Beyond a Reasonable Doubt: One Size Does Not Fit All When it Comes to Courtroom Attire for Women

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Fashion condemns us to many follies; the greatest is to make oneself its slave.
Napoleon I, Maxims (1804-1815)

I. INTRODUCTION

Trial Day. You wake up with adrenaline flowing through your veins. You are ready. You know the facts. You’ve prepped your witnesses. You’ve practiced your opening statement. As you get ready to walk out the door, you run through a mental checklist. Briefcase? Check. Pocket briefs on evidentiary issues that may pop up? Check. Cell phone numbers of witnesses in case you have to call them out of order? Check. And so you head out the door. But wait! You forgot to check the mirror. Yes, the mirror. Because it is not just your brain that the jurors (and the judge) will be checking out over the next few days.

Like it or not, physical appearance is a factor in the work of a trial lawyer, regardless of gender.¹ Although empirical research suggests that immutable physical attributes may play a role in the jury’s perception of an individual,² this essay

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¹ “Research has shown that we automatically assign to good-looking individuals such favorable traits as talent, kindness, honesty, and intelligence…” ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 148 (4th ed. 2001).

² Empirical studies confirm that physical attractiveness is a benefit across all life experiences from politics, to education, to the workplace, to the courtroom. See, e.g., id. at 148-50 (citing empirical research studies); MICHAEL J. SAKS & REID HASTIE, SOCIAL PSYCHOLOGY IN COURT 156-60 (1978) (citing several studies confirming that attractiveness is “important on its own” and that “attractive” defendants were found guilty less often and sentenced less harshly).
addresses those aspects of appearance more easily subject to conscious selection and change, such as clothing, hair, shoes, and jewelry. Over the years, a body of advocacy scholarship has developed around this topic, producing fairly consistent advice about “appropriate” dress for the courtroom. As a general proposition, the advice—for both men and women—can be reduced to some version of “dress conservatively, simply, and inconspicuously.” If this advised style of dress runs counter to the essence of a particular advocate’s persona—as subjectively understood or objectively perceived by others—is it sound? In this essay, I examine the conventional wisdom on courtroom attire and question whether the cookie cutter “feminization” of conventional advice adequately accounts for gender differences in contemporary society. I conclude that conventional advice, if followed blindly, runs the risk of undermining the most valuable asset a female trial lawyer possesses: her credibility.

II. CONVENTIONAL ADVICE ON CLOTHING AND ADVOCACY

A familiar mantra of American trial advocacy is that a trial lawyer’s appearance is a concern for the serious advocate. It turns out that what your mother told you about making a good first impression is true: empirical research demonstrates that people (including judges and jurors) form extraordinarily quick and lasting opinions about other people based on very little information. At the outset of a trial, jurors
form these quick and lasting impressions of the lawyers based primarily on visual information. Lawyers committed to maximizing their appeal to and reception by jurors must evaluate seriously the issue of their physical appearance in order to maximize juror receptivity to their advocacy. Some lawyers view expending time and energy evaluating (and perhaps manipulating) something so seemingly superficial as their physical appearance as a poor use of time as trial approaches. After all, there always remains trial preparation to be addressed as trial looms: important tasks ranging from those legally substantive to strategic to logistic. As inconsequential or inane as the issue of wardrobe may first appear, the physical appearance of an advocate does have a significant impact on the jurors’ perception of her credibility:

Most people tend to be influenced by factors which are quite irrelevant to the credibility of the advocate. As unfair and irrational as it might be, whether an advocate is successful may depend on whether he is perceived as neat or sloppy, well dressed (sic) or shabbily dressed, and pleasing or unpleasing to the eye.6

Although this proposition is true for both genders in the abstract, it plays out with more complexity in practice with respect to women for a number of reasons, including: the delayed entrance of women into the workforce in general, and trial work in particular;7 gender bias and stereotypes;8 issues surrounding female sexuality in the workplace;9 and the differential societal emphasis on and breadth of gender-specific clothing choices.10

6. LAVINE, supra note 4, at 41 (2002).

7. Fifty years ago, when women were first “called to the Bar” as barristers in England, there was considerable controversy about whether they should be allowed to wear wigs along with the men. Some judges felt wigs were decidedly “male” attire, and “if the women were allowed to wear wigs they might as well be allowed to wear trousers.” Her Majesty’s Court Service, Court Dress of the Legal Profession: Barristers’ Wigs, http://www.hmcts-service.gov.uk/infoabout/rcj/history.htm (last visited Dec. 14, 2009). Civil judges in England abandoned wigs entirely on October 1, 2008. Frances Gibb, Judges Give Up Wigs in a Case of Modernisation, TIMES ONLINE, Oct. 2, 2008, available at http://business.timesonline.co.uk/tol/business/law/article4863760.ece. Interestingly, barristers voted against the change and continue to wear wigs, as do judges in criminal courts “where an element of anonymity is favored.” James Lumely & Caroline Byrne, U.K. Civil Court Judges Abandon Wigs, Winged Collars, May 21, 2008, http://www.bloomberg.com/apps/news?pid=20601102&sid=aNCIS5EJG1_Ek&refer=uk.


