I. The Zen of Zealous Advocacy

As defense attorneys, we know we are charged with the zealous advocacy of our clients. On the Zimmerman defense team, we thought we knew what zealous advocacy meant, but everything and everybody that combined to challenge us pushed us so hard and so far that we constantly redefined our understanding of the term. In the Zimmerman case, we faced one extraordinary circumstance after the next: chronic discovery violations, a team of aggressive third-party attorneys, appealable decisions from the bench, stealth jurors, an aggressive and ever present media, and the forced recusal of a judge -- just to name a few. We realized, almost too late, that our focus had to become a fight for a fair trial, with enormous pressures working against such a result.

We have an "innocent until proven guilty" criminal justice system, but the defense is often the only party in the courtroom that really believes that. The prosecutors don't bring an assumption of innocence; they bring a focused presentation meant to overcome that presumption. They want a conviction. Most defendants who appear before a judge wind up guilty of something, so while judges may ascribe to the ideal of the presumption of innocence, their experience may suggest the odds are against it. The jury brings with them all their biases and misconceptions, and it is up the defense attorney to instill in them the notion, the goal, of a fair trial.

The rules, of course -- right down to the Constitution of the United States -- are designed to provide citizens accused with a fair trial, but it is dangerous to assume that prosecutors will always follow those rules. Judges will enforce the rules, but generally only when demanded to do so by counsel, or when the offense is obvious and egregious. A jury will almost always defer to the judge, and they, of course, know virtually nothing about the system except the miniscule amount they learn during voir dire. There are no governing authorities watching courtroom proceedings and policing due-process violations. That job falls to the defense attorney.

Rules, moreover, are open to interpretation. They are flexible and, to a degree, negotiable. From the first court appearance, the defense, the prosecution, and the judge begin a negotiation to determine how the rules will be applied to the details of any specific case. In the Zimmerman case, we started out on very positive footing when we were able to turn a simple bond motion into an aggressive, and therefore effective, cross examination of the chief investigator for the State Attorney's Office. In essence it was a decision to see how far the rules could be worked to gain an advantage. At any point, it could have been shut down, by a well-placed objection or a ruling by the court. But it helped set the stage for how we would handle the case moving forward. Of course, every benefit has its detriment, and our actions that day may well

have led to a tightening of the discovery flow, as will be discussed later.

Good defense attorneys, as true zealous advocates, have the vigilance to recognize when the deck is being stacked against them and when the rules are being broken to the client's detriment. Zealous advocates find creative ways to turn adversity into opportunity. A zealous advocate is tenacious in the fight to preserve the defendant's rights, but also understands the importance of balance, and has the prudence to know when to turn the other cheek.

The term "zealous advocacy," as we've come to regard it based on the lessons of the Zimmerman case, is a composite of vigilance and creativity, of tenacity and balance. The Zen of zealous advocacy is the constant awareness and exemplification of these qualities, and the intuition required to keep these qualities in alignment. The following is an examination of the most extraordinary legal issues we faced in the Zimmerman case and an explanation of what each issue taught us about the nature of zealous advocacy.

II. Discovery

The landmark case of *Brady v. Maryland* tells us that prosecutors must turn over exculpatory information to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963). But do they always? No. And who determines what is considered "exculpatory?" Technically, it should be the defense who makes this determination, but practically, the

prosecution has the first, and oft times the only, opportunity to decide. What if a prosecutor is wrong and withholds exculpatory discovery, either intentionally or inadvertently? As an appellate issue, the burden is on the defense to prove the evidence would have reasonably had an effect on the verdict. That's a high standard to meet. If there is room for interpretation in the *Brady* Rule -- and there is -- prosecutors have the advantage in manipulating the rule in their favor.

In our experience, most prosecutors play it straight with discovery. The problem is, as defense attorneys, we don't know what we don't know. If the State is withholding evidence, how does a defense attorney know to demand it? Perhaps the biggest mistake we made in the Zimmerman case was trusting that the prosecutors would meet their discovery obligations completely and promptly. We gave them a honeymoon period where we waited for them to provide the information we expected -- a few crucial months -- and in the end we had to fight for it. Our lesson was this: you cannot count on prosecutors to fulfill their discovery obligations.

