

# The Imperfect Client



by Randy Kinnard

The title of this article was inspired by my reading the book, "imperfection, A Natural History.



Pievani, one of Italy's most influential philosophers of science, says the obvious-- no human being is perfect, in body or character. But he also explains that imperfection is better than perfection. Our imperfections are part of what drive us to want to be better and do better. They make us interesting. Were it not so, were everyone perfect, it would be a mighty boring place. And just because we are imperfect does not mean we are bad.

In spite of our knowledge that no one is perfect, why is it that we want the client to be "perfect" for trial? I think the answer is that we worry the jury will not like our client, or not respect our client, and thus, find against her.

My advice is stop worrying about perfection. And it is okay--even with the jury-- if your client has some imperfections. However, we do need to work hard to not let the client get in his own way and make some silly mistakes, and move the client forward as close to "trial perfect" as possible.

The timing of reading the "imperfect" book was, ahem, perfect, because I have been working on this article for four decades and it is time to publish it.

In this article I will share stories about some of my experiences with clients, mostly in court, and lessons I learned. Lessons which I hope you will benefit by, and not repeat the same mistakes I made. And where some of my techniques with clients were successful, may they also work to you and your client's advantage.

## THE FIRST IMPRESSION

Some scientific studies suggest that first impressions

are formed in one-tenth of a second. Other studies conclude it takes as long as 30 seconds. On average, the conclusion is it takes only 7 seconds to make that initial impression. This is important for you for two main reasons.

The first reason is that you must be aware of what YOUR first impression is of your new possible client. What do you think of that person? Why do you think that? Is there something about this person you don't like? What is it? Can that be changed? Is it something you can accept and live with? Maybe it's the beard. Maybe it's the hair color. Maybe an attitude appears in the face, one you don't like. Or, do you feel good about this person in the first seven seconds?

This first impression you get has a more powerful impact on you than you might realize. Be ready to adjust your attitude about this person and don't get trapped into believing your own first impression—good or bad. Your impression may be wrong.

You don't want to turn down the case because your first impression was wrong. You also don't want to accept the case because you had such a favorable first impression of the client if the facts end up telling you objectively this is not a worthy case.

The jurors will form their first impressions of your client as fast as you do.

## THE MEAN PERSON

**Experience:** A long time ago, the widow kept telling me throughout the case that she was angry at the defendant doctor for "killing" her husband. I reminded her that he didn't intentionally kill him, and she'd say, "yeah, yeah." The case seemed strong on the facts, but I could never quell that anger in her. At trial, during cross-exam, at a very innocent type question by defense counsel, she exploded. Went off the charts in an

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angry outburst, accusing the defense lawyer of “cheating for his lying client.” Needless to say, the case was over then.

**Lesson:** We must find a way to calm the angry client down. Consider counseling for the client. Get professional help for the client. If the client still insists on carrying that anger into the courtroom, consider letting that client go well before trial. It might be better for both of you if the client found new counsel. And perhaps in that first meeting you can decide whether to even take the case. Be cautious.



### I SWEAR TO GOD

**Experience:** In the first year of my practice, I wanted to try any case I could. So I took criminal court appointments for people unable to afford a lawyer. In an early trial, my client was a nineteen-year-old man who had been charged, along with two other young men, of burglary of a house. Client: “I swear to God, I didn’t do this, Mr. Kinnard.” He looked good, made a good impression on me, and I believed him. “Good, I said. I will defend you.” I was excited at the probability I’d get this innocent guy off.

During the trial the prosecution called a neighbor of the home that had been burglarized. He testified, “I saw those three boys (pointing at the defendants) go around the side of the house, go to the back, take the screen off the window, lift the window and go inside.” To this, my client said out loud, “He’s a liar! There wouldn’t no screen on that window!” To which the judge said, “Mr. Kinnard, you should tell your client we can all hear him.” The jury giggled. And my client went to jail. And properly so.

The good first impression I had of this man did me in and him too. If he had been honest with me, I could have gotten a better plea deal than the ultimate sentence he received.

There are two lessons here: Watch out for that favorable impression at your first meeting with the possible client. Do some work and investigate your case and

keep an open mind about the merits. Figure out if your client is telling the truth. Truth is an absolute must for the case you take. Never represent a client you think is lying.

The second lesson is obvious: Warn all your clients to never speak in court unless spoken to. Far better to look nice than say something really stupid out loud or to say something mean out loud.