9. See, e.g., Bartow, supra note 8, at 248; see also Kathleen A. Bergin, Sexualized Advocacy: The Ascentant Backlash Against Female Lawyers, 18 YALE L.J. & FEMINISM 191 (2006); Mairi N. Morrison, May It Please Whose Court?: How Must Court Perpetuates Gender Bias in the Real World of Practice, 6 UCLA WOMEN’S L.J. 49 (1995). The issues of female sexuality and gender
As a law student, I remember watching actress Glenn Close playing a criminal defense attorney sporting a skirt two sizes too small in the 1985 movie “The Jagged Edge” and wondering whether real female trial lawyers gave much thought to their clothing choices when heading to the courtroom. It turns out I wasn’t the only one. About Close’s character, one (female) law professor wrote: “[S]he wears conspicuously tight, constricting clothing that unavoidably distracts from her professional image. She can barely walk back to her seat after a stinging cross-examination because her skirt is too tight and her heels too high as she walks back and forth to the witness box. The message of her clothing visually undermines any image of competence and gender-neutral skill.”

In the years since that film, trial advocacy teachers, lawyers, judges and jury consultants have opined on what lawyers should—and shouldn’t—wear to court. In 2002, one federal judge advised both male and female lawyers to adhere to conventional dress that is “reserved, conservative, and authoritative” although he acknowledged this to be a trickier proposition for women:

For women, though, this can be a more difficult thing to do: Some jurors—both male and female—are still having difficulty accepting women in their roles as

bias in the courtroom are important but extremely complex and beyond the scope of this essay.


litigators. If the woman lawyer can emphasize her superior legal talents, without making these jurors feel threatened and overwhelmed, she has hit a home run. Dress plays an important role in this delicate tight rope balancing act. My personal opinion is that a sober suit with a below-the-knee skirt and an appropriately coordinating blouse is the safest choice for appealing to most jurors. Women can do wonders with carefully selected accessories in a range of colors that men should never wear in the courtroom. Short skirts, tight sweaters, dangly and gaudy jewelry, and excessively high heels, do nothing to enhance the image of the woman lawyer in the eyes of the juror or court.13

For those who might think that Judge Anderson was hawking an outdated male perspective, recall that it was not so long ago that a state court judge in Seattle forbade a female prosecutor and a female public defender to appear in her courtroom in pantsuits.14 And in early 2009, there was significant press coverage of U.S. District Court Judge Joan LeFkow’s public criticism of some female trial lawyers’ clothing choices.15 During a judges’ panel at a Seventh Circuit Bar Association meeting, Judge LeFkow warned female lawyers to pay more attention to their clothing choices when heading to court.16 The judge’s critique was prompted by a lawyer who had recently appeared for a court hearing dressed like she was “on her way home from the gym.”17 By way of a quick tutorial, the judge recommended that female lawyers consult the website www.corporette.com, a self-described “fashion and lifestyle blog for overachieving chicks.”18

14. It was King County Superior Court Judge Jeanette Burrage who threatened to hold two female lawyers in contempt if they persisted in wearing pants suits to trial. When the defense lawyer asked “Will you sanction me if I turn up in pants tomorrow?” the judge replied, “That’s a possibility.” At the time of the exchange, the defense lawyer was wearing a tailored, off-white pantsuit with a silk blouse and pumps, and the prosecutor was wearing a black, tailored pantsuit with black dress shoes. Elaine Porterfield, Judge Wants Women Attorneys to Wear Skirts in Her Courtroom, SEATTLE POST-INTELLIGENCER, Sept. 30, 1999, at A1, available at http://www.seattlepi.com/local/dres30.shtml.
15. Lynne Marek, Judge’s Remark on Poor Attire of Women Lawyers Leads to Flood of Comments at Legal Gathering, NEW YORK L. J. (May 26, 2009).
16. Id.
17. Id. Judicial frustration with lawyers’ overly casual clothing has prompted several courts to adopt dress codes. When I was a state prosecutor, the judges at juvenile court became so frustrated with the attire of attorneys and probation counselors they issued written rules regarding appropriate court attire. Memo from King County Superior Court Judge and Juvenile Division Chief Laura Inveen dated Sept. 27, 1999 (prohibited attire included jeans, warm-up suits, sandals without hosiery or socks, and “sexually explicit, suggestive, or revealing clothing (including clothes that reveal bare shoulders or midriffs)”).
III. CONVENTIONAL ADVICE ON CREDIBILITY AND ADVOCACY