We let our guard down and became complacent with discovery; the very presumption that most prosecutors do it the right way can dull our senses to when they don't. As a zealous advocate, you have to be vigilant and look for clues in the discovery you have that may suggest more exists, you must be tenacious in your demand for access to the information, and you must be creative in how to get it. We

liken it to a surgeon. The lab tests and X-rays done by the general practitioner are a good start, but not enough to be fully prepared to start cutting. We learned from this case that a strong series of specific demands for discovery was necessary, and was the only way we could corral in prosecutors who intended to delay or confuse the discovery issues.

II. A. The Photo of George's Injuries

In the first discovery package we received from the State on May 14, 2012, we found an image of George. It was a bad, high-contrast black and white photocopy of a photograph. We could make out that it was George, and it looked like he may have some blood on his face, but it showed little else. What it did show conclusively, however, is that there was a proper color photo somewhere. After three months of requests for the original photo, we received a washed-out color photocopy which revealed more of the wounds on George's face, but it was still a poor, grainy image. When we learned the photo had been taken with an investigating officer's cell phone, we demanded the original .jpg image file. When the prosecution failed to produce it, after weeks of additional correspondence, we filed a Motion to Compel on October 12, 2012. At the hearing on that motion, one of the prosecutors claimed he didn't know what a .jpg was. Finally, at the end of November, and after being ordered by the court, the prosecution finally complied. When we received the full-color digital file, we understood two things: we understood that the

injuries to George's face were significant, and we understood why the State didn't want us to have the photo. The photo became, of course, a crucial piece of evidence at trial.

II. B. FDLE Reports

As we began the deposition process, we started to suspect we were missing some information that had been compiled by the Florida Department of Law Enforcement. When we asked for additional discovery, we were told we had everything. When we were able to pinpoint specific information we suspected had been withheld, it was delivered to us -- but only after a long fight. Since we were able to correctly deduce the existence of specific discovery we had not been provided, we felt confident there was discovery out there that we had not thought to specifically ask for. We didn't know what we didn't know.

As a result, we suspended our efforts to take depositions because we didn't want to have to ask the court's permission to conduct second depositions if we found additional relevant information in discovery. We also filed a Motion to Compel and a Motion for Sanctions against the State for discovery violations. While sanctions were denied, we were allowed to go to FDLE to review the entire case file ourselves.

At FDLE, we immediately found that the copy of the FDLE report forwarded by the state had been missing critical pages. We found cellphone tower ping logs. We also found a copy of a seven page

police report documenting an event Trayvon Martin was involved in that was forwarded by Sanford Police Department to FDLE and to the State Attorney's Office, but was removed from the discovery given to us. We also discovered that investigators had abandoned efforts to get data from his phone: a mountain of potential exculpatory information. We are convinced that, but for the extra effort of demanding access to a third party's file (FDLE), that information would never have been presented to us, though it was unquestionably *Brady* material, and, as we realized later, the state was already aware of it.

II. C. The Victim's Phone

Once we discovered investigators had abandoned efforts to extract data from the victim's phone, we demanded the efforts be continued. We knew it was possible to get information from the phone, and we expected, based upon other facts we had been collecting, that there would be significant exculpatory information contained on the device. Once the extraction was completed, the State used an expensive hardware and software package to generate a report on the contents of the phone.

When they provided us with the report and the encoded data file from the phone, our expert was able to determine from the data file that the report we received was incomplete. He used his own hardware and software to compile an independent report, a report which contained a significant volume of very sensitive and potentially

relevant information. Subsequently, a whistleblower for the State came forward and revealed that the State knew about much of the information they failed to disclose, and he indicated that they had intentionally withheld it for several months. While the State failed to keep the information out of our hands, the succeeded in keeping it from us until the eve of trial -- when it was too late for us to verify some of the information or to fight for it to be admitted as evidence during the trial.

When we finally got the State's full report, we discovered it contained some information we hadn't found. We also discovered we had found some information they may not have uncovered. The lesson is this: we are living in a new world, where digital data is collected at an ever increasing velocity and volume. Whether the data is found on cell phones, tablets or computers, red light cameras or security cameras, it will soon be deficient to fail to analyze these potential sources of evidence. You will also fail to the peril of your client, as prosecutors are learning these lessons as well.

