

The Journal Of The Section Of Litigation

American Bar Association

Litigation

Vol. 29 No. 3 Spring 2003



Prejudice

Tilting the Playing Field

by Kenneth P. Nolan

I was raised in the melting pot of New York City. Except that nothing really melted. Every neighborhood, indeed every block, was its own ethnic enclave. Catholics, Jews, Chinese, Blacks, Poles, Puerto Ricans had their own distinct areas, physical and emotional. Actually, a bit like Yugoslavia, but instead of the Croats and Serbs, it was blacks and whites, Jews and Christians, Irish and Italians. Sure, we lived so close that you could smell the sauce simmering on Mrs. Savino's stove, but we rarely intermingled even though we were similar in our struggle to survive and our desire to be the American dream. We were different, after all. The mantra "Stick to your own kind" was the unofficial motto of my Brooklyn.

The city was really a mosaic, as former Governor Mario Cuomo accurately described the failure of the ingredients of the pot to blend. The green of the Irish, next to the red of the Puerto Rican, next to the blue of the Greeks. And that is how we initially viewed people, not by the "content of their character," but by their race, religion, and what part of the world their parents had fled. "What sort of a name is that?" was the question whispered when someone was introduced without the typical identifying Schwartz, O'Brien, Drago, Hernandez.

It was just easier to relate to those who lived like you, attended the same church, ate the same food. In my working-class world, once we knew the person, the stereotype faded. But in order to overcome those initial impressions, the person had to be known, had to prove worth. And a reassuring "He's OK" from a guy in the neighborhood altered the perception from distrust to immediate acceptance.

As I became more formally educated, I thought I could escape the intellectual straitjacket of Sherman Street where we were all the same, everyone knew everyone, and if you misbehaved, any passing mother would yell at you. And then you'd be punished a second time at home. The world of "the City," as we in the outer boroughs called Manhattan, just had

to be different, with its wealth and sophistication, its museums of priceless art and opulent restaurants.

Yet, as I learned when I stepped outside the safe confines of the neighborhood, the world of equality and acceptance that I had envisioned "out there" was a mirage, discussed in college classrooms, written about in the *New York Times*, but practiced rarely. Indeed, the greater my experience, the more I understood that the stereotypes that I thought I could leave behind were, in actuality, the norm. Of course it was not the overt, public "Whaddya want, he's _____" to explain any deficiency. No, in the real world the prejudices were subtle and silent and held by those who had real power—to hire, to influence public opinion, to pass laws. One arrogant high-ranking public official called Staten Island, a bastion of civil servants and streetwise blue-collar workers, "a third-world country," even though that borough lost hundreds in the World Trade Center. By contrast, my neighborhood of high school-educated union members and cops and firemen was a model of fairness.

So by the time I graduated from law school, my naive view of the world, where the educated and powerful were fair and equitable, had vanished. Instead of fleeing my working-class roots and their ethnic emphasis, I understood their limitations, since the harm visited by those I grew up with paled in comparison to the harm inflicted by those with wealth and influence. Of course I was disappointed but not shocked, since this was the real world where happiness was ephemeral, to be attained in the next life rather than this "veil of tears."

As I began litigating and trying cases, the hard realities of life were a constant. To succeed you had to persuade the judge, win the votes of the ordinary citizens who grudgingly sat as jurors, satisfy your client. In theory, those with the best cases always prevailed, but I soon learned there was, as Justice Blackmun sagely observed, a real as well as a theoretical world. *Lee v. Illinois*, 476 U.S. 530, 547 (1986). By my second court appearance, I realized that judges were human, welcomed friends, and adhered to philosophies as simple and

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unrefined and often as outcome derivative as pro-plaintiff or pro-defendant. And at my local bar association, the Bay Ridge Lawyers, a judge, a neighborhood guy from the Democratic clubhouse, told us, "And if you come before me, make sure you let me know you're a member of this fine organization. Kick me in the shins, do something, let me know who you are." Or at dinner with a federal judge who responded to the question of how he was appointed by calmly and candidly stating, "I knew Rockefeller, Javits, and Lindsay."