A basic tenet of trial advocacy is that the trial lawyer’s credibility is her most valuable commodity with the judge and the jury. The concept of attorney credibility is also discussed in advocacy literature in terms of integrity, sincerity, trustworthiness, and reputation. The core of this concept is that an advocate must be authentic—she must present her true self in court, or the jurors will see her as insincere, untrustworthy and unbelievable. Genuine sincerity, not merely the appearance of sincerity, is the trial lawyer’s most valuable asset. A lawyer’s credibility is so widely recognized as the bedrock of successful advocacy that some commentators have drawn a parallel between the importance of credibility in trial advocacy and the importance of location in real estate sales. As is familiar to anyone who has bought or sold property, realtors generally maintain that the three most important factors affecting marketability of real property are: location, location, location. Similarly, three principles undergird successful advocacy:

[C]redibility, credibility, credibility. Anything the advocate does to undermine his credibility with the audience is a cardinal sin of advocacy and can be a fatal blow to the case. ...Sincerity is also important...Another component of integrity is trustworthiness. Does the advocate seem real? Authentic? Does he

19. See, e.g., BERGER ET AL., supra note 3, at 18 (“Jurors can detect a phony, so be yourself.”); FONTHAM, supra note 4, § 1-13(d), at 25-26 (“[P]erhaps the single most important attribute ...is factual command and credibility.”); LAVINE, supra note 4, at 31-32, 35 (“The advocate’s credibility is, without question, his most precious asset.”); LUBET, supra note 4, at 26-27 (“[C]redibility of the lawyers can play a large part in shaping the trial’s outcome.”); McELHANEY, supra note 3, at 102; PERRIN ET AL., supra note 3, at 19; GERRY SPENCE, HOW TO ARGUE AND WIN EVERY TIME 47-65 (1995); STARR & MCCORMICK, supra note 4, at 432-33; WILBUR & VAN NATTER, supra note 4, at 36 (“[M]ore cases are lost through the attorney’s inability to project sincerity.”); Carl I. Hovland & Walter Weiss, The Influence of Source Credibility on Communication Effectiveness, 15 Public Opinion Quarterly 635-50 (1951).

20. See, e.g., GERRY SPENCE, WIN YOUR CASE: HOW TO PRESENT, PERSUADE, AND PREVAIL -- EVERY PLACE, EVERY TIME 27 (“to be trustworthy is to be real”); LUBET, supra note 4, at 26-27 (“Integrity inspires trust, and, in trial work, trust leads to success.”); MAUET, supra note 4, at 11 (“At every stage of the trial, show that you are the lawyer the jurors can trust.”); PERRIN ET AL., supra note 3, at 19 (“[T]he lawyer gains credibility and trust by dressing and acting like someone worth of trust.”); READ, supra note 5, at 15-16 (“[Y]our goal is to show the jury that you are trustworthy.”); WILBUR & VAN NATTER, supra note 4, at 36 (“[M]ore cases are lost through the attorney’s inability to project sincerity”).

21. This runs somewhat counter to a comparison some advocacy teachers draw between trial lawyers and entertainers, performers, or salespeople. See, e.g., FONTHAM, supra note 4, § 1-13(d), at 25 (“Most lawyers understand that advocates must be performers, actors, bluffers, sympathetic figures, committed believers, and genuine, sincere persons—often simultaneously.”); PETER MURRAY, BASIC TRIAL ADVOCACY 11, 67-68 (1995) (comparing the trial lawyer to a salesperson, storyteller and entertainer).
use words and gestures that reflect who he really is, not a canned performance intended to impress?  

The problem with faux sincerity is that it is fragile. It is subject to deterioration when the lawyer is stressed, tired or distracted—which is a highly probable occurrence during the course of a trial. When the disintegration of a false projected image occurs, the judge and jury witness the inherent dishonesty and gamesmanship of the affectation, undermining the credibility (and validity) of everything else the lawyer says and does.

A trial I observed years ago illustrates beautifully the need for absolute personal honesty with the judge and jury. A young lawyer gave a fine closing argument wherein he employed the account of his two small children pointing fingers at one another over a broken vase. The lawyer successfully used the story about himself and his wife as a vehicle to discuss how to figure out who is telling the truth in a “he said/she said” conflict when there are no witnesses. While waiting for the jury to come back with a verdict, I stopped him and complimented him on his jury speech. He thanked me and then confessed that he fabricated the story about “his children.” He wasn’t even married. The lawyer was in his early 30s, but he was very young-looking for his age. He told me that he had heard somewhere that wearing a “wedding ring” could endear him to the jurors and cloak him with some gravitas to counterbalance his youth. He hadn’t time to get a ring, but he worked the “wife and children” into the closing argument, hoping to achieve the same effect. The artifice hit me as a misstep, but I couldn’t say why at the time.