Here's another frightening lesson: when it comes to technology, we have to accept that different experts using different software or hardware will produce different data sets of information. Defense attorneys should know that if they invest in their own expert, they may find information the State failed to discover, or the other way around. A vigilant defense attorney will know that this built-in

potential for discrepancy creates an opportunity for prosecutors to hide information from the defense, if they are inclined to do so.

II. D. The *Frye* Hearing

In the Zimmerman case, a 911 recording captured about 45 seconds of screaming followed by the fatal gunshot. If we could have scientifically determined who the screams belonged to -- the client or the decedent -- the case would have been over. We were surprised that current science could not positively compare recorded screams with a voice exemplar, and we discovered it is practically impossible for a person in a controlled environment to simulate the scream that they would produce under extreme duress (so-called death screams). The top experts we could muster, individuals from the NSA and FBI, from as far away as California and England, told us any data gathered from voice analysis testing would be inconclusive and unreliable.

We were surprised, therefore, when on the eve of the discovery deadline, the State delivered expert reports claiming to positively identify the screams as belonging primarily to the decedent, and a report claiming to decipher specific words from what was otherwise unintelligible static. Our experts opined, with colorful language, that these reports were on the spectrum of "rubbish" to "BS" to "laughable." The words identified in the report, words no other audio experts in the world could identify, would have given prosecutors an opportunity to suggest a *mens rea* -- their only real chance to pursue the 2nd degree murder charge they had saddled on the

case. The reports were, in our opinion, bogus, based on junk science, and it was suspect that they conveniently lent themselves to address the State's primary weakness of its case: that George was acting in some way other than the apparent self-defense.

Until receiving those reports, we were leaning towards not challenging the State's experts in an evidentiary hearing. We had confidence that the strength of our experts' testimony would counterbalance the State's experts during trial, leaving the jury with more than a reasonable doubt as to the reliability of any specific claims. However, regarding the suggestion of words that would point to criminal intent -- we wouldn't be able to unring that bell. After such a suggestion, the jury could hear those words on the tapes, whether or not we had discredited the expert who suggested them. Try not thinking about a black bear -- any luck?

That led us to our *Frye* hearing.

Because the prosecutors presented the new reports at the last possible moment, and because the judge refused to entertain a Motion to Continue, our *Frye* hearing overlapped jury selection. In the last weeks preceding trial, instead of making last minute trial preparations, we busied ourselves for the all-important *Frye* hearing. A special session of court on the Saturday before jury selection concluded without a resolution. The judge suspended the hearing until after jury selection, and so one afternoon, with voir dire complete and opening statements scheduled for the next day, we

completed our arguments, not yet knowing if the jury we selected had heard about the hearing (they were not yet sequestered) or if they would hear about this evidence in our openings. With opening arguments scheduled for Monday, the Court ruled over the weekend, and excluded the evidence. While the State failed to get their experts into trial, they succeeded in forcing us to divert our limited resources away from trial preparation. As the case and trial progressed, it became bitterly apparent that this was one of their game plans all along: keep us overworked by making discovery as difficult as possible, though they accomplished that goal subtlety.

Three weeks later, incidentally, Florida officially switched from the *Frye* to the *Daubert* standard.

III. The Shadow Prosecutor

Benjamin Crump, attorney for the Martin family, interjected himself into the investigation of the shooting very early, and his passionate advocacy for the arrest of George Zimmerman proved instrumental in prompting the 2nd degree murder charge that eventually came. Special prosecutor Angela Corey admitted in a press conference, when she announced charges, that her office had been in daily contact with Crump's team, and that she had prayed with the family. After the press conference, the prosecution team had the luxury of withholding public comment on the case -- after all, they had a surrogate, a shadow prosecutor, in the form of Benjamin Crump, who as a third-party was beyond the rules of the court, outside the

influence of the judge, and free to comment about the case as frequently as the press would entertain him. Even his own attorney, while representing him at a hearing to avoid his deposition called him a private attorney general.