Of course, the world has changed and for the better, and the fear of difference that pervaded my childhood has largely dissipated. But differences continue to exist, and to pretend they don't is a dangerous delusion. Just look around at the myriad ethnic newspapers, the donors who endow colleges with Asian studies centers or scholarships for African Americans. Diversity in colleges, in the workplace, even in the bar associations is the new cause. Instead of a "Se habla español" in the local real estate office, which would once bring fear and flight to the suburbs, the same message is in eight languages including Russian and Norwegian. The most common male first name when my youngest daughter graduated from P.S. 102 in June 2001 was not Johnny or Tommy but Mohammed. And once we break beyond the confines of the big cities, we see regional, class, and other distinctions that affect our work.

Yet I believe in the essential goodness of our system. Not perfect, of course, but close enough. So all judges are not Brennans, big deal—most are hard-working and fair. So jurors bring their inherent biases into deliberations—most do the right thing. And usually those who should win, do. But that's not an excuse for closing your eyes on the strategy of litigating and trying the case in the most favorable jurisdiction, before the most favorable judge and jury. Because as advocates, we get paid to win, and to win, you must consider these differences. If you don't, your adversary will.

And, by the way, don't be shy. There's a fine line between ethical and unethical behavior. Don't be afraid to play by the rules to choose the best jurisdiction, have the best law apply, select jurors who lean in your direction. Maybe the rules should be changed somewhat and you should do what's right rather than what's best. I'll leave that to another article and your conscience. But for now, consider these elements when trying to win.

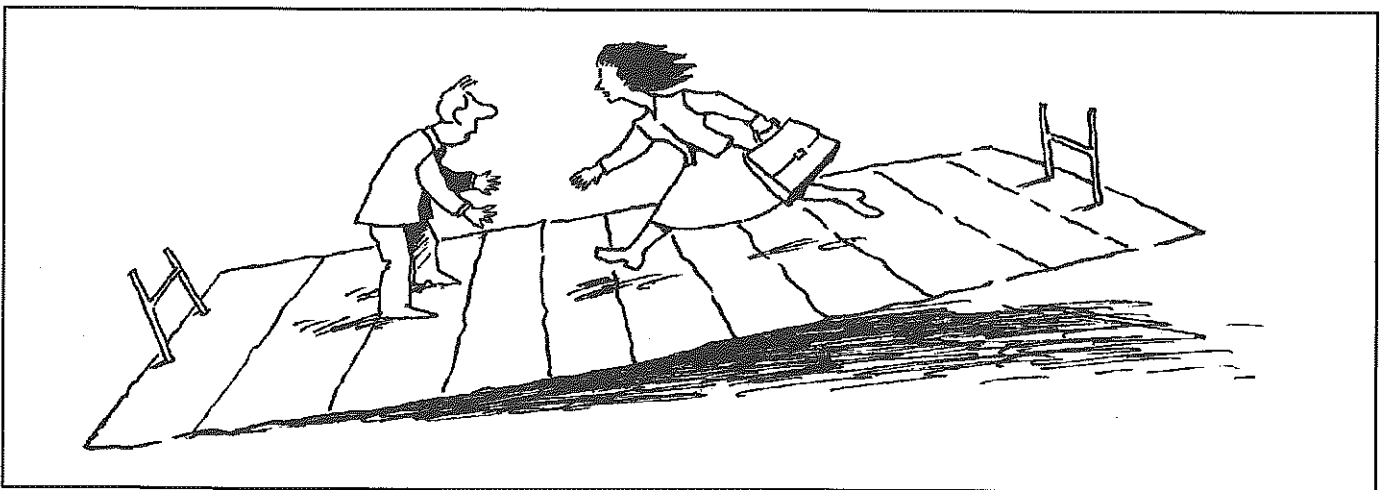
Venue. Even though elementary schools no longer teach geography, where a lawsuit is litigated and tried influences

the law applied, the judge, the jury pool, the appellate decision, and, ultimately, success. A corporate representative handling that company's product liability lawsuits candidly stated that in one jurisdiction, the lawyers told him his company was going to get "home-jobbed," and he could pay now or later. The combination of huge injuries with a sympathetic judiciary and jury pool can easily lead to a plaintiff's victory. I'm sure this corporate representative wouldn't hesitate to transfer a case to a jurisdiction where his company employed thousands or an area where the belief prevails that the tort system has run amok.

So even before the retainer is signed, the research into where the lawsuit can be brought should commence. In which counties, which states, can the lawsuit be brought? State or federal? In multiple-defendant cases, where can you obtain jurisdiction over all defendants? Are all defendants necessary parties, or can you take the gamble of not suing one in order to keep the case in a favorable jurisdiction? How important is it to keep the lawsuit from being removed to federal court? Some state court venues—Cook County, the Bronx—are renowned for favoring plaintiffs. Can the lawsuit be brought and kept there? Just doing so can lead to a quick and equitable settlement. Scott Turow has it right. "The forum can make a difference." S. Turow, *Reversible Errors*, 370 (2002).

