



From Hon. Jacqueline Connor (ret.)



WOMEN IN THE TRIAL TRENCHES

CAALA Advocate Magazine February 2012

Looking at my pending retirement after ten years in front of the jury and twenty five years instructing and managing them, discussions about women in trial courts remains of interest, back then and maybe more so today. I confess that on the rare occasion when counsel table is “manned” by women on both sides, I notice..... and enjoy the noticeably altered dynamics. The Los Angeles Daily Journal had a timely article recently on October 17, 2011 by Sally Phillips and Bradley Boyer, called “Forget the Glass Ceiling, Take the Elevator Up.” This article triggered a troubled response from a woman who wrote back in a letter to the editor that the article was no more than a thinly veiled piece of advice that women would be more successful if they just acted like men. The tips for women provided in the article were, among other things, to stop apologizing, know yourself, promote yourself, radiate confidence, set boundaries, be fearless, work from strengths, and find/be a mentor.

The interesting aspect of the tips in the article is that they apply to both men and women trial lawyers (except for one additional part I did not include discussed in the article, regarding emotions.)

Are men and women different? Despite what various intellectuals dating back to the 60s proposed, our differences are palpable and we disregard them at our peril. Typical traits on both sides of the aisle can be plumbed for their advantages or ignored to their disadvantage. Starting with the tired concession that yes, everyone is different, there clearly are characteristics that apply across the gender lines whether we embrace them or deny them. If you have any doubts, have a child. Case closed.

I have seen successes and failures by men and women who fail to use their strengths and who adopt strategies they learned from a trial course or “master” that simply did not and could not work for them. I have seen attorneys, men and women, step all over their opponents (and themselves), to their own detriment, believing that their show of power and strength was effective. Sometimes, rarely, it can be. Usually the attorney becomes his or her own worst enemy.

Litigators and trial lawyers are not the same. Trial lawyers are the justice system’s gladiators. They are the fighters in the ring. “Litigators” are more commonly seen as the people doing the paperwork, motion work and preparation before the jurors enter the arena. These are two completely different animals. The observations I offer relate to trial lawyers, where the ability to relate to people and to tell a story, show up most clearly.

Some men and women are suited to and relish the challenge of working on their feet, of taking on the task of creating a world that can change question by question, witness by witness and to weave the whole into an appealing and compelling package. Not all do and not all should. Many are not equipped with the nimbleness required to be a really good trial lawyer. Some cannot manage the need for flexibility and

ability to shift on a dime, and the need to be able to read jurors. I have seen some oblivious to these needs, and I marvel that they have chosen a field for which they are so ill-suited.

One example comes to mind. Since starting on the bench, I have invited jurors to submit written questions to the lawyers during the trial. Though this was new back when I started, this is fairly common now and in fact has been incorporated into Rule of Court 2.1033 (effective January 2007.) Every once in a while, a trial lawyer would object that this would destroy his strategy. (In twenty five years, I have never seen a woman make this objection, so the gender is used deliberately.) I am always astonished at such an objection as I have always considered juror questions as priceless gifts to trial lawyers, giving them a golden opportunity to correct a misapprehension, reshape a bias, respond to a concern by the ultimate decision maker, or get a glimpse of what the production looks like from the other side... before it is too late. Not hearing the question, which happens when jurors are not permitted to articulate their confusion, concern or problem, does not make the issue go away. Rather, if the attorneys don't get to answer the question, the juror will readily do so without input from the advocates. Having a chance to know where jurors are perhaps going off track or finding out what might be distracting them and being able to weigh in, is a valuable advantage. The objection to juror questions suggests an approach to trial that is imminently short sighted. It reflects a fixed plan that will be rolled out come hell or high water, regardless of its effectiveness or persuasiveness. There are many trial lawyers with this trait, and if they win, it is too often in spite of themselves.

I have seen both masculinity and femininity played to great success as well as miserable failure. The best trial attorneys, in my view, are not the pitbulls but are, invariably, gentlemen and gentlewomen. It is clear to me that the best trial lawyers project integrity. They are liked, by jurors, judges, court staff and their opponents.

In talking to a number of women about their experience as trial lawyers, there were the expected tough stories about being treated with disrespect and dismissiveness. They came most often from the private sector and the stories tended not to be very recent.

Not seeing what happens outside of the courtroom, I cannot speak to comments about women not being treated equally by clients, colleagues, or bosses. Once in the courtroom, male and female attorneys make or break themselves. There are as many advantages as there are disadvantages to either gender, and the smartest trial lawyers minimize the downside while riding high on the upside.

Certainly there are far smaller numbers of women represented in the unique world of trial lawyers. This is not startling due to the very tough and exacting demands of this profession. When in trial, the commitment is 110% and the work is all-consuming. A trial lawyer is not in trial just during court hours. It is a 24-7 operation, if not in body, certainly in spirit. With traditional responsibilities of children, family and home undertaken by women, the demands of such an unrelenting schedule are virtually impossible to manage. To the extent that no woman or man can "have it all," the balancing of costs makes it completely predictable that there would be fewer women in this arena. This is neither bad nor good, but perhaps reflects a healthy perspective on what one deliberately chooses in life.