I later heard from the court clerk that, although it didn’t affect the outcome of the case, when questioned post-verdict, one juror accused the lawyer of being either a liar or a cheat. She surmised that either he was not really married, and thus a liar (noting the lack of a ring), or he was married and a cheater because she had seen him flirting with the attractive, young court reporter during the trial. The lawyer had predictably failed to maintain the false persona consistently throughout the trial, and he was exposed for the charlatan he was. Fortunately, though the lesson was painful (and thus likely indelible), it was without expense to his client.

IV. WHEN ADVOCACY ADVICE CONFLICTS: CLOTHING OR CREDIBILITY?

For a lawyer to be comfortable and confident, and thus appear credible and competent, the lawyer needs to be herself.  A lawyer can only be who she is—or,

22. LAVINE, supra note 4, at 31-32, 35.

23. See WILBUR & VAN NATTER, supra note 4, at 35-36 (“Attorneys belie…credibility when they project an affected self image.”); SPENCE, supra note 20, at 35-36 (“To be perceived as credible, one must be credible”).

24. The same is true for witnesses. David Ball advises:

   Have your witnesses dress appropriately with respect both to court and to who they are.
perhaps more accurately, whom she perceives herself to be. If she deviates from that subjective perception, she creates an internal conflict.\textsuperscript{25} Researchers Wilbur and Van Natter studied the elements of persuasive trial advocacy and found, based on observing many trials and interviewing judges, trial lawyers and jurors that:

[M]ore cases are lost through the attorney’s inability to project sincerity rather than the failure to present the facts and the law. Projection of sincerity is based on honesty with a simple, straightforward approach. Unfortunately, the projection of sincerity demands the most difficult task of all – the ability to play yourself.\textsuperscript{26}

What then is a lawyer to do when she feels uncomfortably foreign or false donning conventional trial clothing, shoes or hairstyle? To the extent that the advised clothing will undermine her confidence, it will likely undermine her credibility, and, in the courtroom, credibility is everything.

A. Credibility Trumps Clothing Guidelines Every Time

The biggest risk of adopting “off the rack” clothing advice is ignoring one’s own sense of personal authenticity in dress and manner. In such a situation, the clothing becomes a “costume,” undermining the lawyer’s credibility and emphasizing the “play within a play” aspect of trial work. Just as jurors want to do what’s “right” and not decide cases based on “technicalities,” they will better trust the lawyer whom they believe is telling the truth—not a marketable version of the truth. A lawyer who maintains her integrity in her dress and demeanor and is consistently genuine—consistently herself—is more likely to be perceived as credible and trustworthy. The Latin roots of the word suggest as much:

The word integrity comes from the Latin \textit{integritas}, meaning wholeness or soundness, complete in itself. Thus, our concept of integrity has come to mean unsullied, unbroken, undivided moral principle. In other words, it is a quality of the ‘whole lawyer.’ It refers to you and everything you do. When you are seen to depart from a principle you diminish your standing as an honorable

Don’t let a car mechanic dress like a bank president. Don’t let parents dress up a child like Little Lord Fauntleroy. Aside from making a false impression, inappropriate clothing makes the witness self-conscious – which, in turn, makes it harder for him to be clear and credible.

\textbf{BALL, supra note 4, at 43.}

\textbf{25.} See, e.g., Catherin L. Fisk, \textit{Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy}, 66 La. L. Rev. 1111, 1111-12 (2006) (“Clothes and appearance are constitutive of how we see and feel about ourselves and how we construct ourselves for the rest of the world to see.”).

\textbf{26.} \textit{WILBUR \& VAN NATTER, supra note 4, at 21.}
advocate. Thus, there are numerous courtroom behaviors that can add to or detract from your realization as a ‘whole lawyer.’

My experience as a prosecutor and judge is that a lawyer’s “look” can vary from the conventional clothing advice without detracting from her credibility or distancing her from the jury. The bottom line is that clothing—hair, jewelry, shoes, perfume—doesn’t have to be bland or manly. It does, however, have to be consistent with the essence of a trial lawyer’s persona, or it will ring false and be off-putting to the jury. I have three examples from practice that demonstrate this point: the funky dresser, the fashionista, and the anti-coiffurista. All three of these female criminal trial attorneys arguably violated the “cardinal rules” of dressing for court, yet I found each to have made fashion choices that arguably furthered the judge’s and jury’s perception of the lawyers’ credibility and competence.