Most defendants favor federal court, where juries are less likely to run wild. Removal for these lawyers is an art form, perfected to snatch the case from the comfy confines of the local state court and then to battle the remand motion. Once there, the playing field may even tilt to the defense side somewhat. After all, a large plaintiff's verdict in Houston is different from one in South Dakota. The same is true in various counties within a state—in New York a tough case is won or lost depending on whether it's tried in an urban or suburban court. As Judge Rosenberg, a state judge sitting in middle-class Republican Staten Island told me, "You're not in Oz anymore. This isn't Brooklyn. Lower your demand by 50 percent." And he was right.

In class action lawsuits, defendants claim that a few state courts have become magnets because counties like Madison County, Illinois, or Jefferson County, Texas, are considered plaintiff-friendly. Defendants battle to change location, through either litigation or, more frequently, legislation. Recently, President Bush signed a bill providing that the federal courts will have jurisdiction of any civil action involving



minimal diversity between adverse parties that arises from a single accident, where there are at least 75 fatalities. Obviously, the sole purpose is to ensure that the litigation stays out of state court, like Cook County in Chicago.

What law will be applied for liability and damages? What is the jurisdiction's rule on conflict of laws? Is it a balancing test or something else? Is there a particular issue upon which the success of the case rests? Research the law, the appellate decisions, similar cases. In a wrongful death action, New York law allows recovery for pecuniary loss only—nothing for love, companionship, grief. Other states allow recovery for these elements. The difference in recovery for the loss of a teenage son could be \$250,000 under New York law or millions under another state's law.

Judge. I doubt that I would be a good judge. Even when I watch a Mississippi/LSU football game, I have to root. Not having the privilege of being raised in the South, I find the game is meaningless. But I always choose one team, and there I am, screaming at the screen. So it would be hard for me to remain neutral all day. And I'm sure it's difficult for those who actually make rulings, consider objections, and run a courtroom.

It never surprises me when I enter a courtroom and see a buddy of the judge on the other side. Politicians, former bar presidents, and campaign contributors are the usual cast. That's not to say I don't enjoy the scene when the judge pointedly asks me in front of my out-of-town adversary, "What's

thankless job. But the judge is crucial. Do online research about the judge's prior decisions, background, likes and dislikes. Speak to the regulars to get a sense of good/bad, tough/easy. Knowledge of the law and procedure is paramount. Yet don't be afraid to know the judge. It's like chicken soup, it can't hurt.

Obtain all previous decisions and learn the philosophy of the judge. Cite the judge's previous decisions. Don't be afraid to remind him or her of a decision that was overturned if there is an insistence on adhering to the previously overruled decision. Of course, you must be politic. Judges who are abusive must be confronted, and it takes a particular type of courage to file a formal complaint. But you must make a record. If you succumb to a bully or let the judge avoid making a ruling, there likely will be no redress in the court of appeals—only the added insult of being told you waived the point.

When I was a very young lawyer, I represented a small life insurance company that issued small policies in which the premiums on occasion exceeded the payout. In a case brought in small claims court, upon hearing the facts, the judge screamed that our position to pay only the face value was "outrageous and made by an immoral company. Terrible, horrible, disgusting. . . ." The judge continued yelling at me and called for a stenographer for trial "*Right now!*" As I slunk back to my seat, feeling about the same as I did in sixth grade when my mother caught me smoking, an older lawyer took me aside and said, "Hey, don't take that crap from her. Ask her to recuse herself." Knees and voice shaking, I told the judge very politely that she might have prejudged the case and perhaps, just perhaps, another judge should decide the case. She glared and then for the record said that the company's behavior was so egregious that she couldn't contain herself. Off the record, she leaned toward me and whispered, "You're right. I learned my lesson. Next time I'll keep my mouth shut and really fix you."

Jurors. They are the equalizers. The judge is lousy, the law is shaky, but the jurors are the ballgame. All we do is for their benefit. They decide success, and if you convince them, you will be rewarded. And most of us are quite shameless in our pathetic attempts to sway the jury. After the clerk arranged for a cake on the judge's birthday, one attorney announced, "Happy Birthday, Your Honor. Honestly, Judge, isn't this the greatest jury in the world?" I nearly puked on the lawyer's table.