It may also be that women are more traditionally averse to frontal confrontations and are more skilled and

comfortable taking a case to successful resolution short of trial. Jury trials usually result in a winner-take-all ending. The losers (and often the winners as well) turn out not always happy with “justice” as defined for them by twelve strangers who did not quite see the picture as either party saw it. In “real life,” outside of the kabuki staging of the trial, there are generally some good points offered by both sides. Jurors are usually permitted to pick only one.

Also, the difference between the civil bar and the criminal bar reflects an immense divide between the approach and attitudes of trial lawyers. The criminal bar is comparatively small. A criminal attorney on either side destroys his or her own effectiveness if s/he gets a reputation for shading or evading the truth. “Jackets” last forever and getting a “jacket” or bad reputation means that everywhere you go, you are bucking up against a system that will no longer give you the benefit of the doubt. As a client, it may be great to have your attorney burn bridges for you and hold nothing back. Such a strategy, however, destroys an attorney’s effectiveness for future clients when the same lawyer has to go back over the charred and shaky bridge they torched. It is also not worthy of an attorney’s status as an officer of the court or as a counselor. A counselor gives the best professional advice possible, and that includes bad news and saying no. The civil bar is so vast, compared to the criminal bar, that the likelihood of seeing the same lawyers is far smaller. Though the bridge being burned may not have to be crossed in the future, reputations are still made or lost, and this carries a price.

The size of the criminal bar has therefore kept criminal lawyers more forthright and civil than the civil bar. Civil lawyers far too often brutally denigrate each other, send blazing diatribes in various forms, fight over innocuous calendaring issues or discovery items or otherwise expend energy on small blazes, while unknowingly sacrificing themselves in the war. No judge likes to see the inflammatory exchanges that invariably get attached as exhibits in warring motions. It is far more common to see this with male lawyers than with female lawyers but the dynamic is something that is uncomfortably too common.

I recall in my first month in civil, I drew the trial lawyers aside during a recess when the jury was deliberating, and I asked them their views on whether the best trial lawyers started out with integrity and grace, or whether these lawyers had the luxury of integrity and grace once they had achieved professional success. I believe the former is true. The most effective lawyers do appear to start out with integrity and rise to the top because of it, not in spite of it. I was surprisingly impressed, I recall, with one particular incident in my court that spoke volumes. As all attorneys should know, their antics in the courtroom when the judge is not on the bench are relayed back to the judge. I had one such instance when one side was obnoxiously demanding and unreasonable about something. The opposing attorney, a female trial lawyer, refused to rise to the bait and calmly and firmly repeated her position regarding whatever the issue was. Only after the matter was called and completed did my staff tell me about the obnoxious behavior. Of great surprise to me, after the fact, was that the female attorney could have said something. She could have complained or advised me of the “problems communication with opposing counsel” or some other standard euphemism for offensive behavior. To her great credit, she never said a word. She never criticized him or his positions and the issue was simply never raised. To this day I remain impressed and remember her as a real professional. This did not relate to her gender, but did relate to the grace and integrity that show up in the best of the best.

So, in finding that I am rambling a bit about good trial lawyers, I can start out with the best qualities of

trial lawyers, then comment on how typical feminine traits either work for or against these qualities.

The best trial lawyers are always themselves. They appear genuine. They behave the same in front of the judge as they do in front of jurors, opposing counsel and court staff. They don't put on a different persona or attitude. They are the same at a social function as they are in a courtroom.

The best trial lawyers are unfailingly courteous and well prepared.

The best trial lawyers successfully convey their absolute belief in their client, while at the same time are the first to acknowledge their clients' human failings.

The best trial lawyers never stop paying attention to their jurors.

The best trial lawyers are the best story tellers.

The best trial lawyers own the courtroom with their voice and presence.

The best trial lawyers have mastered the evidence code.

The best trial lawyers get their hardcore fighting done in advance of trial, through in limine rulings, stipulations or other strategies that resolve the sticky problem areas in advance. Jurors see nothing but courtesy and calm.

The best trial lawyers know that every item of evidence presents both an opportunity as well as a problem. There is virtually nothing that, in skilled hands, cannot be turned into either a weapon or a shield.

What are the characteristics that jurors don't like?

The worst trial lawyers pay no attention to them.

The worst trial lawyers give away their credibility with unreasonable positions and stretches of common sense.

Jurors are cynical and suspicious. It is clear from dealing with thousands of jurors that they do not believe that the attorneys will give them the whole story. As a result, they constantly search for cues and clues between the lines to find the "truth." If anything confirms that a witness is lying, or an attorney is trying to sell something that is false, the fight is virtually over. Unfortunately, jurors tend to assume the worst and act accordingly.

How does this play out with women trial lawyers?

Genuineness and feeling comfortable in one's own skin comes more with maturity than with any gender. It is not as common to see younger trial lawyers able to project the kind of sincerity that compels jurors. This generally applies to both men and women.

