your listener into that reality.

Humanize: The way to take anything seriously is to care about it. To get the listener to care about your client's story, you must endow it with importance by treating the story as an emotional experience. Storytelling persuades

on a human level when the listener can place himself inside the story with ease, listen deductively, absorb a human story that explains the conflict early on, articulate the story in his own terms, and filter the evidence selectively to be consistent with his personal story, world experience and understanding of the world order.

How do you identify the human element?

First, look at your story and ask:

- what draws me to the client?
- what engages me about his story?
- what does the story mean to me?
- what meaning do I most want to communicate through the story?

Next, ask:

- what does my client want to restore balance in his life?
- what are my client's core needs and desires?
- what is keeping my client from achieving them?
- what key scenes and human truths must I choose to convey the meaning of this client's story so the listener will identify with and help write the ending I want?

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Dramatize: This is your chance to deliver the goods of your case using what I call the dramatic appeal of “Scholarship & Showmanship.” Once upon a time lawyers might have been paid by the word. Today, lawyers know that a great story turns on language that is sensory driven, clear, concise, cogent, simple and active.

To win, identify the story you want to tell, and structure it using the techniques of Visualize—Humanize—Dramatize.

Diane F. Wyzga is the only R.N., J.D., professionally trained storyteller and coach who works as a trial and ADR consultant. She helps attorneys develop their critical listening and persuasive communication skills using the techniques and principles of oral storytelling to translate images into action. With over 20 years' experience, Diane founded Lightning Rod Communications (www.lightrod.net) to train attorneys to identify, shape and effectively deliver their stories using language with passion and precision. She may be reached at (949) 361-3035, or by e-mail at diane@lightrod.net.

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Incorporating Your Themes While Identifying Your Strikes

By Tsongas Litigation Consulting, Inc.

So you want to “sell your case” in voir dire? Lawyers need to minimize the time they spend talking and maximize the time they spend listening and gathering information. While you might be inclined to ask, *“How many of you feel that lawsuits against doctors are driving up the cost of medical insurance?”* when representing a defendant doctor, the question will only identify the plaintiff’s potential strikes. Our philosophy of jury selection is to focus on finding those who have experiential or attitudinal bias against your case and/or client.

You may think you are “planting seeds” in the jurors’ minds, but many studies indicate that opinion formation and change occur over a long period of time—not in two hours of voir dire. However, there are some effective ways to maintain the primary goal of voir dire (i.e., identifying your strikes) while incorporating your themes. The following are just a few practice tips to achieving both of these goals.

1. Use jurors who are not likely to make it into the box to establish your themes.

Ask your theme-building questions to those jurors who are obvious strikes for the opposition or who, because of their seating position, will not make it into the box. This allows you to establish some themes without the risk of identifying an unknown strike for your opponent.

2. Use the forced-choice questioning technique.

It is often difficult for attorneys to ask questions that seem to be in direct opposition to the stance they want to take to trial. While you might be hesitant to ask a question that promotes the opposition’s theme, it is often necessary to identify your high-risk jurors.

For example, when you are representing a plaintiff, your goal should be to identify those jurors who believe there are too many frivolous lawsuits. But, as a plaintiff attorney, you fear suggesting that a claim is anything but completely legitimate. By using the forced choice question technique, you establish that there are at least two opposing opinions on a particular subject. For example ask, *"There are many opinions about lawsuits today. Some of you may strongly feel that there are just too many unjustified suits today. Others of you may feel that if a case makes it to trial, it must have merit. How many of you (by raising your hands) believe that there are just too many unjustified suits today?"*

Ask theme-building questions to jurors who are obvious strikes for the opposition.

3. Ask theme-building questions only when you know they reflect a majority opinion.

When you are defending an insurance company, you may feel compelled to establish a theme by asking, *"How many of you would agree that insurance companies have an undeserved bad reputation?"* The few jurors who raise their hand in agreement are sure to make it on the plaintiffs' strike list. Instead, you want to ask a theme-building question that will not reveal a minority opinion. Asking a question like, *"How many of you agree that policy-holders often try to take advantage of their insurance companies?"* is much more likely to result in agreement by at least half the venire, making it impossible for the other side to strike all those who hold that opinion, while establishing one of the themes of your case.

