

## **Overview of the Jury Selection Process**

*by Patrick J. Ducharme*

*An excerpt from the Canadian Legal Skills book, Jury Selection in Criminal Trials - Skills, Science, and the Law by David M. Tanovich, David M. Paciocco, and Steven Skurka.*

When asked for his observations on the issue of whether to elect trial by judge alone or judge and jury, Windsor defence lawyer Patrick J. Ducharme, provided the following worthwhile advice:

It has often been said that counsel should elect trial by judge alone when in the individual circumstances of the case the law is favourable and trial by judge and jury when the facts are favourable.

In my view, this advice is overly simple and potentially hazardous to the client. Its most serious weakness is that it takes no account whatever of what is arguably the single most important factor of all, the personality of the lawyer who will advocate the case before the trier of fact.

Whatever the law or the facts may be, the lawyer must shape and develop the theme of the argument and ultimately persuade the trier of fact of the sufficiency, the validity, of that argument. And the plain truth is that, while some lawyers have proven themselves quite capable of impressing judges with the "truth" or the cogency of their arguments, they are far less naturally suited to attract and persuade juries.

There is, in short, a phenomenon in advocacy which might be called the "jury personality." Some of the country's most renowned trial lawyers clearly have it. The lawyers most likely to succeed before a jury are not those who are shy or retiring. Although they steadfastly avoid pomposity or arrogance, they have an unmistakable bearing in and subtle control of the courtroom. They know, usually instinctively, that their every word, act, or gesture is being closely observed by the jury. They are magnetic. For them, the trial is elemental human drama and they are invariably "centre stage."

The "jury personality" is also one who has developed some considerable mastery over language. Her words are sharp and crisp and simple and direct. Knowing that the jury members are likely to be in their everyday experiences far removed from those dry spaces in which the law and lawyers reside, she speaks correct informal language free of stilted legal jargon and cliché.

Lawyers with "jury personality" are also consummate storytellers. They understand, therefore, that the story they tell must always and ultimately please and persuade. They must tell it easily, naturally, without detracting attention from it by making it seem rehearsed or otherwise insincere. For this reason, too, jury lawyers tend to work well without artificial props, without podium or paper. Literally and figuratively, these things serve as barriers, not as bridges, to the jury. They get in the way of communication. By contrast, lawyers with well-developed jury personalities let nothing stand between themselves and the trier of fact. Their body language suggests intimacy and identification rather than cool professional distance.

At the same time, the jury lawyer is a model of civility to everyone assembled in the court. Generally speaking, the best jury lawyers interrupt and object to the questions or tactics of opposite counsel only as necessary. In every such instance, they are certain of the correctness of their position. Their civility is manifest, too, in the way they address the jury in closing argument. Again, they eschew the podium and the paper. They remove, in other words, the obstacles. They speak directly to the trier making eye contact, but avoiding the platitudes and irrelevancies and needless, painful, boring repetition. They show respect for the jurors, by avoiding any remark the least bit demeaning. Thus, they do not admonish the jurors to "pay close attention," and they do not tell them that the decision they are about to make is the most important decision they have ever made, and they do not use words such as "winning" or "losing," words with limitless capacity for conjuring all the worst images of lawyers as hired guns and self-aggrandizing, money-

grubbing mercenaries.

Above all else, the lawyer with jury personality connotes with every move made in the courtroom a sense of principled belief in and commitment to the rightness of the client's cause. The jury lawyer has, in this sense, an abundance of pathos, the quality or power of evoking a feeling of compassion or pity. There is nothing new in this: as long ago as the fourth century B.C., the Greek philosopher Aristotle said that "pathos" was an essential quality of the skilled rhetorician and must be capable of inspiring feelings of compassion or pity from his audience.

In light of this, then, it certainly seems that the election of trial by judge alone or by jury requires, in addition to any other considerations regarding the facts or the law, an honest self-appraisal, that his or her skills are of a different order than those revealed by the best jury trial lawyers, then for the client's sake the choice should be trial by judge alone. Whatever the decision, it is for the lawyer to make, not the client, because in the final analysis the burden of rhetorical persuasion falls upon the advocate.

The advice, then, to a lawyer weighing his or her election: know the facts; know the law; know yourself.