The Jury EXPERT
The Art and Science of Litigation Advocacy
from MAY 2014
Volume 26, Issue 2
A publication of the American Society of Trial Consultants

Moving From Hapless to Hapful with the Problem Defendant

by Bronwen Lichtenstein and Stanley L. Brodsky

Moving From Hapless to Hapful with the Problem Defendant

by ***Bronwen Lichtenstein, PhD. and Stanley L. Brodsky, Ph.D.***

Trial consultants and most attorneys are often perceived to be the agents of defendants who are wealthy and able to afford their services. A common accusation is that most trial consultants, and the large law firms that specialize in litigation work, promote the adversarial success of people and organizations already in positions of power and influence. Still, there are many pro bono efforts of trial consultants and law firms, as well as efforts of public defenders and court-appointed counsel, to aid individuals who may fairly be considered lower class in a country that avidly avoids class labels.

The Emma Lazarus poem engraved at the base of Statue of Liberty invites the tired, the poor, the huddled masses, and the wretched to the nation's shores. With much less grace, the tired, poor, and wretched of our society often make their way to the offices of attorneys who seek to defend them in the face of allegations for offenses that are themselves the products of discrimination, undeniable societal schisms, and living conditions and subcultures that poison and stigmatize. We have come to think of these defendants as hapless and unfortunate recipients of social injustice. The broad scope of social injustice is difficult to change. However,

the hapless defendants who become litigants offer an opportunity to make a difference, albeit on a short-term basis with a clientele that poses substantial challenges.

We start with the undeniable fact that many aspects of the U.S. court system have enormous rolling momentum that keeps such hapless defendants uninformed, unprepared, and, for the most part, unsuccessful in their own defense. These defendants are sometimes seen as doomed when defended by public defenders with oppressively heavy caseloads or by court appointed attorneys who have little time to work with them. This article is about the need for quick and effective transformations in representation and interactions so that such defendants have a modestly improved chance of success at their own trials.

Before we move into solutions, some major impediments to success must be noted. Hapless defendants are often irresponsible, difficult to deal with, and even infuriating. That is, they may not show up for appointments as scheduled and often make excuses for their absence. They can appear, when they finally do appear, in dirty clothes, unkempt hair, and they might have poor hygiene. They often do not listen well; in fact, a discussion of legal issues often runs into fatalism, pessimism, or a sense of being distracted, bewildered, or uninterested in what is being said. Information about plea options rarely gets into any nuanced issues, if such attorney-client discussions get into many issues at all. These clients are often insistent about simple and palpably improbable alibis.

Hapless defendants are instantly recognizable by their speech, appearance, gestures, and role-taking. There is the defendant who glares stone-faced at the judge or jury, or who has a poor attitude that serves to alienate everyone. These defendants might ramble, have trouble forming coherent sentences, or they can come across as angry, petulant, or sly. They can look so odd or socially different from other courtroom actors that they fail to elicit sympathy from triers of fact for supposedly objective evaluations of guilt or innocence. In a recent case that we observed in District Court, a house painter with disheveled hair arrived late in torn and spattered t-shirt and overalls, after which the judge curtly adjourned the proceedings and sent him home to clean up. In another case, a young man played up to the crowd by giggling, gesturing, and acting as if it were all a joke. The judge took a dim view of this behavior as well and promptly denied bail and sent him to jail.

Rather than a halo effect, as when an attractive defendant receives a better verdict or shorter sentence because of good looks, charm, and nice manners, the hapless defendant has a horns effect, with measurable negative effects on verdicts and sentencing. In a study of mock juror attitudes, Taylor (2008) found that unattractive defendants drew the short straw compared to more attractive ones, who were less likely to be convicted and more likely to receive shorter sentences. There were racial overtones as well; while Black and White mock defendants were treated equally in terms of the verdict, African-Americans were given longer sentences if they were found guilty. While the attractiveness-leniency bias is well established in such cases, in our recommendations we suggest possible ways in which to counter this unattractiveness effect. Still, the literature is sparse with respect to misbehavior, poor clothing choices, physical differences, or behavioral oddities. The results of the Taylor study suggest that personal or racial biases intensify in the presence of a defendant's personal flaws, but research is needed to investigate the juridical effect of being hapless along with other factors such as race and

social class.

