Be the Fairest of Them All – How to Win by Validating “Negative” Values and Beliefs

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MARJORIE RUSSELL is a case development, trial and jury consultant. For 30 years, she has tried and assisted on hundreds of civil and criminal cases, in state and federal courts, all over the US.

She serves frequently as a case development, jury and trial consultant in civil medical malpractice, personal injury and death of all kinds, and civil rights cases; as well as for the accused in multi-defendant federal prosecutions, including death penalty, murder and white collar crimes; and in state court capital and life felonies, and claims of sexual assault and abuse.

Whether in active cases or in continuing education seminars, Marjorie’s perspective on case and trial preparation employs a blend of action methods, storytelling techniques, brain science, and a good dose of humanity. She is a specialist at finding the story, values and connections that move jurors to action. Once discovered, Marjorie can guide the lawyer and witnesses in presenting their story in a compelling and memorable form.

Ms. Russell is a Distinguished Professor Emeritus, retired after 30 years at Western Michigan University Thomas Cooley Law School in Michigan, where she was primary architect and the last chair of the Litigation Skills department. She is a frequent presenter and trainer at continuing education seminars for lawyers nationwide. In Michigan, she trains the staff who teach in the Criminal Defense Attorneys of Michigan skills seminars and its annual Criminal Defense Trial College, which she helped found in 2004.

She has been active on the staff of the Trial Lawyers College founded by Gerry Spence and others, since 1996. She regularly teaches at regional seminars, as well as the TLC Colleges and the Death Penalty/Capital Crimes seminar held at the home ranch in Wyoming. Many of her techniques have been honed in the amazing laboratory of the TLC, for which she is grateful.

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How to Win by Validating 'Negative' Values and Beliefs
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Marjorie P. Russell

There are three things to take away today:
1. Be the fairest of them all.
2. Separate the person from their behavior.
3. The route to these things is through role reversal.

"You never really understand a person until you consider things from his point of view... Until you climb into his skin and walk around in it." - spoken by Atticus Finch, To Kill a Mockingbird by Harper Lee.

We ask a lot from jurors: respect, compassion, generosity, understanding, to make allowances for and set aside human foibles in considering the worthiness of the claims for justice we raise for the people we are trying to help.
'Please don't judge Johnny for being fat, or for his mistakes in the past, or for the poor way he behaved when this first happened, or for his decisions in whether, when and how to seek treatment.'
'Please don't judge us for being plaintiffs' lawyers.'

Yet we tend to enter trial with distrust and judgment of the only people who now have the power to help us - the jurors - and then we display disrespect, accusation and judgment toward the opponents and their witnesses.
Why should we be surprised when we get the same back?

When we are the fairest of them all it does not weaken or impede our cause, and the credibility and loyalty bonuses we gain are priceless.

Much is forgiven when we are the first to forgive.
Much is understood when we are the first to be understanding.
Much is given when we are the first to be generous.

Let's take a minute to talk about language, because it is likely already obvious that we are going to do some reframing here. I'm asking you to consider a paradigm shift.
Our language choices reflect our values and beliefs, often in ways we have not considered.
Think about these changes:

There is no jury; there are only jurors.
This helps us remember each is an individual.
We are not dealing with a depersonalized thing,
nor an undifferentiated enemy 'they' to be feared and overcome.
The jurors are the only ones who can help us now. They deserve our respect.
When we remember they are individuals, and that we need them,
we can direct portions of the evidence and the story
to specific jurors throughout the trial
in a much more conscious way, based on what we learn about them.

There is no client, only a person we are trying to help.
Please make a commitment to never again say the words 'my client' in a courtroom!

The person we are trying to help is not a thing and is not a possession.
How can we expect jurors to treat him humanely when our own default language takes his humanity away?
We want to avoid creating status differentials between us and others so we can become a group.
When there is a 'we' with the person we are trying to help, and with jurors, the opponents become the 'they'.
'My friend John’, 'John', and 'Mr. Smith' work just fine.
Saying, 'I am trying to help him' reminds me I can't do it without the jurors.