Corny jokes, sugary politeness, off-the-cuff comments about the local high school football team—I've seen them all, and I've done a few. Experts who are the same race as the majority of jurors. A member of the trial team who appears for the first time in the four-year litigation. She's Hispanic, as is the majority of the jury. It ain't pretty.

On occasion it works. Johnnie Cochran quoting the Bible in the OJ case to the church-going African-American jury. Edward Bennett Williams bringing Joe Louis into the Jimmy Hoffa trial to shake Hoffa's hand. Celebrity or politician witnesses in criminal trials of the once-revered who stole from the public till. Even James Caan—Santino Corleone in the *Godfather*—appeared for the defense in one of many local Mafia trials.

But let's be honest. You have to do it. You have to select jurors most predisposed to your case. You have to do the research, the jury surveys, the shadow juries so you know what is effective. Of course, it's truth and fairness that usually rule, but it doesn't hurt to have jurors who view justice

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your name, counselor?" only to say, "Kennnnny, where you been, how the hell are you?" when the other lawyer steps out of the room. And it doesn't hurt when the clerk takes me out of turn and whispers, "Judge, Kenny Nolan, I went to high school with him."

It's the judge who runs the courtroom, makes the crucial evidentiary ruling, has the power to accommodate the schedule of your experts. The judge can simply and easily let the jury know that he thinks you're an idiot and your case has no value. In one case where the judge wasn't happy that the case did not settle and blamed it on me, his response to one of my objections at trial read in the transcript as follows: "Mr. Nolan, you're objecting to this question? Denied." What the transcript didn't show was that as the judge spoke, he was staring at the jury, shaking his head in disgust, and nearly shouting "Denied!" Very intimidating. You can't back down and must adopt the injured-puppy look, which is difficult when your initial reaction is to shout back using what you were taught was foul language, but is ordinary vernacular for my teenage daughters.

So know the judiciary before you file. What are the chances of a favorable judge? Almost all are fair and hard-working and bring a bit of justice to our world. For the most part, a

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through your eyes. Learn the jury profile and determine what type of juror would be best for your client—young/old, man/woman, white/blue collar, high school/college, the list goes on. Before trial, you should know the types of juror you want to select and to avoid.

Juror selection has always been an art, never a science. The juror whom you believe fits the profile for your opposition often is your greatest ally. On the large cases, the jury consultants take up residence in your office with their lists, charts, questions, but the struggle is always whether you listen to them or your instincts. Select jurors by the seat of your pants, an old trial lawyer once told me. If you think that

the juror will be good, put him or her on. Never mind whether they're white, black, or purple. That is advice well taken because I have been amazed over and over again how many times I have been surprised. Even those whom you know like you will tell you, "I wanted to help you, but what could I do?"

Talk to people, partners, support staff. And please, do something that you don't do at home: Listen to them. You're just not as cool as you think. You don't know the music, the TV shows, the movies of the 20- or 30-somethings. If your kids call you a dork, you are. Discuss the facts of your case—look and listen to reactions. Determine what strategy works, and then go with it. But do not substitute research for insight. You might just be right.

Approximately 90 percent of verdicts are fact-based. You know who's going to win the moment you pick up the phone. It's the 10 percent that are determined by the attorneys, the venue, the jurors. If you can question the jurors, do so. If not, fight for a detailed questionnaire. The more you know, the more intelligent your choice. Always ask open-ended questions. "Can you be fair?" is a lousy question. If there is a problem in the case—alcohol involvement, immigration problem, criminal record—bring it up during selection. Be upfront. Don't wait until you finish your opening to allow your opponent to announce, "Mr. Nolan told you a very nice story. But he left out just one little detail..." The jury will never believe another word you say. It's much better to reveal the weaknesses while you can still communicate to the jury. That way you can assess juror reaction and use a peremptory to excuse those who might have prejudged the case or those your instincts tell you shouldn't be on the jury.

It's always refreshing when you speak to the jury after a verdict and realize that their decision was based on their perception of the evidence, not some extrinsic or improper factor. You may disagree, but you know that the system worked. Yet you cannot ignore the real world. Never forget that each juror's perception of the evidence will always and inevitably be colored by individual experiences—by all the prejudices and insults suffered over a lifetime that each carries into the box. You must confront these frailties and not hesitate to consider them in trying a case. Imperfect—yes. But so are you. □