The funky dresser. Theresa Olsen was a very high-profile public defender in Seattle, who was known, among other things, for her always unconventional and sometimes outré courtroom attire. Ms. Olson has been described both as being a “funky dresser” and as sported “an unusual wardrobe she [had] designed and sewn herself. She [would] show up in court wearing a kimono-like robe for a jacket or a bright, button-up shirt with bunnies on it, but rarely a lawyerly suit.” I appeared in court on cases opposite Ms. Olson, and I, too, recall her dramatic personal dress, which wasn’t limited to her clothing, but encompassed her hair, makeup and accessories—everything about her appearance. That being said, what I remember about Ms. Olson’s courtroom presentations is that she was smart and articulate—with an appropriate intensity and aggression that underscored her belief in her clients’ positions. Although I can’t claim to have solicited any jurors for their views, I can attest that I viewed her as projecting an image of an intelligent, shrewd, liberal, unconventional protector of the constitutional rights of the accused. This is consistent

27. LAVINE, supra note 4, at 27.
28. There is a body of research that supports the position that people like and trust people who dress like them. See, e.g., CIA LDINI, supra note 1, at 151.
29. See WILBUR & VAN NATTER, supra note 4, at 35-36 (“Credible attorneys do not play the role of an attorney, nor do they play to the public’s concept of an attorney.”).
32. Id.
33. With respect to the jury’s perception of Ms. Olson, The Seattle Post-Intelligencer newspaper noted that she was perceived by jurors as “unpretentious, devoted or zealous.” Id.
with the expectations of many jurors fed a steady diet of celluloid public defenders depicted as brilliant, unconventional, liberal true believers.  

The fashionista. Another criminal defense lawyer is known as an impeccable, fashionable dresser, in and out of court. Contrary to some of the conventional wisdom that courtroom attire absolutely must not be fashionable, she wears high-end designer suits and shoes in court. Although her suits are designer, they are most definitely tailored and lean towards conservative (in a fashionable Prada, Dolce & Gabbana, or Barneys-of-New-York kind of way). Almost two years ago, I watched her brilliantly defend one of four Hell’s Angels in a twelve-week, twenty-one-count RICO case in federal court. I was impressed with her preparation and execution of each stage of the case, noting that her designer clothing and shoes did not upstage her nor detract from the excellent work she was doing. The fact was that her manner of dressing was the “real” her—it is how she dressed for work in the office, for teaching, and for professional bar meetings. She was comfortable and relaxed, and thus able to focus on the work of being a trial lawyer.

The anti-coiffurista. I watched a federal prosecutor give a brilliant opening statement a little over a year ago in a multi-defendant, high-profile case. I was surprised to see that she elected to wear her hair in what I would call a “yoga class” or “running-to-the-store-for-milk-in-the-morning” hairstyle: her long, blond hair pulled into a ponytail, and then pulled back through the band again halfway, so that it “looped” with a “tail” sticking out the back of her head. This was a very informal


35. See, e.g., Bruess, supra note 3, at 152-53 (advising counsel against dressing “expensively or fashionably,” or wearing “[d]esigner clothes or shoes”).

36. This particular attorney and I once co-taught a class using a direct examination “drill” to practice the use of non-leading questions on direct examination. In the exercise, students were instructed to take a journalistic approach by asking the her a question about her clothing, using only “who, what, where, when, how, explain, describe, or tell me about.” When one student asked her how much her shoes cost, she looked at me with a pained expression and asked, “Do I have to answer that?”

37. Her years of experience navigating in designer high-heeled shoes have produced a level of skill that allows her to maneuver the courtroom with ease—and speed, when necessary. This is in stark contrast to some of my law students who arrive for mock trial competitions in three-inch heels that seem to have a will of their own with respect to the physical direction of the advocate during the course of the trial.
hairstyle and, except for the fact that it did pull her hair away from her face,\textsuperscript{38} it went against the conventional advice on courtroom coiffure.\textsuperscript{39} That being said, as I listened to her talk to the jury—presenting a very well-constructed, theme-driven opening for almost one hour without the use of notes, and using physical movement to augment her opening\textsuperscript{40}—I began to think that her hairstyle quite possibly worked to her advantage. Perhaps a subliminal message of the “yoga hair” was that she was a serious lawyer concerned with the facts and the law and unconcerned with her hair in the least. The image it evoked in me, as I sat listening to her, was of an advocate who had been so busy meticulously preparing her case that she had little time or interest in her own appearance. It underscored her credibility in that it telegraphed a message that she was all about the case and the case was not all about her.