Courteousness and politeness appear to be more common with women trial lawyers. It is rare to see the kind of discourteous behavior that flares up between counsel initiated by a woman, but though rare, it does happen. This may well be part of characteristics of women as traditional caregivers and nurturers, of good listeners tuned into the emotional dynamics of relationships. Women's traditional aversion to conflict may also account for the greater appearance of courtesy and attention to smoothing interactions between themselves and their opponents as well as with jurors, witnesses, and the judge. Women also tend to pay a little more attention to court staff than male attorneys, which is always a plus that reaps benefits.

Being well prepared is even across the lines. There is nothing more painful than to watch an unprepared attorney flounder with missing exhibits, lost deposition transcripts or last minute objections to devastating opposition evidence. Jurors forgive such lapses once, but rarely thereafter.

Conveying belief in the client's cause is also even across the gender lines. This is reflected more as an attitude than a strategy, but you know it when you see it. When it is not there, it shows up as well. I have seen more men caught up in the operations of the trial than women, as in situations where they are seen being somewhat rude to their own clients who might be inadvertently interrupting them to ask a question or offer a suggestion at counsel table. Jurors notice.

Paying attention to the jurors is a common failing of both sides. In my experience, trial lawyers who are best at this invariably tend to have been trained in the criminal sector. While paying attention during voir dire is obvious, too many trial lawyers forget all about their finders of fact until they present their arguments. This is often fatal, as jurors provide information throughout the trial. It does not take great sophistication to discern whether jurors are tired of the repetition, caught up at the edge of their seats, taking notes (or abandoning all note taking), taking leadership roles or tuning out. If a lawyer has lost his audience, it matters not how brilliant s/he thinks s/he is.

The best story tellers seem to be the most prepared. They have their client's case pared down to a theme, a story. This crosses both gender lines.

Owning the courtroom with voice and presence tends to be a weakness of many women trial attorneys. The quality of voice makes a surprising difference in keeping jurors engaged. Tired jurors pick up with the energy of a vibrant voice. Soft voices of either gender can be a disadvantage, and this tends to be something more common with women because of naturally softer voices. Women should be able to use this as an advantage if the softer voice is always calm and in control. I have heard experts in the field of psychology and psychiatry refer to the resistance felt by people when women's voices get loud and shrill, reminding them of their mothers "yelling" at them. The shift from being too quiet to being loud and firm enough has to skirt the potential for sounding shrill.

The impression of a commanding presence deals with the projection of one's confidence. Everyone can recall the experience of watching an actor or speaker on a stage or on the screen where one cannot take their eyes away. That "something" is in large part the skillful projection of confidence.

Both of these qualities, presence and voice, can be achieved and/or improved with thought and practice. However, if the quality is one that is not quite “real,” the danger is that there may be moments when the mask is dropped and jurors will see the real lawyer behind the image.

Vulnerability can be extremely appealing to jurors, when it is owned. Trial lawyers who drop something or get caught midword or midstrategy with an obvious miscalculation or mistake, can win jurors’ sympathy and support by acknowledging the error or miscalculation with some humor and moving on. This ability not to get stricken with embarrassment or to be thrown off stride comes with maturity and genuineness, qualities available to both genders.

Mastering the evidence code unfortunately tends to be rare, and is seen most often with trial lawyers of either gender who were trained, too often, in the criminal sector. Experience with the rules of evidence includes knowing when not to make an objection, or at the very least, making them infrequently and only when it serves a real purpose, such as protecting your witness. Peppering the other side with objections that may be valid but achieve no real purpose other than to rattle the opponent is not well received by jurors. If anything, they often engender sympathy for the lawyer they see as trying to get information to them while the other side is trying to hide the information from them. This is not a good place to be and I see this form of aggressiveness more often with men. Anyone watching a trial between real masters of the art will see very very few objections. That is, in large part, because they have done the rough-and-tumble work behind the scenes through in limine motions and advance rulings when the issues can be addressed cleanly with no jurors waiting.

Appearance is one that creates a unique problem for women, since there is no standard trial “uniform” that works. Men can wear a good suit and with good grooming, appearance is a nonissue. Women? Unfortunately because of the freedom women have to wear different types of clothing, focus on dress and appearance comes to the forefront more often. The bottom line is that a trial lawyer’s appearance must always be professional. In addition to simple grooming, this means nothing tight, no bare arms or legs, no dangling jewelry, and nothing higher than a medium heel. Can women do well with more flamboyant clothing? Of course, just as men might. The danger of offending a juror who might or might not appreciate panache should be enough to curb looser standards. Clothing should never hit the jurors’ radar screen other than to create the impression of confidence, competence and experience. It should be a nonissue and flash rarely works.

Ultimately, if one were to examine the top 25 trial lawyers in Los Angeles, there is a strong feminine presence. Do women need to be “more like men” to do well with juries? Absolutely not. Can feminine characteristics be an advantage? Absolutely. Can we be our own worst enemy? Aren’t we always?

Questions?	Email Judge Connor: judgeconnor@adrservices.org
Mediate with Judge Connor	Contact Audra Graham at ADR Services, Inc. (310) 201-0010 / audra@adrservices.org