Since the Zimmerman verdict, we've seen this advocate triangle -- the dynamic between the defense attorney, the prosecutor, and the civil shadow prosecutor -- show up in dozens of cases across the country. It's a new reality defense attorneys must be prepared to face. We now have not only a prosecutive team to deal with, but we have spokespeople, sometimes untethered to the ethics we as attorneys must live by, who can have significant and sometimes devastating impact on our case and our client.

III. A. Trying the Case in the Media

As defense attorneys, we have a natural, healthy aversion to television cameras. It's not unreasonable to think that criminal cases should be tried in the courtroom rather than in the court of public opinion. We live, however, in the age of mass media, and an industry is evolving around coverage of justice stories. This is fertile ground for third party advocates to make a public case against citizens accused -- to take the fight outside the courtroom. As a defense attorney, if this happens to your client, you'll have to decide whether or not to show up to the fight.

As Larry King recently said, "No comment doesn't cut it anymore." In today's age of immediate media, where being first to

report is much more significant that being right when you report, the defense attorney has to be ready, when necessary, to respond to keep the playing field even. Failing to do that may well allow the seeds of guilt to be sowed with a potential jury pool months before you ever meet them.

In the Zimmerman case, we clearly decided to show up to the fight. We made countless television appearances. We availed ourselves to answer questions whenever there were developments in the case, and we affirmatively addressed misinformation whenever we found it appropriate to do so. We even took the extraordinary step of setting up a website and social media accounts to manage the intense public interest. As tenacious as our efforts may have been, our efforts were focused -- not on convincing the public that George was not guilty -- but rather, on the importance of having a fair trial. Had we used the press to more directly attack either the prosecutors or the Martin family attorneys, we almost certainly would have experienced blowback which may have proven more disruptive than the original onslaught.

On three occasions, the State tendered motions for gag order. They wanted to shut us up. Presumably, a court order would have little effect over a third-party advocate, so a gag order in our case would have produced a net benefit for the State's case. Each time we appeared before a judge to protect our right to speak publicly, we came armed with *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

The Supreme Court ruling protects a defense attorney's right to speak publicly about a case, and specifically it recognizes the role of the press as a safeguard against a potential "miscarriage of justice by subjecting the police, prosecutors, and judicial process to extensive public scrutiny and criticism." *Gentile*, 501 U.S. at 1035. The Supreme Court rendered the *Gentile* decision in 1991, before the O.J. Simpson trial. Since then, the frequency and intensity of the media's coverage of justice issues has exploded, and we feel the rise in influence of third-party advocates means these shadow prosecutors should be subject to the same public scrutiny.

Moreover, the Supreme Court notes that *Gentile* did not seek to sway the pool of potential jurors to form an opinion in advance of trial. Rather, he "sought only to stop a wave of publicity he perceived as prejudicing potential jurors against his client and injuring his client's reputation in the community." *Id.* at 1043. This sentiment proved particularly germane to the Zimmerman case where we discovered that even witness testimony at trial had been clearly influenced by misinformation which had been constantly repeated in the press.

Gentile specifically says, "a defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried." *Id.* We believe it is rare that a legal case justifies an active media engagement by

a defense attorney; however, there will continue to be cases where external forces threaten to corrupt the sanctity of the criminal justice system. It will become more common for third parties to infect criminal proceedings, and there will be increased media attention on a wider spectrum of criminal cases. In these extraordinary situations, we believe that defense attorneys who fail to meet the threats that arise outside the courtroom doors are providing a less than zealous advocacy on behalf of their clients.

III. B. Writ of Certiorari

Benjamin Crump was more than a third-party advocate; he became a witness in the case. In his push for the arrest of George Zimmerman, Crump identified a witness (known during pre-trial as Witness 8), interviewed the witness, coached the witness's testimony as evidenced by an unredacted copy of a part of the interview that Mr. Crump did not forward to us, but which was disclosed by a reporter who was invited to the interview. Yes, invited to the interview -- though it took months for us to get the tapes, and they were incomplete. As a result of his involvement, Mr. Crump found himself on the witness list, and under Florida's rules, eligible for deposition.