### B. Extreme Individuality Can Damage Credibility

I am not advocating complete disregard for conventional wisdom regarding courtroom attire. I am merely suggesting that, in the end, an advocate should choose clothing that she feels comfortable wearing even if it varies from conventional wisdom. A caveat arises when the advocate either knows or suspects that the judge or jury will be disturbed by her appearance. If a lawyer knows that a particular judge has an issue with women wearing pants, as did Judge Jeanette Burrage (however inane and unfair) or any other particular idiosyncratic pet peeve, the lawyer has a responsibility to weigh this when making clothing choices when dressing for court. Likewise, if the lawyer suspects that a particular clothing choice will be so off-putting to the jury that it may impede her ability to advocate for her client, she has a duty to rethink her choice.\textsuperscript{41}

Another example from practice illustrates the potential harm of a fashion choice the lawyer knows may interfere with her advocacy. About three years ago, I was teaching in the southeast and I stopped into the state courthouse to observe local trial practice. I watched a young public defender during jury selection in a felony trial. The lawyer had short, spikey hair and a nose ring, but was otherwise fairly inconspicuous in appearance. Although she seemed comfortable in her own skin—

\begin{itemize}
\item \textsuperscript{38} See, e.g., \textsc{Ball}, supra note 4, at 12 (“If your hair is long, pull it back so it cannot hide any of your face….The more the jurors can see of your face, the more easily they will trust you.”).
\item \textsuperscript{39} See, e.g., \textsc{Bruess}, supra note 3, at 153 (“Jurors …commented that a female attorney was dressed inappropriately for trial. They said that her jacket and skirt did not match and that her hair was disheveled. They thought she needed to go to a hairstylist.”).
\item \textsuperscript{40} The trial was before U.S. District Court Judge Robert Lasnik, a former state judge and prosecutor, and one of the few federal judges who allow counsel free movement during jury speeches.
\item \textsuperscript{41} This raises an issue of whether the tension between a lawyer’s personal appearance choices and her effectiveness as an advocate could be so extreme as to create a conflict of interest vis a vis the client, triggering disclosure and requiring informed client consent or provide a viable bases for appeal as either attorney malpractice or ineffective assistance of counsel.
\end{itemize}
posed and articulate—she clearly suspected the jurors would not be comfortable with her fashion choices. She used over half her allotted voir dire time asking the jurors whether her nose ring presented an issue for them and, if so, would they hold it against her client. Her insecurity about the jurors’ reception of her appearance caused her to redefine the purpose of voir dire from identification of jurors hostile to her client or the issues in the case to identification of jurors hostile to her appearance. Making herself the focus of voir dire not only jeopardized her credibility, but, because she refocused her advocacy efforts from the client’s case to her case, it almost certainly diminished her effectiveness in trial.

C. An Individual Approach to Courtroom Attire

While each advocate and each case triggers unique concerns regarding the personal appearance of the lawyer at trial, making it unfeasible to produce a generic checklist about courtroom attire, it may prove useful to look at how an individualized approach would work in practice. Examining some of the issues likely to occur in criminal trial work is particularly instructive because of the unique relationship of the parties. Balancing potentially conflicting advocacy advice about clothing and credibility involves an additional level of nuanced analysis in the context of a criminal case because, unlike civil lawyers whose roles are symmetrical with respect to function and relationship to client and opposing counsel, prosecutors and criminal defense lawyers have vastly different roles. Clothing choices by prosecutors and criminal defense lawyers may augment or detract from the themes and theory of the case or the advocate’s ability to connect to the jury. To the extent their roles differ, so might respective concerns about projecting an image consistent with their role-specific goals.

In a criminal case, the parties have a unique relationship, distinct from other trial adversaries. The role of the prosecutor is so qualitatively different from that of other lawyers that some have characterized the prosecutor’s role as “quasi-judicial.” A

42. Multiple issues can be implicated by an advocate’s physical appearance in criminal practice, influencing jurors’ perception of a prosecutor, defense counsel, or both. I discuss only two in this brief essay: a prosecutor may appear overly harsh, punitive, and bent on “winning,” whereas a defense attorney may come across as an overly slick “hired gun.”

43. This section examines various issues surrounding a advocate’s clothing choices, noting how those choices can affect the advocate’s real and perceived role at trial and how they may impact the theory of the case. The author recognizes that each lawyer is unique, as is each case. Clothing choices, like all trial strategy, must be made on a case-by-case basis.

44. MODEL CODE OF PROF’L RESPONSIBILITY § 7-13 (1981) (“The responsibility of public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.” (citation omitted)); MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. (1998) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); THE AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS § 3-1.2 (3d ed. 1993) (“The prosecutor is an administrator of justice.”).
prosecutor stands in the place of the sovereign “whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”

As a “minister of justice” a prosecutor’s duty is to seek justice, not merely convict. This includes a duty “to see that the defendant is accorded procedural justice.”