There is no case, only a problem we need the jurors to solve.
We want to come to them and tell them - in so many words - 'We have a problem here, and now we need you to solve it.
If we could have resolved it without all of you, we would have. But we couldn't; and now we need to put it in your hands.
We need you to figure out the proper resolution, to give justice because
    John died when the contractor created a deadly trap on the worksite;
    Mary's doctor hurt her when he didn't pay attention;
    Mr. Jones ran into Zoe and now she is paralyzed.
We need you to make it right.'

Jurors follow relationships, and people decide with their guts - their emotions - and backfill with 'law' or 'facts' later.
When jurors tell us they 'set aside their emotions and followed the law' that isn't what has truly happened, but it is good news.
What they are really saying is, 'We decided who had been betrayed or suffered an injustice, we decided who deserved and needed our help, and then we used the law to justify it.'
When we prepare for trial we become afraid that jurors won't see things as we do. With colleagues we bemoan their limitations, and become impatient that we can't just 'tell them what's really going on - then they'd understand!'.

We spend a lot of energy trying to drag them to where we are, where we want them to end up, instead of meeting them where they are. We need to find jurors where they are and give them the things that are important to them instead of what we have decided is important.

Jurors never get as much time as we do to learn the stories, to meet and understand the players, to figure out how the law might fit in, to see whose behavior has resulted in betrayal and injustice and needs to be corrected.

So we must be attentive, patient and efficient to give them the right things. We must find ways to understand what will move them most easily.

How can we be the fairest, be understanding, compassionate and accepting of each person's truth (whether we agree or not) and still trigger the jurors' righteous indignation and motivate them to action? Doesn't that require attack? Won't we be letting the opponents, the witnesses off the hook?

No. Our focus in the end is on holding people accountable for their behavior. Think of what we teach our children: just because you've said I'm sorry doesn't mean you're finished; accountability means making it right, paying the price, even when you didn't mean for it to happen.

We want only to ask, 'What has to be done to pay back for the losses created (compensate P) and to keep it from happening again (protect the rest of us)?'.

My great mentor, Judge Robert R. Rose, Jr., former Chief Justice of the Wyoming Supreme Court, put it like this:
Separate the person from their behavior.
Never attack, judge or point your finger at anyone and call them bad.

Everyone's truth, and everyone's behavior, has a reason and a source. It is never fair to deny or criticize someone else's truth.
If we do that, we give permission for our own truth to be denied. Theirs comes from their life experiences just as ours does. They are equally entitled to it.
Focus instead on the person's behavior.

Focus on the behavior that needs to stop, change, or be prevented and the consequences that flowed from it.
Avoid judgment and instead show compassion and understanding of who this person is and why they acted the way they did.
Ask only that jurors act to correct behavior.

We may be asking the jurors to hold the person accountable for their behavior by rejecting their testimony as lies or in error, or by telling a party to pay to make things right. We may be asking jurors to compensate for losses caused by someone's behavior, or to render a verdict that ensures it won't happen again.

When we approach each person - juror, opponent, witness, party - in this way we earn the jurors' trust and respect. It requires that we examine who each person is and why they act the way they do. When we tell that story first it creates a lens through which jurors view their behavior and judge whether action is needed to make things right. We give them a basis from which to conclude the same things we have about the person's actions.

The front end of each examination - direct or cross - must then begin first with the 'who' and 'why'. People rarely do intentional harm for its own sake. They have reasons for what they say, do or fail to do. We need to explore things about their life stories and their values that reveal the reasons. We can be compassionate about how the UPS driver is pushed beyond the limits of endurance by quotas and time pressures.
We can be understanding about how he's stuck between what he has to do to keep his job and take care of his family, and the need to be in condition to drive safely. We can be honest about how our witness said things out of nervousness when questioned by police that weren't complete or accurate.

We create the room for the witness to reveal himself for who he is, rather than point the finger and accuse. It matters whether we are speaking with young Dr. Kildare or Dr. Mengele. They may each take the same action, but it may be for different reasons. And it is the person and their reasons that lead jurors to their decisions - the 'who' and the 'why'.

Once we have revealed the who and why, we can move to the 'what' and 'how'. Now is the time to cover the behavior of the witness. What did they do and how did they do it - words, actions, inaction - before, during or after the critical events, and in court while testifying? This is where we can hit the Rules of the Road, and what differences exist between the witness' behavior and the 'by the book' way, and the moments of choice and decision, and the consequences and results of those choices and decisions.