We had serious questions for Mr. Crump. He recorded his initial interview of Witness 8 (we knew this because he played a portion of it during a press conference). It took a fight to get a copy of the recordings, and when we got them, we found them to be poor quality,

and we discovered significant gaps evident between the recorded segments. What happened during those gaps? What was the context of that interview? Who was there? (We knew a reporter had been present). Since we didn't know what we didn't know, we suspected a deposition with Mr. Crump would at least raise some new questions that could reveal more exculpatory information. We set the depo for the afternoon after our next scheduled hearing.

The morning of the scheduled deposition, Mr. Crump's attorney presented us with a written affidavit and this argument: as counsel for the family of the decedent, and with an intent to pursue a civil case against our client in the future, Mr. Crump should be considered "opposing counsel" and therefore not subject to deposition by the defense. Surprisingly, the argument worked. The judge agreed, and our opportunity to depose Mr. Crump evaporated.

With Mr. Crump now classified as "opposing counsel," the judge then determined that we did not meet the three-part test set forth in *Hickman v. Taylor*, 329 U.S. 495 (1947) (1. No other means exist to obtain the information than to depose opposing counsel; 2. The information sought is relevant and non-privileged; 3. The information is crucial to the preparation of the [defense] case.) We argued that Mr. Crump was not "opposing counsel" and that the test set forth in *Hickman* was the incorrect standard to apply. We further cited to Fla.R.Crim.P. 3.220(h)(1)(A) which states in pertinent part, "without leave of court, [the defendant may] take the deposition of any unlisted

witness who may have information relevant to the offense charged." Nonetheless, we argued that even if Mr. Crump were determined to be "opposing counsel" we had met the standard set forth in *Hickman*. Finally, we argued that whether or not Mr. Crump was opposing counsel, any "privileged" information to be inquired of had been affirmatively waived by virtue of Mr. Crump's continual press conferences and news appearances where he discussed in detail the information we were seeking in deposition.

We framed this argument in our Motion for Reconsideration, and despite our efforts, the judge once again denied us the opportunity to depose Mr. Crump. We felt strongly the judge had based her decision on the wrong standard, and while we had disagreed with a number of her rulings in the past, we felt this ruling in particular was ripe for an appellate challenge. Taking a writ on a judge within weeks of the start of a trial is not something we took lightly, but Mr. Crump had made himself a central figure in the Zimmerman case, and the defense deserved the opportunity depose him. It wasn't fair to our client for Mr. Crump to escape any accountability, and from a broader perspective, had the ruling gone unchallenged, it would have set a precedent that civil lawyers could inject themselves into criminal matters with impunity, operating completely outside the jurisdiction of the court. Plus, something just didn't smell right about the whole way this witness was identified and protected (it was said by Crump that she was a minor, although she was 18, and they

refused to give her name), and how she was presented when we finally deposed her.

We drafted our writ, and we sent it to the appellate court. The Florida 5th District Court of Appeal agreed that Mr. Crump was not "opposing counsel" and allowed his deposition to be taken. *Zimmerman v. State*, 114 So. 3d 446 (Fla. 5th DCA 2013). The appellate court handed down their decision one week before our trial date -- the week we had scheduled our *Frye* hearing. The judge refused to continue the trial or even delay the case for a couple of days in order for us to take his deposition, so we ended up conducting it on a Sunday afternoon during the trial.

Clearly, at this point, we had lost much of the benefit we could have rendered from the deposition. Trial was underway, and we had no time to follow any leads or to ask for additional depositions. We had, however, shown the judge that we were willing and able to effectively challenge her decisions, and we proved it just days before we would ask her to make one of the most important decisions in the case -- her ruling on the *Frye* hearing. Also we had set a precedent in the appellate court that will serve as a warning to future third-party advocates: if you get too close to a criminal case, you might find yourself wrapped up in it.

IV. Voir Dire

Sun Tzu in *The Art of War* says that every battle is won before it is fought. We set the stage in the Zimmerman case before the

prosecution called their first witness. If there was one moment when we laid the foundation for the victory, it wasn't the Writ of Certiori or the *Frye* hearing -- it was jury selection. Despite all of the concern about being able to pick an unbiased jury in Seminole County, and despite efforts of stealth jurors to infiltrate our panel, we managed to seat six individuals who proved by their 16-hour deliberation that they could forget what they had heard about our case in the press, and they could judge George based on the facts as presented to them in court and on the letter of the law.