Thus, unlike any other lawyer, a criminal prosecutor has an affirmative duty to the opposing party. A criminal defense attorney has no reciprocal duty to the government; she is charged exclusively with her client’s well-being.

What do these differing roles mean in the context of evaluating conventional advice regarding courtroom attire? Clarence Darrow is quoted as saying “[t]he main work of a trial attorney is to make a jury like his client.” Arguably, a likeable trial lawyer has more “bang for the buck” as a criminal defense lawyer than as a prosecutor for the very reason that the defense lawyer has a client. While both prosecutors and criminal defense lawyers must be credible to do their jobs, they may not both have the same need to be likeable. The difference between the two concepts is slight but discernable.

“Likable” is defined as “having qualities that bring about a

45. Alan Dershowitz notes that “[d]espite the theoretically adversarial nature of our system, the prosecutor is among the most important arbiters of justice” elevating her to a “quasi-judicial” role. Alan M. Dershowitz, Why Do Honest Prosecutors Engage in Misconduct?, in JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT xi (4th ed. 2008).


47. See MODEL RULES OF PROF’L CONDUCT R. 3.8 (1998); see also AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).


49. Unlike other advocates, who have a duty to pursue their clients’ interests vigorously within the bounds of the law, the prosecutor has obligations of evenhandedness precisely because he does not represent an individual but rather the collective good. Procedural and substantive fairness to persons accused of crime is one element of a just society. Therefore, by nature the prosecutor’s loyalties are not undivided….Because the defendant is one member of the society that the prosecutor “represents,” the prosecutor must take the defendant’s interests into account in assessing the validity of the prosecution.

R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 3 (2005).


51. CHALDINI, supra note 1, at 144.
favorable regard: pleasant, agreeable,” whereas “credible” is defined as “offering reasonable grounds for being believed.” 52 In other words, although one must generally be credible to be likeable (I can’t like you if I don’t believe you), one does not necessarily have to be likeable to be credible. While both prosecutors and defenders have an absolute need to establish and maintain credibility with the jury, they may not have the same need to develop their personal likability. In the mind of the juror, the difference lies between “Can I believe or trust what you say?” and “Do I want to believe or trust what you say?”

A prosecutor’s job at trial might be viewed as connecting the dots for the jury—putting the evidence in the record and then walking the jury through the “to convict” jury instruction. To do this the prosecutor must be credible but not necessarily likeable. On the other hand, a defense lawyer’s job—in addition to thwarting the prosecutor with respect to the evidence—is to wrap her client in the positive impression the jury (hopefully) has of her. 53 This “halo effect” is a powerful tool in the criminal defense lawyer’s arsenal, particularly when fostering “reasonable doubt.” If the defense lawyer is perceived as both credible and likable—if the jurors view her as someone they trust and feel comfortable with—then her advocacy efforts are more likely to be successful.

Jurors realize the prosecutor stands in the shoes of the government and wields a tremendous amount of power. In terms of trial advocacy and strategy, a prosecutor must be cautious to not appear too zealous, harsh, bitter, angry or punitive in exercising this power because it suggests an improper prosecutorial motivation. Jurors also understand there is a keen difference between a civil lawsuit where private citizens fight over property and a criminal prosecution where the government challenges a citizen and the defendant’s liberty—and perhaps life—hang in the balance. Consequently, a prosecutor must appear fair and reasonable throughout the trial. To maintain credibility, she cannot appear to be overly aggressive or hell-bent on conviction, nor can her actions suggest a political agenda or a personal vendetta. Rather, a prosecutor must strive to present herself and her case in a way that assures the jury she is thoughtful, thorough, temperate and honest. This is critical to a prosecutor’s credibility. Careful to not over-reach or overstate her case, a prosecutor should aim to present the evidence so as to draw the jury to the logical, inevitable conclusion that the elements of the crime have been proven beyond a reasonable doubt and conviction is mandated. The prosecutor’s goal is to present a case that telegraphs intellect over emotion, unimpassioned analysis over visceral retribution. The jurors need not necessarily like the prosecutor, but they must believe she operates from a motivational position of reasoned, honest intellect. They must believe her to

52. WEBSTER’S NEW COLLEGIATE DICTIONARY (1979).
53. As Tom Mauet points out: “Jurors prefer to return verdicts that favor the party and lawyer they like and trust.” MAUET, supra note 4, at 38.
be credible—and purity of prosecutorial motivation is part and parcel of that credibility.\textsuperscript{54}

A prosecutor’s physical appearance ideally reinforces these goals. To that end, a strict adherence to conventional courtroom attire advice of nondescript conservative suits could backfire. Take the case of the federal prosecutor with the long blond hair. In light of the fact she was wearing a fairly conventional, tailored skirt suit, pulling her hair back into a bun could send a message to the jury that she was rigid, cold, sharp or hard. These attributes run the risk of creating associations in the jurors’ minds of other attributes that might suggest, at least subliminally, that the prosecutor was a punitive, angry or hostile person. This, in turn, could undermine the jurors’ perception of her prosecutorial motivation, damaging her credibility.