4. Know when to ask, "Does anyone disagree?"

If you encounter a juror who "contaminates" the jury by revealing an extremely negative opinion about a particular case issue or your client, you can ask, *"Is there anyone who disagrees with some or all of what Mr. Smith has just stated?"* This approach can result in another juror expressing a more favorable opinion for your case. However, be aware that too much follow-up with this "good" juror increases the

chance that your opponent will add him or her to their strike list.

5. Tell the jury the reason you are asking the question.

Another way to establish your themes while focusing on identifying your high-risk jurors is to begin to establish your case while you explain to the jury (and judge) why you need to ask

a particular question. For example, in a construction case you might ask, *"In this case, you are going to hear that my client met and exceeded the job specifications for this project. However I*

know there are some of you who might have had a negative experience with a contractor. For this reason, I'd like to find out how you feel about this issue."

By using these techniques, you can begin to "sell your case" to the jury without losing your primary focus of finding the jurors who would put your case on an uneven playing field.

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Witness Preparation by Trial Consultants: Competitive Advantage or Invitation to Discoverability

By Craig C. New, Ph.D., Samantha Schwartz, and Gary Giewat, Ph.D.

The witness stand is hardly a place that promotes calm, collected and complete testimony. More often it is a place of anxiety, fear and confrontation. Nonetheless, it is through the process of direct and cross examination that the witness speaks and from which the jury must find the truth.

In cross examination, the deck is truly stacked against the witness. She is questioned by one who feels much more at home in the courtroom. The attorney has questioned many witnesses before her, and he will question many after. He has been trained in law school for this very task, in addition to the advice and tips he has received from his colleagues and mentors. The witness, on the other hand, has in many cases never entered a courtroom, much less been examined adversely by a professional. She has never tried to tell her story in a courtroom, under the scrutiny of the judge and jury. Even if the witness knows exactly what she wants to convey, feelings of dread and a lack of confidence inhibit her ability to have the jury accurately perceive her meaning and intentions. Alternatively, some witnesses may be overconfident coming into their examination only to find the task harder than they thought. Either mindset can lead to devastating consequences for the attorney and the case.

It goes without saying that cases can be won or lost on the performance of key witnesses. No attorney would ever dream of putting an important witness on the stand without some form of practice or preparation. However,

Cases can be won or lost on the performance of key witnesses.

skepticism remains over the extent of an attorney's preparation and the ability to alter the witness's original memory, despite the ethical guidelines of the American Bar Association's Model Rules of Professional Conduct. This skepticism is furthered because witness preparation is generally protected by the attorney-client or work-product privilege, allowing attorneys to conduct it in private without the risk of discovery by the other side.

The benefits of a prepared witness clearly outweigh the risks. Lawyers need to work with witnesses in advance for a number of reasons as part of their duty to produce relevant and reliable testimony. Witness preparation not only provides the attorney with an opportunity to assess the witness's credibility, certainty, and accuracy of recollection, it provides the witness with the opportunity to learn how to communicate more effectively.

Trial Consultants: Aggravating or Mitigating (the) Circumstances?

Witness preparation with the aid of trial consultants has become increasingly common in cases both large and small. Its prevalence has brought with it increased scrutiny and controversy in the

legal community. The most ardent opponents of witness preparation by trial consultants are likely to perceive the practice as a means to fabricate, exaggerate, or restrain aspects of testimony.¹ Some professionals in the legal community have questioned whether trial consultants are properly trained to participate in witness preparation, particularly if they do not have legal training. A related concern is that trial consultants are not required to earn a license and are not necessarily regulated by ethical guidelines. Although the American Society of Trial Consultants (ASTC) has established a Code of Professional Standards and a formal grievance procedure, membership in the organization is not required to practice trial consulting. In contrast, attorneys risk suspension

¹ Applegate, J.S. (1989). Witness preparation. *Texas Law Review*, 68, 277-352; Boccaccini, M.T. (2002). What do we really know about witness preparation? *Behavioral Sciences and the Law*, 20, 161-189.

or loss of their license if they do not adhere to the ABA's guidelines—a severe detriment to their career.

Notwithstanding these criticisms, the use of trial consultants in preparing witnesses to testify remains commonplace.

