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What Do Monica Lewinsky and Bill Clinton Have To Do With Trial Presentation?

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That assertion probably caught your attention. You probably wouldn't think much of it, but Monica Lewinsky and Bill Clinton actually provide a perfect example of an important aspect of the trial lawyer's appearance and role at trial.

I'm not the really smart one in our family. That distinction belongs to my significant other, Anita, who is the Phi Beta Kappa Ph.D. in our family. And it is that PBK designation that is the link to this column. As a member of PBK she receives a publication called the American Scholar with all these really brainy and intellectual discourses on scholarly things—usually above my pay grade. However, a recent cover story referring to the Lewinsky-Clinton scandal was right in my attention zone.

The set-up paragraphs to the article detailed how Lewinsky was taken to a hotel for some long hours of interrogation, and she began to talk about how maybe she should have a lawyer present, and then went further and started to ask for her lawyer. Then came the description of the FBI agent's attempt to locate her lawyer and the author's description of that attempt as sorely lacking in enthusiasm. About that point I sensed that this article was going to be less than complimentary of the FBI, the Starr legal team, and the investigation of Mr. Clinton and the ensuing impeachment proceedings. Thus, my interest in the article waned having sensed a discourse that varied from my own mindset about Mr. Clinton. And then, and then, the epiphany occurred! I realized that my mental reaction was just like that of a juror. (If your location on the political spectrum is causing you distress because of my use of Mr. Clinton, substitute an image of you reading an article complimentary of Karl Rove and George Bush and you will achieve the same mental reaction about two to three paragraphs into the article.)

The situation I have just described is a situation counsel representing plaintiffs face in every jury selection when dealing with tort reform jurors. It is a problem faced by counsel defending corporations whenever they are doing voir dire and face Wal-Mart haters on the jury panel. We need to recognize that every juror will carry into the courtroom those predispositions, lifetime accretions of viewpoints, bias, prejudice, and prejudgments—because we all carry them. The fancy name for the study of these predispositions is heuristics, and dealing with them, probably more than anything else, will determine your success or failure at trial. Dealing with mindsets in the context of a trial is a major issue and not one that can be dealt with in depth in a column of this length. What can be done, however, is to highlight a few suggestions and heighten the reader's sensitivity to having to deal with jury mindsets. Each trial lawyer has his or her own unique persona. Each trial lawyer has to find ways, that work within that persona, to deal with "mindset" topics involving some of the most personal, private, and emotionally charged feelings that a juror might have. Here are four suggestions.

Number one: You have to think about how *you* (not me) can discuss an emotionally charged issue with another person. You, with your persona, your abilities, your verbal facility, your body language, your eye contact, and your voice inflection. Get the message? At the beginning, "it is about you" *and your skills*. You have to be able to *objectively* dissect what you can and cannot do with the skills with which you have been blessed or cursed.

Number Two: Develop and hone your "cause challenges" skill set. This is a discussion of an emotionally charged issue with another human being. This is close to violating the rule taught to you by your Mom and Dad: "Don't ever discuss money, religion, or politics with anyone." So here you are, Mr. or Ms. defense counsel, about to discuss feelings about corporations with a Wal-Mart hater and then get them to excuse themselves for cause or get the judge to excuse them for cause. When you sense that such a feeling runs deep, the tactic to use is to get it out in spades and then suggest, "Maybe Mrs. Jones, this isn't a case that would be good for you. Maybe another case where a corporation isn't involved would be better for you. If you were in my client's shoes would you feel uncomfortable with you on the jury?" Importantly, you can't have this kind of difficult discussion about emotionally charged mindsets on the fly in the heat of voir dire. It has to be thought out. It has to be scripted out. It has to be practiced. You might prepare for it by doing a mock voir dire and having your jury consultant "salt" the mock jurors with some of the mindsets that will be most troubling to your case and getting a feel for how to work with those feelings, how to expose them, how to respond to them, and how to move those jurors to get removed for cause so that you don't have to burn preemptory strikes on them. The three most important questions I ask in voir dire are: (1) Tell me about the core of who you are, what is important to you; (2) Tell me what it is about you that would make you a good juror; and (3) Tell me what it is about you that might make you a not so good juror. The answers to those questions are where predispositions and emotionally charged mindsets start to leak out.

Number Three: Your “Plan B Thinking.” If you don’t try cases with Plan B Thinking (PBT), you aren’t really trying cases. The most important thinking you will ever do in preparation for trial is Plan B Thinking—i.e., "What If … Thinking." If you ever have a trial that all went according to Plan A, you shouldn’t charge a fee because that case could have been tried by your secretary, paralegal, or legal assistant, or you could have thrown the trial folders into court and it could have tried itself. So Plan A was to get that Wal-Mart hater struck for cause but the judge wouldn’t do that. Then Plan B was to use a preemptory strike but there were those other three jurors who were worse and she ended up making it onto the final jury. Now, we’re on Plan C for how to deal with her thinking in the evidence and argument phases of the trial. We have to make our corporate client different from the Wal-Marts and Goldman Sachses (to use today’s news headline) of the world. We need to make the point—in opening and closing and in direct and cross—that this corporation is different from others and can thus be judged differently and viewed differently, without the predispositions that might have come into the courtroom with us.

Number Four: Do indirectly what you can’t do directly. As soon as we have the jury panel list we have our paralegals do internet research on everyone on the panel. By doing that in a case in which I was defending a county government, we actually found a letter on the Wal-Mart website from that particular juror criticizing the county for a decision to allow the building of a Wal-Mart in that community. The juror did not respond to general questioning about being critical of the county government, nor to more pointed questioning designed to allow her to respond. We ended up having to go back in chambers and showing the juror the letter before she admitted her negative feelings.

So there you have it—four quick suggestions for dealing with predispositions of jurors: (1) Know and heal thyself; (2) Develop and hone your "cause challenges" skill set; (3) Develop Plans B and C for differentiating your client from the troubling disposition mindset you fear most in the case; and (4) Do indirectly what you can't do directly—research, on the internet, for example, each of the individual jurors after voir dire to identify problematic predispositions of the jurors that might be impossible to elicit in actual questioning. Following these suggestions will do much to improve your chances of getting the jury to leave its prejudices and predispositions at the door, and hopefully will get your jury to be impartial in deciding the case.