Searcy, Duck & Blanck (2012) state that jurors' hackles are raised when norms of proper demeanor are violated, and evaluations of guilt or innocence will be made accordingly. In terms of self-presentation, Milford (2001, p. 4) wrote "We must devote some of the same care that we put into presenting the law into presenting ourselves." The courtroom is organized into high status and low status people, so it is not surprising that misunderstandings abound, and that unkempt appearance and unpolished behavior, which includes lack of deference to authority, is judged poorly. As a rule, low status defendants will be judged more harshly than high status ones, simply because social power resides in recognizing and acting upon the rules of courtroom etiquette in order to secure the best outcome. Defendants who do not follow the rule "wear to court what you wear to church" jeopardize their case. If they slouch, sneer, or look like a loser, they are more likely to be found guilty as charged.

Before we move to propose approaches with the hapless defendant, we need to acknowledge that class differences and lifelong marginalization from the values of mainstream society can make it tough for people who have little familiarity with or disdain for formal legal proceedings. These deep-seated difficulties and problems are all the more reason to make concerted efforts with such defendants so that justice can be served. With this introduction completed, we now address possible strategies through a series of simple transformations that could be marshaled for use in the courtroom.

There are five working assumptions that underlie these strategies:

1. Nobody can make substantial changes to the fundamental ways in which defendants are hapless. Interventions can only smooth out some rough edges, give pointers for avoiding the obvious faux pas, and outline straightforward steps for putting the best foot forward.
2. The changes that can be made will be brief and transient. The immediate and only goal is to improve the defendants' hearing or trial prospects, not to transform them permanently into socially acceptable, more mannerly people.
3. The best pay-offs require over-rehearsing a narrow range of behavioral self-presentation in court appearances. Three "do's" and three "don'ts" are useful in this regard: Do brush your hair, do brush your teeth, and do be truthful. Similarly, don't be a smart ass, don't look or act angry, and don't be offhand or disrespectful.
4. Many of our judgments are subject to a pervasive attractiveness bias. We will discuss ways to redress this unattractiveness-punitiveness bias, including how to have ready access to clothing that is suitable for the courtroom. In the same sense, one needs to obtain access to grooming allies, such as volunteer or low cost barbershops or hairdressers.
5. It is beyond the reach of most attorneys and court employed psychologists to manage these tasks. For that reason, available community resources may be mobilized to make a difference. Retired persons, community volunteers, and students from both community and two- and four-year colleges are a potential resource for this purpose.

We discuss the application of each of these five assumptions in turn. We begin with topic 1, the

issue of the difficulty of changing the hapless.

1. *Hopeless and Hapless.* Every public defender has stories about the barriers to representing difficult clients. It is not just the unreliability of showing up and issues of body odor and hygiene. With a high proportion of such clients having mental or physical disorders, their attention spans are often limited and their thinking disordered. What to do in order to shift these clients to being hapful (the antonym of hapless) and viewed in a more positive light? In his work with difficult to reach psychiatric clients at the University of San Francisco, Dale McNiel (2013) and his colleagues have implemented the concept of institutional leverage. By using aspects of housing, public assistance, and medical assistance as the levers, they report being able to nudge many of these clients towards using social services. We see related levers available to attorneys and the occasional trial consultants who are involved with the hapless; the challenge is to identify and use the levers that can move clients to attendance and attention. The obvious lever of threatening to withdraw from the case can be surprisingly effective when done right. We are fond of the paradoxical sounding statement, "I only see clients who come to see me." The nonobvious lever of sharing chocolate candy and fast food motivates some clients. We know one attorney who keeps beer in his office refrigerator as just such an incentive.
2. *Brief and Transient.* Even the most skilled and committed psychotherapists have trouble making substantial and lasting changes in difficult clients (Brodsky, 2011). Instead of thinking about changing hapless clients in major ways, a more realistic aim in the legal context calls for modest expectations. With off-putting clients, the objective should aim at small increments of change. Consider promoting a small modification of angry facial expressions, and moving the client towards a neutral state. Defendants who habitually touch their faces or bodies while speaking can learn to stop. Defendants who look away when being spoken to can accept instruction to look at the judge or other speakers when required. It is unrealistic to aim for permanent changes; major changes are beyond the immediate context. Modest changes for a very short time are reasonable.
3. *Over-rehearsal.* There are cogent reasons to believe that multiple efforts at rehearsing socially appropriate behaviors for these short intervals work well. The defendants come to know exactly what they should be doing. They learn – and practice – to keep their sentences to the point and to keep all speech free of slang or curse words. They are taught how to make just the right amount of eye contact with authority figures. They are videotaped in role play and shown the results, with special emphasis on avoiding "the glare," "the slouch," or "the attitude." They are shown pictures of videos with expressions or behavior that irritate judge or jury, such as chewing gum, sneering, sighing, rolling eyes, frowning, looking bored or distracted, gesturing to friends or family, or making light of proceedings. We have a saying that applies in this context: anything worth learning is worth over-learning. Bourke and Van Hasselt (2001) have reported that such repeated pragmatic and progressive skill-building with adult offenders improves conversational skills, anger management, and problem-solving.
4. *The Attractiveness Bias.* A large literature in social psychology concludes that attractiveness leads to higher teacher ratings, better ratings of employees, more likelihood of help from bystanders, and greater leniency in sentencing offenders. Although the leniency outcome does not apply universally, Lieberman (2002) found that