Attorneys, who are trained to focus on case-relevant law and evidence, rely on the content of testimony to support their client's case. Trial consultants

typically focus their efforts outside of the pure content to critical factors impacting credibility such as the witness's body language, speaking style, and varied paralinguistic cues.

The New Assault

A new assault on witness preparation by trial consultants has been mounted in Washington as well as other states. Those behind the latest challenge have asserted that witness preparation by nonlawyers is not protected under the attorney-client privilege and thus should be discoverable. The central argument of these individuals is that the jury is entitled to judge witness credibility based on a "natural" presentation of the witness, and witness preparation may camouflage that. For example, part of this judgment includes an evaluation of "the manner of the witness while testifying" and "any other factors that affect [jurors'] evaluation or belief of a witness or [jurors'] evaluation of his or her testimony."² These "other factors" can include aspects such as the witness's overall demeanor, appearance, posture and vocal inflection. The bottom line for these opponents is that if trial consultants change or help an attorney change these aspects of a witness, the jury should know about it. However, this argument has two fundamental flaws.

First and foremost, it assumes the attorney cross examining the witness is an unbiased truth-seeker, as opposed to an advocate. The adverse attorney is a zealous advocate for the client, and

the goal is often to muddy the waters, confuse the jury, or attack the credibility of the witness. The cross examining attorney prefers witnesses who are more susceptible to tactics that can accomplish these goals, and a practiced and prepared witness is more resilient to these attacks.

A second flaw in this argument is that it assumes trial consultants have special powers to change a witness's demeanor and presentation in ways an attorney cannot. While attorneys are bound by codes of ethical conduct, these codes in no way prohibit the attorney to advise a witness on manner of dress, nonverbal cues, or other factors contributing to credibility. If properly trained in communication, attorneys could offer witnesses the same advice as trial consultants, and the adversary would have no recourse.

So what is the bottom line? In our adversarial legal system, the role of a trial consultant is to provide services that are used to facilitate clear communication and assist witnesses in telling their story. They do not wave a magic wand and "change" a witness's testimony in mysterious ways, nor advise the witness to say anything less than truthful. The reality is that attorneys place a great deal of value on witness preparation and as an advocate for their client should have access to all the tools available to them as long as they are within the ethical guidelines proscribed by the ABA. Ultimately, it is the attorney's decision to choose whether to use trial consultants at all and the strategies or advice they provide.

How Do Trial Consultants Help With Witness Preparation?

Witnesses will often say practice is unnecessary: "I'm just going to get up and tell the truth." It is useful to ask such a witness two questions: "Have you ever been misunderstood?" and "Have you ever had someone deliberately try to twist your words?" In all likelihood, opposing counsel

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² Washington Model Instruction 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.02 (5th ed.); Washington Practice Series, Washington Pattern Jury Instructions – Civil, Washington Supreme Court Committee on Jury Instructions; Part I. General Instructions, Chapter 1. Introductory and General, WPI 1.02. Conclusion of Trial – Introductory Instruction.

wants both of these events to occur in court. There are many ways to tell the truth, and at trial the truth needs to be told clearly and concisely in order for the fact finders to do their job effectively. Attorneys have found trial consultants particularly resourceful for helping the witness to communicate information accurately and efficiently, improving the witness's composure on the stand, and ensuring that the witness's testimony remains more salient than judgments based on juror biases.

Accuracy

Accurate communication by the witness is keenly important to the jury as well. Accuracy means more than telling the truth. It also means choosing the right words and phrases to convey accurately your meaning to the jury. In a classic study, psychologists illustrated how one simple word can affect the impact of a message by manipulating the verb ("hit" versus "smashed") to describe the collision of two cars.³ When people were asked to estimate how fast a vehicle was traveling when it "smashed" into another vehicle, they provided significantly higher speed estimates than when the same question was presented using the word "hit." Trial consultants work with the witness and attorney to ensure that the proper words are used so that the message will be understood as it was intended.

Efficiency

Another area where trial consultants help is with the efficiency of the witness's communication. Jurors must sift through a great deal of sometimes complex information to find the truth—a challenging task that becomes even more difficult when witnesses are not concise or are prone to digressions. Such testimony can impede the jury's understanding of how the pieces of trial evidence

fit together. To the extent trial consultants can help a witness communicate his message more succinctly, the jury's job is made easier.