How can we come to understand a witness well enough to examine them this way? Reverse roles, as Atticus told us to do. And it can be done using action methods which help us let go of our own views and really 'see through their eyes'.

Let's talk about this from the point of view of cross examination, while understanding that it applies equally to direct.

Traditional components of cross examination, like impeachment with prior statements and bringing out biases, are not discarded when conducting compassionate, or constructive, storytelling cross examination. They are simply handled differently. Lawyers lose credibility with juries more often during cross examination than anywhere else. In succumbing to the temptation and enjoyment of skewering, slicing and dicing, killing a witness, we kill our own credibility. Jurors say to themselves, 'Aha! I knew she was just a tricky lawyer!'
The principle of separating the person from their behavior preserves our credibility. The attack mode, aggressive approach is replaced by acceptance and understanding of the person and the reasons behind their behavior, since everyone comes to every situation guided by their past experiences. We respect the witness and create an interaction during which he reveals himself for who and what he is; we don't point the finger. Then we bring out the behavior (before, during or after the event, and/or while testifying) that we will ask the jury to correct.

And, despite conventional wisdom, we do not kill the witness, even when the jury has 'given us permission' and wants him dead. It is true that if we wait for their permission, jurors likely won't hold it against us when we attack the witness. However, even though it is fun and satisfying it does not advance our cause! Why? Because their desire to have us 'kill the witness' is born of the very righteous indignation we want to fuel as we empower them to do justice. We tend to forget that, for normal people, it is a very big punishment having one's mistakes, misstatements and lies exposed publicly, in front of strangers, on a public record that will last forever.

If we kill the witness in the courtroom, the jurors' outrage and distress is relieved. Jurors will feel that the job of holding the witness accountable for his actions is complete. If we do the job, they have none. They can heave a sigh, turn over and go to sleep, so to speak.

It is much better if we use restraint, compassion and understanding while bringing out the witness' actions that need correction. When jurors tell us afterward that we 'should have been harder on that guy' it is the perfect compliment. It means that they were motivated to take action to hold him accountable, and it was not relieved by our cross - it was agitated by it. When that happens, jurors will take action through their verdict.

Here is a description of a process of exploring the complaining witness in a criminal case, as illustration:

Lawyer Steve is here today to get help preparing for his cross examination of David, the complaining witness for the government.
First, we ask Steve to reverse roles with David and introduce him to us. Steve is a bit concerned because he has never met David, and is likely to see him for the first time at trial. Unlike the civil side, in most jurisdictions, defense lawyers do not get to meet or question the witnesses before trial.

Jeff is the accused, the person lawyer Steve is trying to help, and Steve is second on the job. His first lawyer advised Jeff to waive his right to a Preliminary Examination (probable cause), so there is no record of prior testimony. All Steve knows about David he has learned from Jeff or from police reports. "I'll be making all this up," Steve worries. We go ahead, trusting that action methods and our own human experiences will guide us to accurate discoveries.

Lawyer Steve becomes David for us as he understands him to be: talks like him, walks like him, displays his affect and attitudes. 'David' takes us psychodramatically to the house he and Jeff bought and lived in together for nearly five years. It is a modest house, but it has been home for them.

(Steve has visited the house, and is glad of that now. It is important to visit scenes - whether in person or psychodramatically with our client's help. Most of us know this. However, we may underestimate the value of visiting our client's home, even when it is not part of the events at issue, as it is here.)

If the law allowed, this relationship would likely be a marriage. 'David' shows us the important items in the house that are evidence of their years together. Vacation photos, small mementoes, gifts one had given the other on special days, a particular paint color on the kitchen wall, furniture they picked together. Steve, in role as David, is visibly upset. Tears have sprung to his eyes.

What's going on? "It makes me sad to show you these things. It's like getting a divorce." Through doubling, members of the group help Steve deepen his understanding of David's grief and anger over the breakup. (Doubling is a process of saying what we sense might be going unsaid or unrecognized, reading between the lines. Even when we make inaccurate suggestions, it helps our protagonist clarify what is correct.)
We next put the scenes of their last fight into action. Members of the group take roles and act things out according to witness statements and police reports. There may be several versions to explore. Seeing the stories from various points of view clarifies who did what, how and why.