IV. A Stealth Jurors

Our nightmare scenario for jury selection was that someone who had already made up their mind about George, someone with an agenda, would navigate their way through voir dire either to infect the jury during deliberation, or to hang it. The judge prepared a questionnaire designed to eliminate biased jurors, but she did so without input from either the defense or the State. By the end of the first day of jury selection, it became clear to us that the questions designed to eliminate stealth jurors were easy to interpret by those willing to lie to win a spot on the jury. A significant lesson was learned, and we were blind to it as we read the questionnaire ourselves. This became horribly apparent to us as we determined that an activist in the community basically attempted to indoctrinate the jury pool to avoid being removed due to preconceptions (the very issue the questionnaire attempted to

address) by teaching them what to say and not say, regarding their thoughts on the case. As it turned out, this plan almost worked, as we uncovered at least two stealth jurors who 'moderated' their positions in initial jury selection.

Because we had decided to take an affirmative stance with the press in the Zimmerman case -- including setting up a website and social media accounts -- we monitored what was being said about the case in the press and online every day, virtually non-stop. As a result, we had essentially heard every opinion it was possible to hold about the case, and we had learned a little something about the character of each person who held those opinions. In short, after a couple answers to a couple of questions, we could discern a Zimmerman supporter from a detractor. More importantly, we could distinguish someone who truly didn't know much about the case from someone who was pretending not to know (they're called trolls on Internet discussion boards, by the way).

Behind the scenes, we had a team hunched over laptops, scouring the Internet for information on our potential jurors. Most were surprisingly easy to find because so many people have pages on Facebook with privacy settings wide open. Others took only slightly more work. A Google search for one juror's name and the word "Zimmerman" revealed a Facebook post the juror had made that demonstrated in clear, colorful language how he felt about the case. During individual voir dire, after the potential juror swore he could

be impartial, we presented him with the post. He was dismissed on the spot, and the impeachment made the news. Although potential jurors weren't supposed to be watching the news, the next day one potential juror decided serving would be a hardship and dropped out (she guessed correctly that we had found some of her online posts).

This process, by the way, should be standard procedure for all jury selections. Failure to exercise the vigilance required to check potential juror's social media accounts in 2014 is definitely something far short of zealous advocacy, and in the future, it may be grounds for an ineffective claim.

IV. B. Engaging the Venire

There may be no other part of the entire trial process where a defense attorney's vigilance and creativity can reap greater rewards than in general voir dire. Ostensibly, general voir dire is for asking questions of the entire venire so the attorneys can get a better grip on who to strike and who to keep. A good defense attorney recognizes that somewhere in the venire is the jury, the people who will decide the fate of your client. Through a thoughtful series of questions, a lawyer can set the stage for the opening argument and lay the foundation for the theory of the defense -- all the while building a rapport with the potential jurors.

The key, and this is what we did with the venire in the Zimmerman case, is to get the potential jurors engaged in the process and get them asking questions. What we couldn't do in voir dire is

give a lecture about the nuances of Florida's self-defense statute; even if the prosecutors didn't object, the judge would have shut us down. What we could do, however, is ask questions about guns -- ask questions about individual's experiences with self-defense. When a juror asked a specific question, we could answer it without much fear of drawing an objection from the State. Better yet, we could challenge another juror to guess the answer to the question, allowing us to correct them when they get it wrong. Either way, we engaged them in the process, and we guided their journey in exploring the legal precepts of the case as we saw them. Though this type of voir dire examination is more style than actual substance, and it laid the foundation well enough that we were able to discuss with the panel the actual jury instruction on self-defense. The judge even read it to the panel twice during defense voir dire.