it is especially potent for triers of facts who make their judgments experientially. Many hapless clients are, to put it kindly, inattentive to appearance. Having a support structure in place to improve clothing, facial appearance, hairstyle, and sanitary elements can mobilize the halo effect of attractiveness. Indeed, we have seen an intellectually disabled and disheveled defendant who was sufficiently transformed that his appearance was almost indistinguishable from the jurors' own courtroom attire (although we note that only a modest change was needed for the rural Alabama county in which the trial took place).

5. *Liaisons.* As already suggested, moving from hapless to hapful would involve making better eye contact, not having hands in pockets, and paying attention. We should add showing respect through body language and speech, and speaking in a modulated voice. To manage the large numbers of hapless defendants, even in the brief efforts and focused changes we have outlined, can be time-consuming for attorneys who are already overcommitted. We suggest setting up liaisons with volunteers or students in criminal justice or psychology practica who would act as courtroom coaches for defendants. Working initially under the supervision of instructors with appropriate background, or with lawyers, the students would spend specific, goal-directed periods of time, which attorneys do not have at their disposal, and would give defendants normatively appropriate ways of looking and presenting in court.

Conclusions

These defendants are people who engage in a process of unknowing self-sabotage that is seeded in social and demographic qualities. We have coined the term *hapful* to counter the notion of the unlucky, socially stigmatized defendant who comes to court. We propose mobilizing transient changes in behavior, improved attractiveness, limited goals, and assistance from helpful others. By becoming hapful for a little while, accused offenders who are often seen as lowlifes or hopeless victims of social injustice might be now presented and briefly re-conceptualized as persons worthy of thoughtful attention and respectful dispositions.

Bronwen Lichtenstein, PhD [**Blichten@ua.edu] is a Professor of Sociology in the Department of Criminal Justice at The University of Alabama. She is an expert on the intersection of civil and criminal litigation and HIV infection. When she is not working ridiculous hours, you can find her in the garden or playing with her cat. You can review Dr. Lichtenstein's research and contact information at*** http://cj.ua.edu/faculty_and_staff/faculty/lichtenstein/***.***

Stanley L. Brodsky, Ph.D. in a Professor in the Department of Psychology where he directs the Witness Research Lab (see www.witnesslab.ua.edu) and coordinates the Ph.D. concentration in Psychology-Law. He is the author of 14 books including Principles and Practice of Trial Consultation and Testifying in Court. His university website is http://sbrodsky.people.ua.edu ***and his email address is*** sb@ua.edu***. He specializes in the application of psychological knowledge to the law and his areas of professional work include forensic assessments, change of venue evaluations, jury selection, and witness***

preparation.

References

Bourke, M. L. & Van Hasselt, V. (20010. Social problem-solving skills training for incarcerated offenders: A treatment manual. *Behavior Modification, 25*(2), 163-188.

Brodsky, S.L. (2011). *Therapy with coerced and reluctant clients*. Washington, DC: American Psychological Association Books.

Leiberman, J.D. (2002). Head over the heart or heart over the head? Cognitive experiential self-theory and extralegal heuristics in juror decision making. *Journal of Applied Social Psychology, 32*(12), 2526-2553.

McNiel, D.E., Gormley, B., Binder, R.L. (2013). Leverage, the treatment relationship, and treatment participation. *Psychiatric Services, May 1;* doi: 10.1176/appi.ps.201200368 10.1176/appi.ps.56.1.37.

Milford, 2001. Nonverbal communication. *Litigation, 27*(4), 2-9.

Searcy, M., Duck, S., & Blanck, P. (2008). Nonverbal behavior in the courtroom. In R. Feldman & R. Riggio, (Eds). In *Applications of nonverbal behavior* (1-36). New York: Lawrence Erlbaum Press.

Taylor (2008). Can't be him your honour – he's gorgeous! *Psychology Review, 13*(3), 31-33.