We learn that David has already moved out of the house. He is returning today to get the last of his things. Jeff has made it clear that he does not want David in the house when he isn't home. But David still has his keys. And it is killing him to have to face Jeff again. He decides to go over in the afternoon, so he can be gone before Jeff comes home from work.

David is about to leave when Jeff walks in. Jeff is very angry. In moments they are yelling at each other. It begins over why David is there when Jeff had made it clear: not when he's not home. They wrestle over the keys. It quickly spills over into all the old issues, the old hurts. They yell, they push each other, they knock things around. But neither loses control enough to cause physical injury.

Finally, David says to himself, "enough". It's a surrender and he sinks with resignation into a kitchen chair. His head hangs down; he stares at his keys lying on the table. He can't take it any more and prepares himself to rise and leave. Before he can move, Jeff walks to the sink, fills a glass with water, and dumps it over David's head. In shock and anger, David dials 911.

He doesn't want Jeff arrested. He just wants someone to help them stay in neutral corners long enough for him to clear out safely. He doesn't understand that the police will charge Jeff, and that he will face a felony and prison.

Steve and our group have learned a lot about David in just this short piece of action. The story of the case is beginning to take shape. But now we want to dig deep into David and find the part of him that can fuel a compassionate cross examination.

Steve, still in role as David, sits in a chair. We are going to peel through the layers of what David may be feeling and why.
We set up a row of chairs, four or five, one behind the other. Each represents a layer of David's feelings.

Director:
Here, in the first chair, you are feeling as you will when telling your story on direct exam. What is the feeling here?
'David' :
I am angry. Jeff had no right to be so mean. I was just trying to get my stuff without another argument. And he picked the fight. He attacked me.

Director:
Move back here to this next chair. Sit here until you feel something else. What is behind the anger?
'David' :
I have to be right. I have to prove he is wrong to end this relationship. This is a way to do that.

Director:
Move back again to this next chair. Sit here until you feel something else. What do you feel here?
'David' :
I am confused. I don't really know how it came to this between us. Why couldn't we handle it peaceably? I am just reacting, and didn't know how to handle it without asking for help. I really thought the police would just help us stay in neutral corners.

Director:
And again, in the fourth chair, what is here?
'David' :
I am hurt and afraid. I feel like I'm losing everything. My parents are not cool about me being gay. They pretty much rejected me when I came out. They definitely are not interested in Jeff, or our relationship! But Jeff's parents are different. They love us. I am part of the family. We have spent all our holidays with them for five years! And they don't just give me 'have to' presents. They really know me and really care. They spend time to pick something special.
That means so much to me.  
I am losing a whole family, and mine is not there.  
I will be totally alone.  
I want to lash out, or cry, or just curl up in a ball.  
I hurt so much I just want to hurt Jeff,  
even though I never meant for him to get arrested that day.  
I was pushing and shoving as much as he was.  
This was not really a domestic assault.

When jurors hear this story  
via a compassionate cross of David,  
they will understand who these men are  
why they acted the way they did  
and they will see there was no attack, no crime.

We have to trust ourselves that we can accurately  
discover and understand a person's inner story  
even if we haven't met them.  
It is uncanny how often even small details turn out to be accurate,  
though we felt as if we were just guessing.  
When we have actually met them, we can go farther.  
Is this officer Barney Fife or Andy Sipowicz?  
Is the woman dear mommy or mommy dearest?  
Who are they?  
Why do the feel, believe and behave as they do?

Lawyer Steve could understand this situation  
because he had a similar experience  
with a college girlfriend and her family.  
And jurors will understand it too.  
In the end,  
everyone's story is everyone's story.  
If we are adults, we have felt every emotion.  
The situation may not have been factually analogous,  
but we can almost always find emotional connection.

These are the things that give jurors the room to say,  
'Oh! I know how that feels.  
I can see why he acted that way.  
And now I know what we need to do to fix it.'

When we open their eyes to 'who' and 'why'  
we provide a lens  
that clarifies the 'what' and 'how'  
and leads to justice.