The State gave us opportunities as well. In one instance, during the prosecutor's general voir dire, he proposed that circumstantial evidence was just as good as direct evidence (obviously he knew his case was built on mostly circumstantial evidence). We could have objected, but we let it be, and we let it slide because we understood he had just opened a door for us. During our general, we had every right to explore the relationship between circumstantial and direct evidence in more detail -- certainly in more detail that we would have been able to otherwise. And because the defense goes last in general voir dire, we had the last word on

the subject. Next time you hear a prosecutor venture out-of-bounds in voir dire, just as your stomach muscles start to tighten to engage your legs, take a second to decide whether you want the prosecutor to open that door for you -- sometimes it can lead to a great place to wander.

IV. C. Find Opportunities to Make the Rules

During the jury selection process we compiled a binder of all the potential jurors we had spoken to, and we kept our records of the jurors in the order in which they appeared. On the final day of jury selection, we met with the prosecutors at the bench to discuss how the day would be structured and the topic of what order should be used for our consideration. We had already strategically walked through our strikes based upon the order of our binder, so we suggested that. The State suggested that we take the jurors in reverse order, as they seemed to believe that the end of the panel was more state-oriented than the beginning (and they were right, though that wasn't the reason they gave). The judge, who prided herself on being organized, had her folder organized as we did, and agreed with us. The strikes and challenges fell more or less as we predicted, and we seated our jury.

While there is no specific learning point from that scenario that has general application, the nugget is to constantly be vigilant about the opportunity to affect the proceeding, even in small, sometimes innocuous ways. There is no question in our minds that this

decision had significant effect on our jury, and therefore on the outcome.

V. Writ of Prohibition

On paper, Judge Lester was a good judge for the Zimmerman case. He ran a no-nonsense courtroom, and both the counselors on the defense had tried cases before him in the past, so there was a strong working relationship based on respect and trust. That relationship was shaken, however, after the prosecutors, in an ambush motion, presented some evidence from jailhouse phone calls that raised questions about George's awareness of available funds in the "defense fund." Judge Lester revoked George's bond on the spot and reinstated it a month later -- a six times the original amount. Moreover, the new bond order contained language the suggested the judge thought there was strong evidence of guilt (when only a fraction of the discovery had been released), and he reserved the right to hold George in contempt at any time.

Such a situation was untenable. Proceeding with a constant threat of contempt meant we'd be walking on eggshells all the way through trial. With one order, we'd lost our footing, and we feared, based on the prejudice he had demonstrated, that we would be a disadvantage in every subsequent ruling. We had no other recourse other than to ask the judge to recuse himself. When he refused, we

spent several weeks drafting a Writ of Prohibition -- a lot of that time spent debating the wisdom of doing such a thing. In the end, we filed it. The appellate court agreed, and our judge stepped down.

It took some tenacity to file the writ, but tenacity alone doesn't define zealous advocacy. There was, for example, another decision in the Zimmerman case upon which we deliberated for many weeks: whether or not to have a Self-Defense Immunity Hearing. It had been presumed by nearly everyone from the beginning that we would have such a hearing. We even wrote on our website that we intended to do so. But as the case progressed, as we became mired in discovery issues, as one Motion to Continue after another was struck down and the hard deadline for the hearing quickly approached, we began questioning the wisdom of having the hearing.

To conduct a Self-Defense Immunity Hearing would have required us to layout our entire case to the judge, and therefore to the State and to the media. In any pretrial motion, there's that feeling in your belly when you have to preview your strategy or your thoughts to the State. Giving everyone preview of our theory of defense, and giving the State a free shot at cross examining George, made the "no-brainer" decision much more complex. In addition, it would have added significantly to the cost of the defense at a time when donations were at an all-time low, and the case was being funded by us and some experts who were willing to work with fees reduced and deferred. Also significant in the decision-making regarding the hearing was

this: had we lost, we would have done so publicly, before the eyes of potential jurors who would have certainly thought twice about rendering a not guilty verdict after a judge had "ruled" otherwise. While it seemed counterintuitive, and while the tenacious spirit in our hearts wanted to fight that battle, we knew it was a fight we were unlikely to win. Choosing not to fight was the right decision.

Though it rubs against our grain, not fighting -- not having the immunity hearing -- was the creative choice, the prudent choice, and it was without reservation the correct choice. Recusing our judge was the tenacious choice, and at the time, the necessary choice. If there's a learning point here, it's maintaining good balance so you know when and how to fight.