Composure

One of the commonsense cues jurors use to identify deception in witnesses is nervousness.⁴ In mock trials and post-trial interviews with jurors, trial consultants frequently hear comments such as: "Did you see that witness? Boy he looked nervous; he must be lying." Testifying produces anxiety, and two goals of the trial consultant are to decrease the level of nervousness the witness feels when he takes the stand, and to give the witness coping strategies.

Appearance

Often, jurors are influenced knowingly or unknowingly by inaccurate and unfair biases such as stereotyping, which may detract from their understanding or validation of the witness's testimony.⁵ For example, people may perceive a middle-aged man with long hair as an irresponsible person of low character. A trial consultant can recognize the potential influence of such debased judgments on the jury and can advise the attorney accordingly (e.g., making a suggestion regarding the witness's grooming) to eliminate this extraneous variable from the jurors' evaluation of the witness's testimony.⁶

Conclusion

Do jurors take a dim view on the practice of witness preparation? Do they share the same skepticism as some attorneys or legal scholars? The answer seems to be no. A research project conducted by members of the ASTC⁷ involving more than 500 jury-eligible citizens throughout the United States found 73 percent of respondents believe preparing witnesses to

³ Loftus, E. F. and Palmer, J.C. (1974). Reconstruction of automobile destruction: An example of the interaction between language and memory. *Journal of Verbal Learning and Verbal Behavior*, 13, 13, 585-589.

⁴ Pryor, B. and Buchanan, R.W. (1984). The effects of a defendant's demeanor on juror perceptions of credibility and guilt. *Journal of Communication*, 34, 3, 92-99. Zuckerman, M., Koestner, R., Driver, R. (1981). Beliefs about cues associated with deception. *Journal of Nonverbal Behavior*, 6, 2, 105-114.

⁵ Colwell, L.H. (2005). Cognitive heuristics in the context of legal decision making. *American Journal of Forensic Psychology*, 23, 2, 17-41.

⁶ Herbert, D.L. and Barrett, R.K. (1980). *Attorney's Master Guide to Courtroom Psychology: How to Apply Behavioral Science Techniques for New Trial Success*. Englewood Cliffs, N.J.: Executive Reports Corp., 308-09.

⁷ New, C., Schwartz, S. and Giewat, G. (2005). *Lay Perceptions of Witness Preparation*. Presentation at the Annual Conference of the American Society of Trial Consultants, Philadelphia, PA.

testify is a good idea. Another 66 percent agree that it is appropriate for a witness to practice before testifying. Less than 15 percent of respondents believe that witnesses who practice their testimony have something to hide.

The criticisms and attacks on the practice of witness preparation by trial consultants appear to be a tactic by some attorneys to scare others away from leveling the playing field. In 2003, the U.S. Court of Appeals for the Third Circuit found that witness preparation by nonlawyers (i.e., trial consultants) was protected under the work product privilege,⁸ based on their interpretation of Rule 26(b)(3) of the Federal Rules of Civil Procedure. This very strong opinion finds witness preparation by consultants to be "core" work product and therefore deserving of the highest level of protection. The lack of activity in the other circuits suggest that few believe the basis for a credible attack on the process exists. While the matter cannot be called settled, it would require a dramatic shift in prevailing thought for the status quo to change.

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Quick Courtroom Tips

**By
Bob Gerchen**

Develop a Relationship with Every Piece of Evidence

This isn't as racy as it sounds.

We all remember the Rodney King trial. One of the key pieces of evidence was the baton of Officer Timothy Wind. Interestingly, everyone who picked up that baton communicated a different relationship with it. The prosecutors held it with two hands and swung it around a bit, making it look as menacing as possible, while the defense tended to handle it more casually, communicating that it was simply a tool of the trade.

The way you handle evidence communicates a great deal to the jurors. If a document is extremely important, it's incongruous if you handle it casually. Hold it as if it were a newborn baby. Show reverence for this piece of evidence and the jurors will want to know what it is about this document that warrants such special treatment.

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For more information about Bob Gerchen's book, 101 Quick Courtroom Tips for Busy Trial Lawyers, visit www.CourtroomPresentationTips.com.

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⁸In re Cendant Corp. Securities Litigation, 343 F.3d 658.

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