### NEVER EXAGGERATE ANYTHING

**Experience:** I represented a woman who had a cyst removed from her thigh. During the procedure the doctor cut part of her femoral nerve, which caused her to have a severe limp for months. It appeared the injury was permanent. Three years after the injury I tried her case. During lunch break one day, my client, her husband and I were walking out of the courthouse. The woman was limping along, really going slowly. Her husband said to her, “What are you walking so slow for?” I sensed someone was behind us. I turned my head. It was a juror who had clearly heard the husband. When the jury got the case, they were out only 15 minutes, with a defense verdict. Without question the juror who had heard the husband’s statement in the hall had shared that with the jury.

**Lesson:** Far better to never exaggerate anything when you represent an injured person. Just tell it like it is and tell the client to be “as it is.” Nothing more.



### OUTSIDE THE COURTROOM

**Experience:** I lost a case once because on the way to the courthouse, in the parking lot, my client cut in front of a juror to get a parking space. I didn’t know that until after the verdict, when I interviewed the juror who had been offended by a person she didn’t know at the time, but later learned in the courtroom that the inconsiderate person was my client. And that juror poisoned the entire jury.



**Lesson:** Warn your client that even if he is in a rush, do not be discourteous to anyone. It is wrong to begin with and the person he might offend could be a juror.

In the death case of a sweet 16 year-old girl, the sole plaintiff was the mother of the child. Dad was deceased. The verdict in this rural community was horribly low, given the terrible loss. After the verdict I contacted several jurors. One female juror told me she saw my client enter the courthouse on the first day of trial. She said she did not recognize the woman (who she later learned was the plaintiff mother), and the woman had a friend with her and the two of them were just “yucking it up and having a real big time.” The juror went on to say, “Then this woman, who had been having such a good time downstairs, got all Miss Drama Queen and sad and such a crier on the stand. We couldn’t stand that woman.”

**Lesson:** You can figure out the lessons here on your own.



## INSIDE THE RESTROOM

**Experience:** I have had too many encounters in restrooms with jurors to know that this is a very awkward moment if anyone says anything to anybody. The list of bad things that can happen is long.

**Lessons:** In the larger metropolitan areas with big courthouses, restrooms pose little risk to clients’ or lawyers’ saying things they should not say because they usually will not be in restrooms used by jurors. Even in the larger courthouses, however, clients and lawyers can end up together with one or more jurors. This is awkward and should be avoided if at all possible. Warn the client not to say anything in the bathroom.

In the smaller communities, sometimes there is only one restroom for men, one for women. And you will end up in there, sometimes with several jurors. My advice is just tend to business and say nothing unless spoken to. Be professional. If a juror says hello and

the judge has not told you that you may not speak to jurors, say hi back, but nothing else. You do not want to appear to be fawning for votes.

And you can cover this in voir dire by explaining that you will not try to say hello to jurors and add, “This is not because I don’t like you or don’t want to say hello. It’s because I don’t want to give even the slightest hint of doing something wrong.”



## REMEMBER THE SOCKS

My associate and I gave strong instructions to the client on how to dress for trial. Don’t wear loud clothes. Wear quiet clothes. Get a haircut, etc. About ten minutes before voir dire started, I noticed that our client wasn’t wearing any socks. “OMG,” I said to myself. Too late to do anything about it. I wasn’t going to give him my own socks.

**Lesson:** Don’t assume anything. You even have to tell your male clients to wear socks to trial. Better yet, do a full dress rehearsal days before the trial starts. (And keep a pair of socks in your trial tool kit.)



## CRYING IN COURT IN DEATH CASES

In the second year of my practice, I tried five death cases in a row and lost each one. I thought I was in the wrong business and would just quit. Then I thought about it and decided to stick it out a little longer. And I pondered: Was there a commonality in the five losses? There it was right before me...each surviving spouse had cried on the witness stand. So, in preparation with the client for the next death case trial, I told the widower about what had happened before, and I said, “Whatever you do, don’t cry on the witness stand!”

During his testimony, we came to the hard part, when his wife was about to die in the hospital, right before him, and I said, “Now, we are coming to a very hard

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point. I know this was sad, but the jury wants to know the facts. And don't cry, okay? Just tell the jury what happened then." He worked his way through that part without crying. And he won his case.

**Lesson:** Was it a coincidence that he won for not crying? We will never know, but I suggest you tell your clients not to cry if the plaintiff is a surviving spouse. (A surviving parent of a deceased child is a whole different issue. Play that by ear because it is mighty hard not to cry over the loss of your child.)



