I. THE PRELIMINARIES

How intimately must you know the facts of the case? Totally! I believe there are three levels of knowledge which practitioners possess of the facts before they start a trial. The neophyte attorney, or the attorney who has not thought through the pitfalls of a trial will merely know all of the facts well enough to give an opening and close. This isn't nearly good enough. This is the first level.

The accomplished attorney knows far more. He knows page and line. He or she can give you the page and line of every deposition, knows the material of every document of importance down pat. Knows the relevant law. Knows the instruction which he expects the judge to charge. It's far more than memorizing the facts. It's knowing the facts, as well, as you know the fingers of your hand. Knowing the facts, all of the facts, often enough will give you treasures which you can use during the course of the trial. I call this second level.

As an example, I once represented a youngster who died as a result of burn injuries. He was hospitalized for three weeks. The hospital record was over 300 pages. Near the end of the record taken one day before his death, a nurse recorded that he cried and said he was going to die. My entire summation was based upon that frightened revelation. I'll give you my summation later; but, I'm sure, knowing that fact, you've thought of a closing argument which you might use.

However, even knowing the facts to this degree is not enough. There is a third level which goes far beyond merely knowing the facts. This "third level" requires you analyze the facts to determine what really happened: or, to determine whether the testimony of a witness is credible. You intimately look at the facts, the statements of the witnesses, the evidence to determine what happened based upon logic. For instance, using simple examples, if a party in an automobile case says he did not see the other car before the accident, his statement would be impliedly contradicted by the fact that his car left skid-marks. If a police officer says the victim made a good on-the-street identification of your client as the offender, that assertion is sullied by the fact that the police officer took the victim to police headquarters and had her attempt to identify the offender from a line-up. Cases are won by the use of logic and common-sense. If you don't consider that aspect in your study, you're making a big mistake.

The entire trial of a case is a "thought process." From the most elemental to the essential, it

is imperative that you think of the implications of your actions or inactions. As an example, what color, what type of clothing do you wear, especially when you start a trial? If you are a male, many people suggest you wear the power clothing: a dark blue or pin-stripe suit. Obviously, if you believe it is important that the jurors view you as an attorney, such dress would be preferable. However, not everyone likes, or more importantly, believes lawyers. Let me suggest that many jurors harbor a dislike for the members, male members, of our profession. They don't trust us. If you agree with this statement, it might make more sense if you, as a male, wore a tan or brown suit at the beginning of the trial.

You want to appear different than members of our profession. You don't want to look like "a lawyer." As the trial progresses, if you've been scrupulously honest with the jury and they trust you, you can switch to the power suit, especially when cross-examining your adversary's expert witness. It is also beneficial to remember that gaudy rings, bracelets, and watches can create a feeling of a "rich" lawyer. At trial, the jury pays attention to how we act, dress, and speak. Therefore, act appropriately, dress well, and speak clearly.

Obviously, it would be difficult for males to determine how women should dress. In the 70s and 80s, when women were just starting to try cases in great numbers, there was a concern among the gentler gender that jurors did not take the female litigator as a serious advocate. For that reason, the impression which women desired to create was that of a successful and staid business person. As a result of the achievements which women have had in the past decades in the court-room, the concern which women previously had, if not washed away, has blurred.

But, if the venue of the case is based in a jurisdiction which succumbs to the old views, most of the female trial attorneys to whom we've spoken, will still wear the power outfits and will not dress in a fashion which is too feminine. They will wear skirts whose length is demure. They will wear the darker skirts and tops. They will not noticeably wear mascara, rouge, etc, which does not appear business-like.

Whether male or female, you want to present yourself as an honest, likeable person. When I first started trying cases, I used the approach dictated by the sports which I had played. I was tough and sometimes mean. In the mid sixties, the Institute of Continuing Legal Education, through its then executive director, Ely Jarmel, decided there should be a clinical course to teach lawyers how to try cases. They assembled 20 plus lawyers from around the state, selected by the

assignment judges, to take an eight day intensive course with a famed lawyer from New York: Al Julian. We had people such as Michael Patrick King, Tom Shebell, each of whom rose to prominence as litigants and judges, Jimmy Cooper, Mike Bromberg, Dick Amdur, Carl Greenberg and Mel Bergstein to name a few.

After the course was over, Mr. Julian had each of us individually into his office to offer advice. Before I stepped inside, I was pleased with myself. I thought I had done well. Al had me sit opposite him and then slapped me across the face and said: "Stop being a son-of- a bitch in the court-room." I looked at him and said meekly, "Yes, Al." Then he slapped me again and said "never cross-examine crossly, unless you have a conviction based upon a moral certainly that the jury wants you to do so, and that might never happen. Do you understand?" I said I did, and he said good-bye. That advice, given both vocally and physically was needed and wrought dividends. Accept it without the physicality.

As an aside, the reason many jurors do not trust lawyers, is that historically too many lawyers have not been as honest, as credible, as good as they should have been. In reading this book, I trust that it will heighten your skills as an advocate. But, in and out of the courtroom, you should conduct yourself with admirable character. Even more. Maureen Dowd in an almost eulogy for William Safire described him as a "mench." You, whether male or female, should be a "mench" or to coin a word a "menchess" in the court-room. Be honest and treat people as required by the "golden rule." It's a privilege to be a lawyer. And we should act in and outside of the court-room in such a way that in years to come, most jurors, most people, will respect us and the members of our profession.

In addition, in order to do well in court, you must recognize that a trial is a "thought process," and not a game of copy-cat. For that reason don't do things in a courtroom, merely because you're emulating other lawyers. As an example, in almost every courtroom in every trial which I've observed, the attorney will have his client sit next to him or her. I wonder "why." When asked for the reason, the attorney will normally say the reason is to show the jurors that the lawyer likes his or her client. Rubbage. You can show that feeling in many different ways during the trial.

There is a problem when your client sits next to you. Aside from writing notes or making suggestions, they too often wear their emotions on their sleeve. We are told as trial