

Courtroom Strategies: Don't Be Seduced by a Cheering Minority

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Some observers didn't think it possible, but here we are: Currently sitting pretty at the top of the polls for the **GOP** Presidential Nomination for 2016 is...**Donald Trump**.

The businessman, real estate magnate, reality show M.C., and general "Tell it like I see it" personality

is [currently polling](#) at close to a quarter of likely Republican primary voters, well ahead of other contenders like Scott Walker and Jeb Bush. Despite a long history of insensitive statements, as well as a very recent history of comments taken as deeply insulting to immigrants and deeply disrespectful toward Senator John McCain's military service, Trump continues his roll. Of course, some serious skepticism is in order on what this means. Some say it is just the effect of name recognition in early electoral polling. Others say it is a self-fulfilling prophecy brought on by media coverage. Or it could be the effect of a uniquely crowded race creating a field in which someone disliked by a clear majority can, briefly at least, take a clear plurality in the polls. But it is also likely that Mr. Trump is now playing to, and largely picking up, a solid anti-government tea party vote. The more media scrapes he gets into, the more he positions himself as an "outsider." The dilemma for Trump, and the question that makes his campaign interesting rather than just entertaining, is whether he can ever get more than a quarter of the Republican vote, or more than a much thinner slice of the general electorate. There is a high likelihood, in my view, that he can't, and all he is doing is just locking in a minority of voters that, no matter how vociferous and motivated, will never come close to a majority. He has been seduced by the cheering of a relatively small portion of his target electorate, and the louder that minority cheers, the greater the gulf will be between him and the larger electorate he is presumably after.

That same dilemma exists for persuaders in other contexts, including trial. We're all human, and it is only natural to play toward those who are naturally our greatest supporters. And minorities can have an influence. But, particularly for parties who need a unanimity rather than just a majority, we win when we're able to disarm and convert our greatest opponents. In that context, it can be dangerous to focus on the supportive minority, no matter how loudly they're cheering. In addition, some of the frames we would apply and the strategies that we would use in order to lock in that supportive vote would be the very frames and strategies that risk turning off those who are less drawn to our side to begin with. But just as it can be hard for politicians to focus beyond the supportive rallies and the favorable polls, it can be a challenge for litigators to speak to their tougher audience. In this post, I will share my thoughts on a few scenarios where advocates and others in court should resist playing to their own cheering minorities.

Who's At Risk of Being Seduced by a Cheering Minority?

Short answer: Anyone who is more interested in self-validation than ultimate effectiveness as a persuader. There may be a degree of narcissism to this (no diagnosis of Mr. Trump), but it might also be more subtle than that. After all, it does feel good to have someone telling you that you are absolutely, positively correct. In nearly all situations, however, your true target audience won't be those people.

Beyond that general need to aim toward the tougher audience, here are a few situations unique to a litigation context where the cheering minority might pose a problem.

The Sympathy-Driven Plaintiff

Many lawsuits arise out of a tragedy or a loss. So it is a temptation to put that loss at the center of your trial story, making the case about the terrible injury, the bereaved family, or the lost potential. That can be an effective strategy, but only for a certain audience: the kind of 'bleeding heart' underdog-loving person who is likely to lean plaintiff anyway. For the rest of those on the jury, the appeal for sympathy plays a counterproductive role, telling them that the evidence must not be very strong if the plaintiff is trying to play on their heartstrings. A sympathy-driven approach is properly seen as "old school" (and decidedly non-Reptile). The better approach is to aim toward what would

make an otherwise pro-defense juror see your point, and that means speaking their language.

The 'Personal Responsibility' Defendant

Defendants can make the same mistake in appealing to those who are their natural supporters at the cost of alienating the tougher audience that they need to persuade. One example is the familiar defense ground of "personal responsibility" in the form of the belief that we should expect people to look out for themselves, and not to expect nanny-type protection in the form of warnings, design modifications, regulations, or restricted choices. Defendants can usually safely rely on someone in the jury making that point plainly on their behalf. But if the defendant goes too far in playing that card themselves, they risk a backlash for "blaming the victim," turning off those they most need to persuade.

The Witness and the Responsive Juror

It can be lonely on the stand. Armed with the advice to "[look at the jury](#)," it is natural for the witness to focus on a friendly face in the box. The juror who meets our gaze, nods, or even smiles can become an irresistible focus. There are a couple of problems with this. First, we cannot be sure that this 'friendly' juror actually likes us. They may simply have good audience behavior. Second, and more important, the witness risks ignoring those jurors who, for whatever reason, aren't as responsive. Those jurors may be just bending over backwards to "act neutral," or it may just be normal for them to listen while refusing to look like they're paying attention. In either case, those jurors may be the higher risk jurors you have to persuade. So as much as you can, look at the *whole* jury.

The Mock Trial Client and the Supportive Mock Juror

Sitting in a closed-circuit room observing mock trial deliberations, our attention will often center on those who are our side's most committed defenders. They're the ones who seem smarter, who are paying attention, who can resist their prejudice, and who are able to understand and follow the law. "Great," clients will say, "So how do we get more people like that?" But in a world with only a limited number of strikes, that usually isn't the answer. Instead, it is a better course to pay greater attention to those who have serious doubts, if not outright opposition, to our side. Looking at what might change their views, or at least soften their disagreement, is the way to uncover the strategy that you need.

Those are a few settings where courtroom communicators might be distracted by a cheering minority. One other setting might be the situation where clients expect their consultants to tell them everything that is *good* about their case, instead of focusing on the flaws. It is better to be skeptical: Instead of praising the vessel, look for what has a risk of sinking your ship.

As far as Mr. Trump goes, time will soon tell whether he'll sink or keep sailing.

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