## ALL CLIENTS HAVE SOMETHING "BAD" IN THEIR BACKGROUND

The night before trial was to begin, my male client told me, "Mr. Kinnard, I think I need to tell you something." I shrugged. He said, "I killed a man once."

"Holy smokes, John! Why didn't you tell me before?!"

"Because I didn't want you to know. Do you think the other side knows?"

"Oh, yes. They know." (This was long before computers but it was easy to find public records on people. So I figured the defense knew this and was holding back for cross-exam of my client.)

This was a medical malpractice case, and for some reason jurors seem to require more of a plaintiff in the way of heavy proof in a medical malpractice case--more than say in a car wreck case. And your client needs to be as squeaky clean as possible to avoid the jury's getting distracted by collateral issues having nothing to do with the merits of the case.

So, I told John, "I will have to bring this out myself. And I will do it before the other side does."

In voir dire I told the jury that my client had murdered a man once. Juror number three, a nice, elderly lady, said, "Why did he do it?"

I said, "Well, ma'am, he went home from work one day,

found his wife in bed with another man. He fumed over it and three days later went to the man's home and shot him dead."

"I see," she said. "And did he spend time in jail?"

"Yes ma'am."

"How much?"

"Ten years," I said.

She said, "He paid the price. So, no problem for me, young man." I said to the rest of the panel, "Anyone else have a problem with what we just talked about? Can you give John a fair trial in spite of that history?" They all nodded they could.

As you might expect now, John won his case. I was proud of John. I was proud of the jury who let the facts decide the case and not a collateral, severe imperfection in John.

**Lessons:** Urge your client to tell you early on about issues in his life that are not pretty. Learn about them. Deal with them. Appropriate motions in limine may keep those irrelevant events out of evidence. And if not, if the judge rules they are relevant for a legitimate purpose, you bring them out in front of the jury. Do not try to hide them or avoid them. The truth is the way to go. Jurors know we all have imperfections.

## LESS IS MORE

We hear that often. In so many things. In 2010 I had that mantra sealed forever in my mind in personal injury cases. And it got there by accident.

**Experience:** Bette Donathan was paralyzed from the waist down by medical malpractice in a rural hospital. Why is not important here. She was 55 years old, and a wonderful person. We were in federal court in Chattanooga. I prepared her for her direct testimony, and we reviewed all the details of how hard this was on her. All the aggravations, like how difficult it was just to get out of bed and go to the bathroom. She was ready to testify.





I called her husband before her and he explained various problems he saw with her. How her life had been impacted, from his perspective.

As the last witness I called Bette. She couldn't get in the witness chair so the judge let her wheel in front of the jury, a few feet away. I stood at the back right side of the jury to ask questions and after the usual "Who are you? type questions, it went like this:

**Q.** Now, Bette, the jury wants to know how this has affected you. So, please take your time and tell them.

Some jurors prepared to take notes.

**A.** I'm fine, Randy.

Long pause by me. This is going less than perfect, I thought.

**Q.** Bette, I, uh, know you're fine. But the jury wants to know how you are doing.

**A.** I'm doing fine, Randy. I have no complaints. My life is wonderful. I'm truly blessed. And I don't want to complain.

I sensed something special had just happened. And so, I said...

**Q.** Thank you, Bette.

And I sat down.

Of course there was no cross-examination.

In closing I asked for \$22 million for the pair of plaintiffs. The jury awarded it. I bet if I had asked for \$50 million, the jury would have awarded that. Because of the facts and Bette.

**Lesson:** Your injured client does not have to explain every detail. Sometimes obvious injuries speak for themselves. Give the jury some credit. They are very, very smart. Less is more. Use someone other than the injured plaintiff to explain in detail the problems.

## CONCLUSION

We are all flawed. We are all imperfect. Jurors are imperfect. Jurors do not expect your client to be perfect. So, relax a little and stop worrying so much about perfection. Of course do your due diligence and prepare as necessary for battle. Do your best to prevent your client's inadvertent, awkward mistake at trial. But even if it happens, keep the faith and march on. The jury likely will forgive honest imperfections and even major flaws in their background if their cause is just.

## ABOUT THE AUTHOR

**Randy Kinnard** has tried over 250 jury trials. He is a member of the Inner Circle of Advocates and is a past President of TTLA. His firm is Kinnard Law in Nashville, Tennessee.

<sup>1</sup> Telmo Pievani, Author. The MIT Press, 2022.