A defense lawyer has an entirely different role in the proceedings and a different relationship with the jury. Jurors generally understand and support the concept of a criminal defense lawyer as a protector of constitutional rights and individual freedoms. While this provides more flexibility to vary from the conventional wisdom of wearing understated, conservative attire, it does not obviate all wardrobe pitfalls. Criminal defense lawyers, for example, do not want jurors to misperceive them as a “hired gun.” Although jurors understand that defendants have an absolute right to a legal defense, the most effective defense attorneys persuade the jury that the advocate is telling the truth—not just maneuvering for an acquittal. If a defense lawyer is viewed as “gaming” the jurors for a paycheck, the lawyer loses both credibility and likability. Jurors are less likely to believe a lawyer if they suspect she views the trial solely as a business venture and less likely to like her if they view her as lying for money (how a hired gun is perceived). On this issue, the conventional wisdom on courtroom attire to avoid overly flashy, patently expensive, designer clothes may have some merit.\textsuperscript{55}

V. CONCLUSION

Physical appearance is a serious concern for trial lawyers trying to maximize juror receptivity to their advocacy. To some extent, when it comes to trial work, a juror’s perception is a lawyer’s reality.\textsuperscript{56} When preparing for trial, a lawyer needs to

\textsuperscript{54} A prosecutor’s apparent motivation has a direct effect on jurors’ evaluation of her honesty and trustworthiness. A prosecutor perceived as wanting to “win at any cost” has damaged her credibility, perhaps fatally.\textsuperscript{55} I have never witnessed a female trial lawyer dressed so flashily as to raise this concern. In theory it could happen, of course: a fur coat, a big diamond ring, a diamond necklace, a Louis Vuitton briefcase, and Chanel sunglasses would all further an image of a “mouthpiece for hire.” I have, however, seen a number of men dressed as though they had just disembarked their yacht and were heading to the private gambling rooms of Monte Carlo: fancy Italian loafers, a colorful silk pocket scarf with matching tie, designer sunglasses (in court!), and a large diamond pinky ring.\textsuperscript{56} “All perception of truth is the detection of an analogy we reason from our hands to our head.” I \textsc{Henry David Thoreau}, \textsc{The Journals of Henry David Thoreau} 463 (Dover ed. 1962)
anticipate and consider jurors’ expectations, preconceptions and biases about wardrobe and physical appearance. This analysis can be particularly complicated for the female trial lawyer. It may not be your mother’s courtroom, but your (or someone else’s) mother may be on the jury, harboring outdated or discriminatory expectations about “appropriate” courtroom attire for women. As unjustified as the expectations might be, “a quality trial attorney must consider gender issues, be they stereotype, false or real, when planning his or her case.”

This is not to say that lawyers must reinvent themselves for trial in an effort to please the judge or jurors. When it comes to courtroom attire, there are no rigid rules guaranteed to work for every lawyer. While dressing conservatively, simply, and inconspicuously may work for one lawyer, it may prove disastrous for another if it is at odds with her core personality. Although a lawyer must be sensitive to jurors’ perceptions of and receptivity to her, both in dress and manner, she must also remain authentic. An advocate’s efforts to market herself as someone other than herself risks exposing her to the jurors as insincere, untrustworthy and unbelievable. Genuine sincerity, not merely the appearance of sincerity, is the trial lawyer’s most valuable asset. For a lawyer to be comfortable and confident, and thus appear credible and competent, the lawyer needs to be herself. An advocate needs to think through her physical appearance choices, true, but she needs to be certain those choices do not undermine her most valuable asset in the courtroom: her credibility. To paraphrase the high priestess of fashion, Coco Chanel, the best “look” for a female trial lawyer is the one that looks (and feels) good on her!

57. Podgor & Pertnoy, supra note 4, at 713, 727 (footnote omitted); see also Bartow, supra note 8, at 221, 248.

58. French fashion designer (1883-1971) who ruled over Parisian haute couture for almost six decades. She was also known for her bon mots concerning fashion and is quoted as saying “The best color in the whole world, is the one that looks good, on you!”